O/a 10-28-86

IN THE SUPREME COURT OF THE STATE OF FLORIDA

MARVENE GLEAVES and
JAMES GLEAVES,

Petitioners,

vs.

WESTERN WORLD INSURANCE
COMPANY,

Respondent.

CASE NO. 68,328

DISTRICT COURT OF APPEAL,
FIFTH DISTRICT
NO. 85-219

PETITIONERS' REPLY BRIEF

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NOTE OF CLARIFICATION

In its initial brief petitioner inadvertently ommitted a sentence from the first paragraph of the Summary of Argument. The paragraph should have read:

> "Mrs. Gleaves received permanent injuries while struggling in an ambulance with Ollie Mae Hill, a paranoid schizophrenic woman (R-180). At the time of the accident Ms. Hill was engaged in one of a long series of deranged outbursts caused by her mental disorder. These unpredictable outbursts began long before the ambulance arrived and continued even after Mrs. Gleaves was injured (R-168-71). Nonetheless, the Fifth District Court of Appeals, relying on Government Employees Insurance Company v. Novak, 453 So. 2d 1116, (Fla.1984) concluded that Mrs. Gleaves injuries arose from the use of the ambulance. The court thus found applicable a clause in the Western malpractice policy excluding accidents covered by a standard automobile liability policy. However, because of the facts in Novak differ significantly from the instant case, the appellate court misapplied the law."

PRELIMINARY STATEMENT

In this brief the parties will be referred to as "Western World" "the carrier", and "petitioner".

The following symbols will be used:

"R.B.___" Respondent's Initial Brief

REBUTTAL ARGUMENT

POINT ON APPEAL

THE APPELLATE COURT WAS INCORRECT IN REVERSING AND REMANDING FOR ENTRY OF JUDGEMENT FOR WESTERN WORLD BECAUSE:
A. MARVENE GLEAVES' INJURIES DID NOT FALL WITHIN THE "USE COVERAGE" OF THE AUTOMOBILE LIABILITY POLICY AND
B. MARVENE GLEAVES WAS COVERED UNDER WESTERN WORLD'S AMBULANCE ATTENDANTS' MALPRACTICE POLICY.

On June 7, 1977, Western World Insurance Company sold Herndon Ambulance Company an insurance policy covering any negligence of Herndon's ambulance attendants in "rendering or failing to render, during the policy period, professional services." Subsequently, Marvene Gleaves suffered permanent injuries due to the negligence of two Herndon attendants. Mrs. Gleaves was injured as a result of the attendants negligently leaving her alone inside their ambulance with Ollie Mae Smith, a paranoid schizophrenic patient. An ambulance safety expert testified at trial that the attendants neglected their professional duty by failing to maintain contact with Ms. Hill. Despite these facts, Western World now claims that they have no responsibility to Mrs. Gleaves.

A. MARVENE GLEAVES' INJURY DID NOT FALL WITHIN THE "USE COVERAGE" OF THE AUTOMOBILE LIABILITY POLICY. Marvene Gleaves suffered permanent shoulder injuries while struggling inside a Herndon ambulance with Ollie Mae Hill, a large paranoid schizophrenic patient. Throughout the day of the accident, Ms. Hill had engaged in a series of bizarre,

violent outbursts attributable to her medical condition. These outbursts began long before the ambulance arrived and continued until Ms. Hill was sedated in her hospital room.

Western World now claims that Mrs. Gleaves' injuries actually stemmed from the manner of use of the ambulance. Therefore, Western argues, the injuries are covered under Herndon's United States Fidelity and Guaranty Automobile Liability Policy. Since the Western policy contains an exculpatory clause relieving the carrier from coverage of accidents also covered by an automobile liability policy, Western World maintaines that they have no responsibility to Mrs. Gleaves. The principle question before this Court is whether Mrs. Gleaves' injuries arose out of the use of the ambulance or resulted from Ms. Hill's psychiatric illness.

Applying all of the evidence presented at trial to the language of the insurance policies, the trial judge, The Honorable Frank N. Kaney, held that Western World's policy covered Mrs. Gleaves' injuries. Western World presented no evidence suggesting that Marvene Gleaves' injuries fell within the use coverage of the liability policy. The Carrier claims in its initial brief that there was no need to present any evidence since "all other insurance carriers had either been dismissed or petitioners had settled with them." (R.B. 18). Nothing, however, precluded Western from presenting evidence to support its exculpatory clause defense. Petitioner respectfully submits that no such evidence existed.

As the basis for its argument that it has no responsibility to Mrs. Gleaves, Western World cites several

cases addressing the meaning of the standard automobile liability clause "arising out of the ownership, maintanance, or use of motor vehicle." These cases make clear two points. First, in order for the automobile liability coverage to exist, there must be some causal connection or "nexus" between the automobile and the events causing the injuries. Government Employees' Insurance Company vs. Novak, 453 So.2d 1116 (Fla. 1984); Hernandez vs. Protective Casualty Insurance Company, 473 So.2d 1241 (Fla. 1985); Allstate Insurance Company vs. Famigletti, 459 So.2d 1149 (Fla. 4th DCA 1981). Second, no liability coverage exists if the vehicle is merely the site of the injury or the injury occurs incidentally to its use. Reynolds vs. Allstate Insurance Company, 400 So.2d 496 (Fla. 5th DCA 1981); Florida Farm Bureau Insurance Company vs. Shaffer, 391 So.2d 216 (Fla. 4th DCA 1980), reh. den., 402 So.2d 613 (1981).

Novak and Hernandez are recent decisions by this Court interpreting the standard liability usage clause in human assault cases. The Fifth District Court of Appeals found Novak determinative in its decision in the instant case. In both cases, this Court inquired whether the motor vehicle involved played some role in prompting or motivating the injurious events. Likewise, each of Florida's District Courts of Appeals which have addressed this issue have analyzed whether the vehicle was a motivating force in the attack. See, e.g. Doyle vs. State Farm Mutual Automobile Insurance Company, 464 So.2d 1277, (Fla. 3rd DCA 1985); Reynolds vs. Allstate Insurance Company, 400 So.2d 496; Allstate Insurance Company vs. Famigletti, 459 So.2d 1149;

Feltner vs. Hartford Accident and Indemnity Company, 336 So.2d 142 (Fla. 2nd DCA 1976). Petitioner submits that the fine distinctions which separate a vehicle which causes an injurious event from one which is merely the site of an event necessitates a careful analysis of any alleged "nexus".

Western World advances two theories attempting to show this necessary "nexus" between the ambulance and Mrs. Gleaves' injuries. The carrier first argues that had the motor vehicle not been used as an ambulance (R.B. 14). This argument neglects the fact that the only reason Mrs. Gleaves was on the ambulance was due to Ms. Hill's mental condition. Specifically, Mrs. Gleaves had coaxed Ms. Hill into calming down and voluntarily going to the hospital by promising to accompany her on the ambulance. Moreover, Ms. Hill's schizophrenic behavior brought her together with Mrs. Gleaves long before the ambulance arrived at the UCF campus. Mrs. Gleaves had chased and subdued Ms. Hill in the campus parking lot and had remained in an information booth with her until the ambulance arrived. Thus, Ms. Hill's schizophrenic illness, not the ambulance, prompted the two women to enter the ambulance together.

Not only does Western World's formulation incorrectly identify the motivating mechanism which brought Ms. Hill and Mrs. Gleaves into the ambulance together, but this "but...for" test also was specifically rejected in Florida Farm Bureau Insurance Company vs. Shaffer, 391 So.2d 216 (Fla. 4th DCA 1980), reh. den., 402 So.2d 613 (1981). In Shaffer, the Fourth District Court of Appeals held that no

causal relationship is established merely by showing that "but for the use of an automobile an accident would not have happened." The vehicle must play a more direct role in the accident. The Shaffer court pointed out that allowing this relationship alone to constitute a causal connection would lead to absurd consequences. For example, the court pointed out that this test would allow liability coverage where a vehicle simply transports an assailant to the location where an assault occurs.

In no other cases have courts found Western World's "but...for" test sufficient to establish a nexus between the motor vehicle and the injurious events. For example, in Reynolds vs. Allstate Insurance Company, 400 So.2d 496 (Fla. 5th DCA 1981), an assailant hid in the back seat of the injured party's car. After the insured drove the car a couple of miles, the assailant attacked him. Without the car being used as a means of transportation, the two parties would never have come together. The Reynolds court held, however, that the car merely served as a site of the assault and thus did not provide the necessary nexus for a liability coverage.

Western World's "but...for" test is overly broad. While it may be true that "but...for" the presence of the ambulance the accident never would have occurred, it is also true that "but...for" the fact that the two women were on the same college campus the injury would not have occurred. Furthermore, "but...for" the fact that Mrs. Gleaves was a nurse, the injury would never have occurred. Florida Courts require a more direct relationship between vehicle and

injury than Western World proposes. In Western World's second theory of a causal relationship, it states that "the manner of the use of the ambulance prompted the actions causing Mrs. Gleaves' injuries." (R.B. 17). This test, derived from Hernandez, is appropriate for the case at bar. However, there is absolutely no evidence suggesting that the ambulance prompted the struggle which resulted in Mrs. Gleaves' injuries. Instead, all of the medical and eye witness testimony shows that Ms. Hill's rush to the front of the ambulance was a schizophrenic outburst motivated solely by her mental illness. This behavior was similar to her earlier outbursts which took place before the ambulance arrived. Indeed, Mrs. Gleaves testified that Ms.Hill threatened to kill her on at least one occasion before the ambulance ever arrived on the scene and that she was worried about getting hurt at the time she was in the information booth (R. 170-75, 200-02).

Western World has presented no evidence suggesting that either the nature of the ambulance or its use triggered Ms. Hill's outburst. For example, no evidence indicates Ms. Hill had a particular fear of ambulances, was prompted into action by something within the ambulance, or was motivated by the actions of the ambulance attendants. In short, the only relationship Western World has demonstrated between the ambulance and Mrs. Gleaves' injuries is that the vehicle served as the site of the accident.

In Florida Farm Bureau Insurance Company v. Shaffer, 39 So.2d 216 (Fla. 4th DCA 1980) Rev.den., 402

So.2d 613(1981) the Fourth District Court of appeal addressed the situation where a vehicle was involved, but not causally related to the injurious event. There, an assailant, while sitting in one car, shot a young boy who occupied another car. The assailant had an automobile policy covering injuries from the "use of any auto." The Shaffer court, however,held that the injury was not caused by the automobile, but by the gunshot. The court emphasized that from the standpoint of causation the injury could have occurred in the woods, in a house, or anywhere else. Like the Shaffer victim, Marvene Gleaves could have been injured when she attempted to subdue Ms. Hill on the U.C.F. campus or in the information booth. Indeed, Ms. Hill did attack Mrs. Gleaves in the information booth, attempting to rip the stethoscope from her neck. It was merely fortuitous that Mrs. Gleaves was injured while in the ambulance rather than on the U.C.F. campus or in the information booth.

Relying on their two theories of causation, Western World concludes that injuries inflicted upon third parties by ambulance patients "necessarily flow from the use of the motor vehicle as an ambulance." (R.B. 17) Again, this definition has no requirement that the ambulance play some causal roll in the injurious event. For example, liability coverage would exist where a patient enters an ambulance and then decides to rob or kill a third party. Western World would also hold the automobile liability carrier responsible if an attendant, acting in gross negligence, injected a patient with some solution that caused convulsions in the patient and injuries to a third party.

The instant case is virtually identical to the second example above. The jury found that the ambulance attendants committed professional negligence in allowing Mrs. Gleaves to enter the ambulance along with Ms. Hill. As a result of this negligence in the handling of a patient, a third party, Mrs. Gleaves, was injured. The ambulance was the site of these events, but played no roll in their happening.

B. MARVENE GLEAVES WAS COVERED UNDER WESTERN WORLD'S AMBULANCE ATTENDANTS' MALPRACTICE POLICY.

Western World contends that its policy does not cover Marvene Gleaves because she was not in privity with Herndon Ambulance Company. The carrier makes this argument even though its policy includes absolutely no privity requirement, and specifically includes "Any person" injured through the ambulance attendants "rendering or failure to render during the policy period professional services...." Moreover, no part of the policy excludes coverage to reasonably foreseeable third parties who are injured. Western World's argument violates their own observation that insurance policies should be interpreted reasonably, practically, and sensibly (R.B.20).

In defense of its position, Western World maintains that Florida law, with one limited exception, requires privity of contract in malpractice actions. This is a flagrant misstatment of the law. While Florida courts require privity in most legal malpractice cases, there is no such requirement for medical, architectural, or construction

malpractice. Petitioner agrees with Western World that no Florida courts have addressed a privity requirement in ambulance cases. The guidelines used by courts in other types of malpractice cases, however, make clear that no privity requirment exists in the instant case. In McAbee v. Edwards, 340 So. 2d 1167, (Fla.4th DCA 1976) the Fourth District Court of Appeals pointed out that the existence of a privity requirement is a matter of policy and requires the balancing of various factors. These factors include: one, the extent to which a transaction was intended to affect the plaintiff; two, the foreseeability of harm to him; three, the degree of certainty that the plaintiff suffered injuries; four, the closeness of the connection of the defendant's conduct and the injuries suffered; five, the moral blame attached to the defendant's conduct; and six, the public policy of preventing future harm. Based on these criteria, the McAbee court concluded that attorneys who write wills have a duty to third party beneficiaries as well as their clients. See also Lorraine v.Grover, Ciment, Weinstein, and Stauber, 467 So. 2d 315 (Fla. 3rd DCA 1985); Demaris v. Asti, 426 So. 2d 1153 (Fla. 3rd DCA 1983).

Applying the McAbee criteria to the instant case, it becomes clear that the ambulance attendants owed Mrs. Gleaves a duty of care. While the ambulance was initially dispatched for Ms. Hill, the attendants allowed Mrs. Gleaves to assist them and, even escorting her and Ms. Hill into the ambulance. At that point, Mrs. Gleaves, like the testimentary beneficiaries became inextricably involved in the transaction.

Moreover, expert and eyewitness testimony at trial established that Mrs. Gleaves harm was foreseeable by the attendants. There is no doubt that Mrs. Gleaves suffered injuries, and the jury concluded that these injuries were proximately caused by the attendants negligence. Finally, public policy requires that ambulance attendants, who routinely transport third parties with their patients, exercise their position of trust and superior knowledge responsibly to prevent foreseeable injury to third parties such as Mrs. Gleaves. As with an attorney and prospective beneficiaries under a will, the ambulance attendants realistically and in fact assumed a relationship with Mrs. Gleaves. In a case similar to McAbee, Lorraine v. Grover, Ciment, Weinstein, and Stauber, 467 So. 2d 315 (Fla. 3rd DCA 1985) the Third District Court of Appeals also noted two policy considerations crucial to determining whether privity is necessary in a malpractice claim. The first consideration is whether liability to third parties would deprive the contracting parties of control of their own agreement. Holding lawyers liable to the broad class of third parties affected by their relations with their client would paralyze advocacy of the clients rights. This consideration, is inapplicable to the case at bar. The professional services of ambulance attendants are almost always confined to those they are transporting.

The second consideration noted in Lorraine was whether a duty to third parties would impose a huge potential burden of liability upon the contracting parties. As stated above, ambulance attendants' direct their services

to patients and the passengers accompanying them. Thus, the class of potential third party clamants is limited, foreseeable, and under direct control of the ambulance attendants.

Florida courts have specifically rejected privity requirements in malpractice actions involving architects and contractors. In Navajoe, Inc. vs. Development Concepts Corporation, 373 So. 2d 689 (Fla.2nd DCA 1969) the Second District Court of Appeals reiterated that privity is not an element of a cause of action for negligence, even where it is based upon a contractual obligation (emphasis supplied). Rather, the test is whether the injuries to the third party were reasonably foreseeable. The Navajoe court relied chiefly upon the Florida Supreme Court's opinion in A. R. Moyer v. Graham, 285 So. 2d 397 (Fla. 1973), where this court concluded that the extent of professional duty is not limited to those in privity of contract, but extends to foreseeable third parties. See also Gallicho v. Corporate Group Service, Inc., 227 So. 2d 519 (Fla. 3rd DCA 1969), (Injured worker may bring action against company hired by his employer to make safety inspections).

Western World incorrectly states several times throughout their brief that privity is requried in medical malpractice cases. In Hoffman v. Blackman, 241 So. 2d 752 (Fla. 4th DCA 1970) the Fourth District Court of Appeals held that a physician has a duty to advise and warn third party members of a patient's family of the existence of the patient's contagious disease. This holding is consistent with the criteria discussed in McAbee, particularly

regarding the foreseeability of harm to the third party and the closeness of the connection of the defendant's conduct and the injuries suffered. In the instant case, testimony at trial established that the attendants knew of Ms. Hill's psychiatric condition; thus her attack upon Mrs. Gleaves was readily foreseeable. Furthermore, the jury determined that the attendants' negligence proximately caused Mrs. Gleaves injuries. Western World incorrectly cites Greenwald v.Grayson, 189 So. 2d 204 (Fla. 3rd DCA 1966) for the proposition that privity is required in medical malpractice cases. In Greenwald a married couple hired a doctor to examine a child they were considering adopting. The couple subsequently brought two actions, one in breach of contract and the other in negligence, against the doctor. The Greenwald court held that since the relationship between the married couple and the doctor was strictly in contract rather than the usual doctor-patient relationship, the proper action was under contract theory. The Greenwald court in no way established a privity requirement for medical malpractice claims.

Finally, Western World relies on McFarling v. Azar, 519 F. 2nd 1075 (5th Cir. 1975). There a life insurance company brought an action against a doctor and his professional liability insurer to recover benefits paid on a life policy issued on the basis of a false medical report filed by the physician. The McFarling court emphasized that professional liability policies generally cover the primary activities in which the insured is engaged. Thus the court held that the liability insurer was not liable to the life

insurance company. The court went on to point out, however, that the doctor may have been covered if his primary activity was issuing medical reports to life insurance companies. In any event, this case does not establish a privity requirment for malpractice suits.

Not only does Florida law make no requirment for privity in medical malpractice cases, but the instant policy does not concern medical malpractice. Indeed, Western World's policy specifically excludes professional services rendered by physicans or nurses (See Exclusions, Subsection N). The policy applies solely to the rendering or failure to render professional services by ambulance drivers and attendants.

Western World also misstates petitioner's interpretation of the words "any person" in the Western World policy. Western World alleges that petitioner's interpretation of these words would extend liability to "any person in the world who might indirectly be injured..." (R.B. 23). This, of course, is not petitioner's position. Instead, petitioner submits that since the Western policy expressly included coverage to "any persons" injured through the attendants' negligence, reasonably foreseeable third parties such as Mrs. Gleaves should be included. These words certainly contradict Western World's argument that it covers only those in <u>privity</u> with Herndon.

The insurance carrier argues that petitioner would extend liability to one who suffered a heart attack from witnessing the struggle which injured Mrs. Gleaves. This hypothetical bystander, obviously, would not be a

foreseeable third party and had no involvement in the transaction. Mrs. Gleaves, on the other hand, not only was a third party directly under the supervision of the attendants, but was also actively aiding the attendants in transporting Ms. Hill to the hospital.

Incredulously, Western World argues that the attendants were not rendering professional services at the time Mrs. Gleaves was injured. The carrier first argues that Ms. Hill, not the attendants was responsible for Mrs. Gleaves injuries because she intentionally battered her. Western World ignores the fact that the jury found the ambulance attendants responsible for Mrs. Gleaves' injuries. Nobody even filed suit against Ms. Hill for intentional battery. At the time Mrs. Gleaves was injured, the attendants were licensed to transport patients, were answering a routine call, and even were loading a patient into an ambulance belonging to their employer. In all frankness, petitioner can imagine no situation more clearly exemplifing the rendering of professional services by ambulance attendants than the instant situation.

Western World incorrectly asserts that petitioner would classify all negligent acts by the ambulance attendants as "professional services". There are many examples of negligent acts which would not constitute professional services. For example, an attendant who struck a pedestrian with an object he threw out of his ambulance window would not have committed negligence in rendering a professional service.

Finally, Western World maintains that Herndon could not have reasonably expected or contemplated Marvene Gleaves' injuries to be of the type falliing within Western World's malpractice policy when the parties negotiated the policy. Herndon Ambulance Company has provided ambulance services for many years in Central Florida. Herndon was well aware that passengers often accompany patients in their ambulances. Moreover, the policy specifically excludes two other parties who often become involved in ambulance transactions, physicians and nurses. Petitioner respectfully submits that Western World's policy was specifically drafted to include third parties such as Mrs. Gleaves who routinely accompany the ambulance patients.

I CERTIFY that a copy of the foregoing has been furnished by mail to: SID WHITE, Clerk of the Supreme Court of Florida, Supreme Court Building, Tallahassee, Fl. 32301; SHARON LEE STEDMAN, ESQ., P. O. Box 1271, Orlando, Fl. 32802, and ROBERT BONNER, ESQ., 605 E. Robinson Street, Orlando, Florida 32801, this 25th day of August, 1986.

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