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.

PETITIONERS' BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Petitioners/Appellees/Plaintiffs,* RICHARD T. RACE and SUZANNE RACE, his wife, file this brief on the merits to review 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 COMPANY.

THE FACTS

On November 26, 1983 at approximately 10:30 P.M., Richard T. Race, a United States Secret Service Agent, his wife and family were proceeding east in their vehicle on Griffin Road (R.137,169). Upon reaching the intersection of Griffin and Flamingo, Race stopped for the traffic light (R.135,136). While stopped, a vehicle driven by Robert E. Thompson rear-ended Race's vehicle (R.135,137).

After the impact Race got out of his car in order to look at his rear bumper and obtain insurance information from Thompson (R.139,170,182,T.99). Thompson also immediately got out of his car (R.183,185). They discussed whether or not the police should be called (R.183). Race felt he was under a legal and moral obligation to call the police (R.183). Thompson did not want to call the

*The parties will be referred to as they stood in the trial court and the symbol "R" signifies record on appeal and "T", transcript of testimony.

police (R.140,149). Race wanted to leave the cars at the point of impact and Thompson wanted to move the cars (R.172).

Race told him he was a federal agent or officer (R.172). Thompson then asked him for some identification (R.172). At this time both drivers were standing near each other (R.186).

Race carried his identification papers in a male bag (R.170). 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 his small leather bag and show it to Thompson (R.170,171). As he attempted to take his insurance papers and identification card out of his bag and show it to Thompson he was struck by him and knocked to the pavement (R.170,171,174,186,188,190; T.100,101).

When Race attempted to stand up from a crouched position Thompson hit him again (R.175). Race suffered severe and permanent injuries, including broken and shattered teeth, broken jaw, fracture of his right hand, memory loss, residual headaches and aggravation of a previous back injury (R.154,155,156,159,161-163).

Thompson admitted he rear-ended Race's car and that after the accident Race walked back to his car and asked him for his driver's license and registration (R.155). Thompson did not have his wallet (T.155). He did not want to call the police because of a possible increase in his already steep insurance premiums (T.159,160).

Thompson said as he stepped out of his car Race was reaching down toward his side (T.155,156). Thompson said he saw something

big and black, thought it was a gun and based upon a prior experience* assaulted Race causing severe and permanent injuries. Thompson said he never saw the male purse (T.156).

Both versions of the incident establish that the entire sequence of events took place immediately after the accident and as a result thereof and while Race was attempting to obtain information on Thompson's registration and insurance and to show Thompson his identification papers.

All of these events arose out of the automobile accident, out of the maintenance, operation and use of the uninsured vehicle and the process of exchanging driver information. Simply stated, Race and Thompson would have never met and they would have never attempted to exchange identification and insurance information if the automobile accident had not occurred. Race's attempt to take these papers out of his male purse and Thompson's misinterpreting Race's action arose out of the maintenance, operation and use of the uninsured motor vehicle and the attempt to comply with §316.062 Fla. Stat. (1979) which mandatorily requires exchange of driver information. The entire sequence of events which occurred immediately after the automobile accident and as a result thereof satisfies the nexus test set forth in Government Employees Ins. Co. v. Novak, 453 So.2d 1116 (Fla. 1984) and the

*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..." (T.156,157)

subsequent decisions following and applying Novak.

Because Thompson had no automobile insurance, Race sought personal injury protection (PIP) and uninsured motorist (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 (1) 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 and; (2) Nationwide was not collaterally estopped from denying Race UM benefits merely because it agreed to pay Race PIP benefits.

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

SUMMARY OF ARGUMENT

Plaintiffs 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. Hilderbrand, 493 So.2d 75 (Fla.4th DCA 1986); Allstate Ins. Co. v. Gillespie, 455 So.2d 617 (Fla.2d DCA 1984).

Plaintiffs submit that they are entitled to uninsured motorist's benefits because the injuries arose out of the maintenance, operation and use of the uninsured motorist vehicle. The pivotal nexus requirement test has been satisfied.

Plaintiffs also submit that Nationwide is collaterally estopped from arguing that the injuries did not occur as a result of the maintenance, operation and use of the vehicle. This is based upon the stipulation in the prior lawsuit for PIP benefits where Nationwide agreed that Plaintiffs' injuries arose out of the maintenance, operation and use of his vehicle. Well established Florida law supports this argument.

Inasmuch as this was a two-car rear-end accident the stipulation that the injuries arose out of the maintenance, operation and use of Race's vehicle of necessity also includes an admission that the injuries arose out of the maintenance, operation and use of the uninsured vehicle which caused the accident. In this instance the stipulation includes both vehicles.

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. HILDERBRAND, 493 So.2d 75 (FLA.4th DCA 1986); ALLSTATE INS. CO. v. GILLESPIE, 455 So.2d 617 (FLA.2d DCA 1984)

ARGUMENT

Plaintiffs submit that the trial court correctly held that he was entitled to uninsured motorist benefits based upon the §627.727 Fla. Stat., the policy provision set forth on page 4 and the applicable Florida decisions.

§627.727 provides in part as follows:

> (1) No motor vehicle liability insurance policy shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless uninsured motor vehicle coverage is provided therein or supplemental thereto for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness, or disease, including death, resulting therefrom...

Plaintiffs submit that 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 Endicott, 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. The clause "arising out of the use of a motor vehicle" is framed in such general, comprehensive terms in order to express the intent to effect broad coverage. Such terms therefore should be construed liberally because their function is to extend coverage broadly. All that is required is some nexus between the motor vehicle and the injury.

Based thereon this Court 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 in citing Novak said that "arising out of the ownership, maintenance or use of a 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:

> ...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. Hilderbrand, supra is based upon a strikingly similar factual situation. Halpin while operating her automobile on Commercial Boulevard changed lanes to proceed to a gas station and inadvertently "cut off" Hilderbrand's vehicle. Hilderbrand followed her to the gas station, jumped out of his truck while it was still running and came after Halpin. Halpin said that Hilderbrand appeared angry and intoxicated because he was swaying back and forth. Halpin was frightened and she jumped back into her car. Hilderbrand stated that he hated people who cut him off the road and began punching Halpin in the face through the open car window.

Inasmuch as Hilderbrand was uninsured, Halpin sued State Farm seeking damages for the injuries sustained in the incident. State Farm defended on the ground that Halpin's injuries were caused by

the intentional battery of Hilderbrand and since liability insurance does not ordinarily cover intentional torts, it was not liable.

The Court in rejecting State Farm's contention cited Leatherby Insurance Company v. Willoughby, 315 So.2d 553 (Fla.2d DCA 1975) which involved a suit to recover uninsured motorist benefits resulting from an intentional wrong of an uninsured motorist who had deliberately driven his truck into plaintiff. Willoughby discussed the difference between straight liability insurance as indemnitor of the tort-feasor and uninsured motorist coverage.

Willoughby said that the more recent cases involving uninsured motorist coverage were construed from the innocent victim's standpoint because the two types of policies are conceptually dissimilar. Under uninsured motorist coverage the innocent injured party, not the intentional tort-feasor, is the insured and from the standpoint of the innocent victim, the injury is an accident. The intent in the mind of the insured or innocent victim at the time of the acts should determine whether they were accidental or intentional. The Court in citing Celina Mutual Insurance Company v. Saylor, [35 Ohio Misc.81, 301 N.E.2d 158 (1973)] said that to look through the eyes of the uninsured rather than the insured in this factual situation would require an unconscionable twisting of the obvious purpose of purchasing insurance coverage.

The Willoughby Court also said that the statute providing for uninsured motorist coverage was designed for the protection of injured persons, not for the benefit of tort-feasors or insurance companies.

Finally, the Court in Halpin 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.

Finally, in this Court's pronouncement in Allstate Ins. Co. v. Boynton, 486 So.2d 552 (Fla. 1986) which discussed the purpose of uninsured motorist also compels the conclusion that Nationwide's

policy provides UM coverage:

> ...The UM coverage, in purpose and effect, provides a limited form of insurance coverage up to the applicable policy limits for the uninsured motorist. The carrier effectually stands in the uninsured motorist's shoes and can raise and assert any defense that the uninsured motorist could urge. In other words, UM coverage is a limited form of third party coverage inuring to the limited benefit of the tortfeasor to provide a source of financial responsibility if the policyholder is entitled under the law to recover from the tortfeasor. It is not first party coverage even though the policyholder pays for it. In the first party coverage, such as medical, collision or theft insurance, fault is not an element. The insurance carrier pays even though the policyholder is totally at fault. With UM coverage, the carrier pays only if the tortfeasor would have to pay, if the claim were made directly against the tortfeasor."

Based upon the above decisions and the undisputed facts Plaintiffs submit the trial court correctly held that they are entitled to uninsured motorist benefits for the injuries which occurred immediately after and as a result of the automobile accident while Race was attempting to obtain the necessary information concerning insurance and identity from Thompson as a result of the automobile accident.

The pivotal nexus requirement test has been satisfied. Simply stated, except for the automobile accident, the two drivers would have never met. Their entire conversation, confrontation and assault immediately after the accident concerning identification and insurance clearly and undisputedly arose out of the use, maintenance or operation of the uninsured motorist vehicle.

In addition, the District Court held that Nationwide was not collaterally estopped from denying Race UM benefits merely because it had stipulated that the injuries arose out of the maintenance, use or operation of his motor vehicle and had paid Race PIP benefits. This is also erroneous.

In this case there was a two-car rear-end accident caused by Thompson's uninsured vehicle. In the PIP coverage suit Nationwide stipulated that Race's injury arose out of the maintenance, operation and use of his motor vehicle. Obviously, since this was a two-car rear-end accident and the injuries arose out of the accident, the stipulation of necessity related to either or both cars---otherwise, it would not have made sense in this situation.

In other words, Nationwide agreed in the PIP lawsuit to the causal relationship between the incident and the injuries and is now collaterally estopped to deny that Race's injuries arose out of the accident with the uninsured motorist.

Therefore, the stipulation also precludes Nationwide from occupying an inconsistent position now by arguing that it agreed that the injury arose out of the maintenance, operation and use of Race's vehicle but not the uninsured vehicle.

Nationwide's position is a classic example of a distinction without a difference and a semantic exercise in futility. If Thompson's uninsured vehicle had not rear-ended Race's insured vehicle the injuries would not have occurred. Therefore, Nationwide's stipulation collaterally estops it from denying that Race is entitled to UM benefits. Lorf v. Indiana Ins. Co., 426 So.2d 1225 (Fla. 4th DCA 1983); Husky Industries, Inc. v. Griffith, 422

So.2d 996 (Fla.5th DCA 1982).

Lastly, this brief would be incomplete if it failed to discuss the District Court's statement that more direct contact between a vehicle and the injured claimant is required before coverage will be triggered citing Fleming v. Hill, 501 So.2d 715 (Fla.5th DCA 1987). This also fails to follow Novak and conflicts with Hernandez. In Fleming, the insured was the aggressor and the injury occurred to another in a different vehicle not owned or operated by the insured.

The District Court's statement that UM benefits do not apply because both Race and Thompson were ouside their cars on the road at the time of the assault conflicts with Novak which stated that the automobile need not be the instrumentality of the injury nor must the type of conduct which causes the injury be foreseeably identifiable with the normal use of the vehicle.

The District Court's statement that it would be anomalous to create coverage merely because Thompson's vehicle enabled Thompson to be placed in a position where he could attack Race overlooks the "nexus test." The rear-end accident caused both drivers to exit from their vehicles, attempt to exchange driver information in accordance with the statute and resulted in Thompson's misjudging Race's actions of taking his papers out of his bag. The nexus between the use of the automobile and the injury as contemplated by Novak is there.

The District Court's reliance upon the following decisions to support its reversal fails to apply the nexus test as set forth in Novak:

Doyle v. State Farm Mut. Auto. Ins. Co., 464 So.2d 1277 (Fla. 3d DCA 1985) is clearly distinguishable. Insured drove his automobile into the driveway and began to exit his vehicle when an unknown assailant carrying a gun approached the insured and requested money. The assailant shot the insured several times. Clearly, the automobile was only the situs of the injury. However, in the case at bar Thompson and Race after the automobile accident were in the process of exchanging driver information as required by the statute when Thompson, thinking that Race was pulling a gun on him rather than showing him credentials, assaulted him.

Allstate Ins. Co. v. Famigletti, 459 So.2d 1149 (Fla.4th DCA 1984) is also clearly distinguishable. The insureds, who were seeking P.I.P. benefits, were the victims of an attempt by a neighbor to massacre them. On the day in question the attacker, David Famigletti, stepped out from behind a tree to the edge of the road, machine gun in hand and began his attempt to massacre his neighbors. The Court held that the mere fact that Famigletti chose the site of their automobile for his attempted slaughter did not provide a sufficient nexus between the assault and the use of the car to warrant imposition of P.I.P. coverage.

Reynolds v. Allstate Ins. Co., 400 So.2d 496 (Fla.5th DCA 1981) is also distinguishable. In Reynolds, the insured was injured when an unidentified assailant, lurking in the back seat, struck and injured him as he got out of his insured automobile. The complaint alleged that the insured and his automobile was driven several miles from the place of the assault where Plaintiff

was thrown or otherwise ejected from his vehicle causing him further injury.

The Court said the allegations of the complaint are consistent with proof that the insured's assailant physically heaved him from his parked vehicle, or carefully carried him some distance from the vehicle and then violently threw him down, causing injuries, in which circumstance the vehicle would only be a point of departure and neither its use nor its nature caused or contributed to the injuries anymore than if he had been "thrown or otherwise ejected" from his home. The Court said that based upon the allegations of the complaint it appeared that the injuries resulted from the mean and dangerous nature and action of his assailant and not from that of his own vehicle. Again, the facts are easily distinguishable.

Rustin v. State Farm Mut. Auto. Ins. Co., 254 Ga.494, 330 S.E.2d 356 (1985) follows Georgia law not Florida law as set forth in Novak, Halpin and Hernandez and is based upon distinguishable facts:

After the insured Spain's vehicle was involved in a rear end accident with Rustin, Spain followed Rustin at speeds of 70 to 75 miles per hour and overcame him within one-half mile of the collision. Both men stopped, and exited from their vehicles. Rustin ran towards him flailing his arms and screaming. Spain "out of fear" removed his wife's pistol from his vehicle and shouted "Stop, I have a gun." When Rustin failed to stop, Spain shot and killed him.

The Court held there was no liability coverage under Spain's policy and that the parties did not contemplate that the policy would cover damages for wrongful death where the insured employs his vehicle solely for the purpose of driving to a location, then gets out and shoots another person. The facts are clearly distinguishable.

The difference between Florida and Georgia law is reflected in Davis v. Criterion Ins. Co., 179 Ga. App. 235,345 S.E.2d 913 (1986), citing Rustin, supra, which held that "in order for an injury to arise out of the 'operation, maintenance or use of a motor vehicle' there must be such a causal connection as to render it more likely" that the injury "grew out" of the operation, maintenance and use of the vehicle...Likewise, the connection must not be merely fortuitous." Thus, Georgia law in essence is based upon proximate cause rather than the nexus test.

Lastly, Foss v. Cignarella, 196 N.J. Super. 378, 482 A.2d 954 (1984) is also factually and legally distinguishable being based upon New Jersey law rather than Florida law*.

In Foss, the insured Foss was traveling south in the fast lane when a vehicle driven by Cignarella attempted to pass him on the left by traveling on the median and, in so doing, sideswiped Foss' vehicle. Both cars stopped and Foss' vehicle rolled

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*Foss was cited in a footnote in Fleming v. Hill, supra, but Fleming took a pistol from his attache case in his van and approached Dunn [who previously had to be asked twice to move his van in order to allow Fleming to exit from a baseball park] purportedly to scare him and teach him a lesson. Fleming either accidentally or intentionally discharged the gun, killing Dunn as he sat in his own car behind the steering wheel.

forward, bumping into the rear of Cignarella's car. Cignarella flew into a rage and ran up to Foss' vehicle and stabbed Foss in the chest while he was seated in his vehicle.

Foss held there was no coverage for the injuries from the stabbing under Cignarella's policy because (1) there was no substantial nexus between the injury and the use of the vehicle and (2) it would be unreasonable to conclude that the parties to the insurance contract contemplated that the policy would insure against such an incident.

Foss was cited with approval in United Services Auto Ass'n v. Ledger, 234 Cal.Rptr. 570 (Cal.App. 2 Dist. 1987) which recognized that both the Foss court and Rustin court interpreted the phrase "arising out of the use" as requiring some minimal causal connection and/or substantial nexus between the use of the vehicle and the injury and also that the act which caused the injuries must have been within the contemplation of the insurer and insured.

Florida law -- Novak -- only requires some nexus and does not base its decision upon the contemplation of the insurer and insured. Therefore, these decisions are contrary to Florida law and do not govern.

There was a nexus between the use of the vehicle and Race's injury -- the Novak requirement was satisfied.

CONCLUSION

For all the reasons and authorities set forth above, it is respectfully submitted that an express and direct conflict exists, that the decision of the District Court of Appeal fails to follow this Court's pronouncement in Novak and that Plaintiffs/Petitioners, RICHARD T. RACE and SUZANNE RACE, his wife, are entitled to uninsured motorist benefits. Accordingly, Plaintiffs/Petitioners respectfully request this Honorable Court to quash the decision of the District Court of Appeal, Third District, reinstate the Order on Partial Summary Judgment dated April 8, 1986, the Attorneys' Fees and Cost Judgment dated May 9, 1986 and grant Plaintiffs' Motion for Attorneys' Fees simultaneously filed in these proceedings.

Respectfully submitted,

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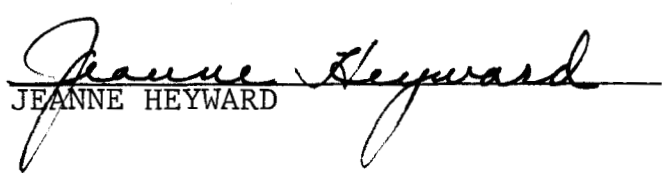

JEANNE HEYWARD

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to Michael J. Murphy, Esq., Gaebe, Murphy & Mullen, 4601 Ponce de Leon Blvd., Suite 100, Coral Gables, Florida 33146 this 20th day of November, 1987.

Jeanne Heyward.
JEANNE HEYWARD