OA 2-4-99

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO.: 92,984
5TH DCA CASE NO.: 97-3189-AP

KARL BLISH

Petitioner,

v.

ATLANTA CASUALTY COMPANY,

Respondent.

_____/

ON APPEAL FROM THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S INITIAL BRIEF

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STATUTES

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References to pages in the transcript of the deposition of Karl Blish, taken December 7, 1995, will be by the designation "KB" followed by the page number.

STATEMENT OF THE CASE AND OF THE FACTS

This is a case from the County Court in and for Brevard County, Florida, for the recovery of Personal Injury Protection (PIP) benefits under a policy of insurance issued by Respondent Atlanta Casualty to Petitioner Blish, for an injury arising out of the ownership, maintenance and use of a motor vehicle. Florida Statutes, 627.736(1), and the policy in question provide for PIP benefits, including medical expenses, incurred "as a result of bodily injury . . . arising out of the ownership, maintenance, or use of a motor vehicle . . . "

Petitioner Blish was forced to stop on the side of a dark road as a result of a blow out of his vehicle's tire. (KB- 47, 52). Petitioner Blish was stranded at this location solely as a result of the flat tire. He was in the process of immediately and physically changing the tire when he was attacked from behind by at least two unknown assailants. (KB- 48, 51). He did not see the assailants approach because he was hunched over and turning a wrench which was attached to the wheel. (KB- 52-54). The unknown assailants beat and robbed Petitioner Blish. (KB-53-55,64). At some time during the attack the front passenger door to his vehicle, which was closed before the attack began, was opened, but not by Blish. (KB- 58, 61). Petitioner Blish suffered a ruptured spleen and incurred medical expense as a result of the attack. (KB-71-73).

Petitioner Blish made a claim to Respondent Atlanta Casualty under the PIP portion of his policy. The claim was denied by Atlanta Casualty on the sole basis that Petitioner Blish was not occupying the vehicle at the time of the attack. (Exhibit C to the Complaint). This suit was filed.

The County Court, Brevard County, Florida, ruled that Atlanta Casualty was entitled to summary judgment on the issue of coverage, and that Blish was ineligible for benefits based on the aforementioned facts. The only pertinent evidence before the court on this issue was the deposition of Petitioner Blish.

The Circuit Court Appellate Division reversed the County Court and ruled that Blish was entitled to a partial summary judgment on the issue of liability, citing as authority the cases of Gov't Employees Ins. Co. v. Novak, 453 So. 2d 1116 (Fla. 1984), and State Farm Mutual Automobile Ins. Co. v. Barth, 579 So. 2d 154 (Fla. 5th DCA 1991). The Circuit Court decision states that "The record is clear Appellant established a sufficient nexus between the use of the car and the injuries suffered." (Circuit Court Appellate decision, page two). The court reversed and remanded the case.

Atlanta Casualty filed a Petition for Certiorari to the Fifth District Court of Appeal. The decision of the Fifth District quashed the opinion of the

Circuit Court, stating the instant case was controlled by Allstate Ins. Co. v. Furo, 588 So. 2d 61 (Fla. 5th DCA 1991). The court stated that to find a sufficient nexus between the use of a vehicle and a criminal attack, it must be found that the "assailant either desired possession (Novak) or use (Barth) of the victim's automobile" Atlanta Casualty Co. v. Blish, 707 So. 2d 1178, 1179 (Fla. 5th DCA 1998). The Fifth District's opinion was based on the conclusion that "In our case, there is nothing in the record to suggest that the assailant wanted anything other than the victim's money. No effort was made to possess or use the automobile." Id. at 1179. The decision of the Fifth District reinstated the judgment of the County Court denying Petitioner benefits under his PIP policy of insurance. A Motion for Rehearing by Blish was denied.

This Court accepted conflict jurisdiction pursuant to Rule 9.030, Florida Rules of Appellate Procedure.

SUMMARY OF ARGUMENT

The Fifth District Court of Appeals erred in two main respects when quashing the appellate decision of the Circuit Court and reinstating the decision of the County Court granting Respondent Atlanta Casualty's Motion for Summary Judgment.

FIRST, the Fifth District has placed an improperly restrictive requirement on persons seeking PIP benefits after being injured in a criminal attack while repairing (owning, maintaining or using) a motor vehicle in emergency circumstances. The Fifth District's exclusive requirement, that the assailant desired either use or possession of the vehicle, otherwise the vehicle is just considered the situs of the attack, is contrary to the Supreme Court statement that the terms extending benefits under this state's PIP provisions should be "construed liberally because their function is to extend coverage" and the automobile is not required to be the "instrumentality of the injury," nor must the conduct which causes the injury be "foreseeably identifiable with the normal use of the vehicle." Gov't Employees Ins. Co. v. Novak, 453 So. 2d 1116, 1119 (Fla. 1984). The Novak decision was not intended to be a limitation on rights or to foreclose the consideration of other fact patterns, as it has been interpreted by the

Fifth District.

The fact pattern in the instant case is different in one very important respect from all other criminal attack cases where PIP benefits were denied. The vehicle in the instant case was not merely the situs of the attack, it determined the situs by its failure (blow out). This is a nexus that does not appear in any of the other cases. This is not a case where the driver chose the situs to conduct repairs in his driveway, this is a case where the motor vehicle's inoperability stranded a driver making him subject to the attack. The repair was immediate and ongoing maintenance to get moving again from a place where the driver did not intend to stop. But for the breakdown, Petitioner Blish would not have been attacked. This clear nexus was never broken before the attack.

The confusion regarding PIP entitlement when criminally attacked is highlighted within the Fifth District itself. Judge Sharp concurred in the instant case (denying benefits) and then issued a dissenting opinion (in favor of benefits) under similar circumstances, in Allstate Ins. Co. v. Jun, 712 So. 2d 415 (Fla. 5th DCA 1998), wherein she stated that "This area of the law is hopelessly confused, contradictory and badly in need of clarification." Id. at 418.

SECOND, this case should be reversed because even if the Supreme Court did intend to exclude entitlement to PIP benefits in cases involving an

assailant, except for the exclusive two circumstances where the assailant desired either use or possession of the vehicle, this was not a case where the strict standard for Summary Judgment was met. There was evidence which a fact finder could conclude indicated a desire on the part of these assailants to use or possess the vehicle, even if only during the time which they opened the passenger door.

The District Court incorrectly held that, "there is nothing in the record to suggest that the assailant wanted anything other than the victim's money," and that, "[n]o effort was made to possess or use the automobile." Blish, 707 So. 2d at 1179. To the contrary, there was evidence that the front passenger side door of the unoccupied vehicle was closed prior to the attack, but was opened after the Petitioner Blish was rendered incapacitated.

The undisputed facts of this case indicate that Petitioner, who was insured for PIP benefits, received bodily injuries during a criminal attack while stranded as a result of a commonly occurring motor vehicle breakdown and while in the immediate process of making emergency repairs on his motor vehicle. But for the breakdown, Petitioner would not have been attacked. Petitioner's bodily injuries arose solely "out of the ownership, maintenance, or use" of his vehicle. Therefore, pursuant to Florida Statute 627.736 (1), Petitioner is entitled to coverage under his PIP policy of insurance.

ARGUMENT

ISSUE I: ARE THE RESULTANT BODILY INJURIES OF A PERSON, INSURED FOR PIP BENEFITS, WHO IS CRIMINALLY ATTACKED WHILE STRANDED AS A RESULT OF A VEHICLE BREAKDOWN AND IN THE IMMEDIATE PROCESS OF MAKING EMERGENCY REPAIRS ON HIS VEHICLE, BODILY INJURIES ARISING OUT OF THE OWNERSHIP, MAINTENANCE OR USE OF THAT VEHICLE PURSUANT TO FLORIDA STATUTE 627.736?

Answer: Yes

The initial denial of benefits by Respondent Atlanta Casualty was on the sole basis that the Petitioner Blish was not "occupying" the vehicle. (Exhibit C attached to the Complaint). Clearly Petitioner Blish satisfies that requirement. Industrial Fire and Casualty Ins. Co. v. Collier, 334 So. 2d 148 (Fla. 3d DCA 1976) (person who was injured while in the process of changing a flat tire was 'occupying' the vehicle at the time of the injury). See also, Laninfa v. Prudential Property and Casualty Ins., 656 So. 2d 965 (Fla. 5th DCA 1995) (mechanic pushing motorcycle after failed test drive was "occupying" the motorcycle); Dunlap v. U.S. Auto Ass'n, 470 So. 2d 98 (Fla. 1st DCA 1985) (mere physical contact can satisfy "occupancy" requirement); Asnip v. Hartford Accident &

Indemnity Co., 446 So. 2d 1121 (Fla. 3d DCA 1984) ("when contact exists, the cases invariably hold that that fact is alone sufficient to render the claimant an occupant") citing, Motor Vehicle Accident Indemnification Corp. v. Oppedisano, 41 Misc. 2d 1029, 246 N.Y.S.2d 879 (N.Y.Sup. 1964) (person pushing vehicle off the road held to be an occupant); Lumbermen's Mut. Casualty Co. v. Norris, 15 Ill.App.3d 95, 303 N.E.2d 505 (1973) (person standing at the side of the car holding onto the side view mirror held to be an occupant); Manning v. Summit Home Ins. Co., 128 Ariz. 79, 82, 623 P.2d 1235, 1238 (App.Ct. 1980); Lokos v. New Amsterdam Casualty Co., 197 Misc. 40, 93 N.Y.S.2d 825 (N.Y.Mun.Ct. 1949), aff'd, 197 Misc. 43, 96 N.Y.S.2d 153 (N.Y.Sup.Ct. 1950) (person standing behind vehicle held to be "occupying" it).

The Fifth District ruled that the instant case was controlled by Allstate Ins. Co. v. Furo, 588 So. 2d 61 (Fla. 5th DCA 1991), and denied PIP benefits to Petitioner Blish under the policy of insurance and the statutes, on the basis that there was not a sufficient nexus between the motor vehicle and the criminal attack. The Fifth District was of the opinion that when a person is criminally attacked, PIP benefits are available only in situations where the assailant desired either possession or use of the vehicle. The District Court placed a restrictive interpretation on the Supreme Court holding in Gov't Employees Ins.

Co. v. Novak 453 So. 2d 1116 (Fla. 1984), and its subsequent ruling in Hernandez v. Protective Casualty Ins. Co., 473 So. 2d 1241 (Fla. 1985).

Both Novak, supra, and Hernandez, supra, concerned claims of personal injury protection benefits in situations where the insured was injured in events associated with their use of their automobiles. Novak, concerned a driver shot in the face by a pedestrian seeking a ride, and Hernandez, concerned a driver injured by police officers in the course of arresting the driver after a traffic stop. In both cases, this court held that the injuries resulted from the use or ownership of the vehicles, thereby allowing the insured to recover personal injury protection benefits.

In Novak, the court stated the following:

> It must be remembered that we are not looking for a proximate causal relationship in the resolution of this case; rather the inquiry should be whether the attack upon the decedent arose out of, or flowed from, the use of the vehicle.
>
> 53 So. 2d at 1117.

> It is well settled that "arising out of " 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.
>
> 453 So. 2d at 1119.

It is clear that in the present case, as the district court

> correctly concluded, there was a highly substantial connection between 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 deranged Endicott to approach and attack the deceased.
>
> 453 So. 2d at 1119.

> Accordingly, we hold that the personal injury protection benefits are applicable to the accident that occurred in this case. The district court was correct in saying, "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."
>
> 453 So. 2d 1119.

The substitution of the facts from the instant case into the Novak decision and the application of the Novak reasoning, makes the Novak result consistent with a finding of PIP coverage in the instant case. In the instant case, as in Novak , the attack only occurred because of the vehicle. The Blish vehicle determined the situs, not Blish. The vehicle became inoperable, placing Blish in a place he did not intend to be. The breakdown or maintenance of the vehicle and the necessary repair (changing of the tire) is what caused Blish to be in the position to be attacked. It was a direct result of the vehicle's action that caused Blish to be there and be vulnerable to attack. It was a direct result of the ongoing repair that he did not observe the impending attack. The vehicle in this case cannot

be said to be incidental to the attack, because but for the breakdown and repair, there would be no attack.

In Hernandez, supra, a case where PIP benefits were awarded to a driver injured while being removed from the vehicle by police after a chase, the court stated:

> The automobile here was, however, more than just the physical situs of petitioner's injury. Petitioner was using the vehicle for the purpose of transportation, which use was interrupted by his apprehension of police officers. 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 a 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 PIP benefits.
>
> 473 So. 2d at 1243 (emphasis added).

In the instant case, Blish's transportation was likewise "interrupted" due to the vehicle's operation, or lack of ability to operate. That interruption of the use of the vehicle, i.e., the accidental, unintended, fortuitous action of the vehicle becoming inoperable, and the focus on fixing that problem, is what allowed the attack to occur. The manner of the use, i.e., the tire blow-out, should be the focus

of the nexus as in Hernandez, supra, rather than the attack, as found below. As stated in the concurring opinion in the Circuit Court Appellate Division below, in analyzing the applicability of the Hernandez, supra, decision:

> In the instant case, it was the Appellant's use of his motor vehicle which cause [sic] him to have a flat tire and thereby become stranded at the location where he became the victim of a criminal act. In Hernandez , the Florida Supreme Court found a sufficient nexus between the plaintiff s apparently illegal driving conduct and the alleged criminal attack upon him to allow P.I.P. coverage. The Appellant should not receive lesser protection where his predicament resulted from the legal (but unlucky) driving act of suffering a flat tire.

We can, again, substitute our facts into the Hernandez decision and the application of the Hernandez reasoning, makes the Hernandez result consistent with a finding of PIP coverage in the instant case. As indicated in the concurring opinion cited above, it would be an absurd result if a person would be entitled to PIP benefits when their own conduct led them to being stopped and injured while being removed from the vehicle, but the accidental happening of a flat tire which is related directly to the maintenance of the vehicle is not considered a sufficient nexus to obtain the same benefits.

In the instant case, the District Court stated that, "no case has yet 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 . . . or use . . . of the victim's automobile." Blish, 707 So. 2d at 1179. However, the court cites to Hernandez, supra, a case in which the required nexus between plaintiff's injury and use of his automobile was established based upon the manner in which the driver used his automobile. Clearly, the police were not intending to use or possess the automobile as the District Court's interpretation would require.

Inextricably intertwined with the confusion amongst the district courts in determining PIP coverage when a person is attacked by assailants, is the role given to the subjective intentions or motivations of the assailants. As stated in Judge Cowart's dissenting opinion in State Farm Automobile Ins. Co. v. Barth, 579 So. 2d 154 (Fla. 5th DCA 1991), "It is a poor rule of law that answers this question as to insurance coverage on the basis of speculation as to the assailant's intentions and motives." Id. at 156.

Judge Sharp, one of the judges on the Fifth District panel which decided against coverage for Blish in the instant case, wrote in favor of coverage in a recent dissenting opinion in Allstate Ins. Co. v. Jun, 712 So. 2d 415 (Fla. 5th DCA 1991),

> This area of the law is hopelessly confused, contradictory and badly in need of clarification. I defy anyone to logically explain why there was coverage in

the Novak case, but not in the Reynolds case.

Id. at 418

Judge Sharp questions what real difference it makes that the assailant in that case wanted to take possession of the victim's car, and answers by stating:

> The answer, I realize, is the now too oft repeated and , I think, too narrow an interpretation of Novak- that for there to be sufficient nexus between use of the insured vehicle and the injuries received from a criminal assault, the assailant must desire possession of or use of the victim's car. Novak found that a sufficient nexus to support coverage arose out of those facts. Indeed, Novak stressed that coverage should be liberally interpreted in such cases and causation in the sense of proximate cause need not be established.
>
> Id. at 418

She concludes, "More guidance on this question is needed either from our Supreme Court or the Legislature." Id. at 419.

Applying Judge Sharp's recent analysis in Jun, supra, to the instant case would result in a totally different holding than the opinion rendered by the Fifth District. Her interpretation in Jun, as quoted above, is the exact analysis that was rejected in the opinion in which she concurred, in the instant case.

ISSUE II: DID THE DISTRICT COURT ERR WHEN GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT (ON THE BASIS THAT THERE WAS NO EVIDENCE THAT THE ASSAILANTS SOUGHT TO USE OR POSSESS THE VEHICLE) WHEN THERE WAS EVIDENCE THAT THE DOOR OF THE UNOCCUPIED VEHICLE WAS CLOSED BEFORE THE ATTACK BUT WAS OPENED DURING THE ATTACK WHILE PETITIONER WAS INCAPACITATED?

Answer: Yes

In Florida, the purpose of a summary judgment is to avoid the expense and delay of trial when no dispute exists concerning the material facts. Nat'l Airlines Inc. v. Florida Equip. Co. of Miami, 71 So. 2d 741 (Fla. 1954). The question for determination on a motion for summary judgment is the existence or nonexistence of a material factual issue. Jones v. Stoutenburgh, 91 So. 2d 299 (Fla. 1956). The two requisites for granting a summary judgement are that there must be no genuine issue of material fact and that one of the parties must be entitled to a judgment as a matter of law on the undisputed facts. Carpineta v. Shields, 70 So. 2d 573 (Fla. 1954).

In the instant case, the District Court's error is clearly evidenced by its improper conclusion that, "there is nothing in the record to suggest that the

assailant wanted anything other than the victim's money" which was in his wallet in his pocket and that, "[n]o effort was made to possess or use the automobile." Blish, 707 So. 2d at 1179. On the contrary, because it is undisputed that the front passenger side door of Petitioner's vehicle was closed prior to the attack, and was opened only after Petitioner was rendered incapacitated, it is clear that the assailants were interested in the use or possession of Petitioner's vehicle, even if just for those few moments. The intended duration of the assailants' use and/or possession of Petitioner's vehicle is unimportant. The assailants had actual physical control of the vehicle. See, Mitchell v. State, 538 So. 2d 106 (Fla. 4th DCA 1989) (where unconscious driver was deemed to have actual physical control over vehicle even though engine was off and defendant driver was sleeping or passed out behind the wheel, when keys were in ignition). This evidence raises a fact question regarding the subjective intent of the assailants as required by the Fifth District for the required nexus between Petitoner's injuries and his vehicle and thus summary judgment was improper.

CONCLUSION

The unique situation that the vehicle itself caused Petitioner Blish to be stranded, and that he was in the immediate and physical process of dealing with the vehicle's malfunction, fits precisely into the language of Novak and the other cited cases for entitlement to PIP benefits, under the liberal construction of the nexus between the vehicle and the injury.

Petitioner's vehicle was more than the mere situs of his attack and subsequent injuries. The Petitioner was where he was only because of the blow out of the vehicle's tire, he did not see the attackers because he was bending over in the process of the repair of the vehicle, the assailants would not have had access to the Petitioner except for the blow out, and the Petitioner's car door was opened after Petitioner was attacked. The injury flowed from the vehicle's inoperability, the vehicle was an integral part of the attack, and nothing occurred to break that nexus. Therefore, Petitioner is entitled to PIP benefits under his policy of insurance and the laws of the State of Florida.

WHEREFORE, the Petitioner prays that this Court quash and reverse the decision of the district court and direct the trial court to enter an Order granting Petitioner's Motion for Summary Judgment, together with attorney's fees and costs, and any other relief which this Court deems just and proper.

Respectfully submitted,

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STATEMENT OF TYPE SIZE AND STYLE

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