

IN THE SUPREME COURT OF FLORIDA

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CASE NO. 70,997

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RICHARD T. RACE and SUZANNE  
RACE, his wife,

Petitioners,

v.

NATIONWIDE MUTUAL FIRE  
INSURANCE CO.,

Respondent.

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SEP 18 1987

CLERK, SUPREME COURT OF FLORIDA

By   
Deputy Clerk

ON PETITION FOR DISCRETIONARY REVIEW FROM THE  
DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

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REPLY BRIEF ON JURISDICTION BY RESPONDENT  
NATIONWIDE MUTUAL FIRE INSURANCE COMPANY

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SUMMARY OF THE ARGUMENT

The cases cited by the Petitioners RACE present no conflict with the instant decision of the Third District Court of Appeal.

Government Employees Insurance Co. v. Novak, 453 So.2d 1116 (Fla. 1984); and Hernandez v. Protective Casualty Ins. Co., 473 So.2d 1241 (Fla. 1985) are both personal injury protection (PIP) cases, and are distinguishable from the instant decision which is an uninsured motorist (U/M) benefits case.

Halpin v. Hildebrand, 493 So.2d 75 (Fla. 4th DCA 1986) is distinguishable from the instant decision because of the different facts involved. Halpin involved an assault by an uninsured motorist perpetrated upon the claimant while the claimant was still in her vehicle while in the instant case, the injury occurred outside of and away from any motor vehicle.

Allstate Insurance Co. v. Gillespie, 455 So.2d 617 (Fla. 2nd DCA 984) is a duty to defend case, and has nothing to do with an uninsured motorist case.

Since the cases cited by the Petitioners RACE are distinguishable from the instant decision, they have not established that this case "expressly and directly" conflicts with decisions of the Court or another District Court of Appeal. Accordingly this Court should decline to exercise its discretionary jurisdiction.

POINT ON DISCRETIONARY REVIEW

THE INSTANT DECISION OF THE THIRD DISTRICT COURT OF APPEALS PRESENTS NO CONFLICT WITH GOVERNMENT EMPLOYEES INSURANCE CO. V. NOVAK, 453 SO.2D 1116 (FLA. 1984); HERNANDEZ V. PROTECTIVE CASUALTY INSURANCE CO., 473 SO.2D 1241 (FLA. 1985); HALPIN V. HILDEBRAND, 493 SO.2D 75 (FLA. 4TH DCA 1986); OR ALLSTATE INSURANCE CO. V. GILLESPIE, 455 SO.2D 617 (FLA 2ND DCA 1984).

The Petitioners RICHARD and SUZANNE RACE, hereinafter collectively referred to as "RACE", have petitioned this court for discretionary review of NATIONWIDE MUTUAL FIRE INSURANCE CO. v. RACE, 508 So.2d 1276 (Fla. 3rd DCA 1987), based on a conflict between that decision and Government Employees Insurance Co. v. Novak, 453 So.2d 1116 (Fla. 1984); Hernandez v. Protective Casualty Insurance Co., 473 So.2d 1241 (Fla. 1985); Halpin v. Hildebrand, 493 So.2d 75 (Fla. 4th DCA 1986); and Allstate Insurance Co. v. Gillespie, 455 So.2d 617 (Fla. 2nd DCA 1984). However, no such conflict exists and the Petition brought by RACE should be denied in all respects.

RACE argues that jurisdiction is proper in this court pursuant to Article V, Section 3(b)(3), Fla. Constitution, which provides as follows:

Jurisdiction--The Supreme Court:

(3) 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. [emphasis supplied]<sup>1</sup>

As will be argued below, none of the cases cited by RACE present any express and direct conflict with the instant decision.

The instant decision held that a person who was assaulted outside his vehicle by an individual also outside his vehicle was not entitled to uninsured motorist benefits. The Third District Court of Appeal reasoned that there was no nexus between the injury suffered and the claimant's motor vehicle and accordingly, his injury did not "arise out of the ownership, maintenance or use of [an] uninsured or underinsured vehicle" so as to trigger uninsured motorist benefits. See Nationwide Mutual Fire Ins. Co. v. Race, supra, 508 So.2d at 1278, 1279, citing and distinguishing Government Employees Insurance Company v. Novak, 453 So.2d 1116 (Fla. 1984).

RACE is therefore mistaken in arguing a conflict between the instant case and Novak because the Third District Court of Appeals expressly distinguished this case from Novak. Conflict jurisdiction based on Article V Section 3(b)(3) must be based on an express and direct conflict on the same point of law, or else jurisdiction in the Supreme Court will not lie. See Reina v. Metropolitan Dade County, 304 So.2d 101 (Fla. 1974) (no conflict presented between cited decisions of the Third District Court of

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1. Petitioners also premise jurisdiction on Rule 9.030(a)(2)(A)(iv) which provides as follows: "the discretionary jurisdiction of the Supreme Court may be sought to review decisions of district courts of appeal that expressly and directly conflict with a decision of another district court of appeal or of the Supreme Court on the same question of law."

Appeal, one of which involved a bus driver's assault on a passenger outside of the bus; and the other involving a bus driver's assault on the occupants of an automobile).

In addition, regardless of the language used by the Third District Court of Appeals to distinguish Novak, the instant decision must be distinguished on its merits. Novak interpreted a personal injury protection (PIP) policy; this case interprets uninsured motorist (U/M) benefits. The law in Florida is that a PIP analysis is qualitatively different from a U/M analysis, and a claimant may be entitled to PIP but not entitled to U/M for injuries sustained in one particular occurrence. See Tuerk v. Allstate Ins. Co., 469 So.2d 815 (Fla. 3rd DCA 1985) (insured shot in his vehicle which was mistaken for a similar vehicle targeted by a gunman), rev. denied, 482 So.2d 347 (Fla. 1986); Pena v. Allstate Ins. Co., 463 So.2d 1256 (Fla. 3rd DCA 1985) pet. for rev. denied 476 So.2d 672 (Fla. 1985) (insured cab driver assaulted by gunman inside cab held entitled to PIP benefits but not to U/M benefits).<sup>2</sup> Since Novak is a qualitatively different

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2. Although the recent cases deciding U/M benefits cite Novak, the holdings in several Florida cases indicate that the test of what injury "arises out of the ownership, maintenance or use" of an automobile is stricter for U/M benefits than it is for PIP benefits. Novak broadly holds that for PIP entitlement, a claimant need only show some "nexus" between the use, ownership or maintenance of a motor vehicle and the injury. Uninsured motorist cases on the other hand require that the injury occur while the claimant is either inside his or her own vehicle, or alternatively, outside the vehicle but injured in such a way that the injury is enhanced by the uninsured vehicle. Compare Halpin v. Hildebrand, 493 So.2d 75 (Fla. 4th DCA 1986) (claimant assaulted while inside her vehicle by an enraged uninsured motorist whom she had "cut off" in traffic); and Fortune Insurance Company v. Ferriero, 458 So.2d 834 (Fla. 3rd DCA 1984) (claimant while a passenger in his employer's truck shot by uninsured motorist apparently attempting to force truck off the road); with Leatherby

holding from the decision below, there can be no conflict between these cases so as to invoke the jurisdiction of this Court.

Likewise, there is no conflict with Hernandez v. Protective Casualty Ins. Co., supra, 473 So.2d 1241 (Fla. 1985). Hernandez, too, was a PIP case and thus must be distinguished from the U//M decision herein. Furthermore, this court expressly limited its holding to the context of a PIP claim with the following language:

"We emphasize that this opinion is directed solely to the [PIP] claim before us, and nothing herein shall be read as expressing an opinion as to any other rights which the parties may have arising out of this incident.

473 So.2d at 1244.

Additionally, Hernandez is distinguishable on its facts. In that case, the injury took place while the claimant was inside his vehicle. Here, the claimant, Race, and his assailant, were both outside their vehicles. There is thus no conflict between the decision below and the Hernandez decision.

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Insurance Co. v. Willoughby, 315 So.2d 553 (Fla. 2nd DCA 1975) (uninsured motorist intentionally drove truck into the claimant). The instant case does not conflict with any of these cases because here neither the assailant nor the victim were inside any vehicle. No Florida case known to this writer allows U/M benefits to a claimant injured outside of and away from his vehicle. Rather, the cases hold that such a claimant may not recover U/M. See, Fidelity & Casualty Co. of N.Y. v. Garcia, 368 So.2d 1313 (Fla. 3rd DCA 1979) cert. den. 378 So.2d 344 (Fla. 1979) (no U/M benefits for accident victim injured outside of her vehicle); State Farm Mut. Automobile Ins. Co. v. Yanes, 447 So.2d 945 (Fla. 3rd DCA 1984) (claimant had already "alighted from" his van and walked away from it; no U/M benefots allowed); see also Northern Ins. Co. of N.Y. v. Hampton, \_\_\_ So.2d \_\_\_, 12 FLW 1835 (Fla. 5th DCA, 7/30/87) (No U/M benefits where shooting death took place outside of insured vehicle even though shot fired from uninsured vehicle).

Allstate Insurance Co. v. Gillespie, supra, 455 So.2d 617 (Fla. 2nd DCA 1984) is likewise a case which does not address U/M issues. The issue in Gillespie was whether an insurer had a duty to defend a particular individual who allegedly fired a gun at the plaintiff following a traffic argument. The instant decision has nothing to do with a duty to defend. Moreover, the assailant herein was uninsured, not insured by a liability policy as was the tortfeasor in Gillespie. Finally, Gillespie is silent as to the issue of indemnity for the Plaintiff, which is the key issue herein. In short, Gillespie is totally distinguishable from the instant case and presents no conflict herein.

Halpin v. Hildebrand, supra, 493 So.2d 75 (Fla. 4th DCA 1986) is the last case cited by RACE in support of his conflict argument. However, because the Third District Court of Appeals in the decision below expressly distinguished Halpin, there can be no "direct and express conflict" sufficient to support jurisdiction in this court.

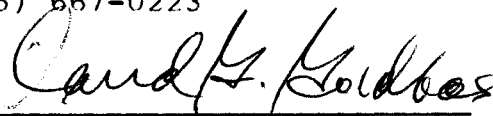
Furthermore, while Halpin was a U/M case, it must be distinguished on its facts. In that case, the claimant was assaulted while still in her vehicle by an uninsured motorist who had become enraged that she had "cut him off". In the instant decision, the injury occurred outside of both vehicles, and RACE's injury was proximately caused not by anyone's use of a motor vehicle but rather by a separate criminal assault.

CONCLUSION

The cases cited by RACE present no conflict to the instant decision. Accordingly, jurisdiction based on Article V Section 3(b)(3) of the Florida Constitution and Rule 9.030(a)(2)(A)(iv), Fla. R. App. P., has not been established. RACE's Petition for Discretionary Review should be denied in all respects.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed to Edward R. Blumberg, Esq., Deutsch & Blumberg, P.A., Suite 2802, New World Tower, 100 North Biscayne Blvd., Miami, Florida 33132; and to Jeanne Heyward, Esq., Suite 300, Roberts Bldg., 28 West Flagler Street, Miami, Florida 33130, this 12 day of September, 1987.

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