IN THE SUPREME COURT
STATE OF FLORIDA
TALLAHASSEE, FLORIDA

GERALD G. MICHALEK,

Appellant/Petitioner,

vs.

DAVID E. SHUMATE and
JUNE SHUMATE,

Appellees/Respondents.

CASE NO. 71,001



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# RESPONDENT'S ANSWER BRIEF ON THE MERITS

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## STATEMENT OF THE CASE AND FACTS

The Respondents, David E. Shumate and June Shumate, while in general agreement with the statement of the case and facts provided by the Appellant, respectfully would include the following additional matters which were omitted by the Appellant.

The complaint filed by the Plaintiff/Petitioner, Gerald G. Michalek in the present case contains only one paragraph of factual allegations against the Appellees, David E. Shumate and June Shumate.[1] (R. 1-4)[2] Paragraph two of the complaint alleges that either David or June Shumate owned a motor vehicle which was operated with their knowledge and consent by Rodney E. Adair. (R. 1) Absent from the complaint is any allegation that either Mr. or Mrs. Shumate had engaged in any conduct which may be characterized as negligent. (R. 1-4)

Following the deposition of Mrs. Shumate, the Shumates moved for summary judgment on the basis that they could not be held liable for the negligence of a repairman/serviceman with whom the vehicle had been entrusted where they had not exercised some control over the injury-causing operation of the vehicle during its transport and were not otherwise negligent. (R. 46) The motion further stated that the complaint contained no allegations that the Shumates had exercised any control over the

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1 The Petitioner, Gerald G. Michalek will be referred to by name or as the Plaintiff. The Appellees, David E. Shumate and June Shumate will be referred to by name or as Defendants. Rodney E. Adair will be referred to by name.

2 For ease of reference herein all citations to the record will be referred to as (R.) with the appropriate citation to the record.

injury causing operation of the vehicle and had merely alleged that they owned a vehicle which was negligently operated by a serviceman/repairman. (R. 46) Thus, it was argued that the dangerous instrumentality doctrine did not apply and there was no basis upon which to base liability against the Shumates. (R. 46)

In response to the Shumate's motion for summary judgment, the Plaintiff filed a memorandum of law and attached the cases upon which he relied. (R. 111-139) The Plaintiff did not dispute the contention that there were no genuine issues of material fact and instead argued that the serviceman/repairman exception to the dangerous instrumentality doctrine did not apply to the case. (R. 111-114) Additionally, the Plaintiff did not contend that Mr. or Mrs. Shumate had committed some independent act of negligence and therefore, the exception did not apply. (R. 111-114) The lower court granted the Defendant's motion for summary judgment on the basis that the dangerous instrumentality doctrine did not apply because of the exception recognized by this Court in Castillo v. Bickley, 363 So.2d 792 (Fla. 1978). (R. 149) That summary judgment was affirmed by the Second District Court of Appeal in Michalek v. Shumate, 511 So.2d 377 (Fla. 2d DCA 1987). Timely review was requested and granted by this Court.

## POINTS ON APPEAL

The Respondents, David E. Shumate and June Shumate respectfully restate the points on appeal as follows:

I.

WHETHER AN AUTOMOBILE OWNER IS LIABLE FOR INJURIES CAUSED BY THE NEGLIGENCE OF ANY EMPLOYEE OF AN AUTOMOBILE SERVICE BUSINESS TO WHOM THE VEHICLE HAS BEEN ENTRUSTED, WHERE THE OWNER DOES NOT EXERCISE CONTROL OVER TRANSPORT OF THE VEHICLE AND IS NOT OTHERWISE NEGLIGENT.

II.

WHETHER AN AUTOMOBILE OWNER'S LIABILITY SHOULD BE RESTRICTED TO THE REQUIREMENTS OF CHAPTER 324, FLORIDA STATUTES, WHERE THE OWNER DOES NOT EXERCISE CONTROL OVER THE INJURY-CAUSING OPERATION OF THE VEHICLE AND IS NOT OTHERWISE NEGLIGENT.

## SUMMARY OF THE ARGUMENT

In Castillo v. Bickley, 363 So.2d 792 (Fla. 1978), this Court held that the owner of a motor vehicle was not liable for injuries caused by the negligence of a repairman or serviceman with whom the vehicle had been left so long as the owner did not exercise control over the injury-causing operation of the vehicle during its servicing, testing or transport and was not otherwise negligent. In the present case, the Second District properly concluded that the exception to liability applied since the Plaintiff's injuries occurred during the transport of the vehicle by a serviceman with whom the vehicle had been left.

The exception recognized in Castillo was premised upon a respondeat superior analysis. That is, that in the auto repair or service situation, liability would not be imposed upon the owner if a master-servant type relationship could not be demonstrated between the owner and the driver. The Petitioner maintains that the exception applies only when the service provided is an absolute necessity to the owner. Where it can be said that the service is merely a convenience to the owner, the Petitioner advocates that the exclusion be disregarded.

The analytical approach and focus suggested by the Plaintiff contains numerous deficiencies. It would require courts to make determinations of liability based upon a subjective determination of what could be considered a "convenience." Such a requirement would result in as many different determinations of liability as there are judges. The

approach would remove the ability to make predictable determinations concerning liability and would cause instability in the law.

The agent/independent contractor analysis, on the other hand provides an objective method by which to make a determination concerning a vehicle owner's liability. It provides a defined objective standard by which liability can be predicted and justifiably relied upon for the average member of the public. This method of analysis has proven reliable for many years in agency law and its use should be continued by this Court.

Since the creation of automobile owner liability by virtue of the dangerous instrumentality doctrine in the early-1920's, the Legislature has created a network by which to satisfy the underlying purpose of dangerous instrumentality liability. That purpose was to shift the risk of loss from an innocent third-party to those who were more financially responsible and better able to assume the loss. Over the years, the Florida Legislature has enacted an entire network of legislation that satisfies that underlying public policy. However, the legislation recognizes a consensus that the risk should not be borne by the average owner but instead be shifted to the insurance industry where the risk can be better predicted and the costs of such risks better spread through society. In those situations where an automobile owner has complied with the legislative requirements, does not exercise control over the

automobile and is not otherwise negligent, this Court should restrict dangerous instrumentality liability to the requirements contained in Chapter 324, Florida Statutes.

## ARGUMENT

### I.

AN AUTOMOBILE OWNER IS NOT LIABLE FOR INJURIES CAUSED BY THE NEGLIGENCE OF ANY EMPLOYEE OF AN AUTOMOBILE SERVICE BUSINESS TO WHOM THE VEHICLE HAS BEEN ENTRUSTED, WHERE THE OWNER DOES NOT EXERCISE CONTROL OVER TRANSPORT OF THE VEHICLE AND IS NOT OTHERWISE NEGLIGENT.

The issue presented in this appeal is not difficult. In fact, the question was answered by this Court in Castillo v. Bickley, 363 So.2d 792 (Fla. 1978). In Castillo, this Court held:

> " . . . We hold that the owner of a motor vehicle is not liable for injuries caused by the negligence of the repairman or serviceman with whom the vehicle has been left, so long as the owner does not exercise control over the injury-causing operation of the vehicle during the servicing, service-related testing, or transport of the vehicle, as is not otherwise negligent." [emphasis supplied] id. at 793.

In the present case, it is not disputed that Mrs. Shumate voluntarily gave her keys to an employee of Ralph's Cleaning Service, Rodney Adair. While transporting the vehicle from Mrs. Shumate's place of business to Ralph's, Mr. Adair was involved in an automobile accident wherein he allegedly injured the Plaintiff, Gerald Michalek. The complaint did not allege nor did the evidence demonstrate that Mr. or Mrs. Shumate exercised

any control over Mr. Adair during the injury-causing operation of the vehicle. Likewise, there was no allegation nor any evidence that Mr. or Mrs. Shumate were otherwise negligent. Thus, an application of this Court's holding in Castillo to the facts of the present case demonstrate the correctness of the summary judgment entered by the trial court and the affirmance of that summary judgment by the Second District Court of Appeal.

Despite the clear language of this Court's opinion in Castillo v. Bickley, 363 So.2d 792 (Fla. 1978), the Petitioner maintains that the decision of the lower court and the Second District Court of Appeal are in error. The Plaintiff argues that each mistakenly utilized a respondeat superior analysis instead of basing an owner's liability on a subjective determination concerning the type of service provided to the owner and whether the service was a convenience to him. The Plaintiff further contends that liability should be imposed solely by virtue of ownership of the injury-causing vehicle. According to the Plaintiff, once Mr. and Mrs. Shumate admitted to ownership of the vehicle and that they voluntarily relinquished control to the employee of Ralph's Car Cleaning this case should be "labeled" as one of liability. Unfortunately for the Plaintiff, labels are no substitute for strong legal analysis and the attendant observations of the historical legal development of the issue involved.

The dangerous instrumentality doctrine was first recognized in Florida in Anderson v. Southern Cotton Oil Company, 73 Fla. 432, 74 So. 975 (Fla. 1917). The Anderson court recognized that automobiles could not be classified as "per se" dangerous instrumentalities. However, because of their ability to gain high speeds and their weight, they became dangerous through their negligent operation. Because of the peculiar dangers associated with the negligent use of the automobile, liability was imposed upon the owner for its negligent use by a third person when it was by the owner's authority that the vehicle was on the public highway. Id. at 987.

In a subsequent explanation of this new doctrine in Southern Cotton Oil v. Anderson, 80 Fla. 441, 86 So. 629 (1920) this Court stated:

> "In entrusting the servant with this highly dangerous agency, the master put it in the servant's power to mismanage it, and as long as it was in his custody or control, the master was liable for any injury which might be committed through his negligence. This is the doctrine of the common laws applied to a new instrumentality eminently dangerous to the persons using the public highways." Id. at 636.

Nearly forty years later, in Weber v. Porco, 100 So.2d 146, 149 (Fla. 1958) this Court explained that dangerous instrumentality liability rested on an application of the principle of respondeat superior. Liability imposed by virtue of

the dangerous instrumentality doctrine was in actuality, a finding as a matter of law, that there was an agency relationship between an owner and his permissive user.

Shortly after Weber, this Court announced a much broader principle of owner liability. In Susco Car Rental System of Florida v. Leonard, 112 So.2d 832 (Fla. 1959), a car rental company attempted to avoid liability on the basis that the lessee had violated the rental contract when he allowed another person to drive the rental car. This Court ruled that the owner could not avoid liability to the public based on a contract or secret agreement with the lessee. Under Susco, only a breach of custody tantamount to a species of conversation would absolve the owner of liability under the circumstances.

As noted by this Court in Castillo v. Bickley, 363 So.2d 792 (Fla. 1978) decisions of the various district courts of appeal subsequent to Susco demonstrated a reluctance to apply such a broad rule of owner liability. That reluctance was manifested in situations where a master-servant type relationship did not exist. In those situations, it could not be shown that the permissive user of the car was acting under the direction and control of the owner. Therefore, it was not possible to characterize the user as the equivalent of an "employee" of the owner. Liability would not be imposed on the owner for the negligent use where the driver could only be characterized as merely an independent contractor of the owner.

For instance, in Frye v. Robinson Printers, Inc., 155 So.2d 645 (Fla. 2d DCA 1963), the Second District absolved the owner of liability under the broad doctrine announced in Susco. In Frye, the automobile owner had left his car at a service station for minor repairs. A service station employee who was driving the vehicle onto a service rack injured a fellow employee. The Second District noted that none of the previous decisions which addressed the dangerous instrumentality doctrine justified a holding that where an owner left his automobile at a service station for repair or servicing that he was liable solely by reason of ownership of the negligent operation of the car by one employee resulting in injury to another.

Subsequent to Frye, other Florida Courts began to utilize a respondeat superior analysis to determine whether the broad liability announced in Susco should be imposed upon the owner of a motor vehicle. More specifically, the Courts began to focus upon the relationship of the driver to the owner. Where the driver was not under the direction and control of the owner, the Courts relied upon the independent contractor exception recognized in principal/agency law to relieve the owner of liability. For instance, in Petitte v. Welch, 167 So.2d 20 (Fla. 3d DCA 1964), the Third District held that an owner of an automobile was not liable when it was negligently driven by a third person where the owner had left the automobile in possession of a service station. The Third District explained that the dangerous instrumentality doctrine was grounded in the

principle of respondeat superior. At the time of the accident, the automobile was being operated by someone under the direction and control of the service station operator and not the owner of the car. Thus, liability should not be imposed upon the owner.

Shortly after Petitte v. Welch, 167 So.2d 20 (Fla. 3d DCA 1964), this Court considered a case which involved the application of the dangerous instrumentality doctrine to the construction and energizing of an electrical power system as opposed to an automobile. In Florida Power & Light Co. v. Price, 170 So.2d 293 (Fla. 1964), the independent contractor exception was relied upon by this Court to absolve the owner of liability. The Court analogized the situation before it to those presented in Frye v. Robinson Printers, Inc., 155 So.2d 645 (Fla. 2d DCA 1963) and Petitte v. Welch, 167 So.2d 20 (Fla. 3d DCA 1964). It also cited those cases with approval for the proposition that the independent contractor exception would be recognized.

Subsequent to Price, the Second District once again addressed the situation in Patrick v. Faircloth Buick Company, 185 So.2d 522 (Fla. 2d DCA 1966). In Patrick, the Second District held that the independent contractor exception applied to an owner's liability which was premised upon the dangerous instrumentality doctrine. In that case, the plaintiff was injured when struck by a vehicle which was owned by Joseph Massaro and negligently driven by Sally Smith, an employee of Faircloth Buick. The Massaro vehicle had initially been taken to Faircloth for servicing. Mrs. Massaro requested that someone

transport her back home and then return with her automobile. The accident occurred when Smith was returning to Faircloth with the vehicle. The Second District held that under those facts, the owner of the automobile could not be held liable by virtue of the dangerous instrumentality doctrine because the automobile was being operated by an agent of Faircloth Buick and not by an agent or servant of Mrs. Massaro.

The First District has also utilized an independent contractor analysis to determine the liability of a motor vehicle owner for injuries caused by the operation of the vehicle by a third party. In Harfred Auto Imports, Inc. v. Yaxley, 343 So.2d 79 (Fla. 1st DCA 1977), an automobile dealer left a car at an independent repair shop for servicing prior to its being shown on a used car lot. During road testing, the car's brakes failed and it slid through a stop sign coming to rest in a lane of traffic where it was eventually struck by the Plaintiff's vehicle. The Plaintiff sued the owner on the basis of the dangerous instrumentality doctrine. The First District reversed the judgment entered in favor of the Plaintiff against the owner using an independent contractor/respondeat superior analysis. Adopting the majority view, the Court noted that an owner of an automobile was not liable for the negligence of a garageman or a mechanic where the automobile owner was not guilty of some direct negligence. The Court stated:

> "Liability in such cases is denied because the relationship between the owner and the mechanic is that of an independent contractor and bailee, rather than that of master-servant.

> Therefore, in most jurisdictions, the vicarious liability of the owner of a dangerous instrumentality is defeated by the negligence of a true independent contractor." Id. at 82.

At the time of the First District's decision in Harfred, not all of Florida's district court of appeal had utilized the independent contractor-respondeat superior analysis in their approach to the question before this Court. For instance, in Jordan v. Kelson, 299 So.2d 109 (Fla. 4th DCA 1974), cert. den., 308 So.2d 537 (Fla. 1975), the Fourth District took a much broader view of owner liability under the dangerous instrumentality doctrine. In Jordan, the Fourth District disregarded both the language and analysis used by this Court in Weber v. Porco, 100 So.2d 146 (Fla. 1958) and Florida Power and Light Co. v. Price, 170 So.2d 293 (Fla. 1964). The Jordon court stated that an owner's liability was not based on respondeat superior or concepts of agency. Instead, automobile owners were liable for injuries sustained by persons on the public highway as a result of the negligence of anyone operating an automobile with the owner's knowledge and consent.

A few years later, the Fourth District narrowed its broad interpretation of the dangerous instrumentality doctrine in Fahey v. Raftery, 353 So.2d 903 (Fla. 4th DCA 1977). In Fahey, the Court distinguished its previous decision in Jordan and absolved the owner of liability where an employee of a valet parking concession had injured another while operating the automobile. The Fahey court distinguished its previous Jordan

decision by noting that the service station operator had been gratuitously returning the vehicle to the owner with his consent. In Fahey, however, the operation of the vehicle was part of the service which had been contracted for and liability should not be imposed on the owner.

In 1978, this Court addressed the apparent analytical conflict among the various district courts of appeal in Castillo v. Bickley, 363 So.2d 792 (Fla. 1978). In Castillo, this Court approved the reasoning of the First District in Harfred Auto Imports, Inc. v. Yaxley, 343 So.2d 79 (Fla. 1st DCA 1977) as it related to the application of the dangerous instrumentality doctrine in a situation involving automotive service agencies. Having adopted that analysis, this Court held that the owner of a motor vehicle would not be liable for injuries caused by the negligence of a repairman or serviceman with whom the vehicle had been entrusted. No liability would be imposed where the owner did not exercise control over the injury-causing operation of the vehicle during the servicing, service-related testing or transport of the vehicle and was not otherwise negligent. Thus, the broad liability which had been announced in Susco had been narrowed by express approval of Harfred, Faircloth Buick and Petitte.

Shortly after this Court's decision in Castillo, the First District announced its decision in Jack Lee Buick, Inc. v. Bolton, 377 So.2d 226 (Fla. 1st DCA 1979), cert. den., 386 So.2d 638 (Fla. 1980). The Jack Lee Buick decision was cited by the

Second District Court of Appeal as conflicting with its decision in the present case. In Jack Lee Buick, Bolton was injured in an accident with one of the vehicles owned by the Buick dealer which was driven by an employee of an independent contractor, U-Wash-M. The independent contractor had been hired by the Buick dealership to wash and wax its used cars, steam clean the engines, paint the engine if needed, and clean the interior, glass and wheels. The vehicles would be picked up from the dealership and driven to U-Wash-M's shop by one of its employees. After the vehicle was cleaned, one of U-Wash-M employees would return it to the dealership. Bolton received a summary judgment in the lower court against the dealership on the basis of the dangerous instrumentality doctrine.

On appeal, the dealership argued that the dangerous instrumentality doctrine did not apply to accidents which occurred while the owner's vehicle was solely under the control of an independent contractor whose services included pickup and delivery. The First District rejected the argument and affirmed the summary judgment. The Court stated that the Castillo exception was limited to accidents while the vehicle was under the control and direction of repair and service agencies during work-related operations. The Court explained that it did not detect in the Castillo opinion any intention by this Court to relieve an owner of liability where a vehicle was coming or going to or from a place where the repairs were to take place. Additionally, the Court stated that the reference by this Court

in Castillo that the exception should apply to "transport" of the vehicle, did not include those instances where the transport was unrelated to the purpose for which the vehicle was entrusted to the repair or service agency. See also, Smilowitz v. Russell, 458 So.2d 406 (Fla. 3d DCA 1984); Lopez v. DeMaria Porsche Audi, 395 So.2d 199 (Fla. 3d DCA 1981).

In the present case, the Second District rejected the holding in Jack Lee Buick, Inc. v. Bolton, 377 So.2d 226 (Fla. 1st DCA 1979), cert. den., 386 So.2d 638 (Fla. 1980). The Court also rejected the analytical approach used by Fourth District in Fahey v. Raftery, 353 So.2d 903 (Fla. 4th DCA 1977) to distinguish the apparent conflict with its decision in Jordan v. Kelson, 299 So.2d 109 (Fla. 4th DCA 1974), cert. den., 308 So.2d 537 (Fla. 1975). By rejecting the decisions of those courts, the Second District correctly interpreted this Court's holding in Castillo v. Bickely, 363 So.2d 792 (Fla. 1978) and reinforced the objective criteria which should be used as the basis for determination of an owner's liability recognized in that case.

In its examination of the Fourth District's approach to the present issue, the Second District analyzed the explanation of its sister court for its retreat from the broad rule announced in Jordan to the majority rule announced in Fahey. The Second District stated that the Fahey court had distinguished the apparent conflict with Jordan by stating that the parking service provided in Fahey was part of the total package of services which had been provided by the restaurant and was not merely performed

as a gratuity for the owner. In Jordan, however, the service station owner was gratuitously returning the automobile for the owner at the time of the accident. The Second District correctly concluded that the distinction was a difference without substance or logical reason. Michalek v. Shumate, 511 So.2d 377, 379 (Fla. 2d DCA 1987).

The Second District also explained its rejection of the First District's decision in Jack Lee Buick, Inc. v. Bolton, 377 So.2d 226 (Fla. 1st DCA 1979), cert. den., 386 So.2d 638 (Fla. 1980). The Second District explained that the Jack Lee Buick court had affirmed the judgment against the owner by distinguishing the type of automobile service agency to which the owner had entrusted the vehicle. The Court noted that such a subjective distinction between the types of service agencies was not warranted by the rule announced by this court in Castillo v. Bickley. Moreover, the Second District stated that while the First District did not "ignore" the Castillo exception pertaining to "transport" the decision not to apply it was inexplicable. The Second District explained that the Jack Lee Buick court held that this Court's reference to "transport" in Castillo only included transport of the vehicle where the transport of the vehicle was directly involved in the repair or service, such as road testing or moving the vehicle from place to place on the agency's premises. Writing for a unanimous court, Judge Campbell stated:

> "We, on the other hand, can detect neither language nor intent in the Castillo opinion to construe

> 'transport' to exclude the transport of a vehicle between the owner and the service agency. To not apply 'transport' to transport between the owner and the service agency would be contrary to the holding in Faircloth Buick, which the Supreme Court in Castillo cited with approval. Any such transport is as much a part of securing the service or repairs as is moving the vehicle about the service agency's premises during the actual repairs. An owner should be able to rely upon a clearly defined objective standard of liability or limitation of liability and not a standard that is subjectively applied to varying situations that are infinitesimally distinguishable." Id. at 380.

The Plaintiff argues that there are two distinct bases upon which liability has been imposed upon the owner of an automobile. The first is the dangerous instrumentality doctrine which the Plaintiff maintains was correctly explained in Susco Car Rental System of Florida v. Leonard, 112 So.2d 832 (Fla. 1959). According to the Plaintiff, in the absence of conversion of the owner's automobile, a type of strict liability should be imposed upon the owner for injuries resulting from the automobile's use. The Plaintiff also maintains that this Court's decision in Weber v. Porco, 100 So.2d 146 (Fla. 1958) either created or recognized a completely different rule of law where liability would be imposed upon an owner only if a master-servant type relationship existed between he and the driver. Evidently, the Plaintiff would argue that this Court's decision in Castillo v. Bickley, 363 So.2d 792 (Fla. 1978) compromised the two divergent theories of liability in situations where automobile

service agencies were involved. The Plaintiff then concludes that unless it can be shown that the service which has been provided to the owner was an absolute necessity and not a convenience to the owner, the broad liability recognized in Susco should be imposed upon the owner.

The approach which is advocated by the Plaintiff is neither logical nor practical. Such an approach would require the courts to focus upon the question of whether a particular service was provided as a convenience to a particular owner. The approach would ignore the question of whether a particular service was part of the total package of services provided to an owner by an independent contractor. Moreover, it would require the courts to base an owner's liability based upon countless subjective determinations that would deny any automobile owner a clearly defined standard of liability.

The problems which would be encountered under the position advocated by the Plaintiff are evident even in the automobile repair situation. For instance, an automobile repair service could include in its contract price both pickup and delivery of a customer's vehicle. The decision to include that service could have been made by the owner based upon a determination that in his experience, he did a better repair business by providing the pickup and delivery service. He may have also determined that he was able to reduce his overhead because there was no longer a need to provide a fully-equipped waiting room for his customers. Under the Plaintiff's approach,

if the repairman's employee injured a third-party while delivering the vehicle, the owner would nevertheless be liable because the repairman elected to use a business practice that in some fashion was convenient to the owner.

It is also not difficult to imagine several examples of the various subjective determinations a court would be required to make when an owners' liability was to be determined on the basis of whether the service could be considered a convenience to a particular owner. Even if contained solely to the automobile repair/service situation, many services which are provided on a daily basis could be considered a convenience for any particular owner. Few people would argue that simple maintenance chores such as changing the oil or changing a tire requires specialized skill and knowledge such that it could be said that a car owner is deprived of any real choice but to have those tasks performed by a service station. However, under the Plaintiff's approach, the owner's liability would be dependent upon whether he or she had previous mechanical experience so as to perform the service. Alternatively, liability would depend on whether one would expect that this particular owner would be able to perform this particular service.

Even when viewing these modest examples, the deficiencies in the Plaintiff's analytical approach become apparent. If a determination of an owner's liability is based upon resolution of the issue of whether the service is considered a convenience to the owner, it would require judges to make the

types of subjective determinations which could result in as many different conclusions as there are judges. This approach provides neither guidance in making those determinations nor stability in the law.

The approach which has been adopted by the Second District Court of Appeal, that is using an agent/independent contractor analysis, on the other hand, provides an objective method by which determinations of an automobile owner's liability can predictably be made. The test is simply whether the owner directed the employee of the independent contractor or had the right to direct the employee in the details of his work. Such a determination is not based upon subjective conclusions regarding convenience but instead, based upon facts which determine authority. Historically, this method of analysis is proven quite reliable in the area of agency law. Moreover, it is the method of analysis which this Court adopted in Castillo v. Bickley, 363 So.2d 792 (Fla. 1978) so as to provide a stable fashion by which to make determinations of a vehicle-owner's liability.

An application of the agent/independent contractor analysis to the facts of the present case leads to the conclusion that the Second District's analysis was correct and that the summary judgement should be affirmed. It is clear, that Mrs. Shumate delivered the keys of her Oldsmobile to an employee of an independent contractor. There is not the slightest suggestion in the record that Mrs. Shumate actually directed Ralph's employee, Adair, in the performance of his job. Likewise, there is not the

slightest suggestion that she had any right to do so. That ability rested solely with Adair's employer, Ralph's Cleaning. Since there is no allegation that Mrs. Shumate was guilty of any independent act of negligence, the decision of the Second District Court of Appeal and the lower court should be affirmed.

## II.

AN AUTOMOBILE OWNER'S LIABILITY SHOULD BE RESTRICTED TO THE REQUIREMENTS OF CHAPTER 324, FLORIDA STATUTES WHERE THE OWNER DOES NOT EXERCISE CONTROL OVER THE INJURY-CAUSING OPERATION OF THE VEHICLE AND IS NOT OTHERWISE NEGLIGENT.

This Court recognized the dangerous instrumentality doctrine as a method of imposing liability upon the owner of an automobile for its negligent use 70 years ago in Anderson v. Southern Cotton Oil Company, 73 Fla. 432, 74 So. 975 (Fla. 1917). The underlying rationale for creation of the doctrine was multi-faceted. The doctrine was created based upon a recognition of the dangerous qualities of an automobile when it was used negligently. Likewise, there was legislative recognition of those dangers which resulted in vast regulation concerning the use of automobiles on the highways of the state. Likewise, there was a recognition of the obligation of an owner to respond to an injured third-party when his automobile had been operated on a public highway.

Some three years later, this Court elucidated upon the societal justifications for the imposition of such liability in Southern Cotton Oil Company v. Anderson, 80 Fla. 441, 86 So. 629 (Fla. 1920). When this Court revisited Southern Cotton Oil, it analogized the use of an automobile to that of a locomotive. It was explained that the dangerous quality of a locomotive required responsibility for the exercise of its use to rest upon the

owner. Social policy would not allow the owner to shift the risk of its use to the owner's agent who would actually control the locomotive in its operation. In fact, the real societal justification for imposition of such liability is revealed by this Court's citation to the United States Supreme Court's decision in Philadelphia and Reading R.Co. v. Derby, 14 HOW. 468, 14 L.Ed. 502. There, the Court stated:

> "If such disobedience could be set up by a railroad company as a defense, when charged with negligence, the remedy of the injured party would in most cases be illusive, discipline would be relaxed and the danger to the life and limb of the traveler greatly enhanced."

Further justification for the imposition of such liability was provided by the additional legislative restraints and regulations imposed upon the use of automobiles. This Court noted that those regulations were imposed because the Legislature felt that it was its duty to regulate and restrain the operation of automobiles for the protection of the public.

In those early times of automobile use, the need to provide a financially responsible person to respond to the injuries of an innocent third-party appear obvious. The vast majority of the population was still dependent upon domesticated animals for their conveyances. Typically, only a wealthy person could afford such an extravagant piece of machinery for his transportation needs. When an owner allowed an employee to use an automobile in his business, the employee typically had few

assets and would not be able to respond for the damages he may have inflicted through the negligent use of the automobile upon innocent members of the public. Thus, from a historical standpoint, the application of dangerous instrumentality liability to automobile owners could be socially justified as a risk-shifting measure from those who had little financial protection to those who could best afford to sustain the loss.

The prevailing social climate in the early-1920's may have justified the imposition of absolute liability upon the owner of an automobile. At that time, the insurance industry was in its infancy. The concept of wide-spread liability had not yet reached its inception. Social conditions in the late-1980's, however, suggest that such an absolute transfer of the risk to an automobile owner is no longer justified and should be modified by this Court. It is respectfully suggested that where an automobile owner does not exercise control over the injury-causing operation of the vehicle and is not otherwise negligent that his liability should be restricted to those amounts which are required in Chapter 324, Florida Statutes.

At the outset it should be noted that it is not suggested that the concern for an innocent injured third-party which justified the creation of an owner's liability under the dangerous instrumentality doctrine is not a legitimate concern. That concern is every bit as legitimate today as it was 70 years ago when the dangerous instrumentality doctrine was created. However, the vast array of legislative regulations and

restrictions which this Court relied upon in 1920 to impose such liability upon an owner have been greatly increased. Since that time, the Legislature has seen fit to protect the public safety by transferring the risk of loss to a source other than the owner. In conformity with the legislatures of most other states and prevailing social attitudes, the Legislature has shifted the risk of loss to the insurance industry. Through the creation of a network of mandatory insurance requirements, the Legislature now protects the public's safety by assigning the risk to a profit-making industry specifically designed for such a task. It is respectfully submitted that in those situations where there is an absence of actual negligence on behalf of the owner and where the owner has not exercised control over the operation of the vehicle, that this Court should give deference to the legislative prerogative of transferring the risk of loss from the owner to the insurance industry.

A recognition of the change in societal attitudes as to how to best spread the risk of loss concerning injury resulting from the use of automobiles first occurred in the Florida Legislature in 1955. In that year, the Legislature created Florida's Financial Responsibility Act, Chapter 324, Florida Statutes. Section 324.011 states the express purpose of the act. It provides that it is the intent of the Chapter to recognize the existing privilege to own and operate a motor vehicle on the public streets and highways of the state. Likewise, it is to promote safety and provide financial security requirements for

owners or operators whose responsibility it is to recompense others for injuries to their person or property caused by the operation of a motor vehicle. Thus, the purpose of the act is identical to those expressed purposes which were used to justify the creation of dangerous instrumentality liability upon an owner.

Although modified on numerous occasions since 1955, the Financial Responsibility Act requires proof of the ability of an owner to respond in damages for liability imposed because of automobile accidents in the amount of $10,000.00 for bodily injury to any one person in an accident and not less than a total of $20,000.00 for any one accident. The act also requires $5,000.00 minimum limits to respond to respond for damages inflicted upon another's property. The coverage required is not provided solely for the protection of an owner. Instead, Section 324.151(1)(a), Florida Statutes requires that the insurance coverage be provided to any permissive user of the owner's automobile.

Subsequent to the creation of the financial responsibility act, in 1961 the Legislature created Section 627.0851, Florida Statutes, Florida's first uninsured motorist statute. The purpose of that coverage has been addressed by this Court on numerous occasions. See, e.g., Mullis v. State Farm Mutual Automobile Insurance Company, 252 So.2d 229 (Fla. 1971). Most recently, this Court discussed the underlying purposes of uninsured motorist coverage in Allstate Insurance Company v.

Boynton, 486 So.2d 552 (Fla. 1986). Essentially, this Court stated the purpose of uninsured motorist coverage is to provide a limited form of third-party insurance coverage that inured to the benefit of the tortfeasor. Basically, the UM coverage transforms a financially irresponsible tortfeasor into a responsible one from the insured's viewpoint. The Legislature has mandated that all motor vehicle liability insurance policies issued or delivered in the State of Florida include such coverage unless specifically rejected by the named insured in writing. In so creating the uninsured motorist statute, the Legislature allowed the risk of loss to be shifted from the innocent injured third-party to the insurance industry where the costs of such risks can be predictably calculated and spread throughout society through insurance premiums.

In 1971, the Florida Legislature finalized the shift in the risk of loss from the injured third-party to the insurance industry by the enactment of "Florida's No-Fault Act," and Florida Statutes, Sections 627.730-617.7405. The system which was implemented by the no-fault act essentially was designed to assure the prompt payment of an injured party's medical bills and compensation for lost income from his own insurer. The system provides that persons injured in automobile accidents will receive timely monetary aid to meet medical expenses and not suffer catastrophic financial consequences that might be attendant to such injuries. See, Laskey v. State Farm Insurance Company, 296 So.2d 9 (Fla. 1974). See also, Chapman v. Dillon,

415 So.2d 12 (Fla. 1982). The no-fault system is a refinement to the shift in the risk of loss to the insurance industry. Under the act, the immediate consequences of the loss or no longer borne by the injured party but instead by his insurance carrier.

It is certainly obvious that the use of automobiles in the late-1980's is far more common place than it was in the early-1920's. Contrary to that period of time, today, almost everyone owns and operates an automobile. Over the years, the Legislature has recognized the historical change which occurred to make the automobile a fundamental part of our everyday lives. As part of that recognition, the Florida Legislature has created a network of mandatory insurance requirements designed to protect the public from the predictable risks associated with automobile use. The legislation is a manifestation of the consensus that the risks associated with daily automobile use should not be borne by individuals but by the insurance industry who is better able to spread the costs of the risk throughout society. Continued imposition of dangerous instrumentality liability upon an owner who has complied with the various legislative mandates disregards the consensus that the costs should be borne by an industry who makes its profit through the calculation and spreading of risks. This Court should instead limit an owner's liability to those amounts required by Chapter 324, Florida

Statutes if the owner has complied with the legislative requirement, does not exercise control over the operation of the vehicle and is not otherwise negligent.

Assuming this Court were to restrict the owner's liability the underlying public policies of the dangerous instrumentality doctrine would still be satisfied. The risk of loss would still be shifted from the innocent third-person to a financially responsible source, in this case the insurance industry. The cost of the risk will not prove catastrophic to any one individual but instead would be spread throughout society in the form of insurance premiums.

It is important to understand that the Respondents do not advocate restricting dangerous instrumentality liability in all situations. For instance, where an owner has not complied with the legislative requirement concerning automobile insurance, such liability could continue unchanged. Liability based upon the availability of insurance coverage is not something new and has been utilized by this Court on previous occasions. See, Ard v. Ard, 414 So.2d 1066 (Fla. 1982).

Likewise, in a situation where a master-servant relationship can be demonstrated between the owner and the driver, the owner's liability would not be affected. Nor is it proposed that an owner's liability would be affected where the owner himself was proven guilty of some active negligent conduct in entrusting the vehicle to one which he clearly knew was incapable of safely operating it. Instead, it is respectfully

submitted that the liability of ownership be restricted in the vast majority of situations where liability is simply imposed for the negligence of some permissive user. The implementation of such a plan will satisfy the underlying public policy which justified the creation of the dangerous instrumentality doctrine. Likewise, it will satisfy another important public policy of placing fault on the actual tortfeasor where it belongs. See, Allstate Insurance Company v. Fowler, 480 So.2d 1287 (Fla. 1985).

## CONCLUSION

The lower court and the Second District both properly concluded that liability could not be imposed upon the Shumates by virtue of the dangerous instrumentality doctrine. The exception recognized by this Court in Castillo v. Bickley precludes the imposition of such liability when the injuries are caused by the negligence of a repairman or serviceman with whom the vehicle has been left so long as the owner does not exercise control over the operation of the vehicle during the servicing, service-related testing or transport of the vehicle and is not otherwise negligent. Both courts properly concluded that those requirements had been satisfied and the exception should apply.

Liability imposed under the dangerous instrumentality doctrine should be limited to the requirements of Chapter 324, Florida Statues. The purpose of such liability was to shift the risk of loss from the injured third-party. The Florida legislature has created a system which completely shifts the risk of loss from the injured third-party to the insurance industry. There no longer exists any justification for the imposition of the risk upon the owner in situations where he has complied with the legislature requirements. This Court should use this case as an opportunity to so restrict that liability.

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 U.S. Mail this 30th day of December, 1987 to **Bruce D. Frankel, Esquire**, P. O. Box 2366, Fort Myers, Florida 33902.

ATTORNEY