IN THE SUPREME COURT
OF FLORIDA

CASE NO.: **73,836**

ROBERT EDWIN SEIBERT and
LIBERTY MUTUAL INSURANCE
COMPANY,

Defendant/Petitioner,

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
GIBBS, a minor child,

Plaintiff/Respondent.

RESPONDENTS' INITIAL BRIEF

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PREFACE

For purposes of this Petition, Respondent adopts the Preface of the Petitioner in his Initial Brief dated April 19, 1989.

STATEMENT OF THE CASE AND THE FACTS

At all times material hereto, the decedent MATTHEW L. McNAMARA, III was the son of MATTHEW L. McNAMARA, JR. and SHARON McNAMARA. (R 1-2) On or about March 21, 1984, MATTHEW L. McNAMARA, III was severely injured when he was involved in an automobile accident with an underinsured motorist, ROBERT EDWIN SEIBERT. MATTHEW L. McNAMARA, III subsequently died from the said injuries. (R 12) At the time of his death, MATTHEW L. McNAMARA, III was a single man, residing with his parents.

At all times material hereto, HELEN GIBBS resided with her mother, MARY GIBBS. (R 25) HELEN GIBBS was pregnant by the decedent, MATTHEW L. McNAMARA, 111, at the time of his death, even though the two had not married. (R 2) For the purposes of the Defendant/Petitioner's Motion for Summary Judgment and this appeal, paternity was undisputed and is not an issue, and was stipulated to by the parties. (R *30)*

At all times material hereto, MARY GIBBS, mother of HELEN GIBBS and grandmother of RACHEL LEONA GIBBS, had in full force and effect a policy of automobile liability insurance with LIBERTY MUTUAL INSURANCE COMPANY [hereinafter referred to as LIBERTY MUTUAL]. This policy of insurance with LIBERTY MUTUAL also provided uninsured/underinsured motorist coverage. This coverage extended to relatives residing in the household with the insured, which therefore

included benefits for RACHEL LEONA GIBBS, the minor. (R 40, 30-52, 63) It is not disputed that RACHEL LEONA GIBBS' father, the decedent McNAMARA, was never a "resident relative" nor an insured of the LIBERTY MUTUAL policy.

The trial court below ruled that a wrongful death action could be brought and maintained by the minor, RACHEL LEONA GIBBS, for the wrongful death of her father, decedent McNAMARA, even though she was unborn at the time of his death. (R 63)

The Plaintiff/Respondent herein has continued to argue throughout the proceedings below and the appeal to the 5th DCA, that the minor, RACHEL LEONA GIBBS was and is an insured under the LIBERTY MUTUAL policy, and is therefore entitled to the underinsured coverage provided for the wrongful death of her father, McNAMARA. In the trial court below, Defendant filed its motion for summary final judgment challenging RACHEL LEONA GIBBS' entitlement to those benefits, on the grounds that her father, decedent McNAMARA, was not a covered person under the policy. (R 30) Defendant further contends that because RACHEL LEONA GIBBS had not herself sustained bodily injuries, she was not entitled to benefits. (R 30)

The trial court agreed with Defendant, granting their summary final judgment, ruling that "...an uninsured motorist claim cannot be brought since the decedent, MATTHEW

L. McNAMARA, III, did not qualify as an insured under the terms of the Liberty Mutual uninsured motorist policy provisions." (R 63)

The Fifth District Court of Appeal, after receiving and reviewing Appellant's Main Brief, Appellee's Answer Brief, and Appellant's Reply Brief, and hearing oral argument of counsel, the Court reversed the trial Court, ruling that "Rachel was an insured within the meaning of the policy, and has uninsured/underinsured motorist coverage as a 'survivor' for the wrongful death of her father caused by the wrongful acts of an underinsured motorist." The Fifth District Court of Appeals followed its previous decision in Webster v. Valiant Insurance Co., 512 So.2d 971 (Fla. 5th DCA 1987), holding that the insurance policy's provision requiring that an insured sustain a bodily injury was an attempt to restrict UMC coverage provided by Florida Statutes section 627.727 (1983), and therefore constituted an action void as against public policy. The Fifth District Court of Appeal interpreted the insurance policy to provide uninsured motorist coverage to a survivor for the survivor's damages relating to an accident with an uninsured/underinsured motorist. The Defendant/Appellee/Petitioner, LIBERTY MUTUAL, filed its Motion For Rehearing and Alternative Motion for Certification; the motion for rehearing was denied and the motion for certification granted. This appeal ensued.

CERTIFIED QUESTION

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

SUMMARY OF ARGUMENT

Florida's uninsured motorist statute requires that survivors insured for protection from uninsured motorists be allowed to recover the same damages from the offending uninsured motorist in wrongful death actions that could have been recovered from an insured tortfeasor. This protection was created, and exists, for those insureds under the policy whether or not they have sustained bodily injuries and whether or not in wrongful death actions the deceased was an insured under the policy.

The Respondent herein incorporates the arguments set forth in Appellant's main and reply briefs filed in the Fifth District Court of Appeal, Appeal Docket No. 86-1631, Circuit Case No. 86-214-CA-01, Janet Webster, as Personal Representative of the Estate of Christopher Baine Manniel, Deceased, vs. Valiant Insurance Company. Respondent further incorporates the arguments set forth in Respondent's Jurisdictional Brief, Initial and Reply Brief in the Supreme Court appeal, Appeal Case No. 71,222, Valiant Insurance Company v. Janet Webster, as Personal Representative of the Estate of Christopher Baine Manniel, Deceased.

ARGUMENT

FLORIDA STATUTE SECTION 627.727 (1983) AND PUBLIC POLICY PROVIDES UNINSURED/ UNDERINSURED MOTORIST BENEFITS TO AN INSURED SURVIVOR, AS DESCRIBED IN THE FLORIDA WRONGFUL DEATH ACT, EVEN THOUGH THE DECEDENT WAS NOT AN INSURED UNDER THE TERMS OF THE INSURANCE POLICY.

The Supreme Court of the State of Florida has consistently held that "[t]he purpose of the uninsured motorist statute is to protect persons who are injured or damaged by other motorists who in turn are not insured and cannot make whole the injured party." Brown v. Progressive Mutual Insurance Co., 249 So.2d 429 (Fla. 1971); Salas v. Liberty Mutual Fire Insurance Co., 272 So.2d 1 (Fla. 1972); and Mullis v. State Farm Mutual Automobile Ins. Co., 252 So.2d 229 (Fla. 1971). See also: Gabriel v. Travelers Indemnity Co., 515 So.2d 1322 (Fla. 3 DCA 1987); State Farm Mut. Auto. Ins. Co. v. McClure, 501 So.2d 141 (Fla. 3 DCA 1987); and Bayles v. State Farm Mut. Auto. Ins. Co., 483 So.2d 402 (Fla. 1985). Likewise, the Supreme Court has held that the uninsured/underinsured motorist statute was intended to allow the insured the same recovery which would have been available to him had the tortfeasor been insured to the same extent as the insured himself. Brown, supra. In Dewberry v. Auto-Owners Ins. Co., 363 So.2d 1076 (Fla. 1978), the Supreme Court held that the primary purpose of uninsured motorist coverage generally is to put a person injured by an uninsured or unidentified motorist in an equal

or "as good as a" position to recover, had the tortfeasor been both identified and insured. Thomas v. Washington Metro. Area Transit Authority, 846 F.2d 1536 (D.C. Cir. 1988). The difference between the cases cited by the Petitioner regarding UMC coverage and those cited herein by Respondent is clear. The cases cited by Petitioner deal with personal injury benefits against uninsured motorist coverage. The cases cited and relied upon by Respondent do not conflict with those of Petitioner, because Respondent is dealing with wrongful death claims against uninsured motorist coverage. This distinction is very, very important because this Supreme Court has consistently held that the Wrongful Death Act invents or creates a new and independent cause of action in the statutorily designated survivor /beneficiary. This cause of action for the wrongful death of RACHEL LEONA GIBBS' deceased father is entirely separate and distinct from any claim for bodily injury. Nissan Motor Co., Ltd. v. Phlieger, 508 So.2d 718 (Fla. 1987).

In United States Fidelity & Guar. v. Fitzgerald, 521 So.2d 122 (Fla. 4 DCA 1987), Judge Glickstein agreed with Judge Sharp in Webster and held as void and contrary to public policy the insurer's attempt to limit wrongful death benefits solely because the decedent is not an insured, so long as the insured person does have a valid wrongful death

claim against an uninsured motorist. The State of Florida's uninsured motorist statute requires that survivors insured for protection from uninsured motorists be allowed to recover the same damages from the erroneous and offending uninsured motorist in wrongful death actions that could have been recovered from an insured tortfeasor. This protection was created, and exists, for those insureds under the policy whether or not they have sustained bodily injuries and whether or not in wrongful death actions the deceased was an insured under the policy.

Respondent believes that the actual issue here is a question of semantics. Petitioner staunchly disregards and ignores the existence of any other type of damages sustained other than "bodily injuries". To clarify, Respondent suggests that an analysis of the terms "bodily injury" and "personal injury" be made. According to Black's Law Dictionary, 707 (5th Ed. 1979), BODILY INJURY refers to physical pain, illness, disease or any impairment of a physical nature. On the other hand, PERSONAL INJURY is used in a much wider sense and includes any and all injuries which would be construed as an invasion of one's personal rights. Respondent fully believes and contends that that is what the Legislature meant to be construed by Fla. Stat. section 627.727 (1983), and not such an prohibitive restriction of coverage that applies only to physical damages. And, as the Fifth District held in Webster,

supra., an insurance policy's language which requires that an insured or covered person must sustain a bodily injury is void and contrary to Florida public policy because it attempts to limit those damages recoverable under Florida's uninsured motorist coverage statute.

The fact that the minor Respondent, RACHEL LEONA GIBBS sustained derivative and personal damages, rather than bodily injury damages is not a basis for denying her coverage. Florida courts have consistently followed the rule allowing derivative claims to be covered and paid from uninsured motorist coverage. In Mobley v. Allstate Insurance Co., 276 So.2d 495 (Fla. 2 DCA 1973), the Second District Court of Appeal reversed the trial court and stated, via Chief Judge Mann, "We held simply that damages for losses of consortium are as fully recoverable under an uninsured motorist clause as any other type of damages." Claims for consortium are, of course, derivative damages, and Mobley's wife recovered for her damages under this UMC policy.

Respondent would show this Court that for all intents and purposes paternity was fully stipulated to by the parties, and RACHEL LEONA GIBBS was believed to be the daughter, and therefore a "survivor", of MATTHEW L. McNAMARA, III. Pursuant to the Florida Wrongful Death Act, Fla. Stat. section 768, et seq., as a survivor, RACHEL LEONA GIBBS is prohibited from bringing her own claim in her own

right. RACHEL LEONA GIBBS must pursue her claim through the Estate by and through the duly acting and appointed Personal Representative. According to Fla. Stat. section 768.20, the Personal Representative "shall recover for the benefit of the decedent's survivors". Furthermore, Fla. Stat. section 768.17 expresses the legislative intent of Florida's Wrongful Death Act for interpretive purposes and provides:

> "It is the public policy of the state to shift the losses resulting when wrongful death occurs from the survivors of the decedent to the wrongdoer." Sections 768.16 - 768.27 are remedial and shall be liberally construed.

In a long string of well-established cases, Florida Courts have uniformly held that Florida's Wrongful Death Act [i.e., specifically, Fla. Stat. 768.16, et seq.], creates a totally separate and independent cause of action on behalf of the survivors and/or named beneficiaries. See: Nissan supra; Florida East Coast Ry. v. McRoberts, 149 *So.* 631 (1933); Variety Children's Hospital v. Perkins, 445 So.2d 1010 (Fla. 1983), and other cases cited in Nissan. Petitioner has stated that the Webster decision is not consistent with cases cited in his Brief. Respondent disagrees, stating that the decision in Webster is consistent with Perkins, supra, and Hoffman v. Jones, 280 So.2d 431 (Fla. 1973). The Courts have consistently analyzed the decedent's claims, had he survived, against the tortfeasor in deciding whether or not a claim existed under

the Act. In Webster, supra, and the case at bar, it does exist, and Respondent is entitled to uninsured motorist benefits.

The legislative history is described by Justice Ehrlich in Allstate Insurance Co. v. Boynton, **486 So.2d** 552 **(Fla.** 1986). Florida created and developed uninsured motorist coverage upon the insurance industry's request, and not that of the public. Basically, it came down to two choices: the insurance industry could allow the enactment of state legislation to create compulsory liability insurance or somehow alter the insurance market relating to financially irresponsible uninsured motorists. The insurance industry opted for the uninsured motorist coverage. This choice was made FOR them BY them.

The purpose and intent of our state's uninsured motorist coverage has been reiterated time and time again, but bears looking at at least one more time:

> "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, supra, at 1, 3 and 5.

An excellent example, citing one of Petitioner's own cases which stands for the proposition that the Courts will not allow insurance companies to strip away the comprehensive protection of uninsured motorist coverage is Mullis, supra. Again, however, one must be aware and remember the distinction between the question of personal injury benefits against uninsured motorist benefits, as contrasted with the question of wrongful death benefits against uninsured motorist benefits, Additionally, there is a great deal of verbiage in Mullis when, like in any other situation, if the language is taken out of context, it appears to restrict coverage considerably. One still must remember and bear in mind that Mullis involved personal injury benefits and not wrongful death benefits, like we have in the case at bar. This Supreme Court in Mullis, repeated the purpose for uninsured motorist coverage:

> "[Uninsured motorist coverage] was enacted to provide relief to innocent persons who are injured through the negligence of an uninsured motorist; it is not to be 'whittled away' by exclusions and exceptions."
> At page 238.

Accordingly, the only exclusions and exceptions made in uninsured motorist coverage which are VALID are those which the insurer is allowed to raise, e.g., family member exclusion, workers' compensation exclusions. Jernigan v. Progressive American Insurance Co., 501 *So.* 2d 748 (Fla. 5 DCA 1987). Similarly, that same Court in Jernigan, stated:

"The law of Florida is well established that

> Under every uninsured motorist policy issued in Florida, an insured is entitled to uninsured motorist benefits where (1) he has been injured by an uninsured motorist vehicle and (2) he is 'legally entitled to recover' from the operator of the uninsured motor vehicle."

and

> "Exclusions in uninsured motorist policies which operate to deny insureds protection in circumstances where persons are injured by other motorists who are not insured and cannot make injured party whole will be declared invalid." [Emphasis supplied]

Id.; Boynton, supra; and Woodard v. Pennsylvania National Mutual Insurance Company, 534 So.2d 716 (Fla. 1 DCA 1988). The Honorable Justice Barkett, concurring in the result obtained in Race v. Nationwide Mutual Fire Ins. Co., 14 FLW 75 (S. Ct. 2/23/89), stated that the purpose of uninsured motorist coverage is "...to indemnify the injured party". Justice Barkett compares this purpose to "...that governing PIP. I believe the common purpose should dictate a common analysis."

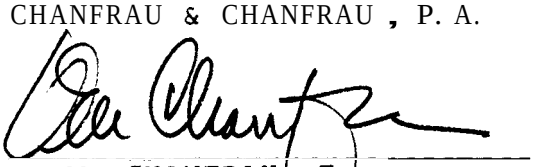
CONCLUSION

Respondent RACHEL LEONA GIBBS sustained a significant loss as the result of the wrongful death of her father, decedent MATTHEW L. McNAMARA, 111. At all times material hereto, the Respondent was an insured under the policy of insurance issued by LIBERTY MUTUAL to her maternal grandmother, MARY GIBBS. It is well documented in case law that Florida's uninsured motorist statute specifically provides for the protection of persons in the position of Respondent, so as to enable her, as an insured, to recover damages which she is entitled to, and which she would have recovered had the responsible tortfeasor been properly and appropriately insured for the loss. To deny RACHEL LEONA GIBBS underinsured motorist protection benefits on the basis that her father was not an insured under the policy strictly and incorrectly violates the intent of the Legislature and the purpose of the stated public policy of the Uninsured Motorist Statute and the Florida Wrongful Death Act,

For the foregoing reasons, Respondent respectfully submits that there is coverage available here to RACHEL LEONA GIBBS, and the Fifth District Court of Appeal's decision should be affirmed,

Respectfully submitted,

CHANFRAU & CHANFRAU, P. A.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by U.S. Mail to: Reinald Werrenrath, 111, Esq., P. O. Box 712, Orlando, FL 32802; and J. Hood Roberts, Esq., P. O. Box 1873, Orlando, FL 32802, this 10th day of May, 1989.

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