O/A 10-28-86

IN THE SUPREME COURT OF THE STATE OF FLORIDA

MARVENE GLEAVES and
JAMES GLEAVES,

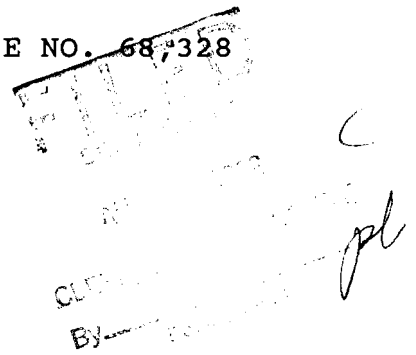
Petitioner,

v.

WESTERN WORLD INSURANCE
COMPANY,

Respondent.

CASE NO. 68,328



RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The respondent was the appellant and the petitioner was the appellee in the Fifth District Court of Appeal. In this brief, the parties will be referred to as the "respondent" or "Herndon" and the "petitioner" or "Gleaves."

The following symbols will be used:

"R"	Record on Appeal
"App"	Appendix

STATEMENT OF THE CASE

The respondent accepts the appellant's statement of the case with the following additions: Gleaves and her husband filed a four count complaint against Herndon Ambulance Company ("Herndon"), United States Fidelity & Guaranty Company ("USF&G"), Western World Insurance Company ("Western World"), and Hartford Accident & Indemnity Company, alleging one count of general negligence against Herndon, a second count against Herndon and Hartford Accident & Indemnity Company for negligence arising out of the use of the automobile, a third count against Herndon for malpractice with Western World as the malpractice carrier, and a claim for loss of consortium by James Gleaves (R. 637-644). A first amended complaint was filed adding party defendants, William Daniel Scalla and Kip Kersey, the ambulance driver and attendant (R. 649-656). A second amended complaint was filed dropping Hartford Accident & Indemnity Company as a party defendant and adding Travelers Insurance Company (R. 667-674).

Travelers Insurance Company had in effect at the time of the alleged incident, a policy of general liability insurance covering Herndon (R. 670). USF&G filed a cross-claim against Travelers Insurance Company as an action for declaratory judgment pursuant to Chapter 86, Florida Statutes (R. 708-709). Travelers Insurance Company filed an answer to the cross-claim alleging that their policy excluded bodily injury

or property damage arising out of the ownership, maintenance, operation, use, loading or unloading of any automobile and additionally excluded professional services (R. 717-718).

Western World filed a cross-claim against the defendants, Travelers Insurance Company and USF&G as a claim for declaratory judgment also pursuant to Chapter 86, Florida Statutes (R. 778-790).

After a non-jury trial for declaratory judgments on the cross-claims brought by USF&G, Western World and Travelers Insurance Company, the trial court entered a declaratory order ordering and adjudging that the policy issued by Travelers Insurance Company did not provide coverage to Herndon for the plaintiff but that a jury question remained as to whether the policies issued by USF&G, the automobile policy carrier, and Western World, the malpractice carrier, if either, should provide coverage to Herndon (R. 983). A final judgment was entered on behalf of Travelers Insurance Company (R. 984).

USF&G settled with the plaintiffs prior to trial. The cause proceeded to trial with Herndon, Kip Kersey, William Scalla, and Western World as defendants.

Western World moved for a directed verdict at the close of the plaintiffs' case on the grounds that the evidence did not establish a professional/patient relationship (R. 471). The motion was denied (R. 473). At the close of all the

evidence, the plaintiffs renewed their motion for directed verdict on the issue of insurance coverage against Western World, which motion was joined in by Herndon (R. 529). The trial court granted the motion on the basis that the facts established that if Herndon was liable, that it was for the negligence of their employees as medical personnel (R. 532).

The jury returned the verdict finding negligence on the part of defendants which was a legal cause of damage to Marvene Gleaves and James Gleaves (R. 93). The jury awarded Marvene Gleaves $340,000.00 and James Gleaves $0.00 (R. 94).

Western World filed a motion in arrest of judgment (R. 112) and motion for new trial and motion for judgment in accordance with motion for directed verdict (R. 110-111), which were denied (R. 1145, 1143). Final judgment was entered pursuant to the jury verdict (R. 1105-1109, 1142).

Western World appealed to the Fifth District Court of Appeal. Western World raised two (2) issues before the appellate court: First, that it's policy did not provide coverage for Gleaves because malpractice liability is predicated upon privity, and there was no privity (*i.e.*, client-patient relationship) between Herndon and Gleaves and secondly, even assuming the basic coverage language encompassed Gleaves, an exclusion in the policy clearly applied. The exclusion, section 1(d) of the policy, reads:

> This policy does not apply:

. . .

> (d) to any liability of the insured which would be covered by a standard automobile public liability policy; . . .

The appellate court did not resolve the first issue because it felt the second issue on appeal was dispositive. Specifically, the appellate court held that the alleged incident arose out of the use of the motor vehicle as an ambulance. The appellate court consequently reversed and remanded for entry of judgment for Western World.

Gleaves filed a petition for a writ of certiorari in this Honorable Court alleging conflict jurisdiction. This Honorable Court accepted jurisdiction and ordered that briefs on the merits be filed.

STATEMENT OF THE FACTS

The respondent accepts the petitioner's statement of the facts.

SUMMARY OF ARGUMENT

An insured procures malpractice insurance for the specific purpose of insuring himself against injuries occurring within the scope of his profession as to those in privity with him in his profession. Malpractice insurance is not general liability insurance for any and all acts done in relation to the general population. For such acts, an insured procures general liability insurance. An insured may also procure automobile liability insurance to insure against liability arising out of the ownership, maintenance or use of his vehicle.

In the instant case, Western World was Herndon's malpractice carrier. The malpractice policy was for ambulance attendants' malpractice coverage and specifically excluded liability covered by a standard automobile liability policy. Under established Florida law, the malpractice policy covered any injured party who may have a professional-patient relationship with Herndon, such as Ollie Mae Hill. Marvene Gleaves had no such relationship with Herndon so that Herndon did not owe her a duty of care under malpractice standards. Her alleged injuries, under the facts of the instant case, fell within the "use" coverage clause of Herndon's automobile liability policy as the motor vehicle in question was an ambulance used for the specific purpose of transporting

patients such as Ollie Mae Hill and, consequently, were specifically excluded from the malpractice insurance policy.

Marvene Gleaves would not have been injured except for the fact that the motor vehicle was being used to transport Ollie Mae Hill. The ambulance, therefore, was more than the mere site of the incident. Since there was no evidence presented that Marvene Gleaves was in privity with Herndon, thereby bringing her within the ambit of the malpractice policy, the appellate court was eminently correct in holding that the attack upon Marvene Gleaves arose out of, or flowed from, the use of the vehicle as an ambulance and, therefore, was specifically excluded from the malpractice policy issued by Western World. Since the trial court had ruled pre-trial that a jury question existed as to whether the policies issued by USF&G or Western World, if either, should provide coverage, the directing of the verdict on the issue of coverage was in essence a ruling that because somebody had to provide coverage and Western World was the only insurance company left, they were it. Such simply cannot be the law.

ARGUMENT

POINT ON APPEAL

THE APPELLATE COURT WAS CORRECT IN REVERSING AND REMANDING FOR ENTRY OF JUDGMENT FOR WESTERN WORLD BECAUSE (A) MARVENE GLEAVES' INJURIES FELL WITHIN THE "USE" COVERAGE OF THE AUTOMOBILE LIABILITY POLICY AND (B) NO PROFESSIONAL RELATIONSHIP EXISTED BETWEEN THE INSURED, HERNDON AMBULANCE COMPANY, AND MARVENE GLEAVES.

The essence of an insurance contract is indemnity against loss. Insurance involves a contract or promise, based upon valid consideration, to compensate the insured or other persons designated by the policy for loss sustained upon the occurrence of some contingency. Appleman, Vol. 12, *Insurance and Law Practice*, Section 70.01 (1980); sec. 624.02, Fla. Stat. (1983). The purpose of an insurance contract is to guarantee to the insurer the payment of premiums, to secure the insurer against fraud and imposition, and to give the insured the security in return for which he pays. Appleman, *supra*, at section 70.04.

There are numerous kinds of insurance. The type that is relevant to the instant appeal is casualty insurance. The Florida Insurance Code defines casualty insurance to include malpractice and vehicle insurance. Sec. 624.605(1)(a) and (k), Fla. Stat. (1985). Section 624.605(1)(k) defines malpractice as:

> Insurance against legal liability of the insured, and against loss, damage or expense incidental to a claim of such liability, arising

> out of death, injury or disablement of any person, arising out of damage to the economic interest of any person, as a result of negligence in rendering expert, fiduciary or professional service.

Section 624.605(1)(a) defines vehicle insurance as:

> Insurance against loss of or damage to any land vehicle or aircraft or any draft or riding animal, or to property while contained therein or thereon, or being loaded or unloaded therein or therefrom, from any hazard or cause and against any loss, liability, or expense resulting from or incidental to ownership, maintenance, or use of any such vehicle, craft, or animal. As to land vehicles, the term also includes insurance providing for medical, hospital, surgical, and disability benefits to injured persons, and funeral and death benefits to dependents, beneficiaries, or personal representatives of persons killed, irrespective of the legal liability of the insured, while in, entering, leaving from, adjusting, repairing, cranking, or being struck by a vehicle, and such insurance is issued as a part of a liability insurance contract.

The respondent submits that the above two (2) types of insurance are mutually exclusive. Herndon bargained for and received malpractice insurance from Western World and vehicle insurance from USF&G. The insurance policies covered two (2) different and distinct types of situations. The ambulance driver's and attendant's malpractice insurance policy was to compensate Herndon for loss sustained upon the occurrence of Herndon becoming legally obligated to pay damages because of injury to a patient arising out of the rendering or failure to render professional services. The situation involved in the instant case is covered by vehicle insurance under established Florida law and is totally removed from the

principles and case law dealing with malpractice insurance coverage.

A. MARVENE GLEAVES' INJURIES FELL WITHIN THE "USE" COVERAGE OF THE AUTOMOBILE LIABILITY POLICY.

Marvene Gleaves' alleged injuries occurred within the natural territorial limits of the ambulance. Marvene Gleaves had voluntarily gotten into the ambulance as she had promised the patient that she would ride with her to the hospital. (R. 176). The ambulance had arrived on the scene for the specific purpose of transporting the patient, Ollie Mae Hill. (R. 175). Western World respectfully submits that injuries sustained by Marvene Gleaves fall within the "use" coverage of a standard automobile liability policy under the prevailing law in Florida.

There is a virtual parade of Florida automobile insurance cases dealing with clauses insuring against injury "arising out of the ownership, maintenance or use" of an automobile. *See e.g., Denbaum v. Allstate Ins. Co.,* 374 So.2d 44 (Fla. 3d DCA 1979), *cert. den.,* 383 So.2d 1192 (1980); *Hutchins v. Mills,* 363 So.2d 818 (Fla. 1st DCA 1978), *cert. denied,* 368 So.2d 1368 (1979); *Hertz Corp. v. Pugh,* 354 So.2d 966 (Fla. 1st DCA 1978). In analyzing whether or not the facts of a case fall within the "use" coverage of the policy, a three-pronged test has been suggested. The test is whether the accident arose out of the inherent nature of the automobile

as such, whether the accident arose within the natural territorial limits of the automobile, with actual use not having terminated, and whether the automobile merely contributed to cause the condition which produced the injury or whether the automobile itself produced the injury. *National Merchandise, Inc. v. United Service Automobile Assn.,* 400 So.2d 526 (Fla. 1st DCA 1981).

Under the circumstances of the instant case, the first prong has been satisfied. The "inherent use" of a vehicle includes its use to transport or store items, either commercial or personal in nature. *Government Employees Ins. Co. v. Batchelder,* 421 So.2d 59 (Fla. 1st DCA 1982). In the instant case, it goes without questioning but that the accident arose out of the inherent nature of an ambulance. The ambulance had been called to the hospital for the specific purpose of transporting the patient to the mental hospital.

The second prong on the test requires that the accident occur within the territorial limits of the vehicle and that the use not have terminated. Here, the accident obviously occurred within the vehicle, and the transportation had not been completed.

Finally, the third prong requires a causal connection or relation between the use of the vehicle and the accident. This prong requires something far short of proximate cause and has been defined as "some connection" or a "nexus" between the

two. *Padron v. Long Island Ins. Co.,* 356 So.2d 1337 (Fla. 3d DCA 1978); *Auto Owners Ins. Co. v. Pridgen,* 339 So.2d 1164 (Fla. 2d DCA 1976). The vehicle, however, must be more than the mere "physical situs" of the accident. *Florida Farm Bureau Ins. Co. v. Shaffer,* 391 So.2d 216 (Fla. 4th DCA 1980), *rev. den.,* 402 So.2d 613 (1981). The injury of Marvene Gleaves was not a remote or mere intervening event bearing no substantial or direct relation to the use of the vehicle as is made clear by the prevailing case law in Florida as discussed below.

In *National Indemnity Co. v. Corbo,* 248 So.2d 238 (Fla. 3d DCA 1971), the insured and his wife were the owners of a German Shepard dog which was kept at home during the day and used as a watch dog at their dry cleaning plant at night. The dog was transported in the family car, driven by some member of the family. The court decided that an automobile liability insurance carrier was obligated to provide a defense to its insured when a passenger in the insureds' automobile was bitten by the insureds' guard dog while the dog was being transported in the automobile from the insureds' home to their place of business. The automobile was being used for the specific purpose of transporting the dog. In the instant case, the causal connection between Marvene Gleaves' injuries and the use of the ambulance is apparent as was the causal connection between the dog bite and the use of the car apparent in *Corbo.* The ambulance in question is used

for the specific purpose of transporting persons, which, of course, at times will be mentally disturbed patients as was the case with Ollie Mae.

In *National Merchandise, Inc. v. United Service Automobile Assn., supra,* 400 So.2d 528, the insured worked for Pic 'N' Save as a pharmaceutical supervisor in Jacksonville. One of his duties was to transfer drugs from one retail outlet to another. It was not unusual for him to leave drugs in his car over night or over a weekend. The alleged auto accident involved a four year child who ingested drugs while seated in the insured's car and later expired. The court held that the auto accident arose out of the use of the automobile.

Contrary to the petitioner's allegation, another case that supports Western World's position is *Government Employees Ins. Co. v. Novak,* 453 So.2d 1116 (Fla. 1984). The issue in *Novak* was whether the injuries and eventual death of Beverly Ann Novak arose out of the ownership, maintenance or use of an automobile so as to enable her personal representative to personal injury protection benefits as provided in the insurance policy. The facts are that as Beverly Ann Novak was about to drive away from her house one morning, a stranger approached her car and asked for a ride. When Beverly refused, the assailant pulled out a pistol and shot her in the face, dragged her out of the car, and fled in the vehicle. Several

months later Beverly died of the injuries. The court stated that the inquiry should be whether attack upon the decedent arose out of, or flowed from, the use of the vehicle. The court answered that it seemed rather clear that the decedent's refusal to allow this assailant to ride in the car, which she was operating, demonstrated a sufficient nexus to meet the requirements of the rule requiring a causal relationship. In the instant case, the attack upon Marvene Gleaves indeed rose out of, or flowed from, the use of the vehicle as an ambulance, *i.e.,* if the motor vehicle were not being used as an ambulance the injuries would not have occurred because neither Ollie Mae nor Marvene Gleaves would have been in the motor vehicle.

Another case on point is *United States Fidelity & Guaranty Co. v. Daly,* 384 So.2d 1350 (Fla. 4th DCA 1980). In *Daly,* the court held that where a pickup truck was being used to transport a mattress and other furnishings from one location to another and the insured, who was in the back of the truck holding down the mattress, was thrown onto the roadway when the wind lifted the insured and the mattress out of the truck, the insured's injuries arose out of the use of the pickup truck. In the instant case, there is no question but that the injury arose out of the use of the motor vehicle as an ambulance, which was being used for the specific purpose of transporting Ollie Mae who caused Marvene Gleaves' injuries.

Another case which found the injury was one "arising out of the ownership, maintenance, or use of a motor vehicle" is *Allstate Ins. Co. v. Gillespie,* 455 So.2d 617 (Fla. 2d DCA 1984). The court in *Gillespie* held that there was coverage and a duty to defend under the automobile policy where the other driver was shot with insured's gun while insured was attempting to repel attack upon him by the other driver which resulted when such driver became enraged because of manner in which the insured drove his car. The court stated that it is well established that for the insurance coverage to apply it is not necessary that the use of the automobile proximately caused the injury but rather than there be a nexus between the automobile and the injury. The inquiry, the court went on, should be whether the attack arose out of, or flowed from, the use of the vehicle. The court held that the instant was, indeed, inexorably tied to the insured's use of his automobile. *Accord, Allstate Insurance v. Jackson,* 463 So.2d 538 (Fla. 2d DCA 1985); *Tuerk v. Allstate Insurance Co.,* 469 So.2d 815 (Fla. 3d DCA 1985), *rev. den.,* 482 So.2d 347 (1986); *Allstate Insurance v. Famigletti,* 459 So.2d 1149 (Fla. 4th DCA 1984).

In *Hernandez v. Protective Casualty Insurance Co.,* 473 So.2d 1241 (Fla. 1985), Hernandez brought suit against the respondent to recover personal injury protection (P.I.P.) benefits for injuries suffered in the course of his arrest

for an alleged traffic violation. The petitioner had alleged in his amended complaint that while "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 [petitioner], that [petitioner] was injured." The respondent 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. The trial court entered a judgment on the pleadings for Hernandez.

On appeal the district court reversed, holding that tort concepts of causation were applicable in determinations of coverage. The court found that the petitioner's injury was caused solely by the force exercised by police in effecting his arrest and that it was not foreseeable in the ordinary course of using a motor vehicle that the operator would be so injured. Accordingly, the court held that the petitioner's injury did not arise out of the ownership, maintenance or use of a motor vehicle and consequently was not covered under the insurance policy issued by the respondent.

This court quashed the decision of the district court.

> . . . The automobile here was, however, more than just the physical situs of petitioner's injury. Petitioner was using the vehicle for the purpose of transportation, which use was interrupted by his apprehension by police officers. It was the manner of petitioner's use of his vehicle which prompted the actions causing his injury. While the force exercised by the police may have been the direct cause of injury, under the circumstances of this case it was not such an intervening event so

> as to break the link between petitioner's use of the vehicle and his resultant injury. We find these facts sufficient to support the requisite nexus between petitioner's use of his automobile and his injury, thereby allowing his to recover P.I.P. benefits.

Id., at 1243.

In the instant case, Marvene Gleaves' injuries were caused by the use of the ambulance in transporting Ollie Mae Hill. It was the manner of the use of the vehicle which prompted the actions causing her injuries. Therefore, Marvene Gleaves' injuries clearly arose out of the "use" of the vehicle, was covered by the automobile liability policy, and specifically and expressly exempted from the malpractice insurance policy. It is an irrefutable syllogism that if the malpractice policy excludes injuries covered by automobile insurance [policy exclusion (d)] and if this injury is covered by automobile insurance [settlement with automobile insurance company and cases X, Y, Z] <u>then</u> this policy does not cover this injury.

The major fallacy with the petitioners' arguments and reliance on the same cases that the respondent has relied on is that the petitioners have neglected to discuss the fact that this particular vehicle was an ambulance that was specifically used for the transporting of patients such as Ollie Mae Hill. Therefore, using common sense and logic, injuries inflicted upon third parties by a patient being transported in the ambulance would necessarily flow from the use of the motor vehicle as an ambulance.

The petitioners have also correctly alleged that Western World submitted no evidence whatsoever at trial suggesting Gleaves' injuries fell within the use coverage of the liability policy. Western World consistently defended upon the fact that it was the malpractice carrier and that the facts did not support a theory of malpractice. There was simply no need for Western World to present evidence that it fell within the use coverage of the liability policy. The only theory of liability upon which evidence was presented at trial, as correctly asserted by the petitioners, was malpractice. The reason being was that all other insurance carriers had either been dismissed or the petitioners had settled with them. Accordingly, there never should have been a trial because the insurance companies who were liable for the injuries were no longer parties.

The petitioners' reliance on the wording of the insurance policy which states that it would provide coverage to "<u>any person</u> injured through the rendering or failure to render professional services properly" to show that there is coverage in this case itself shows the absurdity of the petitioners' argument. Under the petitioners' theory, Herndon would have no need to have any other type of insurance other than malpractice if the ambulance was only ever used for business purposes since the ambulance attendants would always be in their professional capacity when in the ambulance and all

injuries occurring would occur through the rendering of professional services. Such simply is not and cannot be the law.

Based on the above established Florida law, the appellant submits that as a matter of law Herndon's automobile liability policy covered Marvene Gleaves' injuries rather than its malpractice insurance policy. The trial court erred when it denied Western World's motion for a directed verdict as there were no facts supporting malpractice coverage in the instant case.

The respondent acknowledges the general principle of law that where the consideration is a provision of policy relating to coverage, the terms of the policy must be liberally construed in favor of the injured party. *E.g., Hernandez v. Protective Casualty Insurance, supra,* 473 So.2d 1241. The respondent submits, however, that a liberal interpretation and an absurd interpretation are not one and the same. To interpret the malpractice policy as the petitioners request leads to absurd results. The respondent further submits that there is no need to resort to an interpretation of the usage clause since the exclusionary clause specifically excludes the instant alleged injuries so that there is no need to resort to construction.

B. NO PROFESSIONAL RELATIONSHIP EXISTED BETWEEN THE INSURED, HERNDON AMBULANCE COMPANY, AND THE APPELLEE, MARVENE GLEAVES, SO THAT MRS. GLEAVES' INJURIES DID NOT FALL WITHIN WESTERN WORLD'S MALPRACTICE INSURANCE POLICY.

The terms of an insurance policy must be construed to promote a reasonable, practical, and sensible interpretation consistent with the intent of the parties. *United States Fire Insurance Co. v. Pruess,* 394 So.2d 468 (Fla. 4th DCA 1981). The trial court's interpretation of the instant malpractice insurance policy was unreasonable, impractical, nonsensical, and inconsistent with the intent of the parties.

The trial court ruled that the malpractice insurance policy covered the instant situation since the ambulance attendant and driver were in their roles as medical personnel (R. 532). Such is not a reasonable interpretation. The respondent submits that there must also be privity between the medical personnel and the injured just as there must be in legal and medical malpractice causes of action. *See e.g., Weiner v. Moreno,* 271 So.2d 217 (Fla. 3d DCA 1973) (in a negligence action against an attorney, the plaintiff must prove the attorney's employment by the plaintiff, *i.e.,* privity, the attorney's neglect of a reasonable duty owed to the plaintiff, and that such negligence resulted in and was the proximate cause of loss to the plaintiff); *Homemakers, Inc. v. Gonzales,* 400 So.2d 965 (Fla. 1981) (section 95.11(4)(b), Florida Statutes, the statute of limitations for medical malpractice and other forms of professional malprac-

tice, require privity between the plaintiff and the defendant); *Wilhelm v. Traynor,* 434 So.2d 1011 (Fla. 5th DCA 1983), *pet. for rev. den.,* 444 So.2d 418 (1984).

A privity requirement in malpractice causes of action is necessitated by the fact that malpractice is bottomed on negligence. *See, Fla. Std. Jury Instr.* 4.2. Actionable negligence depends on the existence of a duty of care by the defendant, failure to perform that duty, and an injury to the plaintiff proximately caused by such injury. *Reinhart v. Seaboard Coast Line R. Co.,* 422 So.2d 41 (Fla. 2d DCA 1982), *pet. for rev. den.,* 431 So.2d 988 (1983). In the absence of a duty to the plaintiff, actionable negligence does not exist. *Robertson v. Deak Perera (Miami), Inc.,* 396 So.2d 749 (Fla. 3d DCA), *pet. for rev. den.,* 407 So.2d 1105 (1981).

In malpractice cases, the duty flows from the defendant's employment by the plaintiff, as in legal malpractice, *Lorraine v. Grover, Ciment, Weinstein & Stauber, P.A.,* 467 So.2d 315 (Fla. 3d DCA 1985), or a physician-patient relationship, *Greenwald v. Grayson,* 189 So.2d 204 (Fla. 3d DCA 1966). Marvene Gleaves had no such relationship nor was she in privity with Herndon's driver and attendant. The only person having a malpractice cause of action against the attendant and driver was the patient Ollie Mae. If Mr. Scalla and Mr. Kersey did something which they should not have done or

omitted to do something which they should have done, or failed to exercise the required degree of care, skill, or diligence, *Atkins v. Humes,* 107 So.2d 253 (Fla. 2d DCA 1958), *rev. on other grounds,* 110 So.2d 663 (1959), then there was a neglect of duty owed to Ollie Mae, but not to Marvene Gleaves. Therefore, there is no basis for a malpractice action by Gleaves against Herndon. Marvene Gleaves might have had a simple negligence cause of action against Scalla and Kersey as medical personnel but not a malpractice cause of action.

Whatever claims Marvene Gleaves may have against Herndon for its handling of Ollie Mae, they are not the kind of claims Florida recognizes as malpractice. For example, in *Greenwald v. Grayson, supra,* 189 So.2d 204, a married couple employed a doctor to examine a child they were considering adopting. The doctor failed to discover a latent defective condition. The parents, who adopted the child in reliance on this examination, sued both in contract and for malpractice. The court held that there was no evidence of negligence on the part of the physician resulting in an injury to the patient. "A physician-patient relationship did not exist between the parties to this action. Appellants' relationship with the doctor was exclusively in contract." *Id.* at 205. Western World submits that the instant case falls precisely within the parameters of *Greenwald.*

Western World issued Herndon a malpractice policy of insurance covering its ambulance drivers and attendants because of injury to any person arising out of the rendering or failure to render professional services. (App. 1). Professional services means services performed by one in the ordinary course of the practice of his profession, on behalf of another, pursuant to some agreement, expressed or implied, and for which it could reasonably be expected that some compensation would be due. *Aker v. Sabatier,* 200 So.2d 97 (La. 1st Cir.), *app. den.,* 202 So.2d 657 1967). Western World submits that Herndon was not performing services on behalf of Marvene Gleaves for which it expected Marvene Gleaves to compensate it so that Marvene Gleaves does not fall within the "any" person covered by the policy.

To interpret "any" in a malpractice insurance policy to mean any person in the world who might indirectly be injured due to the insured's performing professional services on behalf of another is not a reasonable interpretation. Although ambiguities should be construed against an insurer, this is only applied when there exists a genuine inconsistency, uncertainty, or ambiguity in meaning after resort to the ordinary rules of construction. *Denman Rubber Mfg. Co. v. World Tire Corp.,* 396 So.2d 728, 729 (Fla. 5th DCA 1981). A court should consider the entire contract rather than just an isolated word when resolving a question

of coverage. *Id.* at 730. A reading of the entire malpractice insurance policy leads to the inescapable conclusion that the policy covers only those persons to whom Herndon renders a service and is in privity with Herndon.

Western World's position is buttressed by section 95.11(4)(b), Florida Statutes (1979) which defines an action for medical malpractice "as a claim in tort or in contract for damages because of the death, injury, or monetary loss to any person arising out of any medical, dental, or surgical diagnosis, treatment, or care by any provider of health care." (emphasis added). A medical malpractice claim, however, is limited to persons in privity with the professional. *McFarling v. Azar,* 519 F.2d 1075 (5th Cir. 1975); *Greenwald v. Grayson, supra,* 189 So.2d 204.

Further support is found in section 95.11(4)(a), Florida Statutes (1979), which provides that the limitation of action for professional malpractice shall be limited to persons in privity with the professional. Western World submits that the policy in question is one for professional malpractice and, therefore, within the privity requirement. Herndon procured the malpractice policy explicitly to cover its practice as an emergency medical service of transporting persons who are sick, injured, wounded, incapacitated, or helpless. *See,* sec. 401.27, Fla. Stat. (1983). The persons who are sick, injured, wounded, incapacitated, or helpless who are being

transported are the persons covered by the malpractice insurance policy. It cannot be said that Herndon reasonably expected or contemplated Marvene Gleaves' injuries to be of the type to fall within the malpractice policy when the parties negotiated the policy.

Herndon procured automobile liability insurance to cover situations that arose out of the vehicle being used as an ambulance. That policy was issued by USF&G and covers the instant situation which is specifically excluded by the malpractice insurance policy. The malpractice policy does not apply "to any liability of the insured which would be covered by a standard automobile public liability policy." (App. 1). A standard automobile policy insures against any loss, liability, or expense resulting from or incidental to ownership, maintenance, or use of the vehicle. Sec. 624.605(1)(a), Fla. Stat. (1985). Marvene Gleaves' injuries unequivocally resulted from use of the vehicle as an ambulance. Therefore, as a matter of law, Marvene Gleaves' injuries were covered by USF&G's policy and excluded from Western World's malpractice policy. The respondent, however, was unable to find a case on point in any jurisdiction after extensive research. The respondent submits that the absolute dearth of authority, in itself, is the most telling demonstration of the impropriety of the trial court's ruling. *See, Heimer v. Travelers Ins. Co.,* 400 So.2d 771 (Fla. 3d DCA 1981).

The petitioners are asserting that tort principles are dispositive of the instant issue, *i.e.*, duty of reasonable care and the risk of possible injury to Marvene Gleaves' was foreseeable. (Petitioners' Brief, pages 18 through 19.) The petitioners have, in essence, argued that Marvene Gleaves had a negligence cause of action against Herndon. *Crislip v. Holland,* 401 So.2d 1115 (Fla. 4th DCA), *pet. for rev. den.,* 411 So.2d 380 (1981). The respondent agrees. However, the issue is whether the malpractice insurance policy issued by the respondent covered Marvene Gleaves' injuries, not whether there was a negligence cause of action. The petitioners are mixing apples and oranges.

Under the petitioners' theory, if a person witnessed the instant alleged incident and suffered a heart attack therefrom, the malpractice insurance policy would cover the heart attack victim because the bystander is <u>any</u> person injured as a result. Common sense and logic dictate that such is not the case. The express terms of the instant policy restricts "any" person to only those persons injured "by one of the ambulance drivers or attendants." Therefore, a privity requirement is expressly made a part of the policy. Marvene Gleaves was not injured by one of the ambulance drivers or attendants but by Ollie Mae.

The general rule of insurance law is that the loss must be proximately caused by a peril insured against. *601 West 26*

Corp. v. Equity Capital Co., 178 So.2d 894 (Fla. 3d DCA 1965). Marvene Gleaves' injuries were proximately caused by Ollie Mae and the peril was not one insured against by malpractice insurance. The peril insured against is patients or clients to whom the attendants or drivers might be liable for professional acts which result in injuries to those who contracted with Herndon to provide professional services, not the whole world.

The question presented here is not whether Scalla and Hersey are liable to Marvene Gleaves but whether the liability insurer, Western World, is liable on the liability policy. *See, McFarling v. Azar,* 519 F.2d 1075 (5th Cir. 1975) (a life insurance company brought an action against a physician and his professional liability insurer to recover benefits paid out on a life policy which was issued on the basis of a false medical report filed by the physician; held that the malpractice coverage of the liability policy only covered legal liability of the doctor arising from malpractice so that the liability insurer was not liable to the life insurance company); *Buckner v. Physicians Protective Trust Fund,* 376 So.2d 461 (Fla. 3d DCA 1979) (slanderous statements were not embraced in his duty as an investigator and, consequently, did not constitute a "professional service" within professional service policy). The respondent submits that the intentional battery committed by Ollie Mae upon Marvene Gleaves does not

constitute a "professional service" within the malpractice policy. The fact that the Herndon attendant and driver may have been negligent still does not bring the incident within the purview of the malpractice policy.

Under the petitioners' theory, all negligent acts of the attendant and driver are covered by the malpractice insurance policy. Such simply is not so. "Malpractice" is read narrowly and encompasses bad or unskilled practice on the part of the professional, resulting in injury to the patient or client. *See, Atkins v. Humes,* 107 So.2d 253, 254 (Fla. 2d DCA 1958) (malpractice with reference to physicians and surgeons is bad or unskilled practice on the part of the physician or surgeon, resulting in injury to the patient). "Negligence", on the other hand, has a broader definition and is defined as failure to exercise that degree of care, precaution and vigilance that an ordinarily prudent person would exercise, whereby, and as a consequence whereof, the person or property of another is injured. *De Wald v. Quarnstrom,* 60 So.2d 919 (Fla. 1952). Therefore, acts which are negligent are not necessarily malpractice. In a malpractice cause of action, the professional's negligence, not a third party's, must be the proximate cause of injury to the patient. *Atkins v. Humes, supra,* 107 So.2d at 258. Only negligent professional acts are malpractice and those acts must result in injury to the person that the professional is rendering services to.

Malpractice necessarily includes negligence but not all negligence is malpractice. *See, Atkins v. Humes, supra,* 107 So.2d at 254 (*Atkins* recognizes the distinction between negligence and malpractice and thereby defines them separately).

For example, during a dramatic closing argument, an attorney who negligently strikes a non-interested observer with an errant gesture, would not be liable under his professional malpractice policy even though the act might be seen as negligent. Although acting in his professional role as an attorney and exercising insufficient care to those about him, striking a bystander is simply not a professional act. Under the petitioners' theory, the malpractice insurance policy would cover the injured person.

> . . . Liability under a malpractice policy is generally limited to professional acts. A 'professional' act or service within a malpractice policy is one arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill and the labor or skill is predominantly mental or intellectual, rather than physical or manual, and in determining whether a particular act is a 'professional service' the court must look not to the title or character of the party performing the act, but to the act itself.

7A J. Appleman, *Insurance Law and Practice,* section 4504.01 (Berdal ed. 1979). It cannot be said that the acts of Ollie Mae that injured Marvene Gleaves were professional acts. By definition, then, Marvene Gleaves was excluded from the malpractice insurance policy.

The petitioners have cited to the one exception to the principle of law that privity is required in malpractice cases. *Lorraine v. Grover, Ciment, Weinstein & Stauber, P.A., supra,* 467 So.2d 315; *DeMaris v. Asti,* 426 So.2d 1153 (Fla. 3d DCA 1983). The case law in Florida is absolutely clear that the only exception to the privity requirement is in a situation of a will having been drafted by an attorney.

In *Lorraine,* the court stated the general rule to be that in a negligence action against an attorney, the plaintiff must prove: (1) the attorney's employment by the plaintiff (privity); (2) the attorney's neglect of a reasonable duty owed to the plaintiff; and (3) that such negligence resulted in and was a proximate cause of loss to the plaintiff. The court went on to state the one exception and that is when an attorney has prepared a will, he has a duty not only to the testator-client, but also to the testator's intended beneficiaries. In limited circumstances, therefore, an intended beneficiary under a will may maintain a legal malpractice action against the attorney who prepared the will, if through the attorney's negligence, devise to that beneficiary fails. The only exception to the privity requirement, then, is the limited exception in the area of will drafting to the requirement of privity in a legal malpractice action. The instant situation can in no way be analogized to the above exception of a failure of a devise to a beneficiary. The respondent

agrees that the instant case does not involve a physician-patient relationship, nor does it involve an attorney-client relationship. The cases relied on by the respondent, however, are important to show that in malpractice cases there must always be a privity requirement except in the one limited exception discussed in *Lorraine*.

The petitioners have asserted that had Western World wished to exclude persons not in privity with the insured, it could include such a provision in the policy. The respondent submits, however, that such was not necessary as the type that it is, *i.e.*, malpractice, excludes such persons by its very nature as discussed extensively above in other malpractice cases.

CONCLUSION

Based on the foregoing arguments and authorities cited therein, the respondent respectfully requests that this Honorable Court affirm the decision of the Fifth District Court of Appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of August, 1986, a true and correct copy of the foregoing was placed into the United States mail, first-class postage affixed thereto, properly addressed to ROBERT BONNER, ESQUIRE, 605 East Robinson Street, Orlando, Florida 32801 and to IRVIN A. MEYERS, ESQUIRE, 17 South Lake Avenue, Orlando, Florida 32801.

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