IN THE SUPREME COURT OF FLORIDA

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

# REPLY BRIEF


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## 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

The issue at bar rests upon case law that is not clear but confused. As the law now stands, either the dangerous instrumentality doctrine or respondeat superior can be used to rationalize a decision in any particular case. Gerald Michalek submits that the dangerous instrumentality doctrine should be re-affirmed as the basis upon which to determine a motor vehicle's owner's liability for damage caused by the negligent operation of his vehicle. Exceptions to this rule should be limited to instances of theft or conversion or actual repair to the vehicle. Pragmatic social policies support these exceptions. No such support exists when only the owner's convenience is involved.

There would be no adverse social effects caused by adopting Mr. Michalek's position. Proving negligence would still be a requisite to affixing financial responsibility. The owner, however, could not escape responsibility simply because it was convenient. Mr. Michalek's position does not entitle an injured victim to any greater recovery than he may now obtain. Instead, it would only insure that legitimate sources from which to recover fair compensation were not restricted. All of those who set in motion the forces which caused the harm would be held accountable to their unfortunate victim.

# 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?

The Respondents contend that the issue at bar is clear. They assert that the Castillo decision mandates that they prevail. (Respondents' Brief - P.7-8) This self-serving conclusion ignores both facts of record and applicable appellate decisions.

Initially, it must be pointed out that the Castillo decision re-affirmed the principles set forth by Susco. While This Court pared back Susco to a narrow degree, it certainly did not reject the Susco principle of liability based upon the dangerous instrumentality doctrine. Moreover, Susco stated respondeat superior has no place in determining an owner's responsibility for the negligent operation of his vehicle. Susco Car Rental System of Florida v. Leonard, 112 So.2d 832, 836 (Fla. 1959). The Respondents completely fail to address this aspect of the Susco decision. The Petitioner respectfully submits that a fair evaluation of existing authorities demonstrates that the current state of the law is not clear, but confused. Both parties can point to appellate decisions which support their position at bar and refute that of their opponent.

Gerald Michalek reviewed the confusion that has developed in his Initial Brief. Mr. and Mrs. Shumate ignore this confusion. They only trumpet the alleged clarity of their own position. Appellate decisions handed down after Castillo rebut their assertion. The First District's decision in Jack Lee Buick affirms the position taken by Gerald Michalek at bar. The Supreme Court's denial of certiorari in that case gives lie to the argument that Jack Lee Buick was wrongly decided. The Third District Court of Appeal also views the Castillo exception to the Susco doctrine as limited to servicing or service-related testing of the vehicle. That Appellate District refuses to absolve the owner from liability merely because it was convenient for him to have another drive his vehicle. Smilowitz v. Russell, 458 So.2d 406 (Fla. 3rd DCA 1984); Lopez v. DeMaria Porche-Audi, 395 So.2d 199 (Fla. 3rd DCA 1981). Even the Second District Court of Appeal viewed the Castillo exception in this manner prior to the instant case. Fort Myers Airways Inc. v. American States Insurance Company, 411 So.2d 883, 886 (Fla. 2nd DCA 1982).

Each of the foregoing cases recognized that the Castillo exception was predicated upon the necessity of repair. The Supreme Court carved out the Castillo exception because it served pragmatic social considerations raised by the necessity of repair. A motor vehicle owner's mere convenience was not sufficient to relieve him of responsibility for the negligent operation of his

vehicle. The facts of the instant case present no such pragmatic social considerations. It was strictly for Mrs. Shumate's convenience that Mr. Adair operated her vehicle. Consequently, she should not be permitted to avail herself of the Castillo exception to liability.

Both the Respondents and the Second District Court of Appeal cite with approval, Florida Power & Light Co. v. Price, 170 So.2d 293 (Fla. 1964). (Respondents' Brief - P.12) The Price decision in reality, supports the position of Gerald Michalek. The limited holding in Price was as follows:

> ...liability flowing from operation of the doctrines of dangerous instrumentalities and inherently dangerous work is subject to the exception that where the defendant owner contracts with an independent contractor for the performance of inherently dangerous work and the latter's employee is injured by dangerous instrumentality whom by the defendant which is negligently applied or operated by another employee of the independent contractor but wholly without any negligence on the part of the defendant owner, the latter will not be held liable. Id., at 298

This is not the case at bar. Here, we are concerned with an injured member of the public, not an injured independent contractor in privity with the owner of the dangerous instrumentality. This is an important distinction. The Price court stated "It may well be that said doctrines (dangerous instrumentality and inherently dangerous work) apply without exception to third party members of the general public..." Id.

Price clearly holds that its exception to the dangerous instrumentality doctrine does not apply to members of the general public. The opinion stated that the "exception to the doctrine grows out of the relationship created by the independent contract and the assumption of risks that are necessarily concomitant. Such an exception would not be applicable where members of the general public are injured since they are not embraced in the relationship created by the independent contract." Id., at 298-299. Gerald Michalek is not embraced in the relationship between the Shumates and Ralph's Car Cleaning. Thus, the Price rationale would entitle him, as a member of the general public, to bring his cause of action against the owner of the dangerous instrumentality. The Price decision would be germane only to bar Ralph's employee's claims against the Shumates.

The Respondents present a lengthy "parade of horrors" which they purportedly fear would occur should the Shumates be held liable for the negligent operation of their vehicle. (Respondents' Brief - P.20-22) The thrust of this argument is that there would be no uniformity and a myriad of lawsuits. Earlier, the Respondents argued that the Plaintiff's position was that "a type of strict liability should be imposed upon the owner for injuries resulting from the automobile's use". (Respondents' Brief - P.19) This position would create complete uniformity and a dearth of lawsuits. Neither of these extremes is correct. The injured Plaintiff would still have to prove that the motor vehicle

was operated negligently. There would be no strict liability. However, the owner could not escape responsibility because he chose to hand his keys to someone else solely for his own convenience.

Gerald Michalek believes that a choice must be made as to whether a motor vehicle's liability will be based upon the dangerous instrumentality doctrine or respondeat superior. As the law stands now, a court can choose either theory as the rationale for its decision. Mr. Michalek submits that the dangerous instrumentality doctrine, the original basis upon which liability was founded, should be re-affirmed. Unless a motor vehicle is converted or stolen or unless necessary repairs are required, the owner should remain liable for the damage done by the negligent operation of the vehicle he owns and permits to be driven by another.

For the first time on appeal, the Respondents now present a new issue. They request that the owner's liability be limited to the $10,000.00 floor prescribed by the financial responsibility statute. Their rationale is that the loss would be "shifted from the innocent third-person to a financially responsible source, in this case, the insurance industry". (Respondents' Brief - P.31) It is ironic that they offer widespread insurance coverage as the reason to restrict liability and concurrently restrict insurance coverage in the case at bar. The Respondents' request is neither advisable nor necessary. Ample procedures exist to insure that

the injured plaintiff does not receive a double recovery and is not over-compensated for the injuries suffered. Why should the potential sources from which to obtain that recovery be restricted simply because it was convenient for the defendant? Of the two, it is not the innocent victim, but rather the motor vehicle owner who willfully permitted the tort feasor to operate his vehicle. Consequently, the owner should bear responsibility for the damages he set in motion.

In sum, Gerald Michalek asserts that the existing law is not clear, but hopelessly confused. He believes that the dangerous instrumentality doctrine, together with its two recognized limited exceptions, should be re-affirmed as the sole basis for determining a motor vehicle's owner's liability. This outcome would clarify an area of the law sorely in need of clarification. Moreover, it would insure that all of those responsible for the plaintiff's injuries would be held accountable.

Respectfully submitted,

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## 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 21st day of January, 1988.

Respectfully submitted,

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