IN THE SUPREME COURT 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 REPLY BRIEF

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ATTORNEYS FOR RESPONDENT

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PREFACE

For purposes of this Brief, the following references shall be used. All citations to the record shall be indicated as "(R)". The Petitioner, VALIANT INSURANCE COMPANY, shall be referred to as either the Petitioner, the Defendant or by name. The Respondent, JANET WEBSTER, shall be referred to as the Plaintiff, the Respondent or by name, JANET WEBSTER.

STATEMENT OF THE FACTS AND THE CASE

Respondent disagrees with the statement of the facts and case contained in Petitioner's Initial Brief because the statement is incomplete and misleading. Respondent presents the following supplemental statement to provide a more accurate picture of the issues involved.

This case concerns a claim for uninsured motorist benefits because of the wrongful death of the insured's son. The Plaintiff is JANET WEBSTER. She is the Personal Representative of the Estate of her son, CHRISTOPHER MANNIEL, deceased. The Defendant is VALIANT INSURANCE COMPANY, the automobile liability insurance company which issued a standard motor vehicle liability insurance policy to the father of the decedent, CLYDE MANNIEL.

JANET WEBSTER and CLYDE MANNIEL were divorced from each other, and at the time of the automobile accident giving rise to this claim, CHRISTOPHER had been living with his mother.

The son's death was caused by a one-car accident. By virtue of the death of his son, the insured father was legally entitled to recover damages against the owner and operator of the motor vehicle. The owner and operator were uninsured. The father made a claim for uninsured motorist benefits.

The claim for wrongful death benefits was brought by JANET WEBSTER under the Florida Wrongful Death Act (Florida Statute Section **768.16** through **768.27).** Under the Florida Wrongful Death Law, CLYDE MANNIEL, VALIANT's insured, has an independent claim for damages against the tortfeasor who killed his son.

At the time of the death, the father had in full force and effect a policy of automobile liability insurance issued by Defendant insurance company for delivery in this state with respect to a specifically insured and identified motor vehicle registered and principally garaged in Florida (R-5). The policy provided uninsured motorist benefits (R-29). The named insured was CLYDE MANNIEL (R-5).

VALIANT's policy contains two provisions which Petitioner contends exclude CLYDE MANNIEL's wrongful death claim from uninsured motorist coverage:

> "We will pay damages for bodily injury sustained by a covered person and caused by an accident, which that covered person is legally entitled to recover from the owner or operator of an . . . uninsured motor vehicle . . . (emphasis supplied)."
>
> "We will pay damages which a covered person is legally entitled to recover from the owner or operator of an uninsured motor vehicle because of bodily injury:
>
> 1. Sustained by a covered person; and
>
> 2. Caused by an accident (emphasis supplied)."

Both of these provisions require that the bodily injury resulting in damages be sustained by, or inflicted upon the insured or a "covered person.'' CHRISTOPHER MANNIEL, the son, was not an insured nor was he covered by VALIANT's policy because he was not a member of his father's household.

The Florida Uninsured Motorist Statute does not require that the injury be sustained by a covered person. It simply says:

> "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 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 . . ." Florida Statute 627.727(1).

The father, CLYDE MANNIEL, claimed uninsured motorist benefits on the basis that he qualified under the above sentence of the uninsured motorist statute for uninsured motorist benefits. CLYDE MANNIEL claimed that he was entitled to these uninsured motorist benefits because:

1. CLYDE MANNIEL was a survivor as that term is defined in the Florida Wrongful Death Act, Florida Statute 768.18(1) in that CLYDE MANNIEL was the father of the decedent;

2. CLYDE MANNIEL, as the father of the decedent, was legally entitled to recover damages against the owner and operator of the motor vehicle which caused his son's death;

3. The owner and operator who caused the death of his son were uninsured; and

4. CLYDE MANNIEL had uninsured motorist coverage with the defendant insurance company. (R-1 through R-4).

CLYDE MANNIEL's claim was denied by the Petitioner. The reason the claim was denied was because the son lived with his mother and not with the father. The trial court entered judgment for the Defendant/Petitioner.

The District Court of Appeal for the Fifth District, in an opinion written by Judge Sharp, reversed the trial court and held that in the context of wrongful death (and not bodily injury) the insurance company could not restrict uninsured motorist coverage to damages flowing from bodily injuries suffered by the insured or a covered person.

Thereafter, on December 2, 1987, the Fourth District Court of Appeal, in an opinion written by Judge Glickstein, agreed with Judge Sharp and held as void the attempt by the insurance company to limit wrongful death benefits when the decedent is not an insured so long as the person who is insured does, in fact, have

a valid wrongful death claim against an uninsured motorist. United States Fidelity & Guaranty Company v. Marilyn Fitzgerald, 4th D.C.A. 1987, Case No. 87-2049 (12 F.L.W. 2718), published in the December 11, 1987 issue, a photocopy of which is attached to the Appendix.

VALIANT INSURANCE COMPANY sought to invoke the discretionary jurisdiction of the Florida Supreme Court and jurisdiction was accepted on January 27, 1988.

SUMMARY OF ARGUMENTS

Only two Florida courts have determined this issue, and their opinions are exactly the same. Both the opinion of Judge Sharp in the instant case and the opinion of Judge Glickstein of the Fourth District Court of Appeal in United States Fidelity and Guaranty Company v. Fitzgerald, are attached to the Appendix. Both District Courts hold that so long as the person who had a wrongful death claim is an insured, the insurance company cannot also require that the decedent be an insured.

Secondly, there is clearly no conflict with respect to the Florida cases relied upon by the Petitioner. These decisions represent the law of Florida with regard to claims for personal injury benefits against uninsured motorist coverage. These cases, however, deal with personal injury and not with wrongful death claims against uninsured motorist coverage. This distinction is important, because the Supreme Court of Florida has consistently held that the wrongful death act creates a new and independent cause of action in the statutorily designated beneficiary. This cause of action for wrongful death is separate and distinct from a claim for bodily injury. Nissan Motor Company, Ltd. v. Phlieger, 508 So.2d 713 (Fla. 1987). Even though the deceased child had no claim against VALIANT for uninsured motorist benefits, the Florida Wrongful Death Act gives

his father a claim for uninsured motorist benefits because the father has the two elements necessary for a cause of action against his uninsured motorist carrier: (1) a claim against the uninsured motorist for wrongful death; and (2) uninsured motorist coverage with VALIANT.

Third, the very clause relied upon by the insurance companies in this case requiring that the injuries be "sustained by a covered person" has already been held void in the context of wrongful death claims against uninsured motorist coverage. Davis v. United States Fidelity & Guaranty Company, 172 So.2d 485, 486-487 (Fla. 1st DCA 1965). Fourth, the Florida Uninsured Motorist Statute specifically requires coverage in the instant case. The first sentence of the statute expressly states that all insurance companies must provide uninsured motorist coverage to protect insured persons who are legally entitled to recover damages from uninsured motorists because of injuries or death. The father's claim for wrongful death is within the language of the Uninsured Motorist Statute. The insurance company cannot add requirements limiting coverage. Mullis v. State Farm, 252 So.2d 229, 238 (Fla. 1971).

Finally, a history of the uninsured motorist law demonstrates that coverage should be required in the instant case. The insurance companies prefer uninsured motorist coverage to laws requiring compulsory insurance. While states such as

California [California Vehicle Code, Section 16,0001; Louisiana [Louisiana Revised Statute 32(863.1)]; and Arizona [Article 8, Mandatory Motor Vehicle Insurance] have laws which require liability insurance, Florida does not. If Florida had compulsory liability insurance, a divorced father would have a claim for wrongful death benefits against a responsible motorist. However, Florida does not have compulsory liability insurance and the father has no recourse for the wrongful death of his son. It simply makes no sense to deny a wrongful death claim of a parent simply because the other parent has custody. It, likewise, makes no sense for the insurance companies to argue that they cannot adjust their rates accordingly.

ARGUMENT

ISSUED INVOLVED

THE DECISION IN THIS CASE DEALS WITH A CLAIM FOR UNINSURED MOTORIST COVERAGE FOR WRONGFUL DEATH BENEFITS, NOT BODILY INJURY BENEFITS, AND AS SUCH THE DECISION IN THIS CASE IS IDENTICAL WITH THE DECISION OF THE FOURTH DISTRICT ON THE SAME QUESTION AND WITH FLORIDA JURISPRUDENCE.

As of this date, only two Florida courts have answered the exact question now pending before this Court. As stated earlier, both of these courts came to the same conclusion with respect to wrongful death claims against uninsured motorist coverage. Both held that **so** long as the insured person had a wrongful death claim against an uninsured motorist, the insured person should be provided with coverage. These holdings apply only in the context of wrongful death claims by survivors and do not apply to personal injury claims by the person actually injured. Webster v. Valiant and United States Fidelity & Guaranty v. Fitzgerald (see Appendix).

Each of the Florida cases relied on by Petitioner dealt with a claim for bodily injury and not a wrongful death claim. This distinction is critical to this case. There is no question that if the decedent child had lived he would have no claim against VALIANT because he was not an insured. The Florida Supreme Court, however, has consistently held that the Florida Wrongful

Death Act creates a new and independent cause of action in the statutorily designated beneficiaries. Nissan Motor Company, Ltd. v. Phlieger, 508 So.2d 713, 714 (Fla. 1987). It is this right based upon statute that the father has against the uninsured motorist.

The exact language held void by Judge Sharp in this case was previously held void by the First District Court of Appeal in Davis v. United States Fidelity & Guaranty Company, 172 So.2d 485 (Fla. 1st DCA 1965). Specifically, the First District 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 Law and the Wrongful Death Act. In Davis, the widow brought an action against her father's insurance company. It was conceded that the widow was an insured under the policy. The facts were that the widow and her husband were residents of her father's home. The defendant insurance company insisted that, even though the widow was an insured, 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. The First District rejected the insurance company's argument requiring that the injury in a wrongful death case be "sustained by the insured." In doing so, the First District 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:

> "every insured, within the definition of that term as defined by 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. It necessarily follows that the restrictive language inserted in the insurance policy being considered has the effect of defeating the purpose and intent of the statute and must be considered nugatory and of no effect."

The first sentence of the Florida Uninsured Motorist Statute makes it clear that there is no statutory requirement that the injury be "sustained by the insured.'' The only two elements necessary for an uninsured motorist claim under the statute are: (1) the insured has a claim against an uninsured motorist; and (2) the insured has uninsured motorist coverage. The father in this case has both (the son does not have both, because he has no uninsured motorist coverage with VALIANT).

The legislative history of the uninsured motorist statute is set forth by Justice Ehrlich in Allstate Insurance Company v. Boynton, 486 So.2d 552, 556-557 (Fla. 1986). Uninsured motorist coverage was developed at the request of the insurance companies themselves, not at the request of the public. One of the reasons the insurance industry conceived and developed uninsured motorist

coverage was to forestall the enactment of state legislation directed at either creating compulsory liability insurance or otherwise altering the insurance market with respect to financially irresponsible uninsured motorists. The insurance companies had their choice. They could either allow compulsory liability insurance or provide uninsured motorist coverage. If there were compulsory liability insurance in Florida, CLYDE MANNIEL could sue the owner and driver of the car which caused his son's death. however, the owner and driver were allowed to drive without liability insurance, because the Florida law permits this. The only protection of CLYDE MANNIEL is his uninsured motorist coverage.

The purpose of Florida's uninsured motorist coverage has been stated time and time again:

> "Thus, the intention of the legislature, as mirrored by the decisions of this Court, is plain to provide for the broad protection of the citizens of this state against uninsured motorists. 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 the attempts of the insurer to limit or negate that protection.'' Salas v. Liberty Mutual Insurance Company, 272 So.2d 1, 3, 5 (Fla. 1973).

A good example of the fact that courts will not allow insurance companies to whittle away the broad protection of uninsured motorist coverage is Mullis v. State Farm Mutual Automobile Insurance Company, 252 So.2d 229, 238 (Fla. 1971). Mullis did not deal with wrongful death. Rather, Mullis dealt with a claim

for personal injury. In Mullis, the Supreme Court of Florida held that with regard to uninsured motorist coverage, insurance companies were not allowed to restrict coverage to instances were the insured was injured in a vehicle owned by a family member only if that vehicle was insured by State Farm.

There is language in Mullis which, if taken out of context, would require that a person be an insured or a family member or a resident of the household before coverage applies. However, the Mullis case was not a wrongful death case and the injured person in Mullis was alive and an insured under the policy. The holding of the Supreme Court of Florida in Mullis simply supports the proposition that the insurance company's purported exclusion was void as against public policy. In ruling against the insurance company, the Supreme Court of Florida repeated the purpose of uninsured motorist coverage:

> "(Uninsured motorist coverage) was enacted to provide relief to innocent persons who were injured through the negligence of an uninsured motorist; it is not to be 'whittled away' by exclusions and exceptions." Mullis, 252 So.2d at 238.

Accordingly, the only valid exclusions in uninsured motorist coverage are exclusions which the liability insurer is allowed to raise, such as the family member exclusion and the worker's compensation exclusion. Jernigan v. Progressive American Insurance Company, 501 So.2d **748, 751** (Footnote **4)** (Fla. 5th DCA 1987).

With respect to the opinion of other jurisdictions cited by Amicus Curiae and VALIANT INSURANCE COMPANY, it is important to note that with regard to every jurisdiction except Mississippi, there is compulsory liability insurance. Moreover, in California, the legislative history set forth on page 497 of the Smith opinion makes it clear that the purpose of the uninsured motorist law of California was to provide recovery only for the insured's wrongful death. Smith v. Royal Insurance Company of America, 230 Cal. Rptr. 495 (Cal. App. 5th Dist. 1986). Bakken v. State Farm, 678 P.2d 481 (Ariz. App. 1983), also cited by Petitioner, dealt with stacking uninsured motorist policies and not with the question before this Court. In La Fleur v. Fidelity & Casualty Company of New York, 385 So.2d 1241, 1245 (La. App. 1980), the District Court of Appeal for the Third Circuit in Louisiana held valid the very language struck down as void by the Florida Appellate Court in Davis v. United States Fidelity & Guaranty Company, 172 So.2d 485 (Fla. 1st DCA 1965) (Florida held as void language requiring that the injury be sustained by an insured). Furthermore, it is difficult for the Respondent to understand why the decisions of intermediate courts in Arizona, Louisiana and California are "better reasoned" than decisions from the highest courts in both Ohio and Nebraska. One thing is certain, each of these states has compulsory liability insurance and Florida does not.

The other cases cited by the insurance companies are also not on point. For example, in France v. Liberty Mutual, 380 So.2d 1155, 1156 (Fla. 3rd DCA 1980), involved a claim for uninsured motorist benefits because of a claim for personal injury benefits by a person who was not insured. This was not a wrongful death claim and had nothing to do with the clause in question. Skroh v. Travelers, 227 So.2d 328 (Fla. 1st DCA 1969) deals with policy limits for wrongful death, not the validity of the clause requiring injury to be "sustained by the insured," which clause was held void in Davis, supra. The present case has nothing to do with the Florida no-fault tort threshold.

Finally, the insurance companies argue that affirmance of the district court opinion in the instant case will cause a problem with rate structures. There is no showing that allowing a father to make a claim for uninsured motorist benefits because of the wrongful death of his son is any different than allowing a father to make a claim for wrongful death against the liability insurer of the person who caused his son's death. As pointed out in Allstate Insurance Company, supra, uninsured motorist coverage was developed as an alternative to compulsory liability insurance. An insurance company should not now be allowed to avoid compulsory liability insurance and at the same time refuse to pay wrongful death benefits under uninsured motorist coverage to a father because of the wrongful death of his son.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the Fifth District Court of Appeal in this case and the decision of the Fourth District Court of Appeal in United States Fidelity & Guaranty Company v. Fitzgerald should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing were served by mail this March 18, 1988 upon Jonathan C. Hollingshead, Esq., Attorney for Petitioner, P.O. Box 712, Orlando, FL 32802; and Betsy E. Gallagher, Attorney for State Farm Mutual Automobile Insurance Company, Penthouse, City National Bank Building, 25 W. Flagler St., Miami, FL 33130.

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