IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 65,625

JORGE HERNANDEZ, :

Petitioner, :

vs. :

PROTECTIVE CASUALTY INSURANCE COMPANY, :

Respondent. :

PETITIONER'S REPLY BRIEF

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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.

The Respondent has cited Lumbermen's Mutual Casualty Co. v. Castagna, 368 So.2d 348 (Fla.1979) for the proposition that "... there must be some degree of causation between use and result." (Respondent's Brief, p.3). It then goes on to state that the Supreme Court in Government Employees Insurance Company v. Novak, 453 So.2d 1116 (Fla.1984) did not recede from the Castagna doctrine (Respondent's Brief, p.4).

It is not suprising that Novak did not recede from Castagna. Castagna has nothing to do with the issue decided in Novak.[1/] Contrary to the Respondent's assertion, Castagna does not construe the same statutory provision that was construed in Novak and which is at issue in this case.

Castagna construed the word "caused" as used in §627.736 (4)(d)1 Florida Statutes (1981) and held that it was to be given the same meaning commonly given to it in traditional tort law. In Novak and this case, the issue is the meaning of the term "arrising out of" as used in §627.736(1) Florida Statutes (1981).

1/ Castagna was not cited by either the majority or the dissenters in Novak.

The Novak Court gave the latter phrase a much broader meaning then is conveyed by the word "caused". It follows that Castagna does not apply to this case.[2/]

Florida Farm Bureau Insurance Company v. Shaffer, 391 So.2d 216 (Fla.4th DCA 1981) and Reynolds v. Allstate Insurance Company, 400 So.2d 496 (Fla.5th DCA 1981) also relied upon by the Respondent are distinguishable from the case at bar. Both of those cases involved assaults that had nothing to do the use of an automobile. In each case the automobile merely happened to be the situs from which the assault was launched. There was no connection between the use of the vehicle and the offense that caused injury to the plaintiff.

This case is entirely different. The Petitioner's run in with the police was occasioned by his supposed improper use of the vehicle and his injury occurred during his arrest for

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2/ The reason that §627.736(4)(d)1 was construed in Castagna was that the plaintiff in that case was the driver of a van. A van is considered a commercial vehicle and not a motor vehicle as defined in the no fault statute. Mr. Castagna was therefore in the same position as a vehicle owner who suffered an injury while he was a pedestrian and the question was whether a motor vehicle "caused" his injury. In this case, Mr. Hernandez was an occupant of a covered vehicle and therefore the issue is whether his loss resulted from bodily injury "arising out of the ownership, maintenance, or use of a motor vehicle."

that improper use. The Novak Court held that the automobile does not have to be the instrumentality of the injury nor is it necessary that the conduct which caused it be foreseeably identifiable with the normal use of the vehicle, 453 So.2d at 1119.

All that is necessary is that there be some nexus or connection between the use of the vehicle and the injury. In this case the nexus is obvious. The injury flowed directly from the use of the vehicle. That is all that is required in order to afford coverage under the no fault statute. Such a construction is true to the spirit and intent of the law which is to provide medical coverage for injuries, regardless of fault, so long as there is a link between the injuries and use of a covered vehicle.

The link between Mr. Hernandez' arrest and the use of his vehicle is so obvious it should not require explanation. This case falls squarely within the holding of the Court in Novak.

See, Fortune Insurance Company v. Ferrero, Third DCA Case No. 84-537 (11/6/84), 9 FLW 2321 (11/16/84) where the plaintiff was a passenger in a truck owned by his employer when he was shot by the driver of a car which was attempting to force the truck off the road. The Third DCA held that Novak controlled, pointing out that had the plaintiff been injured by reason of the truck being forced off the road he clearly would have been entitled to benefits. It therefore would be anomalous to deny benefits because the injury was caused by

another instrumentality.

Contrast, Ferrero with Allstate Insurance Company v. Famigletti, Fourth DCA Case No. 83-2638 (11/28/84), 9 FLW 2485 (12/7/84), where a neighbor stepped out from behind a tree and machine gunned the plaintiff's as the victims drove by in their car. The Fourth DCA held that there was no connection between the automobile and the shooting. The vehicle was merely the situs of the attack.

Ferrero is more analogous to this case than is Famigletti. This Court should reverse the decision below and remand with instructions to reinstate the judgement of the Circuit Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing PETITIONER'S REPLY BRIEF was mailed this 14th day of February, 1985 to: JOHN W. WYLIE, KIMBRELL, HAMANN, JENNINGS, WOMACK, CARLSON & KNISKERN, P.A., Suite 900 Brickell Centre, 799 Brickell Plaza, Miami, Florida 33131.

By Joseph C. Segor
JOSEPH C. SEGOR