OA 2-4-99

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO.: 92,984
5TH DCA CASE NO.: 96-16062-AP

KARL BLISH,

Petitioner,

v.

ATLANTA CASUALTY COMPANY,

Respondent.
_____/

ON APPEAL FROM THE FIFTH DISTRICT COURT OF APPEAL

RESPONDENT ATLANTA CASUALTY COMPANY'S ANSWER BRIEF

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The undersigned hereby certifies that this brief has been typed in 12 point, Courier Font that is not proportionately spaced.

STATEMENT OF THE CASE AND FACTS

KARL BLISH left work at about 5:00P.M. on the evening of January 6, 1995 after having just been paid. (Appendix A, p. 44-46). On his way home, he stopped to get some gas, buy some cigarettes and beer, and then stopped off to have a couple of beers at a co-worker's home. (Appendix A, p. 44-46). Later that evening, while driving on U.S. 1, just South of Brevard Community College and about a half mile from Parrish Medical Center, the Petitioner allegedly had a blowout and stopped to change a tire on his truck. (Appendix A, p.47). While he was removing the damaged tire, he was attacked by unknown assailants who kicked and punched him repeatedly and then took the "eighty or a hundred bucks" he was carrying in his pocket. (Appendix A, pp. 55-57, 64). The assailants then fled and the Petitioner recovered his glasses and his wallet, finished changing the tire, and went home. (Appendix A, pp. 59-63). The Petitioner never reported the incident to the police. A few days later, the Petitioner went to the hospital and was operated on for a ruptured spleen. (Appendix A, pp. 71-72). The Petitioner now seeks to recover Personal Injury Protection (hereinafter PIP) benefits from ATLANTA CASUALTY to cover the medical expenses arising out of this criminal attack. See, Atlanta Casualty Company Policy Form F-01, Personal Injury Protection Coverage - Florida, Section I (Appendix B).

ATLANTA CASUALTY filed a Motion for Summary Judgment and Incorporated Memorandum of Law arguing that the Petitioner's injuries did not arise out of the use, operation or maintenance of

the motor vehicle and/or did not occur while he was "occupying" the vehicle. (Appendix C). The Petitioner filed a cross-motion for Summary Judgment. (Appendix D). The Brevard County Court granted ATLANTA CASUALTY'S Motion for Summary Judgment. (Appendix E).

The Petitioner then filed a Notice of Appeal to the Fifth District Court of Appeal, however, this Notice was treated as being a Notice of Appeal to the Eighteenth Judicial Circuit sitting in its appellate capacity. (Appendix F). The parties then filed their respective briefs, had oral argument, and the Circuit Court issued an opinion that reversed the decision of the County Court finding that the Petitioner was entitled to partial summary judgment on the issue of liability. (Appendix G-I).

Thereafter, ATLANTA CASUALTY filed a Petition for Writ of Certiorari to the Fifth District Court of Appeals. (Appendix J). The Petitioner then filed a Memorandum in Opposition to the Petition for Writ of Certiorari. (Appendix K). The Fifth District Court of Appeals issued an opinion granting ATLANTA CASUALTY's Petition for Writ of Certiorari and the Petitioner now appeals that ruling. (Appendix L).

SUMMARY OF THE ARGUMENT

The Petitioner contends that the Fifth District Court of Appeals erred in finding that the Petitioner's alleged injuries did not arise out of the ownership, maintenance or use of a motor vehicle. However, the purpose of Florida's Financial Responsibility Laws and the history of Florida's cases interpreting the phrase "arising out of" in the context of Fla. Stat. § 627.736 and the terms of the policy issued by the Respondent, support the decision of the Fifth District in this matter.

This Court, as well as the District Courts of Appeal have recognized that in order for an injury to "arise out of" the ownership, maintenance, or use of a motor vehicle, there must be some causal nexus between the ownership, maintenance, or use of a motor vehicle and the injuries suffered. The Courts have specifically recognized that while the law does not require that the ownership, maintenance or use of the vehicle be the proximate cause of the injury, there must be more than an incidental or "but for" causal relationship to the injury.

In the instant case, the Petitioner contends that "but for" the fact that his tire blew out, he would not have been in the location where he was attacked. Even if Petitioner is correct in this assertion, the relationship between the ownership, maintenance, or use of his motor vehicle and the injuries he suffered in the criminal attack, is tenuous at best and cannot satisfy Florida's causal nexus requirement.

Other states have also interpreted the phrase "arising out of" and have also adopted a causal nexus requirement that the ownership, operation, maintenance, or use of a motor vehicle, have more than an incidental, "but for" or situs relationship to the injuries suffered.

The Petitioner also contends that the Fifth District Court of Appeals erred when it determined that there was no record evidence to suggest that the assailants desired either the use or possession of the Petitioner's pick-up truck. However, the Petitioner's argument that the door was opened at some point during the attack is insufficient to raise a question of fact on this issue, since the truck had a flat tire and was essentially disabled. It hardly makes sense to suggest that the assailants had the intent of obtaining a vehicle when they attacked the Plaintiff, because the vehicle was disabled at the time.

The Fifth District Court of Appeals correctly determined that there was not a sufficient causal nexus between the Petitioner's ownership, maintenance or use of the motor vehicle and the injuries suffered. The intervening criminal attack could have occurred anywhere and the fact that the Plaintiff was in the vicinity of his vehicle is merely incidental. The stated purpose of the Florida Financial Responsibility Laws would not be advanced by extending PIP benefits to the Petitioner under the instant factual situation. To engage in the analysis suggested by Petitioner would lead to an absurd result.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DETERMINED PLAINTIFF'S INJURIES DID NOT "ARISE OUT OF" THE OWNERSHIP, MAINTENANCE, OR USE OF A MOTOR VEHICLE WITHIN THE MEANING OF FLA. STAT. § 627.736(1) OR THE TERMS OF THE POLICY ISSUED BY THE RESPONDENT.

The Purpose of the Financial Responsibility Laws of Florida is set forth in Fla. Stat. § 627.731 as follows:

> The purpose of ss. 627.730-627.7405 is to provide for medical, surgical, funeral, and disability insurance benefits without regard to fault, and to require motor vehicle insurance securing such benefits, for motor vehicles required to be registered in this state and, with respect to motor vehicle accidents, a limitation on the right to claim damages for pain, suffering, mental anguish, and inconvenience.

It is clear from the language of the statute that the purpose of No Fault coverage in Florida is ***NOT*** to compensate victims for injuries suffered in criminal attacks that are not causally related to the ownership, maintenance, or use of a motor vehicle.

Under Florida law, Personal Injury Protection (PIP) benefits are recoverable only in certain circumstances. Fla. Stat. § 627.736(1) and the contract of insurance issued to Plaintiff by ATLANTA CASUALTY, Form F-01, Personal Injury Protection Coverage - Florida, Section I (Appendix C) provides that an auto insurer shall provide PIP benefits for losses sustained "as a result of bodily injury, sickness, disease, or death *arising out of the ownership, maintenance, or use of a motor vehicle*. . . ." [Emphasis Added]. Florida Courts and Courts across the nation, have long recognized that this provision requires that the automobile be **more than merely the situs of the injury** and that there be a causal connection between the ownership, maintenance,

or use of the vehicle and the injuries suffered. See, Hernandez v. Protective Casualty Ins. Co., 473 So. 2d 1242 (Fla. 1985); Government Employees Ins. Co. v. Novak, 453 So. 2d 1116 (Fla. 1984); Trott v. Finlayson, 690 So. 2d 718 (Fla. 4th DCA 1997); Underwriters Guarantee Ins. Co. v. Therrien, 640 So. 2d 234, 235 (Fla. 4th DCA 1994); Fortune Ins. Co. v. Exilus, 608 So. 2d 139 (Fla. 4th DCA 1992); Allstate Ins. Co. v. Furo, 588 So. 2d 61 (Fla. 5th DCA 1991);State Farm Mut. Auto Ins. Co. v. Barth, 579 So. 2d 154, 156 (Fla. 5th DCA 1991); Parker v. Atlas Mut. Ins. Co., 506 So. 2d 475 (Fla. 1st DCA 1987); Doyle v. State Farm Mut. Auto Ins. Co., 464 So. 2d 1277 (Fla. 3d DCA 1985); Allstate v. Famigletti, 459 So. 2d 1149 (Fla. 4th DCA 1984); Reynolds v. Allstate Ins. Co., 400 So. 2d 496 (Fla. 5th DCA 1981); Stonewall Ins. Co. v. Wolfe, 372 So. 2d 1147 (Fla. 4th DCA 1979); State Farm Mutual Auto Ins. Co. v. Cage, 874 F. Supp. 272 (D. Hawaii, 1994) (distinguishing between the "causal nexus" test and the "territorial nexus" test and applying the "causal nexus" test); Boykin v. State Farm Mut. Auto Ins. Co., 393 S.E.2d 470 (Ga. App. 1990) (recognizing the need for a causal connection between the injury and the operation, maintenance of use of a motor vehicle before the injury can be said to have *arisen out of* such operation, maintenance, or use of the vehicle); State Farm Mut. Auto Ins. Co. v. Rains, 715 S.W.2d 232 (Ky. 1986) (recognizing the purpose of the Kentucky No-Fault Act required a "causal connection" analysis rather than a "positional risk" (situs) analysis); and Continental Western Ins. Co. v. Klug, 415 N.W.2d

876 (Minn. 1987) (recognizing that a vehicle must be an "active accessory" in causing the injury which is something less than proximate cause, but more than the mere situs of the injury).

Each of the cases cited above have addressed a factual scenario in which the insured was injured through an assault by a third party and the Courts have been faced with the question of whether such injuries arose out of the ownership, maintenance or use of a motor vehicle. In each instance, the Courts have interpreted the phrase "arising out of" to require that there be some sort of *causal* connection between the "ownership, maintenance, or use" of the motor vehicle and the injury suffered. As the case law has demonstrated, the connection falls somewhere on the "causal continuum" such that it is more than a "but for" or "incidental" relationship, but something less than "proximate causation."

In the instant case, the Petitioner has argued that "but for" the tire blow-out, he would not have been in the location where the attack occurred. While that *may* be true, it is an unfortunate fact in our society that a criminal attack on the Petitioner could have occurred almost anywhere. The fact that Petitioner's tire blew out at that particular location has, at most, an incidental relationship to the injuries he suffered as a result of the criminal attack.

Under the Petitioner's suggested analysis, any connection with a vehicle would be sufficient to satisfy the requirement that there be a nexus between the injury and the ownership,

maintenance, or use of a motor vehicle. To adopt such an analysis would extend No Fault benefits well beyond the scope of the intent of the legislature and the purpose of the laws. The Petitioner's analysis would require that No Fault coverage be provided to the motorist whose tire blows out and while changing the tire he is stung by a bee. Under the Petitioner's rationale, the motorist would not have been near the bee if the tire had not blown out and necessitated that the motorist get out of the car and make efforts to change the tire.

Taken to its logical conclusion, the Petitioner's analysis would also require that No Fault benefits be paid to a motorist whose car breaks down and who takes it to a mechanic, but while waiting at the mechanic's shop, the motorist is injured when shot by a criminal robbing the shop. In such an instance, as in the case at bar, it can be said that "but for" the fact that the car broke down and required the motorist to begin maintenance on the car, the motorist would not have been at the mechanic's shop and therefore in the path of the stray bullets. Such an analysis yields absurd results that do not support the intended legislative purpose of the Florida Financial Responsibility Laws.

A. A Chronology of Case Law in Florida Demonstrates that Courts Have Been Reluctant to Find that Injuries "Arise Out Of" the Ownership, Maintenance, or Use of a Motor Vehicle Unless There is a Clear Causal Nexus Present.

In 1979, in Stonewall Ins. Co. v. Wolfe, 372 So. 2d 1147 (Fla. 4th DCA 1979), the plaintiff and some other boys were riding on the trunk of an automobile when one of the boys, who also

happened to be carrying a gun, fell off the vehicle. Id. at 1148. The boy who fell off began walking towards the vehicle and fell again, causing the gun to discharge. Id. The bullet struck the plaintiff while he was riding on the vehicle and a claim was made for PIP benefits. Id. The Fourth District denied the plaintiff's claim because "the location of the victim, seated on the trunk of the automobile, [was] merely the physical situs of the injury," and "'it is not enough that an automobile be the physical situs of an injury. . . there must be a causal connection or relation between the two for liability to exist.'" Id. (citing to General Acc. Fire and Life, etc. v. Appleton, 355 So. 2d 1261 (Fla. 4th DCA 1978) for support). The court recognized that the plaintiff "could just as easily have been standing on the shoulder of the road when the gun accidentally discharged." Id. The same is true in the instant case. The plaintiff could just as easily have been beaten and robbed by the same assailants if he had been walking along the shoulder of the road, or he could have been beaten and robbed outside the store where he stopped by buy beer and cigarettes. The assailants in this action were interested only in the "eighty or a hundred bucks" Mr. Blish was carrying in his pocket.

Two years later in 1981, in Reynolds, the plaintiff was struck and injured by an unknown assailant lurking in the backseat of his automobile. 400 So. 2d at 496. The assailant then drove several miles and ejected the plaintiff from the automobile. Id. The Fifth District Court of Appeal cited Stonewall for the rule

that "'it is not enough that an automobile be the physical situs of an injury or that the injury occur incidentally to the use of an automobile, but that there must be a causal connection or relation between the two for liability to exist.'" Id. at 497 (citing Stonewall, 372 So. 2d at 1148). The Fifth District Court of Appeal then determined that based on the allegations in the plaintiff's complaint, his injuries, "appear to have resulted from the mean and dangerous nature and action of his assailant and not from his own vehicle." Id. In the instant case, as in Reynolds, KARL BLISH'S injuries did not "arise out of the ownership, maintenance, or use of a motor vehicle," they resulted from the mean and dangerous nature and action of his assailant(s)." Id.

Three years later, in 1984, the Fourth District Court of Appeal addressed the issue in Famigletti, 459 So. 2d 1149 (Fla. 4th DCA 1984). In Famigletti, the plaintiffs were riding in the automobile, on their way to work, when a neighbor with whom they had a history of violent confrontations, jumped out from behind a tree and began firing upon them with a machine gun. Id. at 1150. The plaintiffs were severely injured and brought a claim against Allstate to recover PIP benefits. Id. Allstate sought a declaratory decree that its policy did not provide coverage.

The Fourth District Court of Appeals found that the "Famigletti's attack was not caused by nor did it arise out of the use of the automobile." Id. Rather, the court cited to numerous cases including Reynolds and Stonewall, and found that "[t]he automobile was merely the situs of the attack." Id. The court

recognized that the neighbor intended to murder the plaintiffs and "[t]he mere fact that he chose the site of their automobile for his attempted slaughter does not provide a sufficient nexus between the assault and the use of the car to warrant the imposition of PIP coverage." Id. In the instant case, the intent of the assailants was to attack and rob the Appellant and the mere fact that Appellant was changing his tire at the time of the attack, "does not provide a sufficient nexus between the assault and the use of the car to warrant the imposition of PIP coverage." Id.

During that same year, this Court issued its opinion in Government Employees Ins. Co. v. Novak, 453 So. 2d 1116 (Fla. 1984). In Novak, this Court did find a sufficient nexus between the motor vehicle and the injury suffered by the plaintiff. Id. at 1119. In Novak, the plaintiff was about to drive away from her home when a stranger approached her vehicle. Id. at 1117. He asked her for a ride and when she refused he shot her in the face, dragged her out of the vehicle and stole her car. Id. The plaintiff died as a result of the injuries and her estate sought to recover PIP benefits from her insurer. Id.

This Court concluded that "there was a highly substantial connection between Ms. Novak's use of the motor vehicle and the event causing her fatal injury, [because] [o]btaining a ride in or possession of the motor vehicle was what motivated the deranged [assailant] to approach and attack the deceased." Id. at 1119. In reaching its decision, the court recognized that although

"arising out of" did not mean "proximately caused by," it did require that there be "some nexus between the motor vehicle and the injury." Id. The court then recognized that there was a "highly substantial connection" between the use of the vehicle and the injury suffered by Miss Novak because it was the attacker's need for the vehicle which motivated his attack. Id. In the instant case, there is no such nexus between the Plaintiff's "ownership, maintenance, or use" of the motor vehicle and the injuries suffered at the hands of his assailants.

The following year in 1985, the Third District Court of Appeals issued its opinion in Doyle v. State Farm Mut. Auto Ins. Co., 464 So. 2d 1277 (Fla. 3d DCA 1985). In Doyle, the plaintiff, accompanied by his wife, pulled into his driveway and while exiting the vehicle a robber approached the plaintiff and demanded money. Id. at 1278. When the plaintiff reached for his wallet, the robber shot him several times causing severe injury. Id. The plaintiff then sought to recover PIP benefits from Allstate. Id. The Third District recognized that "[t]he facts of this case are similar to those of a line of other cases finding no coverage where the automobile was merely the situs of an injury without a causal connection to the injury." Id. at 1279 (citing other cases including Stonewall and Famigletti).

Later that same year, this Court issued its opinion in Hernandez v. Protective Casualty Ins. Co., 473 So. 2d 1242 (Fla. 1985). In Hernandez, the plaintiff was operating his vehicle in a manner which attracted the attention of the police and resulted in

a high speed chase and an eventual traffic stop. Id. at 1242. The plaintiff's actions in operating the vehicle had apparently so angered the police officers attempting to stop him, that they used considerable force in apprehending and arresting him. Id. On appeal, this Court again recognized that "it is not enough that an automobile be the physical situs of an injury or that the injury occur incidentally to the use of an automobile, but that there must be a causal connection or relation between the two for liability to exist." Id. at 1243 (citing to Reynolds, 400 So. 2d at 497).

In Hernandez, this Court determined that there was a sufficient causal nexus between the plaintiff's use of the vehicle and the attack by the police officers at the traffic stop. Id. at 1243. This Court stated that "[w]e do agree with the proposition reiterated in Reynolds that 'it is not enough that an automobile be the physical situs of an injury or that the injury occur incidentally to the use of an automobile, but that there must be a causal connection or relation between the two for liability to exist'." Id. In finding such a nexus, this Court distinguished the case from that of Feltner v. Hartford Accident & Indemnity Co., 336 So. 2d 142 (Fla. 2d DCA 1976), in which PIP coverage was denied where the plaintiff was injured when he was struck in the head by a piece of pipe wielded by the father of a girl he was bringing home. This Court distinguished the situation from the Feltner case because in Feltner, "the automobile in that case was only incidental to the assault and the driver's resultant injury.

. . [and] [t]he provocation for the assault was the relationship between the driver and the young woman and was not in any way connected with the use of the vehicle." Hernandez, 473 So. 2d at 1243. In Hernandez, the attack by the police officers was provoked by the plaintiff's operation of the motor vehicle.

In the instant case, the attack on the Petitioner was not provoked by his ownership, maintenance or use of the motor vehicle and therefore, there is no causal connection or nexus between the use, operation, or maintenance of the Petitioner's motor vehicle and the alleged attack on the side of the road. Rather, it appears that the attack was provoked by the attackers' belief that the Petitioner had money in his wallet or simply by the "mean and dangerous nature" of his assailants.

In 1987, the First District Court of Appeals issued a ruling in the case of Parker v. Atlas Mut. Ins. Co., 506 So. 2d 475 (Fla. 1st DCA 1987). In Parker, the plaintiff and his girlfriend were sitting in their car in the parking lot of a Jax Liquor Store mixing and consuming alcoholic beverages. Id. at 476. An unknown assailant threw a rock through the front window and injured the plaintiff. Id. The First District Court of Appeals cited to Hernandez, Feltner, and Famigletti, an determined that "the automobile was merely the physical situs of the injury that occurred to Mr. Parker, and the injury was not one related or incidental to the use of his vehicle." Id.

In 1991, the Fifth District Court of Appeals issued its opinion in the case of State Farm Mut. Auto Ins. Co. v. Barth, 579

So. 2d 154 (Fla. 5th DCA 1991). In Barth, the plaintiff was sitting in her car in a mall parking lot waiting to pick up her son. Id. at 155. An unknown assailant got into her car and said, "Drive Bitch." When she refused to drive, he grabbed her and repeatedly beat her before exiting the vehicle and getting into another car and driving off. Id. The Fifth District Court of Appeals determined that the plaintiff had demonstrated sufficient facts to show the nexus between her vehicle and the injury sustained. Id. at 156. This court stated that:

> There is no way of knowing the ultimate plan or motive of Barth's deranged attacker. He may have wanted to switch vehicles to avoid police detection, he may have wanted a better operating car, or he may have just wanted to assault Barth. There are countless possibilities. ***We are certain, however, that he wanted her to drive him for whatever reason, and that her refusal to do so brought about the beating and injury***. [Emphasis added].

Id. In reaching its decision, the Fifth District Court of Appeals did not find that the intentions of the attacker are unimportant to the determination of whether the victim's injuries "arose out of" the ownership, maintenance, or use of a motor vehicle, only that the specific intentions of the attacker need not be shown if it is clear that the attacker wanted the victim to drive him (i.e. "use" the vehicle) for whatever reason. See, Id. at 155-156 (noting that the attacker commanded Barth and said "Drive Bitch").

Just a few months later, the Fifth District Court of Appeals also rendered its opinion in the case of Allstate Ins. Co. v. Furo, 588 So. 2d 61 (Fla. 5th DCA 1991). In Furo, the plaintiff was shot while riding in a car with his step-daughter when the

step-daughter's ex-boyfriend fired shots at the car. Id. at 62. The trial court determined the Plaintiff was entitled to recover PIP benefits and the Fifth District Court of Appeals reversed that decision. Id. In reaching its decision, the court distinguished both Barth and Novak and recognized that "no case yet has found a sufficient nexus between the use of the vehicle and the injury when it has not been shown that the *assailant* either desired possession (*Novak*) or use (*Barth*) of the victim's automobile." Id. [Emphasis in original]. The court then determined that the vehicle in Furo was merely the situs of the injury and the plaintiff was not entitled to recover PIP benefits from Allstate. Id.

In Furo, the vehicle may have been used to transport the injured plaintiff to the scene of the attack, and it may have helped to make him a target for the attacker because the ex-boyfriend saw him in the car with the daughter. However, the Fifth District Court of Appeals found that such a relationship between the vehicle and the injuries suffered was too tenuous to satisfy the requirement that there be a nexus between the use of the vehicle and the injury suffered. In the instant case, the Petitioner now contends that "but for" the fact that the vehicle broke down, Mr. Blish would not have been at the site of the incident and would not have been attacked. The same can be said for the Plaintiff in Furo (i.e. "but for" the fact that he was obtaining a ride in a car with his daughter, the daughter's ex-boyfriend would not have shot him).

A year later, the Fourth District Court of Appeals again addressed the issue, in the case of Fortune Ins. Co. v. Exilus, 608 So. 2d 139 (Fla. 4th DCA 1992). In Exilus, the plaintiff was driving a vehicle owned by his friend, who was riding along as a passenger. Id. at 139. When they stopped at a stop sign, another car drove up alongside their vehicle and a man got out of the car an approached the plaintiff's window. Id. The man asked the plaintiff a question, but before the plaintiff could answer, he pulled open the plaintiff's door. Id. The plaintiff drove away and as he did so, he was struck by a bullet in his left leg. Id. at 139-40. The plaintiff then sought PIP benefits. Id. at 140.

The Exilus court recognized that "[n]umerous cases have construed the meaning of "arising out of the ownership, maintenance, or use of a motor vehicle" in factual situations involving criminal attacks on individuals in, on, or near an insured vehicle" but also that such cases "make it clear that some connection of nexus between the injury and the use of the vehicle is required." Id. The court engaged in a lengthy analysis of the case law on the issue and ultimately determined that the facts were insufficient to establish that the shooting arose from the use of the vehicle and therefore determined the Plaintiff was not entitled to PIP coverage for the incident. Id. at 143. In reaching its decision, the court made the following observation:

> We concede that we are somewhat concerned about the supreme court's holding in Novak, that PIP coverage should be broadly construed to provide coverage. Obviously, there was *some* connection between the vehicle and the injury in the sense that Exilus was driving the vehicle when he was shot. However, we construe the case law to require more of a

> connection than the insured's simple use of, or presence in, the vehicle at the time of injury. *We are particularly influenced by the supreme court's statement in Hernandez approving the Reynolds holding that, in order to be compensable, an injury must be more than incidentally related to the use of an automobile.*

Id. at 143. [Some emphasis added].

In 1994, the Fourth District Court of Appeals again addressed the issue. In Underwriters Guarantee Ins. Co. v. Therrien, 640 So. 2d 234, 235 (Fla. 4th DCA 1994), the plaintiff was helping a friend work on his car when another vehicle drove up and threw something that landed near the car they were working on. The plaintiff picked up the item and approached the car and the occupants of the vehicle began striking him with a pool cue. Id. The plaintiff grabbed the pool cue and put his hand on the window ledge. Id. As he did so, a dog in the vehicle was released and bit his hand. Id. The plaintiff then sought to recover PIP benefits for the injuries caused by the dog bite. Id.

The Therrien court cited to this Court's decision in Novak and observed that this Court had "ruled that the phrase 'arising out of the ownership, maintenance, or use of a motor vehicle' in section 627.736(1), Florida Statutes (1983), requires a nexus, i.e. a substantial connection, between the use of the vehicle and the injury." Id. at 235. The court also cited to the explanation in Hernandez that "'it is not enough that an automobile be the physical situs of an injury or that the injury occur incidentally to the use of the automobile, but that there must be a causal connection or relation between the two for liability to exist.'" Id. The court then determined that the provocation for the

assault on the plaintiff was a long-standing feud between the plaintiff and the assailants and that the use of the vehicle was only incidental to the event. Id. at 236. In the instant case, the Petitioner was attacked because his assailants intended to commit a criminal act, and the fact that he was changing his tire at the time of the attack was at most, incidental, to the event.

In 1997, the Fourth District Court of Appeal again faced the issue raised in this case. In Trott v. Finlayson, 690 So. 2d 718, 719 (Fla. 4th DCA 1997), Robert Trott agreed to assist his friend Leslie Hurst to retrieve Ms. Hurst's son, Caleb, from her ex-husband's home. Mr. Trott waited in Ms. Hurst's car when Ms. Hurst went inside the home to speak to her ex-husband. Id. Mr. Trott entered the home when he heard yelling inside and he began fighting with the ex-husband. Id. Mr. Trott, Ms. Hurst and Caleb fled the home and as they entered Ms. Hurst's vehicle, Mr. Trott was shot in the leg by the ex-husband. Id. The gunfire continued and a window shattered resulting in injury to Caleb. Id. Thereafter, Mr. Trott brought a claim against his own insurance company seeking to recover Personal Injury Protection Benefits and Uninsured Motorist Benefits. Ms. Hurst brought a similar claim against her insurer, on behalf of Caleb. Id.

The ex-husband testified that he had no intention to gain possession of Ms. Hurst's vehicle and that he was trying to protect his home and his family when he shot at Mr. Trott. Id. The trial court granted final summary judgment in favor of both insurers. Id. Mr. Trott and Caleb appealed and the Fourth

District Court of Appeals affirmed the decision of the trial court. Id. at 720. With regards to the PIP claim, the Fourth District Court of Appeals found that the ex-husband's attempts to stop the vehicle did not equate with a desire to gain possession of the vehicle and therefore the vehicle was merely the situs of the injury. Id. at 719. The court further stated that "Trott's mere presence in Hurst's vehicle at the time of the shooting does not satisfy the nexus test." Id.

A review of the case law history cited above reveals that Florida has taken the course that most states have taken with regards to the interpretation of the phrase "arising out of" in the context of No Fault laws. Florida law, like most other states, has rejected a "territorial nexus" or "positional nexus" or "situs" analysis to determine whether an injury arose out of the ownership, maintenance, or use of a motor vehicle. Instead, Florida law requires that the ownership, maintenance or use of the motor vehicle have more than an incidental or "but for" causal relationship to the injury, but it does not have to reach to the level of "proximate cause."

In the instant case, based upon prior Florida law, the Fifth District Court of Appeal correctly determined that the Petitioner's injuries did not arise out of the ownership, maintenance, or use of a motor vehicle. The fact that the blow out of the tire caused Petitioner to be in the location where he was attacked is at most incidental to the fact that he was the victim of a crime.

B. The Decision of The Fifth District Court of Appeal is Also Supported by the Case Law of Other States.

This Court has not directly addressed the issue since 1985 with its decision in Hernandez. At that time, this Court cited to Reynolds and stated "[w]e do agree with the proposition reiterated in Reynolds that 'it is not enough that an automobile be the physical situs of an injury or that the injury occur incidentally to the use of an automobile, but that there must be a causal connection or relation between the two for liability to exist'. Hernandez, 473 So. 2d at 1243.

When faced with the task of interpreting this same phrase in their own No Fault laws, other states have looked to the purpose of No Fault coverage and have also required a causal nexus between the ownership, operation, maintenance and/or use of the motor vehicle nd the injuries sustained.

For example, the Hawaiian Supreme Court has determined that before No Fault benefits will be available, the claimant must establish more than a "minimal causal connection" between the injury and the use of the vehicle. AIG Hawaii Ins. v. Estate of Caraang, 851 P.2d 321, 330-31 (Haw. 1993). In State Farm Mut. Auto Ins. Co. v. Cage, 874 F. Supp. 272 (D. Hawaii 1994), the Federal District Court of Hawaii addressed the issue.

In Cage, the plaintiff had a violent confrontation with the insured driver of a pick-up truck. Id. at 274. The plaintiff was killed when he reached into the pick-up to strike at the driver and he was shot. Id. Since the plaintiff was uninsured, his estate sought No Fault benefits from the insurer of the pick-up

truck. Id. at 277. The court recognized that in order for the plaintiff to recover No Fault benefits, "his injury must have been caused by an accident resulting from the ownership, operation, maintenance or use of [the pick-up truck]" Id. The court then recognized that three factors must be met in order to prove more than a minimal causal connection and set forth the factors as follows:

> (1) the extent of causation between the [vehicle] and the death rendered the [vehicle] an "active accessory;"
> (2) [whethr] an act of independent significance occurred to break the causal link; and
> (3) the injury resulted from use of the [vehicle] for transportation purposes.

Id. See also, Continental Western Insurance Co. v. Klug, 415 N.W.2d 876 (Minn. 1987) (finding that a vehicle must be an "active accessory" to the injury which requires something less than proximate cause, but more than being the mere situs of the injury"). The Cage court then determined that the facts failed to satisfy any of the three factors and found as a matter of law that the plaintiff's death did not arise out of the use, operation, or maintenance of the motor vehicle and therefore, there was no entitlement to No Fault coverage.

An analysis of Georgia's law on the issue is set forth in Boykin v. State Farm Mutual Automobile Ins. Co., 393 S.E.2d 470 (Ga. App. 1990). In Boykin, the plaintiff had gone to a gas station and went into the convenience store to make some purchases. Id. at 471. When she came back to the car, she reached for the door handle and slipped on an oily substance and fell to the ground, injuring her hand an wrist. Id. The court

recognized that even if it could be said that the plaintiff was "entering" the vehicle at the time she fell, her injury did not arise out of the use, operation, or maintenance of the motor vehicle and ***at most, there was only a remote connection between the injury and the motor vehicle***. Id. at 471-72 [Emphasis Added].

In State Farm Mut. Auto Ins. Co. v. Rains, 715 S.W.2d 232 (Ky. 1986), the Kentucky Supreme Court explained its analysis of the phrase "arising out of" in the context of No Fault insurance. In Rains, the Kentucky Supreme Court recognized that one of the purposes of the Kentucky No Fault law was "[t]o provide prompt payment to victims of motor vehicle accidents without regard to whose negligence caused the accident . . . " and that the No Fault statute required the provision of No Fault benefits for "injuries arising out of the maintenance or use of a motor vehicle." Id. at 233 (citing to K.R.S. 304.39-010(2) and to K.R.S. 304.39-030(1) and 304.39-040(2)). The court recognized that "arising out of" implied a causal connection. Id. at 234. The court then found that there was not a sufficient causal connection in a case where the plaintiff went out into the parking lot and came upon a fight that was occurring on the hood of his car, he joined the fight, subdued his attacker, and then was struck on the back of the head with a baseball bat by an unknown assailant while he was entering his car. Id.

In each of these cases, the courts have recognized that there must be more than a "but for" or "proximate" causal relationship between the ownership, operation, maintenance and/or use of a

motor vehicle and the injuries alleged suffered in order for such injuries to have "arisen out of" the ownership, operation, maintenance and/or use of the motor vehicle. This Court's statements in Hernandez support the same analysis in Florida and in the instant case, the Petitioner's maintenance of use of the motor vehicle was, at most, incidental to the injuries he suffered in the criminal attack.

II. THE DISTRICT COURT DID NOT ERR IN DETERMINING THAT THE PETITIONER WAS NOT ENTITLED TO RECOVER PIP BENEFITS WHERE THERE WAS NO EVIDENCE THAT THE ASSAILANTS DESIRED EITHER POSSESSION OR USE OF HIS VEHICLE.

In its opinion, the Fifth District Court of Appeals found that the injuries suffered by the Petitioner in the instant case did not arise out of the ownership, maintenance, or use of his motor vehicle. In reaching its conclusion, it cited to Allstate Ins. Co. v. Furo, 588 So. 2d 61, 62 (Fla. 5th DCA 1991) for the authority that there must be a causal connection or relation between the automobile and the injury and the automobile cannot be merely the situs of an injury, or the injury occur incidentally to the use of the automobile. (Appendix L, p.2). The Court then stated that "there is nothing in the record to suggest that the assailant wanted anything other than the victim's money" and "[n]o effort was made to possess or use the automobile." (Appendix L, p.3).

The Petitioner finds error in the court's analysis of the facts and contends that his testimony that the passenger side door of the vehicle was open after the attack and that it had not been open prior to the attack, creates a question of fact as to whether the assailants sought the use or possession of the vehicle. Although the deposition of Karl Blish has been part of the record, the Petitioner has never argued this point during any other aspect of this case. However, Petitioner's argument is sorely lacking in that it is hardly likely that the assailants would have chosen the Petitioner's inoperable pick-up truck with a flat tire if they had sought the use or possession of a vehicle. Rather, as the Fifth

District Court of Appeals recognized, the evidence suggests only that the assailants sought to rob the Petitioner and take any money that he might have had with him that night.

CONCLUSION

In the instant case, the Petitioner claims that "but for" the fact that he got a flat tire, he would not have been at the location where he was attacked, and he would not have been injured. The Petitioner contends that this "but for" relationship between his maintenance and/or use of the motor vehicle and his injuries entitles him to recover PIP benefits. However, such an analysis is not supported by Florida law or by other states that have rejected the situs analysis.

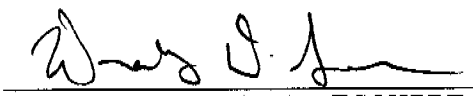
Florida law requires that there be a causal nexus between the ownership, maintenance, or use of a motor vehicle and the injury suffered before PIP benefits will be payable. Such a nexus requires something more than a "but for" or "incidental" relationship, but does not require that the ownership, maintenance, or use of the vehicle "proximately cause" the injury. In the instant case, any relationship between the Plaintiff's ownership, maintenance, or use of the pick-up truck and the injuries he suffered at the hands of the criminal assailants is tenuous or incidental at best and is insufficient to satisfy the causal nexus test.

Florida's analysis is also supported by several other states which have rejected a situs analysis in favor of requiring some causal nexus to effectuate the terms of No Fault laws utilizing the phrase "arising out of".

The District Court did not err in finding that there was nothing in the record to establish that the assailants desired

either the use or possession of the Petitioner's vehicle. It is clear from the record that the Petitioner's truck had suffered a tire blow out and had become inoperable. It would be greatly stretching inferences to suggest that the assailants intended to steal or possess the Petitioner's pick-up, when the truck was essentially inoperable when the assailants robbed the Petitioner.

Respectfully Submitted,



WENDY D. JENSEN, ESQUIRE
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail delivery to **MICHAEL L. REDA, ESQUIRE, Cianfroga, Telfer, Reda, Faherty, and Anderson, P.A.**, 815 S. Washington Ave., Titusville, Florida 32760, this 25th day of September, 1998.

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