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FILED
SID J. WHITE
MAY 16 1994
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

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 REPLY BRIEF ON MERITS

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TABLE OF AUTHORITIES[1]

[1] Table of Authorities prepared by Lexis.

REPLY STATEMENT OF THE CASE AND FACTS

Nationwide relies upon the Statement of the Case and Facts in its Initial Brief.

REPLY 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.

The Plaintiffs concede that this Court's recent decisions in World Wide Underwriters Ins. Co. v. Welker, ___ So.2d ___, 19 Fla. L. Weekly S153 (Fla. March 31, 1994) and Nationwide Mut. Fire Ins. Co. v. Phillips, ___ So.2d ____, 19 Fla. L. Weekly S157 (Fla. March 31, 1994) state the controlling law to be applied to the issues raised in this case. They argue, however, that the present case is distinguishable from those cases because unlike Mr. Welker who expressly rejected UM coverage, the decedent elected not to purchase any insurance whatsoever for his motorcycle, and thereby was deprived of the opportunity to make a knowing rejection of uninsured motorists (UM) coverage. According to the Plaintiffs' argument, since the decedent was financially irresponsible, such that he did not even have liability coverage for his operation of the motorcycle, it would not be unfair to allow his estate to collect UM benefits from his parents' policies with Nationwide. There is no basis in law for this argument, and it should be rejected by this Court.

As Nationwide argued in its Initial Brief and as this Court stated in World Wide, UM coverage is intended to provide the reciprocal of liability coverage mandated by Chapter 324, Florida Statutes, the Financial Responsibility Law. Citing to its previous

decision in Valiant Ins. Co. v. Webster, 567 So.2d 408 (Fla. 1990), the World Wide court reiterated that Florida courts have consistently followed the principle that if the liability portions of an insurance policy would be applicable to a particular accident, the UM provisions would likewise be applicable. However, if the liability provisions did not apply to a given accident, the UM provisions of the policy would also not apply. In World Wide, this Court concluded that pursuant to the legislative intent of the UM statute, if the liability provisions in an automobile policy would provide liability coverage to the insured for the particular accident giving rise to the insured's injury, the policy must also provide UM coverage to that insured. This Court noted that as a corollary, there was no requirement that the insurer provide UM coverage to an insured for an accident involving a vehicle owned by the insured and not listed in the policy, when the policy would not provide liability coverage to the insured had the insured been responsible for the particular accident. This Court concluded that since Welker was not covered for liability under his mother's policy for accidents involving his own vehicle, World Wide was not obligated to provide him with UM coverage. Nowhere in that decision did this Court remotely suggest that the rule should not be applied or the analysis altered, if the person claiming UM benefits was completely uninsured for the operation of the vehicle involved in the accident.

In announcing its decision in World Wide, this Court expressly disapproved of the Fifth District's decision in

Nationwide Mut. Fire Ins. Co. v. Phillips, 609 So.2d 1385 (Fla. 5th DCA 1992). In Phillips, the Fifth District interpreted the Mullis decision as requiring an insurer to provide UM coverage if the person claiming UM benefits was insured for any purpose under the liability portion of the policy. The World Wide court noted that the Fifth District reached that decision despite policy language which specifically excluded the husband from coverage while operating his own vehicle. The same day the World Wide opinion was filed, this Court quashed the decision in Phillips with directions on remand for the trial court to enter judgment in favor of Nationwide.

The Plaintiffs' attempt to avoid the effect of these recent rulings is, at best, based on factors irrelevant to the analysis and, at worst, borders on being specious. Under the Plaintiffs' argument, this Court should ignore the language of the Nationwide policies and the legislative intent of the UM statute and create coverage under some tortured "analysis" of Mullis v. State Farm Mut. Auto. Ins. Co., 252 So.2d 229 (Fla. 1971). Under this novel approach advocated by the Plaintiffs, this Court should apply the rationale of those decisions that misapplied the Mullis rule and create coverage where none clearly exists. The Plaintiffs' justification for this approach is that the decedent carried no insurance whatsoever for the operation of his motorcycle, and this factor should somehow then transform the Nationwide policies and the law to require UM coverage be made available to his situation. Simple common sense should have

alerted the Plaintiffs to the obvious flaws in this argument. First, the analysis must begin with whether the Nationwide policies provide liability coverage for the accident. The absence or presence of some other liability coverage is immaterial to this analysis. Second, the Plaintiffs seek to be rewarded for the decedent's rejection of financial responsibility to third-party members of the public. Even in a light most favorable to the Plaintiffs, it is impossible to understand the logic of an argument that would deprive a claimant UM coverage if he purchased liability coverage to protect the public and yet award UM coverage to an irresponsible motorcycle owner/operator who purchases no coverage whatsoever. Even if this argument was painted with the broadest brush of "public policy", it cannot be made any less illogical.

The Plaintiffs agree that the motorcycle the decedent was operating at the time of his death was not listed on the policies at issue here (A-27). The Plaintiffs do not argue that either of the two Nationwide policies would have provided liability coverage for the decedent's operation of his motorcycle. Nor do the Plaintiffs contest that the unambiguous exclusions contained in the Nationwide policies preclude UM coverage for this incident. Given those concessions, it is clear that this case falls squarely within the parameters of the rules announced in World Wide and Phillips. While the trial court did not have the benefit of those decisions at the time of the judgment, the principles advocated by Nationwide are identical to those accepted by this Court. As it did in Phillips, this Court should quash the decision of the district

court with directions on remand for the trial court to enter judgment in favor of Nationwide.

CONCLUSION

The decision in this case is governed by this Court's recent decisions in World Wide Underwriters Ins. Co. v. Welker and Nationwide Mutual Fire Ins. Co. v. Phillips. Here, it is uncontested that the decedent was operating his own uninsured motor vehicle which was not insured under either of the Nationwide policies at issue in this case. Likewise, it is uncontested that the exclusion in Nationwide's UM coverage would preclude the decedent from obtaining any benefits under the Nationwide policies. Since the decedent would not be provided with liability coverage under the policies at issue for the operation of his motorcycle, Nationwide was not obligated to provide him with UM coverage for the operation of that motorcycle. This Court should quash the decision of the Second District with directions on remand that judgment be entered in favor of Nationwide.

Respectfully submitted,

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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 May 12, 1994.

George A. Vaka, Esquire