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'S AMENDED ANSWER BRIEF ON JURISDICTION

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Summary of Argument

The Petitioner, KARL BLISH, has sought to invoke the discretionary jurisdiction of this Court under Fla. R. App. P. 9.030(a)(2)(A)(iv). The authority for this rule is found in the Florida Constitution, which specifically provides that this Court may review "any decision of a district court of appeal . .. that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." Art. V, §3(b)(3), Fla. Const. The Petitioner alleges that both the underlying decision of the Fifth District Court of Appeals and the decision of the court in Allstate Ins. Co. v. Furo, 588 So. 2d 61 (Fla. 5th DCA 1991) conflict with decisions of this Court in Government Employees Ins. Co. v. Novak, 453 So. 2d 1116 (Fla. 1984) and Hernandez v. Protective Casualty Ins. Co., 473 So. 2d 1241 (Fla. 1985). However, because the facts of the instant case and those in Furo are readily distinguishable from the facts in both Hernandez and Novak, the decisions cannot be said to expressly and directly conflict with one another, and this Court should decline to accept jurisdiction.

Statement of Relevant Facts and Procedural History

In the instant case, the record shows that the Petitioner left work at about 5:00P.M. on the evening of January 6, 1995, and on his way home, he stopped off for a couple of beers at a co-worker's home. Later that evening, he allegedly experienced a blowout and stopped to change a tire on his truck. While he was changing the damaged tire, he was attacked by unknown assailants who kicked and punched him repeatedly and took the "eighty or a hundred bucks" he

was carrying in his pocket. The assailants then fled and Petitioner recovered his glasses and his empty wallet, finished changing the tire, and went home. Petitioner never reported the incident to the police. A few days later, Petitioner went to the hospital and was operated on for a ruptured spleen. Petitioner now claims an entitlement to PIP benefits from ATLANTA CASUALTY for medical expenses.

ATLANTA CASUALTY took the deposition of Petitioner and then filed a Motion for Summary Judgment in the County Court arguing that Petitioner could not recover PIP benefits under the policy issued by ATLANTA CASUALTY and under the Laws of Florida, because his alleged injuries did not "arise out of the ownership, maintenance, or use of a motor vehicle," nor did they occur "while occupying a motor vehicle" or as a result of contact with a motor vehicle. See, §§ 627.736(1) & (4)(d)(1) Fla. Stat. (1993), and, Atlanta Casualty Company Policy Form F-01, Personal Injury Protection Coverage - Florida, Section I. Petitioner filed a cross-motion for summary judgment. The Honorable Peter Haddad took the motions under advisement and later issued an opinion granting ATLANTA CASUALTY's Motion for Summary Judgment.

The Petitioner thereafter appealed to the Circuit Court of Eighteenth Judicial Circuit. The Circuit Court, sitting in its appellate capacity issued an opinion reversing the decision of Judge Haddad and ordering that partial summary judgment be entered on behalf of the Petitioner on the issue of liability.

ATLANTA CASUALTY then filed a Petition for Writ of Certiorari with the Fifth District Court of Appeal. The Petition was granted and the Fifth District rendered an opinion finding that the Petitioner was not entitled to PIP benefits. In its opinion, the Fifth District determined that Allstate Ins. Co. v. Furo, 588 So. 2d 61 (Fla. 5th DCA 1991) was controlling.

Argument

The Petitioner now contends that both the underlying decision of the Fifth District Court of Appeals and the decision of the court in Furo conflict with the decisions of this court in Novak and Hernandez.

In 1981, the Fifth District Court of Appeals issued an opinion in the case of Reynolds v. Allstate Ins. Co., 400 So. 2d 496 (Fla. 5th DCA 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 Appeals cited Stonewall Ins. Co. v. Wolfe, 372 So. 2d 1147, 1148 (Fla. 4th DCA 1979), 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." Reynolds, 400 So. 2d at 497. The Reynolds court 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.

A few years later, in 1984, this Court rendered its opinion in Government Employees Ins. Co. v. Novak, 453 So. 2d 1116 (Fla. 1984). In Novak, the plaintiff was about to drive away from her home when a stranger approached her vehicle. Id. at 1117. The stranger asked her for a ride and when she refused, he shot her in the face, dragged her out of the vehicle, and drove away in her car. Id. The plaintiff died as a result of the gunshot and her estate sought to recover PIP benefits from her insurer. Id. This Court acknowledged the requirement that there be some nexus between the use, operation, or maintenance of the motor vehicle and the injury which was suffered and then 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.**" [Emphasis Added] Id. at 1119. See also, State Farm Mut. Auto Ins. Co. v. Barth, 579 So. 2d 154, 156 (Fla. 5th DCA 1991) (finding a sufficient nexus where the plaintiff was beaten when an unknown man entered her car and said, "Drive, bitch," and she refused to drive).

In reaching its decision in Novak, this Court cited to and distinguished the decision in Reynolds. Specifically, this Court recognized that the facts in Reynolds were insufficient to

demonstrate a nexus between the use of the car and the injuries to the Plaintiff. Novak, 453 So. 2d at 1119.

In the year following its decision in Novak, 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 resulted in a police 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. at 1242-1243 ("**It was the manner of petitioner's use of his vehicle** which prompted the actions causing his injury" [Emphasis added]). 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, the Florida Supreme Court determined that there was a sufficient nexus between the plaintiff's use of the vehicle and the attack by the police officers at the traffic stop. Id. at 1243. In finding such a nexus, the court distinguished the case from Reynolds and other "analogous assault cases" in which the automobile "was only **incidental** to the assault and the driver's resultant injury. . ." [Emphasis added] whereas in Hernandez, the attack by the police officers was provoked by the plaintiff's operation of the motor vehicle. Id. at 1243.

Several years later, the Fifth District Court of Appeals issued its opinion in 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. Id. The Fifth District Court of Appeals cited Reynolds as the controlling case, because in Reynolds as in Furo, "there was no indication that the assailant **desired either the use or possession of the vehicle.**" [Emphasis added] Id. The Fifth District explained the rationale set forth in 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 the instant case, the Fifth District Court of Appeals determined that the Petitioner was not entitled to PIP benefits under the policy issued by ATLANTA CASUALTY for the injuries received as a result of the beating by his assailants because the injuries did not arise out of the maintenance, operation or use of his motor vehicle. In reaching that conclusion, the Fifth District Court of Appeals distinguished Hernandez and cited to its own

opinion in Allstate Ins. Co. v. Furo, 588 So. 2d 61 (Fla. 5th DCA 1991).

Although Furo relied upon Reynolds, which was cited to and distinguished in both Novak and Hernandez, the Petitioner still contends that both Furo and the underlying decision of the Fifth District Court of Appeals (because it cites Furo as controlling) conflict with the opinions of this Court rendered in Novak and Hernandez. However, as in Reynolds, the facts of both Furo and the instant case are distinguishable from the facts in Novak and Hernandez.

In the instant case, the attack on the Petitioner was **not** provoked by his use, operation, or maintenance of the motor vehicle and therefore, there was not any nexus or causal connection between the use, operation, or maintenance of the Petitioner's motor vehicle and the alleged criminal attack on the side of the road. Rather, it appears that the attack was provoked by the attackers' belief that the Petitioner might have money in his wallet or simply by the "mean and dangerous nature" of his assailants. Reynolds v. Allstate Ins. Co., 400 So. 2d 496 (Fla. 5th DCA 1981).

Furthermore, in Hernandez and in Novak, it can be said that use, operation or maintenance of a motor vehicle was integrally related to the injuries suffered by the Plaintiff. The same cannot be said in the instant case or in Reynolds or Furo. In the instant case, as in the cases cited above, the Petitioner's vehicle provided merely the situs of the alleged injury. The fact that the Petitioner arrived on the scene via the automobile does not create

a sufficient nexus between the assault and his alleged injuries to give rise to PIP coverage. The attackers may have intended to injure the Petitioner and to rob him, but the attackers clearly were not seeking to obtain a ride in (Barth), or possession of (Novak) the Petitioner's truck, nor were they attacking him because they were provoked by his operation of the vehicle prior to the stop (Hernandez).

The Petitioner could have been a victim of a robbery and beating in any number of situations. For example, the Petitioner could have been robbed and beaten when he got out of his truck to walk into the grocery store where he bought the beer earlier in the evening, or he could have been robbed and beaten in the parking lot of the grocery store as he was putting the beer into his truck. In both of these situations, the Plaintiff arrived at the situs of the criminal attack through the use of his motor vehicle. However, neither of these situations demonstrate a nexus between the Petitioner's ownership, use, or maintenance of a motor vehicle, and the injuries suffered at the hands of his criminal attackers. The same is true under the facts of the instant case. The facts in the instant case, like the facts in both Reynolds and Furo, are distinguishable from those of both Novak and Hernandez. See also, Trott v. Finlayson, 690 So. 2d 718 (Fla. 4th DCA 1997) (finding no entitlement to PIP benefits when plaintiff was injured as a result of gunshots fired at his car by his friend's ex-husband while he was assisting his friend retrieve her child from the ex-husband's home); Doyle v. State Farm Mut. Auto Ins. Co., 464 So. 2d 1277

(Fla. 3d DCA 1985) (finding no entitlement to PIP benefits when the plaintiff was robbed and shot while exiting his vehicle in his driveway); Allstate v. Famigletti, 459 So. 2d 1149 (Fla. 4th DCA 1984) (finding no entitlement to PIP benefits where the plaintiffs were shot in an ambush by a neighbor on their way to work one morning); and Stonewall Ins. Co. v. Wolfe, 372 So. 2d 1147 (Fla. 4th DCA 1979) (finding no entitlement to PIP benefits when the plaintiff was shot while riding on the back of a vehicle, when another boy riding on the back of the vehicle fell off and accidentally discharged a shotgun in his direction).

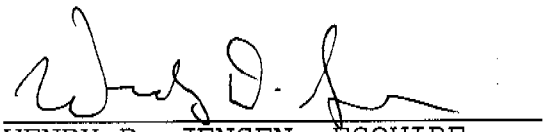
Conclusion

This Court has repeatedly recognized that there must be some causal nexus between the ownership, maintenance, or use of a motor vehicle and the injuries suffered, before a claimant will be entitled to recover PIP benefits under an automobile insurance policy. In Novak, this Court found that a sufficient nexus existed where the plaintiff motorist was shot in the face by a deranged attacker **seeking possession** of her vehicle. In Hernandez, this Court found that a sufficient nexus existed where the plaintiff motorist was injured by police officers during a traffic stop following a police chase **prompted by the operation** of the vehicle by the plaintiff. In both Novak and Hernandez, this Court distinguished the facts in Reynolds recognizing that the facts in Reynolds did not demonstrate a sufficient nexus where the plaintiff was attacked by an unknown assailant hiding in his back seat and eventually ejected from his vehicle.

In the underlying case, the Fifth District Court of Appeal relied upon its previous decision in Furo which found that a sufficient nexus did not exist where the plaintiff was injured while operating his vehicle, by gunshots fired at the vehicle by his daughter's jealous boyfriend. The court in Furo had relied upon the decision in Reynolds and distinguished the facts from the facts in both Novak and Hernandez. The facts of the instant case, as well as the facts in Furo are more readily distinguishable from the facts in Novak and Hernandez than even the facts in Reynolds. Therefore, it cannot be said that the underlying decision of the Fifth District Court of Appeals or the decision in Furo "expressly and direcly conflict[] with a decision of another district court of appeal or of the supreme court on the same question of law" as required by the Florida Constitution, in order for this Court to exercise discretionary jurisdiction over this matter.

WHEREFORE, the Respondent, ATLANTA CASUALTY COMPANY, respectfully requests that this Honorable Court decline to accept jurisdiction to review the Fifth District Court of Appeal's decision in the instant case.

Respectfully Submitted,



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Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by facsimile and/or regular U.S. mail delivery to **Michael L. Reda, Esquire, CIANFROGNA, TELFER, REDA, FAHERTY & ANDERSON, P.A., 815 S. Washington Avenue, Titusville, Florida 32780** this 1st day of June, 1998.

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