

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' CONSOLIDATED REPLY BRIEF
ON THE MERITS

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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)

REPLY ARGUMENT

Petitioner Race contends that his injuries arose out of the ownership, maintenance and use of Thompson's uninsured motor vehicle. The uninsured motor vehicle rear ended Race's vehicle. This caused both parties to exchange driver and insurance information which was required by statute [§316.062 Fla.Stat. (1979)].

During their attempt to exchange this information Thompson mistakenly thought Race was pulling a gun on him rather than pulling out his cards from his small leather bag and he assaulted Race resulting in severe injuries.

Race's entitlement to uninsured motorist benefits is supported by Government Employees Ins. Co. v. Novak, 453 So.2d 1116 (Fla.1984) which held that:

(1) "arising out of the 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. In Novak 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 or possession of the motor vehicle was what motivated the deranged stranger to approach and attack the deceased;

(2) "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;

(3) the District Court correctly stated that: "We do not understand that the automobile must be the instrumentality of the injury nor do we believe the type of conduct which causes the injury must be foreseeably identifiable with the normal use of the vehicle."

The facts in the present case are even stronger than in Novak because the uninsured motorist's negligence caused the rear end accident, caused the drivers to exchange the necessary information which lead directly to the assault by Thompson when he mistakenly thought that Race was pulling a gun on him rather than producing his identification papers and insurance information.

NATIONWIDE'S ARGUMENT

Nationwide argues that Race is not entitled to uninsured motorist benefits because the minor impact did not cause any personal injuries, the injuries were caused directly by the intentional assault of Thompson and, at the time of the assault Thompson was not in his uninsured motor vehicle.

In support of its argument Nationwide cites Florida Farm

Bureau v. Shaffer, 391 So.2d 216 (Fla.4th DCA 1981). However, Shaffer does not govern because (1) in Shaffer the automobile was merely used to transport the assailant to the scene of an assault and; (2) Shaffer was decided long before Novak and even the Fourth District which had authored the Shaffer decision subsequently acknowledged that it was easily distinguishable because it relied upon foreign law rather than Florida law, as had been pointed out in Allstate Insurance Co. v. Gillespie, 455 So.2d 617 (Fla.2d DCA 1984), and did not govern in Halpin v. Hilderbrand, 493 So.2d 75 (Fla.4th DCA 1986).

Nationwide contends that Government Employees Ins. v. Novak, supra is distinguishable because it applies to PIP benefits as opposed to uninsured motorist benefits. This is a distinction without a difference. Nationwide's uninsured motorist provision is similar to §627.736(1) Fla. Stat. (1981), the PIP statute--both provide benefits for any loss or damages "arising out of the ownership, maintenance or use" of a motor vehicle or uninsured or underinsured vehicle. Nationwide's intent to provide broad uninsured motorist coverage or coverage at least equal in scope to the PIP coverage is obvious. Therefore, the reasoning or rationale of Novak which requires only some nexus between the motor vehicle and the injury applies in the present case.

Nationwide's argument that Novak should be receded from and given a decent burial overlooks the fact that since liability insurance is not required prior to a first accident, the purchase of uninsured motorist coverage is to protect an innocent purchaser

from any loss or damage arising out of an automobile accident with an uninsured motorist or an underinsured motorist--the phrase "arising out of" does not mean proximately caused by but has a much broader meaning, it only requires some nexus and the phrase should be liberally construed--the exchange of driver and insurance information is an integral part of an automobile accident and thus Thompson's assault on Race during this exchange of information is covered.

Furthermore, Nationwide's reliance upon the fact that the injuries were not caused by the minor impact and Thompson was not in his car at the time of the accident is answered by Novak which held 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 car.

Nationwide also contends that if Thompson had 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 motorists section of Race's policy.

However, this argument overlooks Allstate Ins. Co. v. Gillespie, supra which held that Allstate had a duty to defend its insured, Stewart, who fired a gun at another motorist Gillespie. Stewart had cut off Gillespie's vehicle in traffic and Gillespie approached Stewart's vehicle thinking the latter was a disabled motorist. An altercation ensued and Stewart took a revolver from the car's glove compartment and fired it, injuring Gillespie. The Court based its decision on Novak which held that the phrase "arising out of" the use of a motor vehicle should be liberally construed to effect broad coverage, that the incident was inexorably tied to the use of

his automobile and there was sufficient nexus between the car and the injury. Thus, Nationwide's argument is refuted by Gillespie.

Nationwide admits that Halpin v. Hilderbrand, supra conflicts with the Race decision but states that although Halpin could be discussed and distinguished, it would prefer to state that the decision is simply wrong because the Court tries to rationalize its opinion by "viewing" the case from the standpoint of the injured victim and finding it to be an accident as to the injured victim whether it was caused by a negligent or intentional tortfeasor. Race submits that this is the proper "view" and follows the well established principle of law that provides that where a clause is framed in such general comprehensive terms in order to express the intent to effect broad coverage, the clause should be construed liberally because its function is to extend coverage broadly. In the present case Nationwide's policy does not define or limit the term "accident"--therefore it should be viewed from the standpoint of the insured who purchased the uninsured motorist coverage to protect himself from damages caused by an uninsured motorist regardless of the latter's mental intent.

Nationwide's reliance upon Northern Ins. Co. of New York v. Hampton, 510 So.2d 649 (Fla.5th DCA 1987) is misplaced. Hampton involved an assault by the uninsured motorist totally unconnected and separate and apart from the maintenance, operation and use of the vehicle. Hampton is based on clearly distinguishable facts--in the present case Race and Thompson were exchanging driver and insurance information as a direct result of the automobile accident

caused by Thompson's uninsured motor vehicle. The entire incident arose out of the maintenance, operation or use of the uninsured vehicle.

Nationwide's reliance upon Fleming v. Hill, 501 So.2d 715 (Fla. 5th DCA 1987) is also without merit. Fleming, the insured, shot Dunn while the latter sat in his own parked car behind the steering wheel. In the present case, Thompson, the uninsured motorist, assaulted Race when he thought the latter was deviating from his attempt to show him his identification papers. The exchange of driver and insurance information was directly related to and caused by the automobile accident. The nexus requirement has been satisfied.

Contrary to Nationwide's contention the applicability of Hernandez v. Protective Cas. Ins. Co., 473 So.2d 1241 (Fla.1985) is not diminished by the fact that it is a PIP case. Nationwide's uninsured motorist provision is similar to §627.736(1) Fla.Stat. (1981), the PIP statute--both use the broader term "arising out of" rather than "caused by." Thus, Hernandez applies. Contrary to Nationwide neither Hernandez, Novak nor Gillespie are wrong. They represent the better view which based upon the statute and policy terms require only a nexus between the automobile and the injury. Race's injury arose out of or flowed from the automobile accident caused by the uninsured motorist and thus he is entitled to uninsured motorist benefits.

Nationwide's statement on page 2 of its brief that Race abandoned the issue of collateral estoppel and res judicata overlooks Race's argument on pages 14 and 15. Since Nationwide has failed

to answer Race's argument on this issue it stands unrefuted.

Lastly, Nationwide's argument directed toward setting rates, anticipating risks and the fact that individuals who engage in criminal conduct should not be allowed to insure themselves and insulate their potential personal liability for such actions is totally beside the point. Race purchased uninsured motorist coverage to protect himself and others from an accident arising out of the ownership, maintenance or use of the uninsured or underinsured vehicle. The term "arising out of" does not mean "proximately caused by" but has a much broader meaning. Having offered such broad coverage, Nationwide should not be allowed to argue in this forum that perhaps its premiums are not high enough. Furthermore, Nationwide's argument that criminals should not be allowed to insure themselves and insulate their potential personal liability is totally irrelevant. Nationwide has subrogation rights against any legally liable party--the tortfeasor is not insulated.

ALLSTATE'S ARGUMENT

Allstate presents an overall review of various types of insurance policies and coverage even though the issue is not that extensive and, also argues that where a plaintiff's claim involves a tort which is unrelated to a motor vehicle's quality as a dangerous instrumentality, the claim should be covered under general liability insurance on the tortfeasor rather than by automobile liability insurance.

The answer to this, however, is quite basic and clear. First, various other types of insurance coverage are not in issue and therefore totally irrelevant.

Second, the claim arose out of the motor vehicle's quality as a dangerous instrumentality. The automobile accident required the drivers to exchange driver and insurance information and the assault occurred during this exchange of information when Thompson misinterpreted Race's attempt to pull his identification cards out of his male bag.

Third, Nationwide's policy provides for uninsured motorist benefits "arising out of" the ownership, maintenance or use of an uninsured or underinsured vehicle. Therefore, Allstate's attempt to narrowly limit the uninsured motorist coverage to claims which are related to a motor vehicle's quality as a dangerous instrumentality (a) overlooks the fact that the assault arose out of the accident or the dangerous instrumentality quality of the uninsured motor vehicle; (b) overlooks the statutory requirement of an exchange of driver information as a result of an automobile accident and; (c) seeks to rewrite the policy terms by changing "arising out of" to "proximately caused by" in order to limit the uninsured motorist coverage.

Allstate also argues that if uninsured motorist coverage is expanded to include "risks typically covered by homeowners policies, this Court is legislating a form of uninsured tortfeasor coverage which the Legislature itself has not created."

Again, the answer is clear. The entire sequence of events took place as a result of the automobile accident--without it the

parties would have never met--and the assault was an integral part of the attempt to exchange driver information. Allstate's statement that this is "typically covered by homeowners policies" is without any case citation for the simple reason that the facts in this case are not similar to any other Florida case involving a homeowners policy. Parenthetically speaking, if Nationwide's policy had been a homeowners rather than an automobile liability policy, the defense to Race's claim would have taken the opposite approach i.e., the claim arose out of the maintenance, operation and use of a motor vehicle and therefore was excluded under the homeowners policy.

Contrary to Allstate's contention the Novak decision does not require a clarification or limitation. There is no logical reason why a greater connection to a motor vehicle is required in liability insurance or uninsured motorist insurance than in personal injury protection coverage. This is especially so in the present case where Nationwide's uninsured motorist coverage tracks the language of the PIP statute--both provide for benefits "arising out of" rather than proximately caused by.

Allstate's argument under its Point I is based upon a hypothetical case involving incomplete or totally different facts. There is no explanation as to the reason for the assault--whether it arose out of the maintenance, operation or use of the motor vehicle or was totally unconnected therewith i.e., being based upon a long standing vendetta. Furthermore, Mr. Baker did not cause the motor vehicle accident but he did assault Mr. Abel. In the present case Thompson, the uninsured motorist, caused the accident and assaulted Race. The

difference in the facts makes the argument an exercise in futility or an effort to discuss hypothetical situations totally unrelated to the issue in this case.

Furthermore, Allstate's argument continually overlooks the fact that Nationwide's policy provides uninsured motorist coverage for damages "arising out of" the maintenance, operation or use of an uninsured vehicle and Novak correctly holds that "arising out of" is broader than proximately caused by and means whether it flowed from the use of the vehicle. Allstate's argument also overlooks the fact that Thompson's assault occurred during an exchange of driver information when Race attempted to pull out his cards from his small leather bag. The entire sequence of events between the parties flowed from the dangerous qualities of the automobile and the attempt to exchange driver information as a result of the accident. Thus, the assault is covered under the uninsured motorist provision.

The 'physical situs' decisions of Watson v. Watson, 326 So.2d 48 (Fla. 2d DCA 1976) and General Accident Fire & Life Assurance Corporation v. Appleton, 355 So.2d 1261 (Fla. 4th DCA 1978) cited by Allstate on pages 14 and 15 are easily distinguishable from the case at bar. In this case the accident and ensuing mandatory exchange of driver information and assault arose out of the automobile accident--the parties would have never met except for the accident. The automobile was not merely the physical situs of the incident.

In addition, Allstate's speculative argument on page 17 concerning Halpin v. Hilderbrand, supra and whether the result might have been different if Mr. Hilderbrand had had automobile liability

insurance is totally irrelevant and requires no answer.

Under its Point II Allstate argues that uninsured motorist coverage should only provide protection in lieu of automobile liability insurance, should not replace homeowners coverage, general liability coverage or risks that are uninsured as a matter of public policy. This argument is immaterial because Race is not seeking to replace one coverage for another. On the contrary, Race is seeking to recover uninsured motorist benefits to which he is entitled because his injuries "arose out of" the maintenance, operation or use of the uninsured motor vehicle. As this Court held in Allstate Insurance Co. v. Boynton, 486 So.2d 552 (Fla.1986) "the (UM) carrier pays only if the tortfeasor would have to pay, if the claim were made directly against the tortfeasor." There is no doubt that Thompson is responsible, therefore Race's UM carrier, Nationwide, is required to pay.

Allstate's argument based on an attempt to shift responsibility to a homeowners policy that does not exist is not only improper and speculative [since the terms of the homeowners policy cannot be examined], but it overlooks the broad language of Nationwide's policy which extends coverage for all damages "arising out of" the maintenance, operation or use of an uninsured or underinsured vehicle. This is the same coverage available under automobile liability coverage.

Under its Point III Allstate argues that the nexus or connection requirement announced in Novak should be limited to no-fault benefits. After a somewhat lengthy and irrelevant discussion of

the alleged differences between no-fault insurance and uninsured motorist coverage, Allstate asks this Court to limit and clarify its Novak decision by requiring the Plaintiff to show injury which directly results from a risk created by a motor vehicle's quality as a dangerous instrumentality before UM coverage will be provided.

Again, the answer to this argument is basic and clear.

First, Nationwide's policy tracks the language of the no fault statute. Therefore, Novak should apply with equal force to Race's claim.

Second, Race's injuries arose out of the maintenance, operation or use of Thompson's uninsured motor vehicle. Thompson rear ended Race. The parties attempted to exchange driver information. Thompson assaulted Race as the latter was pulling out his identification cards because Thompson thought he was not complying with the statute but instead was pulling a gun on him. Therefore, any argument based on alleged differences between the no-fault and uninsured motorist claims is immaterial.

Third, there is no reason to broadly extend coverage in no-fault claims but narrowly limit coverage in uninsured motorist claims especially in view of the fact that a UM carrier has a right of subrogation against the tortfeasor and this Court said in Boynton quite clearly:

"...With UM coverage, the carrier pays only if the tortfeasor would have to pay, if the claim were made directly against the tortfeasor."

Boynton clearly states the basic underlying principle and purpose of uninsured motorist coverage. No-fault coverage is

complimentary or in addition to uninsured motorist coverage. Both have as their purpose to protect the insured from loss arising out of an automobile accident. Nationwide's policy tracks the broad language of the no-fault statute. There is no logical reason to apply the Novak definition of "arising out of" in no-fault cases and to ignore it in uninsured motorist cases.

CONCLUSION

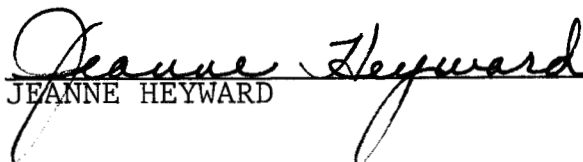
For all the reasons set forth in Petitioners' briefs, Petitioners respectfully request this Honorable Court to quash the decision of the District Court of Appeal, Third District, reinstate the Order on Partial Summary Judgment dated April 8, 1986, the Attorneys' Fees and Cost Judgment dated May 9, 1986 and grant Plaintiffs' Motion for Attorneys' Fees simultaneously filed in these proceedings.

Respectfully submitted,

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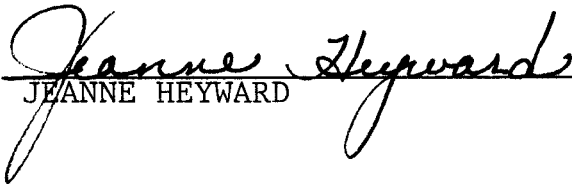
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CERTIFICATE OF SERVICE

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 and to Chris W. Altenbernd, Esq., Fowler, White, Gillen, Boggs, Villareal & Banker, P.A., P.O. Box 1438, Tampa, Florida 33601 this 25th day of January, 1988.


JEANNE HEYWARD