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IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 92,984

LOWER COURT: FIFTH DISTRICT COURT OF APPEAL
CASE NO: 97-3189

KARL BLISH,
Petitioner,

v.

ATLANTA CASUALTY COMPANY,
Respondent.

IN RE: PETITIONER'S REPLY BRIEF

PETITIONER'S REPLY BRIEF

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TABLE OF CITATIONS, STATUTES, AND OTHER AUTHORITIES

STATUTES

TRANSCRIPT REFERENCES

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.

PETITIONER'S ARGUMENT IN RESPONSE AND REBUTTAL TO ANSWER BRIEF

Issue 1: BODILY INJURIES TO A PERSON WHO IS CRIMINALLY ATTACKED, WHILE STRANDED AS A RESULT OF A VEHICLE BREAKDOWN AND WHILE IN THE IMMEDIATE PROCESS OF MAKING EMERGENCY REPAIRS ON HIS VEHICLE, ARE BODILY INJURIES ARISING OUT OF THE OWNERSHIP, MAINTENANCE OR USE OF THAT VEHICLE, PURSUANT TO FLORIDA STATUTE 627.736.

Much of Respondent, ATLANTA CASUALTY COMPANY's, Answer Brief focuses on various cases from Florida and other states, which analyze what type of nexus is required between a criminal assault and a vehicle, before PIP benefits are applicable. While the analysis is an interesting educational exercise, the Florida Supreme Court has already established a general rule on this issue in Government Employees Ins. Co. v. Novak, 453 So.2d 1116 (Fla. 1984) and Hernandez v. Protective Cas. Ins. Co., 473 So.2d 1242 (Fla. 1985).

Petitioner does not suggest, as stated in Respondent's Answer Brief, that a "but for" test is determinative. To the contrary, the "but for" test is merely a part of the analysis to determine "whether the attack arose out of, or flowed from, the use of the vehicle". Novak, supra at 1117. The "but for" test is a part of the definition

of "arising out of" which has a much broader meaning than "proximately caused by". Novak, supra, at 1119 .

Petitioner concedes that the vehicle must be more than the mere situs for PIP benefits to apply. It is clear from the cases cited in the Respondent's Answer Brief that the nexus is a fact-sensitive issue. While Respondent suggests factual circumstances where the person repairing a vehicle is stung by a bee or assaulted at a repair shop during a robbery, these facts are not before the court in this appeal.

The issue in the instant appeal is whether a person interrupted in their travel by an unexpected emergency breakdown of their vehicle, in a place they would otherwise not be, and who is assaulted while in the immediate uninterrupted process of such a repair to get moving again, has sustained an injury which "arises out of" the maintenance or use of that vehicle under the liberal interpretation of that phrase as announced by this Court.

The Fifth District Court Of Appeals has taken a very narrow interpretation from Novak and has used it to change what is supposed to be a liberal construction to a "checklist" construction. Under the Fifth District Court of Appeals' checklist, we need only look to see whether the assailant desired use or desired possession of the vehicle. If neither one of these items is checked off, then we don't consider the facts beyond that point. It is submitted that the Supreme

Court did not intend for such a narrow construction. Judge Sharp of the Fifth District Court Of Appeals, after ruling against benefits in the instant case, acknowledged in Allstate Ins. Co. v. Jun, 712 So. 2d 415 (Fla. 5th DCA 1998), that the exclusive requirement of a desire to use or possess the victim's car was too narrow an interpretation of Novak. Jun at 418.

As the Answer Brief of the Respondent concludes, after citing cases from both Florida and other states, the connection between the injury and the vehicle is a "causal" continuum between "but for" and "proximate causation". Petitioner agrees the test of "but for" is a starting point and the facts in the instant case show we are at least past that point on the continuum. Under Respondent's argument, that the connection must be between "but for" and "proximate causation", the benefits should be due. Respondent's Answer Brief makes no argument as to where the causal connection is broken as is required by the pertinent case law.

Respondent argues that the Petitioner "could just as easily have been beaten and robbed by the same assailants if he had been walking along the shoulder of the road" (page 9 of Respondent's Brief). The point is and the evidence is that Petitioner would not have been walking along the shoulder of that road at night.

This is not a case where Petitioner Blish drove his vehicle to a certain place

and was coincidentally assaulted while there. If the Petitioner had pulled over to the side of the road to take a picture of a sunset and was attacked, then the vehicle might be considered the mere situs. In the instant case, however, stopping on the side of the road was exactly the opposite of what the Petitioner intended to do. Instead the location and timing of the stop were determined by the vehicle's action. This is a distinction which does not exist in any of the situs cases denying coverage.

The sudden breakdown, the fact the Petitioner did not intend to stop at that location, the emergency nature of the repair, and the attention of the Petitioner on the repair at the time he was attacked are all factors to be considered in making this factual determination. Being stranded on the side of a dark road at night, was a situation to avoid just as surely as a motorist would want to avoid a drainage ditch or a deep washed-out hole in the road. Novak, supra, at 1118.

ISSUE 2: THE DISTRICT COURT ERRED 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.

The Respondent's Answer Brief states that it is "hardly likely that the assailants would have chosen the Petitioner's inoperable pickup truck with a flat tire if they had sought the use or possession of a vehicle." (Page 25, Respondent's Answer Brief) If it is even slightly likely, then summary judgment was improper as all inferences must be resolved in favor of the non-movant. Moore v. Morris, 475 So. 2d 666 (Fla. 1985)(moving party must show conclusively the absence of any genuine issue and the court must draw every possible inference in favor of party against whom summary judgment is sought); Harvey v. Alfonso, 650 So. 2d 644 (Fla. 2d DCA 1995)(moving party has the burden of establishing "irrefutably" that the non-moving party cannot prevail; even the "slightest doubt"; "possibility" of any issue).

CONCLUSION

There is no question that the attack in this case arose out of, or flowed from, the use of the vehicle and its unintended, surprise, emergency breakdown. Nothing occurred which broke the nexus between the vehicle's action of having the blowout and the attack. Petitioner is entitled to PIP benefits, attorney's fees, and costs.

Respectfully submitted,

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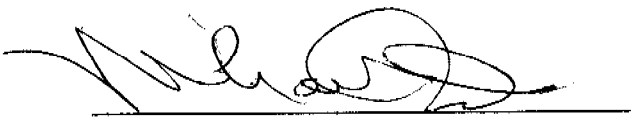

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