IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 65,625

FILED
SID J. WHITE
JAN 24 1985
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

JORGE HERNANDEZ,

Petitioner,

vs.

PROTECTIVE CASUALTY INSURANCE COMPANY

Respondent.

ON APPEAL FROM THE DISTRICT COURT OF APPEAL
THIRD DISTRICT OF FLORIDA

RESPONDENT'S BRIEF

KIMBRELL, HAMANN, JENNINGS,
WOMACK, CARLSON & KNISKERN, P.A.
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JOHN W. WYLIE

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STATEMENT OF THE CASE AND FACTS

The Petitioner, JORGE HERNANDEZ (hereafter HERNANDEZ) sued the Respondent, PROTECTIVE CASUALTY INSURANCE COMPANY (hereafter PROTECTIVE), for personal injury protection (hereafter PIP) benefits. HERNANDEZ alleged injuries arising out of forceful arrest by police. The police had stopped HERNANDEZ for an alleged traffic violation. PROTECTIVE admitted:

> ...while Plaintiff was driving a motor vehicle he was stopped by the police for an alleged traffic violation and the police used such force in apprehending and arresting Plaintiff, that Plaintiff was injured."

Both parties moved for judgment on the pleadings. The trial court granted HERNANDEZ' motion. The Third District Court of Appeal reversed and ordered entry of judgment for PROTECTIVE.

This Court accepted jurisdiction on the basis of apparent conflict between the opinion of the Third District and the opinion in Novak vs. Government Employees Insurance Co., 424 So.2d 178 (Fla. 4th DCA 1983), aff'd. 453 So.2d 1116 (Fla. 1984).

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QUESTION I

WHETHER A PERSON IS ENTITLED TO PERSONAL INJURY PROTECTION BENEFITS WHEN HE IS INJURED BY POLICE, AFTER STOPPING, FOLLOWING A TRAFFIC VIOLATION.

ARGUMENT

Whether a person is entitled to personal injury protection benefits when he is injured by police, after stopping, following a traffic violation.

Inherent in the question and conflict jurisdiction is the initial issue of conflict. There is no conflict between this case and the Novak case. The holding in this case is correct for the facts.

Research has disclosed no precise set of facts such as those found herein. That is, no precedent involving injuries arising out of an arrest following a traffic violation. The real issue, on the merits, is whether there is sufficient nexus between the prior operation of a vehicle and an injury caused by police after the vehicle was stopped following the traffic violation. The answer is no.

The benefits, if any, are statutory; as stated by the Third District herein:

> (1) REQUIRED BENEFITS -
>
> Every insurance policy complying with the security requirements of s. 627.733 shall provide personal injury protection to the named insured...to a limit of $10,000.00 for loss sustained by any such person as a result of

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> bodily injury, sickness, disease, or death arising out of the ownership, maintenance, or use of a motor vehicle....[e.s.]
>
> (4) BENEFITS; WHEN DUE -
>
> (d) The insurer of the owner of a motor vehicle shall pay personal injury protection benefits for:
>
> 1. Accidental bodily injury sustained in this state by the owner while occupying a motor vehicle, or while not an occupant of a self-propelled vehicle if the injury is caused by physical contact with a motor vehicle.

The statute triggers coverage if there is accidental injury sustained by an owner while occupying his vehicle, if the injury arose out of the ownership, maintenance or use of the vehicle. The Third District here held there was insufficient nexus.

The Courts of Florida are in accord that there need be no strict traditional negligence cause - effect relationship, instead, there must be some degree of causation between use and result. This Court recognized that fact when it adopted consistent language in the case of Lumbermens Mutual Casualty Co. vs. Castagna, 368 So.2d 348 (Fla. 1979) at 350:

> While the no-fault law was intended to remedy the concept of fault in automobile negligence cases, we do not think that tort concepts of causation were intended to be entirely abandoned. We think that by inserting the word "caused" in the statute, the legislature plainly intended that it would be a factor to be considered.

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Although the language quoted by the Supreme Court arose in a pedestrian claimant case[1], Castagna involved a claimant who was an occupant, as here.

Novak did not recede from the Castagna doctrine. Novak held there was an accident and that there was sufficient relationship between use and injury to trigger coverage. This Court reasoned that the pedestrian injured Novak because she refused to use her car for him. In other words, he wanted to use the car in the then future. Novak refused and was shot therefore.

This Court cited two cases[2] in Novak in approbatory exposition of the "arising out of the use of" conundrum. PROTECTIVE believes that the distinctions in this case were keenly proscribed in Florida Farm Bureau Insurance Co. vs. Shaffer, 391 So.2d 216 (Fla. 4th DCA 1981). In Schaffer, there was held to be no coverage for the insured, Paul Long, where Long shot Shaffer following a car chase. Long was in his car when he fired the shot.

In Shaffer, the Fourth District showed that Corbo was not controlling and neither was Valdes (where the injury was caused by a beer mug thrown from a car), when the court stated at p. 218:

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[1] Royal Indemnity Co. vs. Government Employees Insurance Co., 307 So.2d 458 (Fla. 3d DCA 1975)

[2] National Indemnity Co. vs. Corbo 248 So.2d 238 (Fla. 3d DCA 1971); Valdes v. Smalley, 303 So.2d 342 (Fla. 3d DCA 1974) cert. discharged sub nom, National Ben Franklin Insurance Co. vs. Valdes, 341 So.2d 975 (Fla. 1976).

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> [2,3] But, just as was true of the victim in Appleton,[3] Shaffer's injury did not result from any incident of use of the vehicle. The fact that the tortfeasor was occupying the car at the time of the shooting was no more than incidental and did not make the injury one resulting from the use of the vehicle. To hold such a relationship alone sufficient to constitute a causal connection would logically lead to absurd consequences, such as allowing recovery under an automobile liability policy when a vehicle is simply used as the means of transporting an assailant to the location where an assault is committed. The injury was not caused by the automobile but by the gunshot. From the standpoint of causation, the injury could have occurred in the woods, in a house or anywhere else. As we stated in Appleton, supra, a criminal assault is not the usual risk anticipated under an automobile policy and for coverage to apply there must be a showing that the autmobile itself was used in some manner to cause or produce the injury.
> [footnote added]

PROTECTIVE asserts that for the facts of the instant case, the rationale of Reynolds vs. Allstate Ins. Co., 400 So.2d 496, 497 (Fla. 5th DCA 1981) is controlling:

> [1] In Stonewall[4] it is noted that the court in Appleton concluded "that it is not enough that an automobile be the physical situs of an injury or that the injury occur incidentally to the use of an automobile, but there must be a causal connection or relation between the two for liability to exist." 372 So.2d 1148. Accordingly, insurance does not cover every incident or accident that happens in a car.

[3] General Accident Fire and Life Assurance Corp., Ltd. v. Appleton, 355 So.2d 1261 (Fla. 4th DCA 1978).

[4] Stonewall Ins. Co. vs. Wolfe, 372 So.2d 1147 (Fla. 4th DCA 1979)

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> [2.3] As a plaintiff is entitled to recover if he presents evidence of any set of facts which proves the elemental allegations of his complaint, it is essential that those allegations of his complaint adequately state in terms of ultimate facts a cause of action in law under every set of evidentiary facts that can reasonably and fairly be argued to meet fulfill, and prove the ultimate facts set forth in the complaint. The allegations of this complaint are consistent with proof that appellant's assailant physically heaved him from his parked vehicle, or carefully carried him some distance from the vehicle then violently threw him down, causing injuries, in which circumstances the vehicle would be only a point of departure and neither its use or its nature caused or contributed to appellant's injuries anymore than if he had been "thrown or otherwise ejected" from his home.

Remember that this Court in Novak, specifically stated at page 1119 that it was not disapproving Reynolds. Further, the Third District herein below bottomed its opinion on Reynolds.

Lastly, although the opinion of the Third District herein stated that Novak was "probably indistinguishable", PROTECTIVE believes that statement to be dictum and unnecessary to the opinion. This Court in its opinion in Novak recognized the difference between Novak and Reynolds. The Third District did too.

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CONCLUSION

PROTECTIVE suggests that this Court find, after briefs on the merits, that there is no conflict. Alternatively, PROTECTIVE suggests that this Court further affirm the Reynolds rationale and affirm this case.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, by mail, this 23rd day of January, 1985 to: STEPHEN CAHEN, P.A., 8585 Sunset Drive, Suite 75, Miami FL 33143 and JOSEPH C. SEGOR, ESQ., 9785 S.W. 146th Street, Miami FL 33176.

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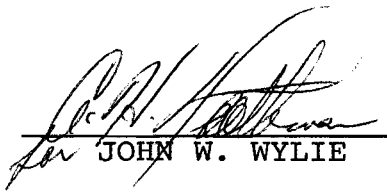

for JOHN W. WYLIE