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IN THE SUPREME COURT OF FLORIDA

CASE NO. 73,836
Fifth District Case No. 86-1882

ROBERT EDWIN SEIBERT and
LIBERTY MUTUAL INSURANCE COMPANY,

Petitioners,

vs.

MATTHEW L. McNAMARA, JR. and
SHARON McNAMARA, as Co-Personal
Representatives of the Estate of
MATTHEW L. McNAMARA, 111, and
HELEN GIBBS, as mother and next
friend of RACHEL LEONA McNAMARA-GIBBS,
a minor child,

Respondents.

**AMICUS CURIAE BRIEF OF
STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY**

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I N D E X

TABLE OF CITATIONS AND AUTHORITIES

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OTHER AUTHORITIES:

STATEMENT OF THE CASE AND FACTS

This case arises from a wrongful death action seeking damages through the underinsured motorist provisions of an automobile liability policy issued by Liberty Mutual (A. 1). The action sought underinsured motorist's benefits from Liberty Mutual for the decedent's survivor despite the fact that the decedent was not a resident of the household of Liberty Mutual's named insured. The survivor was an unborn child at the time of the accident who was conceived by the decedent before the accident. The survivor sought the underinsured motorist benefits from a Liberty Mutual policy issued to her grandmother with whom she lived (A. 1-2). The trial court entered a summary final judgment in favor of Liberty Mutual determining that the decedent did not qualify as an insured under the provisions of the insurance policy (A. 1).

On appeal, the district court reversed and held that the decedent's survivor was an insured under the Liberty Mutual policy, and "has uninsured/underinsured coverage as a 'survivor' for the wrongful death of her father caused by the wrongful acts of an uninsured motorist" (A. 1-3). In reaching the decision the Fifth District quoted language from its earlier decision of Webster v. Valiant Ins. Co., 512 So.2d 971 (Fla. 5th DCA 1987), that any insurance policy requirement that the bodily injury be sustained by a "covered person" is void as contrary to public policy (A. 2).

On February 9, 1989, the Fifth District denied appellee's motion for rehearing but granted appellees' motion for certification. The court certified to the Supreme Court the following as being a question of great public importance:

> MAY A SURVIVOR, AS THAT TERM IS DEFINED IN THE FLORIDA WRONGFUL DEATH ACT, RECOVER FROM HIS OWN UNINSURED MOTORIST POLICY HIS DAMAGES WHERE THE DECEDENT IS NOT A COVERED PERSON UNDER THE POLICY?

(A. 4-9).

POINT INVOLVED ON REVIEW

WHETHER FLORIDA PUBLIC POLICY REQUIRES PAYMENT OF UNINSURED MOTORIST BENEFITS TO AN INSURED SURVIVOR WHOSE DECEDENT WAS NOT INSURED UNDER THE TERMS OF THE POLICY.

SUMMARY OF ARGUMENT

In holding that uninsured motorist benefits are owed to an insured survivor even though the decedent was not insured under the terms of the policy, the district court has expanded the scope of uninsured motorist coverage beyond that contemplated by the legislature or the contracting parties.

In reaching its conclusion, the district court confused two very distinct concepts regarding "derivative insureds." The Florida cases relied on by the district court which allow recovery for a survivor of an insured whose death is caused by an uninsured motorist are completely inapposite.

There is a split of authority among the various states on the issue involved in this case, with the better reasoned cases holding that injury to a non-insured does not give rise to UM coverage. Moreover, these better-reasoned cases are consonant with the principles outlined in Mullis v. State Farm Mutual Automobile Insurance Co., 252 So.2d 229 (Fla. 1971), which has been the polestar for interpreting legislative intent regarding the scope of uninsured motorist coverage in Florida.

Public policy is not thwarted by focusing on the status (either insured or uninsured) of the person sustaining bodily injury or death, rather than on the insured status of the survivor(s). Such a focus lends stability to interpretation of uninsured motorist policies and allow insurers to adequately

evaluate the underwritten risks. The decision of the district court, however, threatens to undermine existing rate structures and could call into question the continued validity of numerous Florida decisions governing basic tenets of uninsured motorist law.

ARGUMENT

FLORIDA PUBLIC POLICY DOES NOT REQUIRE PAYMENT OF UNINSURED MOTORIST BENEFITS TO AN INSURED SURVIVOR WHOSE DECEDENT WAS NOT AN INSURED UNDER THE TERMS OF THE POLICY.

The decision under review should be quashed as it has broadened the scope of uninsured motorist coverage in this state beyond that contemplated by the contracting parties or by the legislature. The district court adhered to its earlier decision in Webster v. Valiant Insurance Co., 512 So.2d **971** (Fla. 5th DCA **1987)** and held that the defendant carrier owed uninsured motorist benefits to the insured in this case despite the fact that neither the decedent nor the automobile in which he was killed were insured by Liberty Mutual. This result eliminates the requirement of any nexus between the insured or the insured automobile and effects a sweeping change in the statutorily mandated coverage. The voiding of the policy requirement that bodily injury be sustained by a covered person is not required by Florida's public policy nor is it supported by the Florida cases relied upon by the district court.

The district court held that the Liberty Mutual policy language, which required bodily injury be sustained by a covered person, was invalid as contrary to public policy, quoting Webster at **973.** This Court, however, has recognized at least implicitly, that the coverage required by the uninsured motorist statute

contemplates bodily injury to one who falls within the class of persons insured under the policy.

In Mullis v. State Farm Mutual Automobile Insurance Co., 252 So.2d 229, 237-238, this Court held that uninsured motorist coverage

> 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. [emphasis supplied].

In the quoted language, this Court delimited the scope of uninsured motorist coverage as intended by the legislature, and recognized that the coverage contemplates bodily injury or death to an insured.

Elsewhere in the opinion, this Court stated:

> [a Class I insured] is covered by uninsured motorist liability protection ... whenever or wherever bodily injury is inflicted upon him by the negligence of an uninsured motorist.

Id. at 238. [Emphasis supplied]. Finally, in invalidating the exclusion at issue in that case, the Court relied on a California case involving a similar issue and noted: "Our 5627.0851 and §627.0852(1)(a) [the predecessor uninsured motorist statutes] coupled with §324.021(7) [the financial responsibility law] cover the same class of insureds sustaining bodily injury because of the negligence of an uninsured motorist." Id. at 237. [Emphasis

supplied]. Cf. Hodges v. National Union Indemnity Co., 249 So.2d 679 (Fla. 1971)(coverage protects named insured under all circumstances "when he is injured" by uninsured motorist).

In interpreting the legislature's intent as to the scope of uninsured motorist coverage, this Court has clearly recognized that bodily injury to a covered person is a permissible prerequisite to the applicability of the coverage. This construction leads to rational, predictable consequences and is in conformity with the prevailing view. See Smith v. Roval Insurance Company of America, 186 Cal. App.3d 239, 230 Cal. Rptr. 495 (1986); La Fleur v. Fidelity & Casualty Co. of New York, 385 So.2d 1241 (La. App. 1980); Gillespie v. Southern Farm Bureau Casualty Insurance Co., 343 So.2d 467 (Miss. 1977). See also Bakken v. State Farm Mutual Automobile Insurance Co., 139 Ariz. 296, 678 P.2d 481 (App. 1983); Couch on Insurance 2d (Rev. ed.) §45.634 ("An insured or an insured vehicle must be involved in the accident in order to collect under the UM endorsement."). But see State Farm Mutual Automobile Ins. Co. v. Selders, 187 Neb. 342, 190 N.W.2d 789 (1971); Sexton v. State Farm Mutual Automobile Insurance Co., 69 Ohio St.2d 431, 433 N.E.2d 555 (1982).

When faced with the identical issue, the court in Smith v. Roval Insurance Company of America, supra at 496, found that the purpose of California's uninsured motorist statute was "to provide financial protection for bodily injury or wrongful death

suffered by the insured and caused by an uninsured motorist." [Emphasis in original]. After examining the legislative history of Insurance Code §11580.2--the same provision found by this Court in Mullis to be analogous to Florida's uninsured motorist statute--the California court concluded that the legislative scheme contemplated bodily injury to an insured.

> Even a liberal construction of the statute ... does not mandate recovery on these facts, as respondent [insurer] neither intended nor was required to provide coverage for wrongful death when neither the decedent nor the car in which he was riding was insured by respondent.

Id. at 497. Accord Gillespie v. Southern Farm Bureau Insurance Co., supra at 470 ("we find no conflict between the definition of the term 'insured' in [the uninsured motorist statute] and the definition contained in each policy of insurance.").

The Court in La Fleur v. Fidelity & Casualty Company of New York, supra, reached the same conclusion when it held that Louisiana's legislature

> did not intend ... to afford coverage for what an insured may be legally entitled to recover as his "wrongful death" damages, sustained because of the death of some third person ... Here the mother of plaintiffs-appellants ... was not an insured. She was a third person having no connection with the policies of insurance, the insured vehicles, or the households of the plaintiffs-appellants.

Id. at 1245.

As the above cases point out, the objective of the uninsured motorist statute--to provide relied to innocent persons injured by uninsured motorists--is adequately carried out by providing a mechanism for survivors' recovery upon the insured's wrongful death. See Zeagler v. Commercial Union Insurance Company of New York, 166 So.2d 616 (Fla. 3d DCA 1964), cert. denied, 172 So.2d 450: Davis v. United States Fidelity & Guaranty Co., 172 So.2d 485 (Fla. 1st DCA 1965). Annot. 26 A.L.R.3d 935 (1969). The district court, in this case, apparently commingled these two very distinct concepts: i.e., the right of an insured to recovery consequential damages based on injury to a stranger to the insurance contract, and the right of a third person, or "derivative insured" to recover damages based on injury to or death of the insured. To be sure, both situations involve the right of a non-injured person to recover damages based on injuries to another caused by an uninsured motorist, but there the similarity ends. The issue with which this Court is faced is a separate and distinct concept from that presented in Davis and Zeagler, and requires separate analysis. In cases where the decedent is insured, coverage for his death is contemplated under the policy and under the uninsured motorist statute; the same is not true with respect to damages claimed because of the death of a third person who is a stranger to the policy. The cases which allow for a survivor's recovery under the insured's UM policy in

the former situation simply do not provide authority for a finding of coverage in the latter.

As did the district court below, the court in State Farm Mutual Automobile Insurance Company v. Selders, supra, failed to distinguish these two concepts. In addition, the Nebraska court based its decision, in part, on a misinterpretation of the policy language which provides for recovery by derivative claimants based on injury to the insured.[1] As a result of the apparent lack of careful analysis, the Selders decision, relied upon by the court below, should be rejected by this Court as persuasive authority. See also State Farm Mutual Insurance Company v. Wainscott, 439 F.S. 840 (D. Alaska 1977) (wherein the court rejected Selders).

Perhaps the most thoughtful analysis of the issue with which this Court is confronted was supplied by the Court of Appeals of Arizona in Bakken v. State Farm Mutual Automobile Insurance Co., supra. Although the issue was presented in a slightly different factual setting, the court's reasoning applies with full force to this case. In Bakken, the plaintiffs' survivors sought to avoid "anti-stacking" provisions found in two applicable policies (one issued to the husband of the decedent, and the second to a son), each of which contained uninsured motorist coverage. The decedent mother and wife was within the

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[1]/ Cf. Florida Insurance Guaranty Association v. Cope, 405 So.2d 292, 294 (Fla. 2d DCA 1981)(wherein the court interpreted similar policy language as "merely authoriz[ing] recovery by derivative claimants").

definition of an insured under each policy, and State Farm tendered the statutorily required limits of liability for one person. *678* P.2d at 482. Plaintiffs argued that since each of them was insured under a separate policy, and that each of them had sustained separate "wrongful death" damages as a result of the death of another, they should each be entitled to recover the full **"per** person" limits of liability under their own UM policies, without reference to the anti-stacking provisions. In essence, plaintiffs argued that the insured status of the decedent was immaterial. Id. at 484.

This argument was rejected by the court, which found that

> Arizona's statutory provisions ... require coverage only for damages resulting from bodily injury, including death, of an insured and that in interpreting both the statutory and policy provisions relating to the amount of damages recoverable, the focus must be upon the bodily injury (including death) to that insured.

Id. [Emphasis in original]. In reaching its conclusion, the court employed the following hypothetical illustration:

> At the time of her death, Mrs. Bakken was survived by seven children and her spouse. Assume, for purposes of illustration, that each of these children and her husband owned automobiles covered by separate State Farm policies with uninsured motorist coverage and, further, that at the time of her accident she was not living in the same household with her spouse or any of her children. Under such circumstances she would not have any connection with any of the policies and clearly would not have been an

> insured under them. Consequently, there would not have been any uninsured motorist coverage available for the damages resulting from her devastating bodily injuries. However, under plaintiffs' interpretation, if she were to then die as a result of her bodily injuries, suddenly there would spring into existence uninsured motorist coverage under each of the eight policies. This coverage would exist under each policy (since each insured under the separate policies would have suffered wrongful death damages) with a possible total coverage of $105,000. ... Such a result would be patently absurd in the context of statutorily mandated uninsured motorist coverage.

Id. at 484-485.

The court went on to fully embrace the reasoning and holding of La Fleur, supra, and held that "coverage exists only because an insured has incurred bodily injury resulting in death, and the policy provisions must be interpreted from that perspective." 678 P.2d at 486. Elsewhere, the court noted:

> The mere fact that plaintiffs might, by reason of Arizona's wrongful death act, be entitled to share in the proceeds of the coverage for bodily injury to another insured, does not operate to expand the limits of coverage provided by the policies, which fully comply with the requirements of A.R.S. §20-259.01.

678 P.2d at 485.

A similar result was reached in Florida by the District Court of Appeal, First District in Mackoul V. Fidelity & Casualty Co., 402 So.2d 1259 (Fla. 1st DCA 1981), rev. denied, 412 So.2d 467. There the personal representative of the deceased insured argued that since each of the three survivors had a separate

cause of action under the wrongful death statute, the available policy limits should be applied separately to each survivor, for a total limit of $300,000. The court rejected this argument, relying on the policy provisions which clearly limited the total liability for bodily injury sustained by one person to $100,000, regardless of the number of causes of action which might arise out of bodily injury to one person.

An examination of the progeny of Sexton v. State Farm Mutual Automobile Insurance Co., 49 Ohio St.2d 431, 433 N.E.2d 555 (1982), relied on by the court below, demonstrates that the concerns voiced by the Bakken court were well-founded. In Auto-Owners Mutual Ins. Co. v. Lewis, 10 Ohio St.3d 156, 462 N.E.2d 396 (1984), the insured's son was killed by an uninsured motorist. The policy affording UM coverage to the insured and his son contained per person limits of $100,000 and insured six vehicles. Because the court found stacking to be appropriate, the available limits were $600,000. Relying squarely on Sexton, and focusing on the survivor's status as an insured under the policy, the court found that the insured father was entitled to a total recovery of up to $1.2 million dollars: up to $600,000 for the claim asserted in his representative capacity on behalf of the deceased and up to $600,000 for his individual survivor's claim under the wrongful death statute.

Such a result is patently contrary to established Florida law on this point,[2] yet, as the court in Bakken, noted, naturally follows from focusing on the status of the survivor as insured, rather than focusing on the status of the decedent.

Historically, Florida courts have made coverage determinations by focusing on the insured status of the injured person, and the cases following this approach are legion. See, e.g., Row v. United Services Automobile Association, 474 So.2d 348 (Fla. 1st DCA 1985) (insured's deceased son held to be "resident relative", entitling estate to recover under father's uninsured motorist coverage): Auto-Owners Insurance Co. v. Queen, 468 So.2d 498 (Fla. 5th DCA 1985) (where insured's daughter was resident relative and would have been covered under liability coverage afforded by policy, her estate was entitled to recover uninsured motorist benefits under mother's policy); Auto-Owners Ins. Co. v. Bennett, 466 So.2d 242 (Fla. 2d DCA 1984) (fundamental question under Mullis is whether insured's deceased son would have been entitled to basic liability coverage; since deceased was a resident relative, and within definition of insured under liability coverage, estate entitled to UM benefits under father's policy); American Security Insurance Co. v. Van Hoose, 416 So.2d 1273 (Fla. 5th DCA 1982)(insured's daughter and

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[2]/ New Amsterdam Casualty Co. v. Hart, 16 So.2d 118 (Fla. 1043); Florida Insurance Guaranty Association v. Cope, 405 So.2d 292 (Fla. 2d DCA 1981); MacKoul v. Fidelity & Casualty Co. of New York, supra; Biondino v. Southern Farm Bureau Casualty Insurance Co., 319 So.2d 152 (Fla. 2d DCA 1975), cert. denied, 330 So.2d 14 (Fla. 1976).

grand-daughters injured by uninsured motorist were not resident relatives, therefore no coverage under named insured's policy).

The district court's opinion in this case, which shifted the focus to the survivor's status as an insured and away from the status of the person sustaining bodily injury, has created an embarrassing conflict of decisions. The decision under review conflicts with Mullis v. State Farm Mutual Automobile Ins. Co., supra, which interpreted the legislature's intent as to the scope of uninsured motorist coverage: since this Court in Mullis recognized that the coverage contemplated bodily injury to an insured.

Furthermore, the decision of the district court is in conflict with Mullis, to the extent that it runs counter to the principle established by this Court that uninsured motorist coverage is intended to provide the "reciprocal or mutual equivalent" of liability insurance coverage. This principle focuses the insured status of the injured person, and requires payment of uninsured motorist benefits to or on behalf of one who would have been provided liability insurance protection under the same policy. Mullis, supra at 237-238. See also Auto-Owners Insurance Co. v. Queen, supra: Auto-Owners Insurance Co. v. Bennett, supra; France v. Liberty Mutual Insurance Co., 380 So.2d 1155 (Fla. 3d DCA 1980).

In France v. Liberty Mutual Insurance Co., supra at 1156, the District Court of Appeal, Third District noted:

> Courts should be extremely cautious when called upon to declare a contract or provision thereof void on the ground of public policy. ... Justice Terrell in Story v. First Nat. Bank & Trust Co., in Orlando, 115 Fla. 436, 439, 156 So. 101, 103 (1934), described public policy as "a very unruly horse, when once you get astride it, you never know where it will carry you." In the absence of statutory provisions to the contrary, insurers have the right to limit their liability and to impose such conditions as they wish upon their obligations, not inconsistent with public policy and the courts are without the right to add to or take away anything from their contracts.

[Citations omitted]. As outlined above, the policy provision relied upon by the insurer is not contrary to Florida's public policy as interpreted by this Court. The objective of the insured motorist statute is fully carried out by providing recovery to survivors upon the death of the insured--the risk contemplated by the contracting parties, for which a premium is paid.

There is nothing in Florida's public policy or Section 627.727 which requires elimination of a logical nexus between the insured or his automobile, and an automobile accident involving an uninsured motorist to trigger the applicability of uninsured motorist coverage. That logical nexus is bodily injury caused by an uninsured motorist to one insured under the policy.

By improperly focusing on the status of the survivor as insured, the district court opinion has broadened the scope of uninsured motorist coverage, subjecting insurance carriers in this state to liability for additional risks not taken into account by existing rate structures. The upheaval sure to follow in the wake of the district court's decision, if allowed to stand, is certainly not in the best interest of Florida's automobile insurance premium-paying public which demands stable, fair and equitable premiums for all.

C O N C L U S I O N

In the interest of stability and uniformity of Florida decisions outlining the scope of uninsured motorist coverage, this Court is urged to resolve the embarrassing conflict which has arisen by quashing the decision under review.

Respectfully submitted,

BY: Betsy E. Gallagher
BETSY E. GALLAGHER

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Amicus Curiae Brief of State Farm Mutual Automobile Insurance Company was mailed this 20th day of March, **1989** to: W. M. CHANFRAU, ESQ., Post Office Box **3156,** Daytona Beach, Florida **32018;** J. HOOD ROBERTS, ESQ., 11 E. Pine Street, Orlando, Florida **32801;** and to JONATHAN C. HOLLINGSHEAD, ESQ., Post Office Box **712,** Orlando, Florida **32802.**

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