IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. **71,222**

VALIANT INSURANCE COMPANY

Defendant, Petitioner,

vs.

JANET WEBSTER, as Personal Representative of the Estate of Christopher Baine Manniel, Deceased,

Plaintiff, Respondent.

RESPONDENT'S JURISDICTIONAL BRIEF

On Petition for Discretionary Review of a Decision of the District Court of Appeal of Florida, Fifth District

---

PAUL A. BERNARDINI
LaRue, Bernardini, Seitz and Tresher
Post Office Box **2200**
Daytona Beach, Florida **32015-2200**
904/258-3453

CYNTHIA S. TUNNICLIFF
Carlton, Fields, Ward, Emmanuel, Smith, Cutler and Kent, P.A.
Post Office Drawer 190
Tallahassee, Florida **32302**
904/224-1585

Counsel for Plaintiff, Respondent

TABLE OF CONTENTS

CITATION OF AUTHORITIES

CITATION OF AUTHORITIES con'd

OTHER AUTHORITIES

STATEMENT OF THE CASE AND OF THE FACTS

Plaintiff, Respondent, Janet Webster ("Webster") generally agrees with Valiant's statement of the case and of the facts, except that, contrary to Valiant's assertion, the decision of the district court of appeal does not conflict with prior decisions of either this Court or another district court of appeal. It should also be pointed out for clarification that the claim for uninsured motorist coverage in this case is for the damages suffered by Clyde Manniel, an insured under the Valiant policy, for the wrongful death of his son, Christopher. In Webster, the district court held that policy language requiring that the insured or a covered person suffer the bodily injury that gives rise to the damage claim is void and contrary to Florida public policy because it seeks to limit damages recoverable under Florida's uninsured motorist statute **(A-4)**.

SUMMARY OF ARGUMENT

The District Court held that when a wrongful death claim is made under uninsured motorist coverage, the decedent need not have been an insured or covered person within the terms of the policy when, as here, the survivor entitled to damages is an insured. **As** stated in the District Court opinion, this is a case of first impression in Florida **(A-4)**. The Webster decision follows the tradition of the Florida appellate courts in invalidating insurance contract provisions inserted by insurors to exclude insureds from uninsured motorist coverage contrary to the policy of the Florida uninsured

motorist law. In doing so, the decision conflicts with none of the principles of law or prior decisions urged as conflicting by Valiant. Instead, the decision is entirely consistent with the spirit with which the uninsured motorist statute has been interpreted, that of not permitting "piecemeal whittling away of liability for injuries caused by uninsured motorists." Mullis v. State Farm Mutual Automobile Insurance Co., 252 So.2d 229, 235 (Fla. 1971)(emphasis omitted), quoting First National Insurance Co. v. Devine, 211 So.2d 587, 589 (Fla. 2nd DCA 1968). Accordingly, this Court should deny Valiant's petition for review.

ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL IS CONSISTENT WITH FLORIDA CASE LAW AND DOES NOT CONFLICT WITH PRIOR DECISIONS OF THE FLORIDA SUPREME COURT OR OTHER DISTRICT COURTS OF APPEAL.

The District Court held that a father, who is an insured under his own automobile insurance policy affording uninsured motorist coverage, is entitled to recover, under his policy, the damages sustained because of the death of his son caused by an uninsured motorist, even though his son was not an insured or covered person under the policy. In so holding, the court followed the plain language of the Florida uninsured motorist statute, Section 627.727, Florida Statutes (1985), which provides in relevant part as follows:

> No motor vehicle liability insurance policy shall be delivered or issued for delivery in this state . . . unless uninsured motor vehicle coverage is provided therein or supplement thereto for the protection of persons insured thereunder who are

> legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness, or disease, including death, resulting therefrom.

Clyde Manniel, the father, is an insured under the automobile insurance policy issued to him by Valiant. By virtue of the Florida Wrongful Death Act, Section 768.16-768.27, Florida Statutes (1985), Clyde, as a "survivor," is entitled to recover damages in his own right from the owner or operator of the uninsured motor vehicle by which his son, Christopher Manniel, was killed (A-2, 3).

The District Court in Webster held that Clyde thus has a wrongful death claim against Valiant under the uninsured provisions of his policy, even though his son was not an insured or covered person under the policy. The District Court also held that the provision of the policy which requires that bodily injury be "sustained by an insured" impermissibly limit uninsured motorist coverage required by the statute.

The purpose of the uninsured motorist statute is to provide the same protection as the insured would have had against the negligent motorist if that motorist had maintained a policy of liability insurance, Salas v. Liberty Mutual Fire Insurance Co., 272 So.2d 1, 3 (Fla. 1973). The Court in Salas, supra, also stated:

> As a creature of statute rather than a matter for contemplation of the parties in creating insurance policies, the uninsured motorist protection is not susceptible to attempts of the insurer to limit or negate that protection.

The scope of uninsured motorist coverage is circumscribed by the liability of the tortfeasor. Under uninsured motorist coverage, the carrier pays if the tortfeasor would have to pay if the claims were made directly against the tortfeasor, Allstate Ins. Co. v. Boynton, 486 So.2d 552 (Fla. 1986). Indeed, uninsured motorist coverage was conceived and developed by the insurance industry in an attempt to forestall the enactment of state legislation creating compulsory insurance, Boynton, supra. Consistent with this established case law the decision in Webster focuses on whether the tortfeasor would have to pay if the claims were made directly against the tortfeasor.

Valiant, however, argues that Webster directly conflicts with what Valiant claims are three established principles of law. In fact, Webster, conflicts with none of the decisions cited by Valiant.

Scope of Uninsured Motorist Coverage. Valiant argues first that uninsured motorist coverage under a given policy is the mutual equivalent of the liability coverage of that policy, citing Mullis v. State Farm Mutual Automobile Insurance Co., 252 So.2d 229 (Fla. 1971); France v. Liberty Mutual Insurance Co., 380 So.2d 1155 (Fla. 3rd DCA 1980); Auto-Owners Insurance Co. v. Bennett, 466 So.2d 242 (Fla. 2nd DCA 1984); and Auto-Owners Insurance Co. v. Queen, 468 So.2d 498 (Fla. 5th DCA 1985). Even if that principle of law were correct, the decisions cited by Valiant do not conflict with the district court's decision in Webster. Although the reasoning used in Mullis, Bennett and Queen differs from the district court's decision in Webster, the results in all four cases cited by Valiant would have been the same if the decision in Webster were applied to the facts in those cases.

The district court in Webster employs a two-part analysis of uninsured motorist cove age: if the claimant is an insured under the policy affording uninsured motorist coverage and if the claimant would have a claim under the uninsured tortfeasor's liability policy if the tortfeasor had such a policy, then the claimant can recover under his uninsured motorist policy.

In Mullis, a father, for himself and for his minor son, claimed uninsured motorist benefits under a policy issued to the father for damages resulting from his son's injuries caused by an uninsured motorist. Under the policy the claim was barred because at the time of the accident the son was riding a motorcycle that was not covered by liability insurance issued by his father's insurance company. This Court in Mullis held that it was not permissible to exclude the son from uninsured motorist coverage since the son was an insured under his father's policy. Application of the rationale in Webster would yield the same result: the claimants, the father and son, are both insured under the father's policy and both of them would have had a claim under the tortfeasor's liability policy if he had one: the father and son can both recover under the father's policy.

In France, a daughter who was injured by an uninsured motorist claimed benefits under the uninsured motorist provisions of her parent's policy, under the terms of which the daughter was not an insured because she owned a private passenger automobile. The district court in France held that since the daughter was not an insured under the terms of the policy, she could not recover. The

same result would be reached under the rationale of Webster, since the daughter, the claimant, was not an insured under the policy.

In Bennett, a son was killed in an automobile owned by a third party with minimal liability coverage. The decedent's father claimed uninsured motorist coverage under the father's policy, which provided that uninsured motorist coverage applied to underinsured motorist situations. The district court in Bennett permitted recovery by the father, even though the son was excluded from uninsured motorist coverage because he owned an automobile. Although the court's rationale is different, the result is consistent with the decision in Webster: the father was the insured and claimant under his own policy and the father would have had a claim against the underinsured tortfeasor's liability policy if he had one.

Queen presents essentially the same fact pattern, policy provisions and result as Bennett.

The results in Mullis, France, Bennett and Queen are all consistent with Webster. In Webster, Mullis, Bennett and Queen, the appellate courts found uninsured motorist coverage if the claimant is an insured under the policy affording uninsured motorist coverage and if the claimant would have a claim under the uninsured tortfeasor's liability policy if the tortfeasor had such a policy. In France the district court denied coverage because the claimant was not an insured under the policy. Despite "reciprocal or mutual equivalent" language in the Mullis, Bennett and Queen opinions, the results in those cases do not conflict with the district court's decision in Webster.

Moreover, the requirement that the insured must sustain bodily injury to recover under the uninsured coverage was ruled void and against public policy by the First District Court of Appeal in Davis v. U.S.F. & G., 172 So.2d 485, 486-487 (Fla. 1st DCA 1965). The Court, in Davis, held that the insurance policy's language requiring that in wrongful death cases the injury be "sustained by the insured" was void because such language had the effect of defeating the purpose and the intent of the uninsured motorist statute. The defendant insurance company insisted that even though the widow was an insured under the policy, the uninsured motorist coverage extended only to the "insured who sustained bodily injury" or in the case of death, to the decedent's personal representative. In rejecting the insurance company's argument, the Court held that the language requiring that the injury be sustained by the insured was void as against public policy, saying at 172 So.2d 486-487:

> . . . [E]very insured, within the definition of that term as defined in the policy, is entitled to recover under the policy for damages he or she would have been able to recover against the offending motorist if that motorist had maintained a policy of liability insurance. It is our view that when the insurance company inserted the limiting words 'sustained by the insured' under Coverage G entitled 'Family Protection (Damages for Bodily Injury)' in the policy issued in this case it sought to restrict the coverage afforded by the policy in a manner contrary to the intent of the statute.

Nature of Survivor's Claim. Valiant incorrectly argues that the nature of a survivor's claim under the Florida Wrongful Death Act, Sections 768.16-768.27, Florida Statutes, is derivative of the

decedent's claim, suggesting that since Christopher Manniel could not recover under Valiant's policy, because he was not an insured, his father should not be able to do so. In a well-established line of cases this Court has consistently held that the wrongful death act creates a separate and independent cause of action in the named beneficiaries. See, e.g., Nissan Motor Co. v. Phlieger, 508 So.2d 713 (Fla. 1987), and cases cited therein. The flaw in Valiant's argument is of course that had Christopher survived, he could have pursued a claim for damages against the tortfeasor. It is upon this claim that the wrongful death act focuses, not upon whether Christopher would have had a claim against the insurance company. Indeed, the decision in this case is consistent with those cases cited by Valiant. In both cases cited by Valiant, Variety Children's Hospital v. Perkins, 445 So.2d 1010 Fla. 1983), and Hoffman v. Jones, 280 So.2d 431 (Fla. 1973), this Court analyzed the decedent's claim, had he survived, against the tortfeasor in deciding whether or not a claim existed under the act. The decision of the district court in Webster simply does not conflict with the decisions cited by Valiant.

Impact Rule. Valiant incorrectly argues that the district court's decision in Webster disregards Florida's impact rule, claiming that a survivor under the wrongful death act must have suffered an impact to recover emotional damages. In so arguing, Valiant completely misapplies the rule.

The wrongful death act creates a statutory cause of action and expressly provides that each survivor, as defined in the act, may recover for various categories of damages, including loss of support,

loss of services, medical and funeral expenses and, as in the instant case, for each parent of a deceased child under 25 years of age, mental pain and suffering from the date of injury. "The right to recover damages for a negligently-caused death is entirely a creature of statute. . . . [W]e look to the statute alone to discover who can recover and what may be recovered." Wade v. Alamo Rent-A-Car, Inc., 510 So.2d 642, 643 (Fla. 4th DCA 1987)(emphasis in original). The language of the act is clear and contains no restriction that requires a plaintiff to experience an impact before recovery under the act is allowed. It is a judicially-created limitation that bars under certain circumstances a cause of action for a plaintiff's emotional damages suffered as the direct result of a tortfeasor's negligent act that injures another. That a survivor experienced no impact is irrelevant and inapplicable to a claim under the wrongful death act. In addition, a number of Florida cases have permitted a survivor to recover damages for his own mental pain and suffering in wrongful death actions absent impact to the survivor. See, e.g., Walt Disney World Co. v. Goode, 501 So.2d 622 (Fla. 5th DCA 1986), and Seaboard Air Line Railroad Co. v. Gay, 201 So.2d 238 (Fla. 1st DCA 1967). Neither of the two cases cited by Valiant, Champion v. Gray, 478 So.2d 17 (Fla. 1985), and Brown v. Cadillac Motor Car Division, 468 So.2d 903 (Fla. 1985), conflicts with Webster. In fact, footnote 4 of the Champion opinion makes it clear that the impact rule, in barring causes of action for psychic trauma in certain circumstances, does not apply to causes of action for psychic trauma specifically provided for by statute.

CONCLUSION

Valiant has failed to demonstrate that the decision of the district court in Webster conflicts with a decision of this Court or of another district court of appeal. Accordingly, this Cou t should decline to review the decision of the district court of appeal.

Respectfully submitted,

PAUL A. BERNARDINI
LaRue, Bernardini, Seitz and Tresher
Post Office Box 2200
Daytona Beach, Florida 32015-2200
904/258-3453

and

CYNTHIA S. TUNNICLIFF
Carlton, Fields, Ward, Emmanuel,
Smith, Cutler and Kent, P.A.
Post Office Drawer 190
Tallahassee, Florida 32302
904/224-1585

BY: Cynthia S. Tunnicliff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, by U.S. Mail, to JONATHAN C. HOLLINGSHEAD, ESQUIRE, of Fisher, Rushmer, Werrenrath, Keiner, Wack and Dickson, P.A., Post Office Box 712, Orlando, Florida 32802, this 2nd day of November, 1987.

Cynthia S. Tunnicliff