

IN THE SUPREME COURT OF
THE STATE OF FLORIDA

FILED

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MARVENE GLEAVES and
JAMES GLEAVES,

Petitioners,

vs.

WESTERN WORLD INSURANCE
COMPANY,

Respondent.

ANSWER JURISDICTIONAL BRIEF

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STATEMENT OF THE CASE AND FACTS

The respondent accepts the petitioners' statement of the case and facts with the following additions and/or clarifications:

The respondent, Western World Insurance Company, had in effect at the time of the alleged incident, an ambulance drivers and attendants malpractice insurance policy covering Herndon Ambulance Company (R. 30). The malpractice policy specifically excluded liability covered by a standard automobile liability policy. The petitioners filed a four count complaint against Herndon Ambulance Company, United States Fidelity & Guaranty Company, Western World Insurance Company and Hartford Accident and Indemnity Company alleging one count of general negligence against Herndon Ambulance Company, a second count against Herndon Ambulance Company and Hartford Accident and Indemnity Company for negligence arising out of the use of the automobile, a third count against Herndon Ambulance Company for malpractice with Western World Insurance Company as the malpractice carrier, and a claim for loss of consortium by James Gleaves (R. 637-644). The automobile liability policy carrier settled with the petitioners prior to trial. The cause proceeded to trial with Herndon Ambulance Company, the driver and attendant, and Western World Insurance Company as defendants.

On the date of the alleged incident, Herndon Ambulance Company was dispatched to the University of Central Florida to pick up a psychiatric patient, Ollie Mae (R. 287). Mrs. Gleaves requested that she accompany Ollie Mae, the patient, to Florida Hospital (R. 483).

Western World Insurance Company moved for a directed verdict at the close of the plaintiffs' case on the ground that the evidence did not establish a professional-patient relationship (R. 471). The motion was denied (R. 473). At the close of all the evidence, the plaintiffs renewed their motion for a directed verdict on the issue of insurance coverage against Western World Insurance Company which motion was joined in by Herndon Ambulance Company (R. 529). The trial court granted the motion on the basis that the facts established that if Herndon was liable, it was for the negligence of their employees as medical personnel (R. 532).

Western World filed a motion in arrest of judgment (R. 1112) and motion for new trial and a motion for judgment in accordance with motion for directed verdict (R. 1110-1111) which were denied (R. 1145, 1143).

The appellate court, however, reversed the trial court by holding that, even assuming the basic coverage language of the malpractice policy encompassed Gleaves, the automobile liability exclusion thereafter in the policy clearly applied. Relying on the well-established law in Florida, the appellate court held that the injury to Gleaves arose from the use of the motor vehicle as an ambulance. Therefore, the appellate court did not feel it necessary to reach the issue that since malpractice liability is predicated upon privity, and there was no privity (i.e., client-patient relationship) between Herndon Ambulance and Gleaves, Western World's policy did not provide coverage for Gleaves.

PRELIMINARY STATEMENT

The petitioner was the appellee and the respondent the appellant in the Fifth District Court of Appeal. In the brief, the parties will be referred to as the "petitioner" and the "respondent".

The following symbols will be used:

"A" Appendix containing the lower court's opinion

"R" Record on Appeal

SUMMARY OF THE ARGUMENT

This Honorable Court does not have jurisdiction over the instant case as Florida Rule of Appellate Procedure 9.031(a)(2)(A)(iv) requires an "express as well as a direct" conflict as a prerequisite to Supreme Court review. Art. V, sec. 3(b), Fla. Const. (1980). Rather than the instant opinion being in conflict with a decision of another district court of appeal or of the Supreme Court on the same question of law, the instant decision relies on and follows the long line of Florida cases dealing with "accidents arising out of the use of a motor vehicle."

An insured procures malpractice insurance for the specific purpose of insuring himself against injuries occurring within the scope of his profession as to those in privity with him in his profession. Malpractice insurance is not general liability insurance for any and all acts done in relation to the general population. For such acts, an insured procures general liability insurance. An insured may also procure automobile liability insurance to insure against injury arising out of the ownership, maintenance or use of his vehicle.

In the instant case, Western World was Herndon Ambulance Company's malpractice carrier, the malpractice specifically excluding liability covered by a standard automobile liability policy. Under established Florida law, the malpractice policy covered any injured party who may have a professional-patient relationship with Herndon, such as Ollie Mae Hall. Marvene Gleaves had no such relationship with Herndon so that Herndon did not owe her a duty of care under

malpractice standards. Consequently, her alleged injuries, under the facts of the instant case, fell within the "use" coverage clause of Herndon's automobile liability policy if the ambulance in question was used for the specific purpose of transporting patients such as Ollie Mae Hall and were specifically excluded from the malpractice insurance policy.

The Fifth District Court of Appeal, therefore, was eminently correct in finding that the exclusion in the Western World policy was applicable, and that the trial court erred in finding coverage under the policy.

ARGUMENT

POINT ON APPEAL

THE SUPREME COURT DOES NOT HAVE JURISDICTION TO REVIEW A DECISION OF THE FIFTH DISTRICT COURT OF APPEAL THAT DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH OPINIONS OF OTHER DISTRICT COURTS OF APPEAL OR THE FLORIDA SUPREME COURT.

Rather than being able to show how the Fifth District Court of Appeal's decision invokes this court's conflict jurisdiction, the petitioners are doing nothing more than attempting to show how this court might have arrived at a different conclusion than that reached by the district court. Such is simply not the measure of this court's constitutionally mandated conflict jurisdiction. The petitioners, therefore, are requesting nothing more than a second appeal which is not a function of this court's discretionary jurisdiction.

The primary purpose of Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv) is to avoid confusion and to maintain uniformity in the case law of the state and to avoid any uncertainty that might derive from situations where conflicting decisions develop in the district courts of appeal. Lake v. Lake, 103 So.2d 639 (Fla. 1958), overruled on other grounds, Foley v. Weaver Drugs, Inc., 177 So.2d 221 (Fla. 1965); Hastings v. Osius, 104 So.2d 21 (Fla. 1958). A cursory review of the opinion issued by the Fifth District Court of Appeal in this case shows on its face that there does not exist a direct conflict between its decision and a decision of this court or of another district court. The cases cited to in the opinion are cases wherein Florida courts have interpreted the

standard automobile policy coverage of "accidents arising out of the ownership, maintenance or use of any automobile." The cases cited by the district court's opinion are Government Employees Insurance Company v. Novak, 453 So.2d 1116 (Fla. 1984), Allstate Insurance Company v. Gillespie, 455 So.2d 617 (Fla. 2d DCA 1984), National Merchandise Company v. United Service Automobile Ass'n., 400 So.2d 526 (Fla. 1st DCA 1981), United States Fidelity & Guaranty Co. v. Daly, 384 So.2d 1350 (Fla. 4th DCA 1980), and National Indemnity v. Corbo, 248 So.2d 238 (Fla. 3d DCA 1971). All of the above-cited cases stand for the proposition that if an insured's injuries arise from the use of the motor vehicle, then the PIP coverage is available for the accident in question. There can be no question but that the attack upon the petitioner arose out of, or flowed from, the use of the vehicle as an ambulance.

The cases relied upon by the petitioners are factually distinguishable from the instant case and, therefore, not authority for finding conflict. In the instant case, the vehicle was being used as an ambulance to transport a patient when the petitioner's injuries occurred. The petitioner's injuries, consequently, clearly arose out of the use of the vehicle and were excluded from the respondent's malpractice policy. Such is simply not the case in Allstate Insurance Company v. Famigletti, 459 So.2d 1149 (Fla. 4th DCA 1981) or Doyle v. State Farm Mutual Automobile Insurance Company, 464 So.2d 1277 (Fla. 3d DCA 1985). In Famigletti, the injuries arose out of a feud between neighbors wherein one of

the neighbors happened to be in the automobile when the injury occurred. Likewise, in Doyle, there was no nexus between the injuries by an unknown assailant requesting money and the use of the automobile as an automobile. The ambulance here was not just the situs of the injury, but the injury would not have occurred if the vehicle had not been an ambulance as the psychiatric patient would not have been in the vehicle.

As to any reliance on Reynolds v. Allstate Insurance Company, 400 So.2d 496 (Fla. 5th DCA 1981), conflict jurisdiction is when there is a conflict with another district court of appeal or of the Supreme Court. Assuming arguendo that there is conflict, which the respondent steadfastly maintains there is not, the petitioner's remedy would be an en banc proceeding pursuant to Florida Rule of Appellate Procedure 9.331, which is a procedure for maintaining intra-district conflict.


There is simply no authority in the State of Florida for finding that the instant case conflicts with another district court of appeal or an opinion of this court. The opinion follows the well-established law in Florida. The petitioners are doing nothing more than requesting this Honorable Court to substitute its judgment for that of the district court, which is not a function of Rule 9.030(a)(2)(A)(iv).

CONCLUSION

Based on the foregoing arguments and authority cited therein, the respondent respectfully requests that this Honorable Court deny the petitioners' petition to invoke discretionary jurisdiction.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been mailed this 17th day of March, 1986, to SHERRY L. DAVIS, Attorney at Law, 17 South Lake Avenue, Orlando, FL, 32801.


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