OA 2-2.88

IN THE SUPREME COUPT
STATE OF FLORIDA
TALLAHASSEE, FLORIDA

RICHARD T. RACE and
SUZANNE RACE, his wife,

Petitioners,

vs. CASE NO. 70,997

NATIONWIDE MUTUAL FIRE
INSURANCE CO.,

Respondents.

BRIEF OF THE RESPONDENT NATIONWIDE MUTUAL FIRE INSURANCE CO.

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PREFACE

The Petitioners/Appellees/Plaintiffs below, RICHARD T. RACE and SUZANNE RACE, will hereinafter be referred to collectively as "RACE". The Respondent/Appellant/Defendant below, NATIONWIDE MUTUAL FIRE INSURANCE CO., will hereinafter be referred to as the "INSURER". All emphasis is added unless otherwise indicated. References to the record on appeal will be made by the designation "R" with appropriate pagination. References to the separately bound copy of trial testimony found below and taken from Case No. 83-13408 styled State v. Thompson will be made the designation "TR" with appropriate pagination.

STATEMENT OF THE CASE AND FACTS

The INSURER agrees with the statement of the case and facts as outlined by RACE up to that point in the first paragraph on page 3 of RACE's brief where they stray from the facts and citations to the record to talk about conclusions and arguments regarding the merits of the case.

Succinctly stated, RACE was involved in an accident with the tortfeasor Thompson and no one sustained injuries as a result of that minor impact. (R. 181). It was a "minor fender bender". (R. 181). The injuries RACE received were as a result of an assault by Thompson. That assault took place immediately after the minor fender bender and although RACE goes to great lengths to discuss the purpose behind the assault and the cause of the assault, the only relevant fact is that the injuries occurred as

a result of the assault as opposed to being inflicted in the auto accident.

SUMMARY OF ARGUMENT

The Third District Court of Appeals' decision correctly reversed the summary judgment in favor of RACE and against the INSURER. RACE's injuries received in the assault were not covered under the uninsured motorist provisions of the policy issued to RACE by the INSURER because the minor impact caused by Thompson's uninsured vehicle caused no personal injuries. The personal injuries of RACE were caused directly by the intentional assault of Thompson. The cases clearly hold and the statute and the INSURER's policy provide that for injuries to be compensable under the uninsured motorist portion of the policy they must "arise out of the use, maintenance, and operation of an uninsured motor vehicle." The intentional tortfeasor, Thompson, did drive an uninsured motor vehicle, however, at the time he assaulted RACE, he was not in his uninsured motor vehicle, the uninsured motor vehicle was not an instrument of the assault, and the insurance or lack of insurance on Thompson's vehicle was as relevant and material to RACE's injuries as was Thompson's lack of life insurance.[1]

RACE has abandoned the issue having to do with collateral estoppel and res judicata in his brief and it will not be argued herein.

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1. The INSURER adopts as its own the cogent argument presented in the brief of the Amicus Allstate.

ARGUMENT

THE THIRD DISTRICT COURT OF APPEALS CORRECTLY HELD AS A MATTER OF LAW THAT THE INSURER DID NOT PROVIDE UNINSURED MOTORIST BENEFITS TO PACE FOR THE INJURIES HE RECEIVED IN THE INTENTIONAL ASSAULT BY THOMPSON.

The INSURER's policy issued to PACE provides in pertinent part as follows with respect to uninsured motorist coverage:

> "Under this coverage, we will pay bodily injury damages that you or your legal representative are legally entitled to recover from the owner or driver of an uninsured or under insured motor vehicle. Damages must result from an accident arising out of the ownership, maintenance, or use of the uninsured or under insured vehicle.

The coverage language contained in the policy above is descriptive of the language and intent of the Florida Legislature as described in Fla. Statute Sec. 627.727 regarding uninsured motorist coverage.

This is a simple case of assault which occurred following a minor traffic accident in which no injuries were sustained as a result of the impact from the traffic accident itself. In Florida Farm Bureau v. Schaffer, 391 So.2d 216, 218 (Fla. 4th DCA 1980), the Fourth District Court of Appeals held as follows with respect to a claim against the liability insurer for an intentional assault.

> "[A] criminal assault is not the usual risk anticipated under an automobile policy and for coverage to apply there must be a showing that the automobile itself was used in some manner

to cause or produce the injury."

In Schaffer the Fourth District stated that the injury "was not caused by the automobile but by the gun shot." In the instant case the injury was not caused by the use of the vehicle, the operation of the vehicle, or the maintenance of the vehicle, it was caused by the fists of its driver, Mr. Thompson. If Thompson carried liability insurance, there could be no claim under the liability portion of his policy and there should be no claim for this assault under the uninsured motorist portion of PACE's policy for the same assault. As this Court stated in Dewberry v. Auto Owners Ins. Co., 363 So.2d 1077, 1081 (Fla. 1978):

> "The statute [the Uninsured Motorist Statute, Florida Statute Section 627.727], was only intended to allow the insured the same recovery which would have been available to him had the tortfeasor been insured to the same extent as the insured himself. [Citations omitted]. It could not have been intended to place the insured who was injured by an under insured motorist in a better position than one who is harmed by a motorist having the same insurance as the insured."

The primary case relied upon by PACE as conflicting with the instant case is the case of Government Employees Insurance Company v. Novack, 453 So.2d 1116 (Fla. 1984) which involved PIP benefits and not uninsured motorist benefits. Novack is distinguishable on the basis that it does apply to PIP benefits as opposed to uninsured motorist benefits. The INSUPEP also believes that Novack at the very least should have its holding limited to the PIP arena, and if Novack should be re-examined it should be

only for the limited purpose of admitting that it was wrong when it was decided and should be receded from and given a decent burial. As Justice Ehrlich in his cogent dissent stated:

> "Whether Mrs. Novack was standing outside of the car or was seated in the car when shot makes no difference. The use of the car was not involved in the act of violence and that is the dispositive element in order to bring into play one's entitlement to PIP under the policy of insurance."

Justice Ehrlich was correct in Novack, he is still correct, and Novack should be receded from by this Court.

The INSURER would be less than candid with the Court if it did not state that the case of Halpin v. Hildebrand, 493 So.2d 75 (Fla. 4th DCA 1986) appears on its face to conflict with the instant decision although same was distinguished below by the Third District Court of Appeals. Whereas the Halpin case could be discussed and distinguished, the INSURER prefers to point out that it is simply wrong in its analysis and holding that an uninsured motorist carrier should be responsible for an intentional assault. Probably the most blaring fallacy of the case is the fact that the court tries to rationalize it's opinion by "viewing" the case from the standpoint of the injured victim and finding it to be a "accident" as to the injured victim. This rationalization misses the point. The innocent tort victim is always just as injured whether he is injured by a negligent tort feasor or an intentional tort feasor.

As pointed out by Judge Cowart in Northern Insurance Company of New York v. Hampton, 510 So.2d 649 (Fla. 5th DCA 1987)

> "Bodily injuries arising from an intentional gun shot are not caused by an accident arising out of the ownership, maintenance, or use of a motor vehicle, whether the shooter or the victim was occupying a motor vehicle before or at the time of the shooting, and notwithstanding that the shooting may have resulted from ill will that arose out of some incident involving the use of the motor vehicle."

Hampton is probably the closest factual scenario to the instant case. In Hampton, Bruce was insured for uninsured motorist benefits through Northern Insurance Company. Bruce was driving the covered vehicle at a time when Anderson, an uninsured motorist, cut him off. Bruce made an obscene gesture toward Anderson and at a stop light, Bruce exited his vehicle, blocked Anderson's vehicle, approached Anderson's vehicle on foot, slapped the windshield and made a threat at Anderson. Anderson seated in his vehicle shot Bruce dead. Bruce's personal representative made a claim for uninsured motorist benefits and the Fifth District Court of Appeals held:

> "In this case the death of Bruce did not arise out of the ownership, maintenance, or use of Anderson's uninsured motor vehicle."

Another decision from the Fifth District Court of Appeals in Fleming v. Hill, 501 So.2d 715 (Fla. 5th DCA 1987) is also enlightening with respect to this issue. The Fleming case involved an individual who was enraged over the refusal of another driver Dunn to move his car. Fleming fatally shot Dunn and Dunn's estate filed a wrongful death action against Fleming and his insurers. The Fifth District reversed the trial court's order

which had held that Dunn's death had arisen out of the use of a motor vehicle.

RACE also relies upon the case of Hernandez v. Protective Casualty Ins. Co., 473 So.2d 1241 (Fla. 1985). Hernandez is distinguishable because it is a PIP case the same as Novack and/or it is simply wrong as was Novack and should be receded from the same as Novack.

RACE also relies on Allstate Ins. Co. v. Gillespi, 455 So.2d 617 (Fla. 2nd DCA 1984). Gillespi involved a situation where one driver became enraged at another driver's manner in which he drove his vehicle. Both vehicles were insured and when the one driver attacked the other, he was repelled by a gun shot. In that case the Second District held that the injury was caused arising out of the ownership, maintenance, or use of a motor vehicle. This is simply wrong as pointed out in the other cases and analysis above. Gillespi which has not been overruled but has been criticized by other courts should be expressly overruled by this court.

From the standpoint of an insurance company which was to set rates and anticipate risks when writing liability coverage and uninsured motorist coverage, the attendant risk of injury from criminal attack is incalculable for insurance companies. Insurance companies use actuaries who calculate risks on identifiable verifiable facts such as age, miles driven, areas of the country, and things such as this. From these facts they can actuarially predict how many accidents will occur and set rates accordingly. There is absolutely no way to predict or calculate

actuarially intentional torts and criminal assaults. And there is no way actuarially to determine how or why a court may find a criminal assault or intentional tort which "did arise" or did not arise out of the use, maintenance, or operation of a motor vehicle. These are simply risks not contemplated by the insurer and certainly not contemplated by an insured when he buys an automobile insurance policy. They should not be risks which are covered by an automobile policy and the courts should not extend the coverage to so include these risks. From a public policy standpoint as well, individuals who engage in criminal conduct should not be allowed to insure themselves and insulate their potential personal liability for such actions. It would not serve as a deterrent to be able to foist the liability for criminal assault upon an insurance company.

CONCLUSION

The Trial Court's order upholding coverage was erroneous and the Third District Court of Appeals decision reversing the Trial Court with directions to enter judgment in favor of the INSURED was correct and should be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 4th day of January, 1988, to: Edward B. Blumberg, Esq., Deutsch & Blumberg, P.A., New World Tower, Suite 2802, 100 N. Biscayne Blvd., Miami, Florida 33132; Jeanne Heyward, Esq., Suite 300, Roberts Building, 28 West Flagler Street, Miami, Florida 33130; and to Chris Altenbernd, Esquire, Fowler, Whyte, Gillen, Boggs, Villareal & Banker, P.A., P.O. Box 1438, Tampa, Florida 33601.

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