O/A 2-3-88

IN THE SUPREME COURT OF FLORIDA

GERALD G. MICHALEK,	)	
	)	SUPREME COURT
Petitioner,	)	CASE NO: 71,001
	)	
-vs-	)	SECOND DCA
	)	CASE NO: 86-2085
DAVID E. SHUMATE, et ux.,	)	
	)	CASE NO: 85-5976 CA-EOF
Respondents.	)	
	)	

INITIAL BRIEF

BRUCE D. FRANKEL, ESQUIRE
GOLDBERG, RUBINSTEIN & BUCKLEY, P.A.
Post Office Box 2366
Fort Myers, Florida 33902
(813) 334-1146

TABLE OF CONTENTS

STATEMENT OF THE CASE AND OF THE FACTS

Plaintiff below, Gerald G. Michalek, appeals a Summary Judgment granted by the trial court to Defendants, Shumate. The Second District Court of Appeal affirmed the trial judge's decision. The facts of this case are not complex.

Gerald G. Michalek was injured in a motor vehicle accident in Fort Myers, Florida, on February 12, 1985. (R 20-22, 23-24, 54, 65-67) David and/or June Shumate were the owners of the automobile which struck him. (R 20-22, 23-24) The Shumate automobile was driven by Rodney Adair, an employee of Ralph's Car Cleaning Service. (R 20-22, 23-24, 36, 68-72) Mrs. Shumate gave Mr. Adair the keys to her car and permission to take it to Ralph's for cleaning. (R 37) The accident took place as Mr. Adair left Mrs. Shumate's place of employment. (R 20-24, 68-72)

Mr. Michalek was seriously injured and eventually had a disc removed. (R 78-79) He continues to treat and additional surgery is anticipated. (R 78-80, 96) He brought an action for personal injuries against David and June Shumate, among others, because they were the owners of the motor vehicle which struck him. (R 1-16) When the Second District Court of Appeal affirmed Summary Judgment, it recognized a direct conflict with another District Court of Appeal on the same question of law. The Supreme Court accepted jurisdiction.

POINT ON APPEAL

IS THE OWNER OF A MOTOR VEHICLE ABSOLVED FROM LIABILITY FOR ITS NEGLIGENT OPERATION BY THE EMPLOYEE OF A CLEANING SERVICE WHOSE PERMISSIVE USE OF THE VEHICLE IS SOLELY FOR THE OWNER'S CONVENIENCE?

SUMMARY OF ARGUMENT

Originally, an automobile owner's liability for injuries caused by its negligent use rested upon the dangerous instrumentality doctrine. Southern Cotton Oil Company v. Anderson, 80 Fla. 441, 86 So. 629 (1920). Gradually, respondeat superior emerged as a second theory upon which a motor vehicle owner's legal liability could be determined. Some Supreme Court cases relied upon respondeat superior. Weber v. Porco, 100 So.2d 146 (Fla. 1958). Others stated that the dangerous instrumentality doctrine controlled and principles of respondeat superior were irrelevant. Susco Car Rental System of Florida v. Leonard, 112 So.2d 832 (Fla. 1959). The appellate courts also vacillate between these theories to the point where the issue has become hopelessly confused.

The Supreme Court recognizes two exceptions to the dangerous instrumentality doctrine. One is when the motor vehicle is stolen or converted. Susco Car Rental System of Florida v. Leonard, 112 So.2d 832 (Fla. 1959). The other is in a repair situation, where the owner often has no reasonable alternative to ceding use of his vehicle. Castillo v. Bickley, 363 So.2d 792 (Fla. 1978). Neither of those situations exists at bar.

The question of a motor vehicle owner's responsibility for its negligent use needs to be clarified. Either the dangerous instrumentality doctrine or respondeat superior must prevail.

Mr. Michalek submits that the better solution would be to re-affirm the dangerous instrumentality doctrine upon which a motor vehicle owner's liability was originally based. Additionally, the narrow Susco and Castillo exceptions should continue. Consequently, the Summary Judgment entered against Mr. Michalek should be reversed and the instant cause remanded to the trial court to be decided on the merits of his claim.

ARGUMENT

IS THE OWNER OF A MOTOR VEHICLE ABSOLVED FROM LIABILITY FOR ITS NEGLIGENT OPERATION BY THE EMPLOYEE OF A CLEANING SERVICE WHOSE PERMISSIVE USE OF THE VEHICLE IS SOLELY FOR THE OWNER'S CONVENIENCE?

Gerald Michalek submits that the foregoing question should be answered "No". This is because an automobile is a dangerous instrumentality whose owner is responsible for injuries caused by its negligent operation. The Supreme Court of Florida has recognized only two exceptions to an owner's responsibility. One is a theft or conversion. The other is a repair situation where the owner has no alternative to the use of his vehicle by another. Neither of these exceptions applies at bar.

There is ample confusion contained in Florida decisions at all appellate levels regarding a motor vehicle owner's liability. This confusion results from the sporadic and unpredictable application of two doctrines. These distinct doctrines are the dangerous instrumentality doctrine and respondeat superior. In view of this confusion, Mr. Michalek believes a review of the evolution of a motor vehicle owner's legal responsibility in the State of Florida would be beneficial to deciding the issue at bar.

In 1920, the Supreme Court of Florida addressed the issue of a motor vehicle owner's legal responsibility for injuries caused by its negligent operation. Southern Cotton Oil Company v.

Anderson, 80 Fla. 441, 86 So. 629, 631 (1920). In doing so, This Court considered the dangerous instrumentality doctrine. The doctrine recognized that certain things posed such an extraordinary risk that a man who exposes his neighbor to such a risk is held responsible even though his act is not of itself wrongful. Id., at 631. This doctrine was already well-established in 1920. It originally applied to instrumentalities such as fire, flood, water and poisons. Id., at 632. Technological developments brought new instrumentalities, automobiles among them, into the doctrine's purview. Id., at 631. The theory rested on the belief that some items, including automobiles, are peculiarly dangerous in their operation. Id., at 632.

In Southern Cotton Oil, an employee of the corporation which owned the automobile had permission to use it. Id., at 636. He negligently injured the plaintiff while attending to a purely personal matter. Id. This Court applied the dangerous instrumentality doctrine to automobiles. Id. The corporation was held liable because it put the dangerous instrumentality into the custody or control of its employee, who then had the power to mismanage it. Id. The owner of a dangerous instrumentality "cannot exonerate himself from liability for injury caused to others by the negligence of those to whom they are entrusted". Id., at 632.

Thus, liability in the Southern Cotton Oil case was based upon ownership of the dangerous instrumentality. It was not a

vicarious liability imposed on the basis of respondeat superior. As Florida Standard Jury Instruction 3.3(b)(1) indicates, an employer's responsibility under respondeat superior depends upon his agent acting within the scope of his employment at the time and place of the incident complained of. This was not the situation in Southern Cotton Oil. There, the employee/driver was not acting in the scope of his employment, but attending to a purely personal matter. Liability was affixed to the motor vehicle's owner even though the requirements of respondeat superior were not met. Unfortunately, in the ensuing decades, the distinction between the two doctrines has become blurred.

Almost forty years later, This Court considered an automobile owner's liability for its negligent operation by another. Weber v. Porco, 100 So.2d 146 (Fla. 1958) In this case, the Supreme Court held that the owner-wife could be responsible for her husband's negligent operation of her automobile, irrespective of her own actions. Weber incorrectly stated that an owner's liability rested on respondeat superior beginning with the Southern Cotton Oil case. Id., at 149. The following year, the Supreme Court took a position diametrically opposed to that espoused by Weber.

The Supreme Court of Florida again addressed an owner's responsibility under the dangerous instrumentality doctrine in Susco Car Rental System of Florida v. Leonard, 112 So.2d 832 (Fla. 1959). In Susco, This Court rejected the attempt by the

automobile's owner to contract away its responsibility to one injured by its automobile. This Court stated "when control of such a vehicle is voluntarily relinquished to another, only a breach of custody amounting to a species of conversion or theft will relieve an owner of the responsibility for its use or misuse." Id., at 835-836. The rationale still was that the owner who permits his dangerous instrumentality to be operated on the public highways is responsible for its negligent use. Id., at 836. In Susco, the Supreme Court pointed out that liability under the dangerous instrumentality doctrine "is imposed independent of other theories of vicarious responsibility in tort law, to include respondeat superior". Id. Inconsistencies among the cases resulted from efforts "to reason within the confines of inapplicable principles, such as those of respondeat superior". Id., at 836. Unfortunately, the Susco decision ignored Weber which had stated exactly the opposite principle only a year before. Thus, two Supreme Court decisions handed down within eighteen months provided two mutually exclusive rationales for a motor vehicle owner's liability.

The Susco opinion recognized that automobiles had become even more dangerous then they had been in 1920. Id., at 837. The Court noted the legislative view that public interest required financial responsibility based upon ownership. Id. Consent on the part of the owner is pertinent only to the use of the

automobile beyond his own immediate control. Id. These considerations still apply today.

Despite the Supreme Court's blunt statement in Susco that inconsistencies and confusion result from grounding liability on principles such as respondeat superior, subsequent cases did just that. The Third District Court of Appeal citing Weber and ignoring Susco, states that the dangerous instrumentality doctrine "has always been grounded exclusively upon respondeat superior". Petitte v. Welch, 167 So.2d 20, 22 (Fla. 3rd DCA 1964). Although this statement is not correct, the Second District Court of Appeal used it as a basis to invoke an independent contractor exception to the dangerous instrumentality doctrine. Patrick v. Faircloth Buick Company, 185 So.2d 522, 525 (Fla. 2nd DCA 1966).

Once again, This Court entered the swampland of an owner's responsibility for the negligent use of his vehicle in the case of Castillo v. Bickley, 363 So.2d 792 (Fla. 1978). In Castillo, the broad rule set forth by This Court in Susco was reiterated. The High Court then recognized the limitations placed on the Susco doctrine by various District Courts of Appeal. This Court receded from the Susco principle, but only to a narrow degree. It held that the dangerous instrumentality doctrine would not be applied in situations involving automotive service agencies.

This was a "paring back" of the dangerous instrumentality doctrine based upon social policy and pragmatism. These considerations were that an owner often has no acceptable

alternative to relinquishing control of his vehicle to a service center and no ability to select the person to whom the vehicle may be entrusted. The considerations supporting the Castillo exception do not apply at bar.

Mrs. Shumate handed the keys of her car to the same individual who moments later caused the accident. There is no showing that Mrs. Shumate had no acceptable alternative to relinquishing control of their vehicle. Her car was to be cleaned, not serviced. It was only for the convenience of Mrs. Shumate that her car was driven by an employee of Ralph's Car Cleaning rather than herself.

The First District Court of Appeal recognized the limited nature of the Castillo exception to the Susco principle. 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 Court of Appeal stated that Jack Lee Buick conflicts with its decision at bar. Since the facts presented by Jack Lee Buick are substantially similar to those at bar, they merit discussion in some detail.

Jack Lee Buick was a used car dealership which contracted for the cleaning of its vehicles with various cleaning companies, one of which was U-Wash-M. Id., at 227. U-Wash-M picked up the vehicles from Jack Lee's place of business, transported them with its personnel to its shop where the vehicle was cleaned, and then delivered the vehicle back to Jack Lee. Id. Except for

transporting the vehicle, U-Wash-M's cleaning service did not require the operation of the automobile. Id. During one of those trips, Wayne Bolton was injured allegedly by U-Wash-M's driver's negligent operation of one of Jack Lee Buick's cars. Id. The trial court held as a matter of law that Jack Lee Buick was liable under the dangerous instrumentality doctrine.

The First District Court of Appeal upheld the trial court's ruling. The First District refused Jack Lee Buick's attempt to broaden the Castillo exception. They pointed out that in Castillo, the accident occurred while the car was being road-tested by a mechanic employed by the service station. Id., at 228. However, in instances such as here, where the operation of the car has nothing to do with repairing it, but is purely for the accommodation or convenience of the owner, the owner is the one who directs and controls the vehicle's use, and there is no reason not to apply the dangerous instrumentality doctrine. Id. This decision is in accordance with the policy decisions upon which the Castillo exception rests. Other District Courts of Appeal recognize that necessity, not convenience determines when the Castillo exception comes into play. Smilowitz v. Russell, 458 So.2d 406 (Fla. 3rd DCA 1984); Lopez v. DeMaria Porche-Audi, 395 So.2d 199 (Fla. 3rd DCA 1981); and Jordan v. Kelson, 299 So.2d 109 (Fla. 4th DCA 1974), Cert. den., 308 So.2d 537 (Fla. 1975).

The Second District Court of Appeal initially interpreted Castillo the same way. Prior to the instant case, the Second

District Court of Appeal considered the Castillo holding in Fort Myers Airways, Inc. v. American States Insurance Company, 411 So.2d 883 (Fla. 2nd DCA 1982). In Fort Myers Airways, the dangerous instrumentality was an airplane not an automobile. There, as here, the contention was made that the dangerous instrumentality doctrine does not apply if the dangerous instrumentality is delivered to an independent contractor. Id., at 886. Referring to the Castillo exception, Judge Schoonover wrote:

> ...this exception applies only when the use of the dangerous instrumentality is not permissive and when the owner has no choice in determining if, when, and how the dangerous instrumentality is to be used.
>
> Id.

Judge Schoonover's words in Fort Myers Airways reflect the Supreme Court's considerations in carving out the Castillo exception; namely that the motor vehicle owner has no real alternative in a repair situation. Both this principle and the Second District Court of Appeal's own words in Fort Myers Airways, were glossed over or ignored in the case at bar. Rodney Adair's use of the Shumate vehicle was permissive and Mrs. Shumate did have a choice in determining if, when, and how her automobile was to be used. Nevertheless, the trial court and the Second District Court of Appeal absolved Mrs. Shumate from all legal responsibility for the injury inflicted by the negligent use of her automobile.

The use of both respondeat superior and the dangerous instrumentality doctrine as a basis for determining a motor vehicle owner's legal liability has become hopelessly confused. A court can pick and choose Supreme Court cases which adopt one rationale and castigate the other. Occasionally, both rationales are ratified in the same opinion. The Castillo decision is an example of this phenomenon. As discussed above, the Castillo decision, to a limited extent, recedes from the broad Susco principle. In doing so, Castillo cites with approval, Harfred Auto Imports, Inc. v. Yaxley, 343 So.2d 79 (Fla. 1st DCA 1977). This Court stated that Harfred carefully analyzed the state of Florida law in following the rule that owner liability exists only where the doctrine of respondeat superior pertains. 363 So.2d at 793. The Harfred decision claims that Southern Cotton Oil's application of the dangerous instrumentality doctrine was grounded upon respondeat superior. 343 So.2d at 80. That is simply not correct. Liability was based upon ownership of the dangerous instrumentality. The owner was prevented from exonerating himself from liability in Southern Cotton Oil merely by permitting a servant to drive the vehicle. Moreover, Harfred cites Weber with approval, but ignores the Susco decision itself, decided differently the following year. Id. at 81. Both Justices Adkins and Boyd recognize this dilemma in their Castillo dissents.

There now exist two separate bases for a motor vehicle owner's liability. A court can choose to follow the rationale set

forth in either Susco or Weber. The issue needs classification. The Castillo decision claims to "pare back" Susco. The rationale it approves is an appellate decision which ignores Susco and follows Weber. The social and pragmatic considerations upon which Castillo is based are non-existent at bar.

Gerald Michalek submits that This Court should re-affirm the Susco principle with the two narrow exceptions. As the Southern Cotton Oil case recognized over sixty years ago, the owner of a peculiarly dangerous instrumentality such as an automobile should be held responsible for the damage it's negligent use causes. Liability should not hinge on the driver's employment status. Moreover, the owner should not, in good conscience, be permitted to absolve himself of this liability by permitting another to drive his automobile solely for the owner's convenience. Unless his vehicle is converted or stolen or unless repairs are necessary and the owner has no reasonable alternative to turning use of his vehicle over to the serviceman, he should remain liable. The unfortunate injured victim should not be left without a source of compensation simply because it was convenient for the owner.

CONCLUSION

Gerald G. Michalek submits that the granting of Summary Judgment below, affirmed on appeal, was error. The facts of this case place it squarely within the dangerous instrumentality doctrine as that doctrine was originally conceived. Neither the Susco theft exception nor the Castillo repairman exception apply to the facts at bar. The confusion of respondeat superior with the dangerous instrumentality doctrine should not be permitted to reduce a motor vehicle owner's legal responsibility.

Mr. Michalek respectfully requests that the Final Summary Judgment entered against him be reversed and that this case be remanded to the trial court for a trial on the merits of his case.

Respectfully submitted,

GOLDBERG, RUBINSTEIN & BUCKLEY, P.A.
Attorneys for Petitioner
Post Office Box 2366
Fort Myers, Florida 33902
(813) 334-1146

BY: _____
BRUCE D. FRANKEL

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the above and foregoing Initial Brief have been furnished by delivery to the Supreme Court of the State of Florida, and a copy to George A. Vaka, Esquire, Post Office Box 1438, Tampa, Florida 33601, this 2nd day of December, 1987.

Respectfully submitted,

GOLDBERG, RUBINSTEIN & BUCKLEY, P.A.
Attorneys for Petitioner
Post Office Box 2366
Fort Myers, Florida 33902
(813) 334-1146

BY: _____
BRUCE D. FRANKEL

Initial Brief