

IN THE SUPREME COURT
OF FLORIDA

CASE NO. 70,997

RICHARD T. RACE and SUZANNE
RACE, his wife,

Petitioners,

vs.

NATIONWIDE MUTUAL FIRE
INSURANCE CO.,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

PETITIONERS' JURISDICTIONAL BRIEF
AND APPENDIX

EDWARD R. BLUMBERG, ESQ.
DEUTSCH & BLUMBERG, P.A.
Suite 2802 - New World Tower
100 North Biscayne Blvd.
Miami, Florida 33132

and

JEANNE HEYWARD, ESQ.
Suite 300, Roberts Bldg.
28 West Flagler Street
Miami, Florida 33130
(305)358-6750

TOPICAL INDEX

	<u>PAGE</u>
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF ARGUMENT	4
POINT ON DISCRETIONARY REVIEW	
WHETHER THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH <u>GOVERNMENT EMPLOYEES INS. CO., v. NOVAK, 453 So.2d 1116 (FLA. 1984); HERNANDEZ v. PROTECTIVE CAS. INS. CO., 473 So.2d 1241 (FLA. 1985); HALPIN v. HILDEBRAND, 493 So.2d 75 (FLA. 4th DCA 1986); ALLSTATE INS. CO. v. GILLESPIE, 455 So.2d 617 (FLA. 2d DCA 1984)</u>	6
CONCLUSION	10
CERTIFICATE OF SERVICE	10
APPENDIX, <u>NATIONWIDE MUT. FIRE INS. CO. v. RACE, 508 So.2d 1276 (FLA. 3d DCA 1987)</u>	A.1-6
PETITION FOR REHEARING AND MOTION FOR REHEARING EN BANC	A.7-18
ORDER	A.19

CITATION OF AUTHORITIES

	<u>PAGE</u>
ALLSTATE INS. CO. v. GILLESPIE 455 So.2d 617 (Fla.2d DCA 1984)	4,5,8,9
GOVERNMENT EMPLOYEES INS. CO. v. NOVAK 453 So.2d 1116 (Fla. 1984)	4,5,6,7,9
HALPIN v. HILDEBRAND 493 So.2d 75 (Fla.4th DCA 1986)	4,5,7,8
HERNANDEZ v. PROTECTIVE CAS. INS. CO. 473 So.2d 1241 (Fla. 1985)	4,7

STATEMENT OF THE CASE
AND FACTS

Petitioners/Appellees/Plaintiffs,* RICHARD T. RACE and SUZANNE RACE, his wife, seek review of the decision of the Third District Court of Appeal which reversed the Order on Partial Summary Judgment in their favor and remanded with directions to enter a judgment in favor of Respondent/Appellant/Defendant, NATIONWIDE MUTUAL FIRE INSURANCE CO. (A1-6).

RICHARD T. RACE, a U.S. Secret Service Agent, with his wife and family, stopped his automobile, for a traffic light at an intersection when it was struck from the rear by a car driven by Robert E. Thompson.

RACE and Thompson got out of their respective vehicles. In compliance with §316.062 Fla. Stat. (1979) which mandatorily requires drivers at the scene of an accident to exchange certain information, RACE attempted to remove his insurance papers from a small leather bag he carried and show it to Thompson. Thompson said he saw something big and black, thought it was a gun, and based upon a prior experience,** assaulted RACE causing severe

*The parties will be referred to as they stand before this Honorable Court and the symbol "A" signifies Petitioners' Appendix.

**The decision states that Thompson's reaction to RACE's post-collision conduct was an "inexplicable reaction." However, Thompson explained his behavior by stating that he thought that RACE was pulling out a gun when in reality RACE was pulling out his credentials from his black bag. Thompson said that he saw "something big and black and that at that point I thought he was going for a gun. I just retaliated because prior to--a while back a gentleman did pull a gun on me. It was at a rodeo on Davie..." (A8)

and permanent injuries.

Because Thompson had no automobile insurance, RACE sought personal injury protection (PIP) and uninsured (UM) benefits from his own insurer, NATIONWIDE. NATIONWIDE's policy contained a clause for PIP benefits "for accidental bodily injury of an insured that arises out of the ownership, maintenance or use of a motor vehicle." After initially denying RACE's claim for PIP coverage, NATIONWIDE stipulated that it was liable for PIP benefits since RACE's injuries "arose out of the maintenance, use or operation of his motor vehicle."

RACE then requested UM benefits under his NATIONWIDE policy. The policy contained the following UM provision:

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 underinsured motor vehicle. Damages must result from an accident arising out of the ownership, maintenance or use of the uninsured or underinsured vehicle.

After NATIONWIDE denied his UM claim, RACE filed a petition to compel arbitration and complaint for damages. NATIONWIDE answered and counter-claimed for declaratory relief. Both sides moved for summary judgment.

The trial court granted partial summary judgment in favor of RACE on two bases: (1) RACE's injuries "resulted from an accident arising out of the ownership, maintenance and use of the uninsured vehicle" thereby bringing RACE's injuries within the scope of UM coverage and; (2) based upon the judgment entered in the prior PIP litigation between RACE and NATIONWIDE the doctrine of collateral estoppel precluded NATIONWIDE from denying UM benefits to RACE.

The District Court of Appeal, Third District, reversed the Order on Partial Summary Judgment in favor of RACE and held that the attack was not an accident arising out of the ownership, maintenance or use of Thompson's uninsured vehicle and the nexus test was not satisfied. (A1-6)

The District Court denied RACE's petition for rehearing and motion for rehearing en banc. (A7-19). The decision appears at Nationwide Mut. Fire Ins. Co. v. Race, 508 So.2d 1276 (Fla.3d DCA 1987).

SUMMARY OF ARGUMENT

Petitioners contend that the decision of the District Court of Appeal, Third District, conflicts with Government Employees Ins. Co., v. Novak, 453 So.2d 1116 (Fla. 1984); Hernandez v. Protective Cas. Ins. Co., 473 So.2d 1241 (Fla. 1985); Halpin v. Hildebrand, 493 So.2d 75 (Fla.4th DCA 1986); Allstate Ins. Co. v. Gillespie, 455 So.2d 617 (Fla.2d DCA 1984).

The present decision holds that there was no nexus between the attack by Thompson and the use of his uninsured automobile even though (1) at the time of the assault immediately after the accident the parties were exchanging information mandatorily required as a result of the rear end accident caused by Thompson's uninsured motor vehicle; (2) Thompson assaulted RACE after he mistook RACE's small leather bag or his attempt to pull out his identification papers from it as an attempt by RACE to pull a gun on him and; (3) RACE and Thompson would have never met or attempted to exchange information if Thompson's uninsured motor vehicle had not rear ended RACE's vehicle.

Novak which initially set forth the nexus test held that the shooting of a driver by an assailant after the driver had refused his request to ride in the vehicle constituted a sufficient nexus between the use of the motor vehicle and the event causing the fatal injury for the recovery of PIP benefits.

Hernandez applied the Novak nexus test and held there was a sufficient nexus between injuries caused to the insured by a

police officer during his arrest for an alleged traffic violation and the use of his automobile in order to recover PIP benefits.

Halpin applied the Novak nexus test and held that the operation of the insured's automobile in such a manner as to cut off an uninsured motorist which incited the latter to attack the insured constituted a sufficient nexus between the insured's automobile and the injury, which is the critical factor, in order to recover UM benefits.

Gillespie applied the Novak nexus test and held that the insurer had a duty to defend its insured arising out of an argument between the insured and another driver culminating in the insured firing a gun taken from his glove compartment.

The conflict between the present decision and above cited decisions is obvious.

POINT ON DISCRETIONARY REVIEW

WHETHER THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH GOVERNMENT EMPLOYEES INS. CO., v. NOVAK, 453 So.2d 1116 (FLA. 1984); HERNANDEZ v. PROTECTIVE CAS. INS. CO., 473 So.2d 1241 (FLA. 1985); HALPIN v. HILDEBRAND, 493 So.2d 75 (FLA.4th DCA 1986); ALLSTATE INS. CO. v. GILLESPIE, 455 So.2d 617 (FLA.2d DCA 1984)

ARGUMENT

The decision of the District Court of Appeal, Third District, creates express and direct conflict with the above decisions. Thompson's attack, immediately after the accident, arose out of the ownership, maintenance, or use of his uninsured vehicle. Thompson's uninsured motor vehicle caused the rear end accident and his attack on RACE arose out of the use of the motor vehicle and the necessary exchange of information after the accident. The Novak nexus test is satisfied.

Government Employees Ins. Co. v. Novak, supra involved a suit to recover PIP benefits arising out of the death of Ms. Novak who was shot in her face by a stranger who had pulled her out of her car and drove away after she refused his request to ride in her vehicle. This Court held that the clause "arising out of the use of the motor vehicle" does not mean "proximately caused by" but has a much broader meaning. All that is required is some nexus between the motor vehicle and the injury. This Court also said "there was

a highly substantial connection between Ms. Novak's use of the motor vehicle and the event causing her fatal injury. Obtaining a ride in or possession of the motor vehicle was what motivated the deranged Endicott to approach and attack the deceased." This Court also said that the automobile does not have to be the instrumentality of the injury nor must the type of conduct which causes the injury be foreseeable with the normal use of the vehicle.

Hernandez v. Protective Cas. Ins. Co., supra quashed the decision of the District Court of Appeal and held that the insured was entitled to recover PIP benefits for injuries received from a policeman in the course of his arrest for an alleged traffic violation as a result of the use of his automobile. This Court cited Novak and said:

...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 him to recover P.I.P. benefits.

Halpin v. Hildebrand, supra is based upon a similar factual situation. Halpin changed lanes to proceed to a gas station and inadvertently "cut off" Hildebrand's vehicle. Hildebrand followed her to the gas station, jumped out of his truck and came after her. He appeared angry and intoxicated. Halpin was frightened and jumped back into her car. Hildebrand stated that he hated people who cut him off the road and began punching Halpin in the face through the open car window.

Hildebrand was uninsured. Halpin sued State Farm seeking damages for injuries sustained in the incident. State Farm defended on the ground that Halpin's injuries were caused by the intentional battery of Hildebrand and since liability insurance does not ordinarily cover intentional torts, it was not liable.

The District Court rejected State Farm's argument and said:

We hold that the factual circumstances surrounding Halpin's injuries constituted an accident arising out of the use, maintenance or operation of a motor vehicle and the incident was, thus, covered by the uninsured motorist provisions of Halpin's policy. Halpin was in the process of operating her automobile when she unintentionally impeded the progress of another motorist who became enraged, followed her into a gas station, and, while she was seated in her car, proceeded to commit a battery upon her. One could not seriously question the nexus between Halpin's automobile and the injury, and that is the critical factor, as was held in Government Employees Insurance Company v. Novack, 453 So.2d 1116 (Fla. 1984), and in Fortune Insurance Co. v. Ferreiro, 458 So.2d 834 (Fla. 3d DCA 1984). The Shaffer case relied on by the trial court is easily distinguishable as pointed out in Allstate Insurance Co. v. Gillespie, 455 So.2d 617 (Fla. 2d DCA 1984). Novack, decided long after Shaffer, also demonstrates Shaffer's inapplicability to the facts of this case.

Allstate Ins. Co. v. Gillespie, supra involved an altercation between Allstate's insured, Stewart, and Gillespie who approached Stewart's vehicle thinking the latter was a disabled motorist even though he had cut off Gillespie's vehicle in traffic. An altercation ensued. Gillespie attempted to hit Stewart through an open door window. Stewart unsuccessfully attempted to repel the attack and then took a revolver from his glove compartment and fired it several times and injured Gillespie. Stewart said he fired the

gun to frighten rather than harm him.

After Gillespie sued Stewart, Allstate filed a declaratory decree action seeking a determination of whether its policy provided coverage for the incident. Allstate's policy provided coverage for "claims for accidents arising out of the ownership, maintenance or use, loading or unloading" of an insured automobile.

The District Court in holding that there was coverage and Allstate had a duty to defend said: (1) the incident was "indeed, inexorably tied to Stewart's use of his automobile. Gillespie became enraged because of the manner in which Stewart drove his car, which precipitated and led to Gillespie's attack on Stewart. Surely, this is certainly sufficient nexus between the car and the injury."; (2) it is well established that for insurance coverage to apply it is not necessary that the use of the automobile proximately cause the injury but rather that there be a nexus between the automobile and the injury citing Novak and; (3) the inquiry should be whether the attack arose out of, or flowed from, the use of the vehicle.

The present decision conflicts with the above cited decisions.

Thompson's operation of his uninsured vehicle in such a manner as to rear end RACE's vehicle and his subsequent and immediate assault on RACE, after mistakenly believing RACE was pulling a gun on him rather than taking his identification papers out of his bag, satisfies the Novak nexus test.

In addition, as this Court stated in Novak, the automobile does not have to be an instrumentality of the injury nor must the type of conduct which causes the injury be foreseeably identifiable

with the normal use of the vehicle.

CONCLUSION

Based upon the reasons and authorities set forth above, it is respectfully submitted that an express and direct conflict exists and this Honorable Court should accept jurisdiction.

Respectfully submitted,

EDWARD R. BLUMBERG, ESQ.
DEUTSCH & BLUMBERG, P.A.
Suite 2802, New World Tower
100 North Biscayne Boulevard
Miami, Florida 33132

and

JEANNE HEYWARD, ESQ.
Suite 300, Roberts Building
28 West Flagler Street
Miami, Florida 33130
(305) 358-6750

By: *Jeanne Heyward*
JEANNE HEYWARD

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to Michael J. Murphy, Esq., Gaebe and Murphy, 4601 Ponce de Leon Blvd., #100, Coral Gables, Florida 33146, this 27th day of August, 1987.

Jeanne Heyward
JEANNE HEYWARD