IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 65,625

JORGE HERNANDEZ, :

Petitioner, :

vs. :

PROTECTIVE CASUALTY INSURANCE COMPANY, :

Respondent. :

PETITIONER'S BRIEF

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STATEMENT OF THE CASE AND FACTS

The Petitioner, JORGE HERNANDEZ, brought suit against the Respondent, PROTECTIVE CASUALTY INSURANCE COMPANY, to recover personal injury protection benefits for injuries suffered in the course of his arrest for an alleged traffic violation.

Paragraph 3(c) of the amended complaint alleged:

> "On November 6, 1982, 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. The injuries resulted in hospital, doctor and other medical expenses as well as lost earnings." (A. 11,13,14).

Protective Casualty admitted the above allegation, but denied coverage on the basis that the injury did not arise out of the use, operation or maintenance of a motor vehicle. It maintained that the automobile was only the physical situs of an injury unrelated to the automobile (A.15,16).[1/]

Cross motions for judgment on the pleadings were filed

1/ Protective Casualty's defense is based upon § 627.736(1) Florida Statutes (1981) which provides in pertinent part:

> (1) REQUIRED BENEFITS. - Every insurance policy complying with the security requirements of s. 627.733 shall provide personal injury protection to the named insured ... subject to the provision of subsection (2) and paragraph (4)(d), to a limit of $10,000 for loss sustained by any such person as a result of bodily injury, sickness, disease, or death arising out of the ownership, maintenance, or use of a motor vehicle.... (Emphasis added).

and the trial court granted Mr. Hernandez's motion while denying that of Protective Casualty (A. 17).

On appeal, the Third DCA reversed, Protective Casualty Insurance Company v. Hernandez, 450 So.2d 864 (Fla. 3rd DCA 1984), holding that tort concepts of causation were to be applied and that Petitioner's injury was caused solely by the force exercised by the police. Consequently, it did not arise out of the ownership, maintenance or use of a motor vehicle.

Review in this court was sought on the basis of conflict with the contrary holding in Novak v. Government Employees Insurance Co., 424 So.2d 178 (Fla. 4th DCA 1983) affirmed, Government Employees Insurance Company v. Novak, 453 So.2d 1116 (Fla. 1984).

SUMMARY OF ARGUMENT

The Petitioner was injured during the course of his arrest for a traffic violation. The question is whether the injury "arose out of" the use of his motor vehicle. The case is governed by the court's opinion in Government Employees Insurance Company v. Novak, 453 So.2d 1116 (Fla. 1984) where it was held that "arising out of" does not mean "proximately caused by" but has a much broader meaning. The relevant inquiry is whether there is a nexus between the motor vehicle and the injury.

In this case it is clear that had the Petitioner not been driving his vehicle he would not have been arrested and therefore he would not have been injured. The nexus is readily apparent and the decision of the Third DCA that the Petitioner's injuries did not arise out of the use of his motor vehicle should be reversed.

ARGUMENT

I

INJURIES TO A MOTORIST CAUSED BY THE POLICE DURING THE COURSE OF AN ARREST FOR A TRAFFIC VIOLATION ARISE OUT OF THE OWNERSHIP, MAINTENANCE OR USE OF A MOTOR VEHICLE.

Section 627.736(1) Florida Statutes (1981) requires that automobile insurance policies provide personal injury protection benefits for any "loss sustained ... as a result of bodily injury, sickness, disease, or death arising out of the ownership, maintenance or use of a motor vehicle."

In this case the trial court held that the Petitioner's injuries at the hands of the police during his arrest for a traffic violation arose out of the use of his motor vehicle. The Third DCA reversed holding that tort concepts of causation are to be employed when construing the "arising out of" language of the statute. The court then concluded that the injuries were caused solely by the force used by the police and therefore did not arise out of the use of the vehicle. It also stated that it was not foreseeable that in the ordinary course of using a motor vehicle, an operator will suffer injury by arrest for violation of traffic laws.

The Third DCA's use of "tort concepts" of causation to construe § 627.736(1) is contrary to this court's holding in Government Employees Insurance Company v. Novak, 453 So.2d 1116 (Fla. 1984). In that case the court said:

> "It is well settled that 'arising out of' does not mean 'proximately caused by,' but has a much broader meaning. All that is required is some nexus between the motor vehicle and the injury." 453 So.2d at 1119.

The court went on to state that there was a "highly substantial connection", 453 So.2d at 1119, between Ms. Novak's use of the motor vehicle and the event causing her fatal injury. An even greater nexus or substantial connection exists in the present case. Mr. Hernandez was arrested for allegedly operating the vehicle in an unlawful manner. His injuries occurred during the course of the arrest. What closer connection could there be? Were it not for the alleged manner of his "use" of the vehicle, he would not have been arrested and injured. The use of the vehicle led directly to his arrest and to his injuries.

It is this direct connection between Mr. Hernandez's use of his vehicle and his injuries which distinguishes this case from the cases that hold there is no PIP coverage if the vehicle is the mere situs of the injury. In those cases it is merely fortuitous that the injury happened to occur in a vehicle and not somewhere else, See, Reynolds v. Allstate Insurance Co., 400 So.2d 496 (Fla. 5th DCA 1981) cited by the Third DCA below and distinguishe by this court in Novak, supra, 453 So.2d at 1119. In this case the injuries could not possibly have occurred if the Petitioner had not been driving his vehicle. It was the alleged manner in which he "used" his vehicle that led to his arrest and injuries. Mr. Hernandez would not have been arrested or injured had he not been

"using" his vehicle. It follows that the vehicle was not the mere situs of the injuries and that its use was directly connected to them.

The foreseeability of the injuries is of no consequence because the question is not whether the vehicle was the "proximate cause" of the injuries, but whether there was a nexus between its use and their occurrence. The Third DCA ran astray when it relied on Lumbermen's Mutual Casualty Co. v. Castagna, 368 So.2d 348 (Fla. 1979) and Royal Indemnity Co. v. Government Employees Insurance Co., 307 So.2d 458 (Fla. 3rd DCA 1975).

Those cases do not construe the term "arising out of" in § 627.736(1). Rather, they construe the word "caused" as used in § 627.736(4)(d)1.[2/] That section deals with injuries "caused" by physical contact with a motor vehicle while the owner is not an occupant of a motor vehicle. It clearly does not apply to this case and cases construing "caused" in the context of subsection (4)(d)1, to have the meaning commonly given to it in tort law are therefore inapplicable.

The Third DCA recognized that the Fourth DCA's opinion in Novak was "probably indistinguishable" (A. 2), but chose not to follow it. The Third DCA was correct in its observation that Novak is legally indistinguishable from this case. This

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2/ (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. (Emphasis added).

court's affirmance of Novak is therefore controlling and the decision below should be reversed.

CONCLUSION

The decision below should be reversed with instructions to reinstate the judgment of the circuit court.

Respectfully submitted,

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By _____
JOSEPH C. SEGOR

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF PETITIONER was mailed this 4 day of January, 1985 to A. H. TOOTHMAN, Esq. of Kimbrell, Jamann, Jennings, Womack, Carlson & Kniskern, P.A., Suite 900 Brickell Centre, 799 Brickell Plaza, Miami, Florida 33131.

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JOSEPH C. SEGOR