IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 65,625

JORGE HERNANDEZ, :

Petitioner, :

vs. :

PROTECTIVE CASUALTY INSURANCE COMPANY, :

Respondent. :

ON DISCRETIONARY REVIEW OF A DECISION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

PETITIONER'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

The Petitioner, JORGE HERNANDEZ, the Appellee below, seeks to invoke the discretionary jurisdiction of the Supreme Court on the ground that the decision below of the Third District Court of Appeal is in express and direct conflict with the decision of the Fourth District Court of Appeal in Novak v. Government Employees Insurance Company, 424 So.2d 178 (Fla. 4th DCA 1983).

The underlying facts in the case are not in dispute. They were succinctly summarized by the Third DCA as follows:

> "Plaintiff was apprehended by police officers at a traffic signal for a traffic infraction. After his automobile had come to a complete stop he was forcibly removed from the vehicle, then frisked and handcuffed. The injuries were caused by the arresting officers." (Opinion pp. 1-2, A -2).

Petitioner filed a declaratory judgment action to determine coverage under the personal injury provisions of his automobile insurance policy. The trial court determined that Mr. Hernandez was entitled to benefits because he sustained bodily injury arising out of the ownership, maintenance, or use of a motor vehicle and entered judgment on the pleadings in his favor.[1/]

1/ Section 627.736 Florida Statutes (1983) provides in pertinent part:

(1) REQUIRED BENEFITS. - Every insurance policy complying with the security requirements of s. 627.733 shall

The Third DCA reversed 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.

1/ (cont.) 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)

(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.

ARGUMENT

THE THIRD DCA'S APPLICATION OF A TORT CONCEPT OF CAUSATION TO THE "ARISING OUT OF" LANGUAGE OF § 627.736(1) FLORIDA STATUTES (1983) EXPRESSLY AND DIRECTLY CONFLICTS WITH THE HOLDING OF THE FOURTH DCA IN NOVAK v. GOVERNMENT EMPLOYEES INSURANCE COMPANY, 424 SO.2d 178 (4TH DCA 1983) THAT TORT CONCEPTS OF CAUSATION DO NOT APPLY TO THE CONSTRUCTION OF THAT PROVISION.

A. NOVAK AND THE INSTANT CASE EXPRESSLY AND DIRECTLY CONFLICT.

The Third DCA stated in its opinion that Novak v. Government Employees Insurance Co., 424 So.2d 178 (Fla.4th DCA 1983) is "... probably indistinguishable but we choose not to follow it ...." (Opinion p. 2, A - 2).

The facts in Novak are far stranger and much less likely to occur than those in the present case. Beverly Ann Novak lived at home with her parents. As she was about to drive away from home one morning, a stranger approached her car and asked for a ride. When Beverly refused, the stranger pulled out a pistol, shot her in the face, dragged her out of the vehicle and fled in it. She died several months later from the injuries.

Her father, as personal representative of her estate, filed a claim for personal injury protection benefits contained in an insurance policy which covered the automobile in which Beverly was shot. When the claim was denied, a suit was filed.

The trial court granted a summary final judgment for the insurance company on the ground that the decedent's injuries did not arise out of the ownership, maintenance or use of the automobile because there was insufficent causal connection between the use of the vehicle and the attack.

The Fourth DCA held that the trial judge's analysis was incorrect and reversed. The court based its ruling on the determination that the term "arising out of" gives rise to a broader concept of causation than the traditional tort concept of proximate cause. In so holding, the Fourth DCA stated:

> "It is quite well established that the term 'arising out of' is broader in scope than the words 'caused by'; the term is understood to mean ' originating from,' 'having its origin in,' 'growing out of,' or 'flowing from.' 2/ (footnote omitted). 424 So.2d at 179."

The court went on to state that while some causal relationship or nexus must exist between the ownership, maintenance or use of the vehicle and the injury, a direct proximate causal relationship in the strict legal sense is not required. Applying these principles to the facts in Novak, the Fourth DCA concluded that the shooting in that case was motivated by and a direct result of the assailant's request to ride in the vehicle and the driver's refusal to grant the request prompted the attack which caused the injury.

The court then emphasized that it was not looking for a proximate causal relationship, but rather the inquiry was whether the attack upon the decedent "arose out of, or flowed from the use of the vehicle." It found that the decedent's refusal to allow the stranger to ride in the car, which she was operating, demonstrated a sufficient nexus to meet the causal relationship requirement inherent in the term "arising out of." 424 So.2d 180.

The present case is obviously indistinguishable from Novak. The Petitioner was stopped for a traffic infraction. He was then arrested for the infraction and in the course of the arrest was injured. The Third DCA did not arrive at its conclusion that PIP benefits were not available by factually distinguishing the present case from Novak. It accepted the factual similarities but, in contrast to Novak, applied a tort concept of proximate causation to the facts.

It specifically quoted the following passage from Royal Indemnity Co. v. Government Employees Insurance Co., 307 So.2d 458, 460 (Fla. 3rd DCA 1975) which in turn was quoted by the Supreme Court in Lumberman's Mutual Casualty Co. v. Castagna, 368 So.2d 348, 450 (Fla. 1979).

> "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 [§ 627.736(4)(d)1, Fla.Stat. (1983)][1] the legislature plainly intended that it would be a factor to be considered."(Emphasis added).(Footnote omitted).(Opinion p.3, A - 3).

After setting out the above quotation, the Third DCA stated that the Petitioner's injury was caused solely by the force exercised by the police officers in effecting the arrest and that it was not foreseeable that in the ordinary course of using a motor vehicle, an operator will suffer injury by arrest for a violation of traffic laws. Based upon these conclusions the Third DCA reversed the judgment on the pleadings that had been entered in favor of the Petitioner in the Circuit Court.

It is obvious that the concepts of causation used by the Third and Fourth DCAs to construe the term "arising out of" are irreconcilable and that the opinion of the Third DCA directly and expressly conflicts with the opinion of the Fourth DCA in Novak.

This court should take jurisdiction to reconcile the conflict.

B. REASONS WHY THE COURT SHOULD EXERCISE ITS DISCRETION AND ENTERTAIN THE CASE ON THE MERITS SHOULD IT FIND JURISDICTION.

There are two reasons in addition to the fact of direct and express conflict between Novak and this case, why the court should resolve the case on the merits. The first reason is that there are a large number of cases, involving numerous factual situations construing the term "arising out of." These cases are in disarray and provide little help to the bench and bar in construing the language of the statute.[2/] Controversies

2/ The Third DCA applied the liberal definition of "arising out of" adopted in Novak in two prior cases, National Indemnity Co. v. Corbo, 248 So.2d 238 (Fla. 3rd DCA 1971); O'Dwyer v. Manchester

over the meaning of the term are sure to reoccur and a uniform definition will go a long way toward resolving those controversies.

The second reason involves the fact that the Third DCA mistakenly applied the part of § 627.736(4)(d)1 that applies to accidents to an owner of a motor vehicle that occur while he is not occupying a self-propelled vehicle to a situation where the owner is injured while occupying a motor vehicle. The statute states that if the owner is not occupying a self-propelled vehicle the injury must be caused by physical contact with a motor vehicle. Lumberman's Mutual Casualty Company v. Castagna, 368 So.2d 348 (Fla. 1979) and Royal Indemnity Company v. Government Employees Insurance, 307 So.2d 458 (Fla. 3rd DCA 1975), cited by the Third DCA both construe the "caused by" language of that part of the statute.

2/ (cont.) Insurance Company, 303 So.2d 347 (Fla. 3rd DCA 1974). The First DCA has also used the liberal definition, see, National Merchandise Co., Inc. v. United Service Automobile Association, 400 So.2d 526, 532 (Fla. 1st DCA 1981); Government Employees Insurance Company v. Batchelder, 421 So.2d 59, 61 (Fla. 1st DCA 1982). Other cases determine the causation issue without stating which definition was used, Valdez v. Smalley, 303 So.2d 342 (Fla. 3rd DCA 1974); General Accident Fire and Life Assurance Corporation, Ltd. v. Appleton, 355 So.2d 1261 (Fla. 4th DCA 1978; Stonewall Insurance Company v. Wolfe, 372 So.2d 1147 (Fla. 4th DCA 1979); Florida Farm Bureau Insurance Company v. Shaffer, 391 So.2d 216 (Fla. 4th DCA 1981); Reynolds v. Allstate Insurance Company, 400 So.2d 496 (Fla. 5th DCA 1981).

Novak and the present case both involve owners injured while occupying a motor vehicle. The "caused by" provision of the statute does not apply to such situations, but the Third DCA erroneously applied it when it analyzed the meaning of "arising out of." This court should correct the confusion caused by that analysis.[3/]

CONCLUSION

The decision of the Third DCA in this case expressly and directly conflicts with the decision of the Fourth DCA in Novak v. Government Employees Insurance Company, 424 So.2d 178 (Fla. 4th DCA 1983).

Respectfully submitted

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3/ After this brief was prepared the Petitioner learned that the Court had approved the Fourth DCA's decision in Novak, supra. Government Employees Insurance Company v. Novak, Supreme Court Case No. 63,207, July 12, 1984, 9FLW 280 (July 13, 1984). In

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF PETITIONER was mailed this 24th day of July, 1984 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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3/ (cont.) its decision this Court approved the Fourth DCA's definition of "arising out of", and stated that it does not mean "proximately caused by" but has a much broader meaning. The Court held that all that is required is some nexus between the motor vehicle and the injury. In light of its decision in Novak, this Court should accept jurisdiction, quash the decision of the Third DCA and remand for further proceedings, State v. Mitchell, 368 So.2d 591 (Fla.1979). If the Court does this without requiring briefs on the merits, it should permit the Petitioner to file a Motion for Attorney's Fees, Sections 627.736(8) and 627.426(1) Florida Statutes (1982).