IN THE SUPREME COURT OF FLORIDA

T. PATTON YOUNGBLOOD,

Petitioner,

vs.

DCA No.: 2D05-3112
Case No.: 03-3591

ESTATE OF REINALDO VILLANUEVA, by and through ROSALINA VILLANUEVA as Personal Representative,

Respondent.
_____/

PETITIONER'S INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The question presented is whether the exception to the dangerous instrumentality doctrine established in *Castillo v. Bickley* applies where an owner turns over a vehicle to a car lot for sale on consignment.

References to the District Court record page numbers are designated (R__). References to the Appendix are designated (App. __).

STATEMENT OF THE CASE AND FACTS

The vehicle involved in this case was originally purchased by Petitioner for his former wife during their marriage. (R 209-210). The vehicle was titled and insured solely in the former wife's name, while Petitioner was the sole obligor on the promissory note. (R 210, 215-216). During the course of their divorce proceedings, Petitioner agreed to assist his former wife in selling the vehicle. (R 212-213).

In November 2002, after the divorce was finalized, Petitioner took possession of the vehicle for the purpose of selling it. (R 212-213, 217). By then, Petitioner's former wife had transferred the insurance to her newly purchased vehicle. (T216). Petitioner was not permitted to insure the old vehicle, since the insurance company required that he be a titleholder in order to do so. (R216).

On December 4, 2002, Petitioner delivered the vehicle to Extreme Auto Sales and Accessories, Inc., ("Extreme Auto") and consigned it there for sale. (R218-219). Petitioner dealt with one of Extreme Auto's principals, Teddy Aponte. (R218-219). Petitioner and Aponte discussed the desired sale price for the car. (R218-219, 239). It was agreed that Extreme would be compensated for selling the car regardless of the price. (R 218-219, 239). There were no conversations pertaining to Extreme Auto's authority to operate or otherwise use the vehicle. (R 218, 220, 223-224, 239). Petitioner did not expect to regain possession of the vehicle; only to receive the sale proceeds. (R 223).

On December 24, 2002, Aponte drove the vehicle from the lot, allegedly to take it home for safekeeping. (R240). Aponte stated he would regularly take higher-end cars home at night for this purpose, and that Petitioner's vehicle was the most expensive car on the lot at the time. (R240-241).

After leaving the lot, Aponte stopped by some friends' houses and a convenience store on the way to a holiday party at his sister's house. (R241-243). On the way to the party, Aponte was involved in an accident that killed the Respondent/Plaintiff's decedent, Reinaldo Villanueva. (R241-243, 226-227).

Mr. Villanueva's personal representative sued, *inter alios*, Petitioner Youngblood, Extreme Auto, and Extreme Auto's principals, Teddy Aponte, Maria Vega, and Eddy Aponte. (R 5-8, 22-26, 55-60). The claims against Extreme Auto,

Vega, and the Apontes were settled. (R 303-305). The claim against Petitioner was based solely on the theory of vicarious liability under the dangerous instrumentality doctrine. (R 55-60).

The parties filed cross-motions for summary judgment on the issue of vicarious liability. (R 247-292). Petitioner's motion was based on three grounds: The *Castillo v. Bickley* exception to the dangerous instrumentality doctrine, the theft or conversion exception to the doctrine, and Petitioner's lack of consent to Aponte's use of the vehicle. (R 276-292).

The trial court granted summary judgment in favor of Petitioner, finding as follows:

> 1. The record evidence in support of Defendant's subject motion, including the depositions of Defendants, Teddy Aponte and T. Patton Youngblood, along with the affidavit of T. Patton Youngblood, and the remainder of the court file show that there are genuine issues of material fact with regard to ownership of the subject motor vehicle (Lexus).
>
> 2. Notwithstanding the foregoing, the record evidence in support of Defendant's subject motion, including the depositions of Defendants, Teddy Aponte and T. Patton Youngblood, along with the affidavit of T. Patton Youngblood, and the remainder of the court file show that there is no genuine issue of material fact with regard to Defendant's liability for the actions of the operator of the subject motor vehicle (Lexus), which allegedly caused the losses claimed by Plaintiff.

> 3. Based on the law set forth in Defendant's subject motion, Defendant T. Patton Youngblood, is entitled to judgment as a matter of law.
>
> ***

(R 311-313).

Mr. Villanueva appealed and the Second District reversed. *Villanueva v. Youngblood*, 927 So. 2d 955 (Fla. 2d DCA 2006). (App. Exhibit 1). In its opinion, the court acknowledged the exception to the dangerous instrumentality doctrine established in this Court's landmark decision, *Castillo v. Bickley*, 363 So. 2d 792, 793 (Fla. 1978), i.e., that the owner of a motor vehicle is not liable for injuries caused by the negligence of a repairman or serviceman with whom vehicle has been left, so long as owner did not exercise control over injury-causing operation of the vehicle during the servicing, service-related testing, or transport of the vehicle, and is not otherwise negligent. (App. 1-7). However, the Second District refused to apply this exception in the present case because it did not consider Extreme Auto an "automobile service agency." (App. 5-6). The court added:

> We do agree with Youngblood that some of the policy reasons behind the "shop" exception apply equally to the consignment of a car for sale. In both cases, the owner turns the car over to another and relinquishes control to that entity. In both cases, the owner has no ability to ensure the public safety unless and until the car is returned. In both cases, it is foreseeable that the vehicle will be operated on the public roads for test-drives, whether by a repairman testing the vehicle or by a prospective purchaser. Further, in both cases, the

> perpetrator of the injury, i.e. the repair firm or the dealership, is in the better position to use due care and to insure against the financial risks of injury.

(App. 6-7).

Despite these parallels, the Second District ruled that if the exception is to be applied to such a consignment situation, "the Supreme Court is the most appropriate body to do so." (App. p. 7).

Petitioner sought discretionary review based on conflict with *Castillo v. Bickley*, 363 So.2d 792 (Fla. 1978), *Fought v. Mullen*, 609 So. 2d 726 (Fla. 5th DCA 1992) and *Roberts v. United States Fidelity and Guaranty Company*, 498 So. 2d 1037 (Fla. 1st DCA 1986). Jurisdiction was accepted on October 27, 2006.

SUMMARY OF ARGUMENT

In *Castillo v. Bickley*, this Court ruled that the owner of a motor vehicle who leaves the vehicle for service is not liable for injuries caused by its use, so long as the owner did not exercise control over the injury-causing operation of the vehicle and is otherwise not negligent. This exception to the dangerous instrumentality doctrine is based on the owner's relinquishing control of the vehicle to the service agency, which is then in the position to oversee its use. It has been applied to a wide variety of vehicle-related services, including cleaners and auctioneers -- and should have been applied here.

The Second District's ruling is based on a false distinction between a consignment service and other vehicle-related services. This Court has expressly stated that the nature of the service being performed by the company in possession of the vehicle is irrelevant to whether the exception applies. A used-car lot that stores, advertises, secures and test drives a consigned vehicle is performing a "service" just as surely as a repair shop that stores, secures, repairs and test drives a vehicle. All of the criteria for applying the Castillo rule are present in this case. In fact, a consignment lot provides a more compelling case for its application, since the owner wholly entrusts the business with both handling the vehicle and supervising its use by prospective buyers.

At least two other district courts have properly applied the rule in situations parallel to the case at bar. The Fifth District ruled that an owner who turned his vehicle over to an auto auction for sale was not liable for injuries caused by an auction worker while moving the vehicle. The First District exonerated an owner who left his car with a repairman who then caused injuries in an accident while driving the owner's car to the beach. The conflict presented by the Second District in the instant case should be resolved in favor of the Fifth and First Districts' views, which faithfully follow this Court's landmark decision.

A ruling in favor of the Petitioner in this case does not require an expansion of the exception – only a proper application of it to the facts of this case. Moreover, even if the trial court's ruling were an extension of the doctrine, it would be fully justified by the practical and public policy reasons for the exception itself – as candidly acknowledged in the Second District's opinion.

The Second District's decision should be vacated and the matter remanded for reinstatement of summary judgment in favor of the Defendant/Petitioner.

STANDARD OF REVIEW

A ruling as to whether a party is entitled to summary judgment is reviewed *de novo*. See, e.g., *Major LeagueBaseball v. Morsani*, 790 So. 2d 1071, 1074 (Fla. 2001).

ARGUMENT

ISSUE

WHETHER THE EXCEPTION TO THE DANGEROUS INSTRUMENTALITY DOCTRINE ESTABLISHED IN CASTILLO V. BICKLEY APPLIES WHERE A VEHICLE OWNER RELINQUISHES CONTROL OVER THE VEHICLE TO A DEALERSHIP PERFORMING THE SERVICE OF SELLING IT ON CONSIGNMENT.

A. The *Castillo* Rule

Under Florida's dangerous instrumentality doctrine, the owner of a motor vehicle who entrusts it to a third party is generally vicariously liable for the negligent operation of that vehicle by the third party. *Southern Cotton Oil Company v. Anderson*, 86 So. 629 (Fla. 1920). The doctrine, unique to Florida, is grounded in the concept of *respondeat superior*, in that one who permits another to operate his automobile becomes the principal and the driver becomes his agent for that purpose. *Weber v. Porco*, 100 So. 2d 146, 149 (Fla. 1958).

The broadest interpretation of the doctrine appeared in *Susco Car Rental System of Florida v. Leonard*, 112 So. 2d 832, 835-836 (Fla. 1959), which stated that only a breach of custody amounting to a species of conversion or theft would relieve an owner of responsibility for his vehicle's use or misuse. See also *Jordan v. Kelson*, 299 So. 2d 109 (Fla. 4th DCA 1974)(ruling auto owners liable for injuries caused by anyone operating vehicle with owner's knowledge and consent).

Exceptions to this broad formulation arose when several district courts found that the doctrine did not apply when the permissive user was not acting under the direction and control of the owner. In *Harfred Auto Repairs, Inc. v. Yaxley*, 343 So. 2d 79 (Fla. 1st DCA 1977), a car dealer had a vehicle it owned towed to a repair shop to get it running so it could be sold. One of the mechanics test-drove the car while taking another employee to another place of business and was involved in an accident. After a trial resulted in a judgment against the owner, the First District reversed based on a review of several cases, which held that a vehicle owner was not vicariously liable where control over the vehicle had been relinquished to a service agency. See *Frye v. Robinson Printers, Inc.*, 155 So. 2d 645 (Fla. 2d DCA 1963); *Patrick v. Faircloth Buick Company*, 185 So. 2d 522 (Fla. 2d DCA 1966); *Petitte v. Welch*, 167 So. 2d 20 (Fla. 3d DCA 1964).

The court also acknowledged that the opposite result was reached in *Jordan v. Kelson*, 299 So. 2d 109 (Fla. 4th DCA 1974), which found an owner vicariously

liable where a repair shop employee was delivering the car to the owner at owner's request. Taking these views into account, the *Harfred* court sided with the majority view; i.e., that an owner who places his vehicle in the custody of a repair shop has no knowledge or control over the operation of the vehicle during that time, and hence the independent contractor should have sole liability for the vehicle's negligent operation while having custody and control of it.

The ruling and rationale of *Harfred* were followed by the Third District in *Bickley v. Castillo*, 346 So. 2d 625, 626 (Fla. 3d DCA 1977). There, an owner left his car with a mechanic who was later involved in an accident while road-testing it. In the ensuing personal injury suit, the court found that the owner was entitled to summary judgment as a matter of law, since he had placed his car in the custody of the repair shop and had no knowledge of or control over its operation at the time of the accident.

The conflict between the *Susco*/*Jordan* view and the *Harfred*/*Castillo* line of cases was resolved on review of the *Castillo* decision. In *Castillo v. Bickley*, this Court expressly approved the reasoning expressed in *Harfred*, "insofar as it relates to the applicability of the dangerous instrumentality doctrine in situations involving automotive service agencies…" and, to that extent, receded from *Susco*. 363 So. 2d 792, 793 (Fla. 1978). It was therefore held:

> … that the owner of a motor vehicle is not liable for injuries caused by the negligence of a repairman or serviceman with whom vehicle has been left, so long as owner did not exercise control over injury-causing operation of the vehicle during the servicing, service-related testing, or transport of the vehicle, and is not otherwise negligent.

Id.

In creating this rule, the Court explained:

> Our decision to pare back the dangerous instrumentality doctrine in service station and repairman situations stems from considerations of both social policy and pragmatism. An automobile owner is generally able to select the persons to whom a vehicle may be entrusted for general use, but he rarely has authority and control over the operation or use of the vehicle when it is turned over to a firm in the business of service and repair. Moreover, an owner often has no acceptable alternative to relinquishing control of his vehicle to a service center, after which he has no ability to ensure the public safety until the vehicle is returned to his dominion. Persons injured by the acts of garage and service repair agencies are not, however, without protection for their losses. They can and in logic should look to the perpetrator of the injury, who frequently is better able to use due care and to insure against the financial risks of injury.

Id.

B. The Case at Bar

The present case falls squarely within the Castillo rule. Extreme Auto took possession of the subject vehicle on consignment and had exclusive authority and control over its use and storage. It was the car lot personnel who could handle the

vehicle, authorize test-drives, and otherwise operate it. This is no different than a vehicle left for repairs, where the owner cedes authority and control to the repair shop.

The Second District's opinion does not deny that the *Castillo* criteria apply. Instead, the decision is based on the fact that *Castillo* has yet to be applied to a consignment sale situation. This is not a relevant distinction. For the purpose of applying the exception, there is no legal difference between a business that has custody of the car for sale as opposed to one performing repairs. This is clear from this Court's opinion in *Michalek v. Shumate*, which indicated that cleaning services would fall within the rule:

> We decline to distinguish between types of service. The owner's dilemma is the same regardless of the service offered. He has no more control over his vehicle's use once delivered for cleaning than he has once delivered for transmission service. [1]

524 So. 2d 426, 427 (Fla. 1988).

By this same logic, turning a vehicle over to a consignment lot must also fall within the Castillo rule. A consignment car lot that stores, advertises, secures, and test-drives a vehicle is performing a "service," just as surely as a repair shop which

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1 The Michalek court ultimately did not apply the exception because the accident occurred when the vehicle was being transported from the owner to the service company at the owner's direction. That distinguishing fact does not exist in the case at bar.

stores, secures, repairs and test-drives a vehicle. In the case of the repair shop, one presumes that the car will be test-driven for the purpose of diagnosing and testing repairs on the vehicle. Similarly, when a car is left for consignment, one presumes it will be test-driven by prospective buyers whom the owner cannot identify or control. In both situations the car may be moved to accommodate other vehicles or to provide for safekeeping. It is the relinquishment of control to the service agency that is important, not the nature of the service being performed. See also *Smilowitz v. Russell*, 458 So. 2d 406 (Fla. 3d DCA 1984) (applying the Castillo rule where car had been left with an upholstery company).

The Castillo rule is expressly grounded in public policy and practical considerations which - - as the Second District acknowledged - - apply to the case at bar. In fact, a consignment lot provides a more compelling case for the rule than a repair shop, since the consignment seller entrusts the business with both handling the vehicle and supervising its use by prospective buyers - - with the view of never regaining control. By excluding the present case from the rule, the decision below creates an irrelevant distinction and conflicts with *Castillo*, *Michalek*, and their progeny.

C. Proper Applications of the Castillo Rule

The clearest illustration of the Second District's error is presented by *Fought v. Mullen*, 609 So. 2d 726 (Fla. 5th DCA 1992). In that case, Defendant Mullen brought a vehicle he owned to Orange County Auto Auction, Inc. to offer it for sale. Plaintiff Barbara Fought, who worked at the auction, directed another auction employee to drive Mullen's car through the lane to the auction block. When Ms. Fought turned away, her co-employee drove Mullen's car into her, causing serious injuries. Fought sued Mullen for vicarious liability under the dangerous instrumentality doctrine. The trial court granted summary judgment in favor of the defendant and the Fifth District affirmed, citing *Castillo*. The court applied the Castillo rule since Mullen had entrusted his car to the auction company at the registration desk for the service of auctioning it, adding, "...we find no reason to distinguish between types of service when applying the automobile service exception and hold that under the facts in this case the auctioning of an automobile is a service which falls within the exception." *Id.* at 727 (citing *Michalek*, 524 So. 2d at 427).

Fought is a proper analysis of the Castillo rule and is legally indistinguishable from the case at bar. An auction service holds a vehicle for exhibition and sale, just as a consignment lot does. The Castillo rule cannot apply to one and not the other. In fact, a case cited in both *Castillo* and *Fought* anticipated that car dealerships would be treated like other vehicle services in

forming an exception to the dangerous instrumentality doctrine: In *Fahey v. Raftery*, 353 So. 2d 903 (Fla. 4th DCA 1977), an owner turned his vehicle over to a valet parking attendant who then injured a co-worker. In affirming summary judgment in favor of the owner, the court observed:

> …any car left at a service station, or automobile dealership, will be normally and expectedly driven on or about the premises. Moreover, although not essential to this decision, we recognize that such entrusting of one's car for service or repair, presupposes that it will also be road tested and we are of the opinion that such road testing should not normally result in liability to the owner simply because he is the owner.

Id. at 904. (emphasis added).

The Castillo rule was also properly applied in the factually similar *Roberts v. United States Fidelity and Guaranty Company*, 498 So. 2d 1037 (Fla. 1st DCA 1986), where a repairman, who had been given a vehicle for the purpose of making repairs, caused injuries while driving it on a trip to the beach. The First District ruled that the owner/defendant was entitled to judgment as a matter of law. Hence, here, the Castillo rule applies regardless of whether Aponte's use of Youngblood's vehicle on the day of the accident was connected to the service (i.e., to remove it from the lot at night for safekeeping), personal, or a combination of both.

Placing the present case within the Castillo rule would be consistent with the historical underpinnings of that decision as well as its scope as recognized in the cases that have followed.

D. Cases Falling Outside the Exception

Those cases in which courts have refused to apply the Castillo rule are qualitatively different from the situation at bar. In *Lopez v. Demaria Porche-Audi,* 395 So. 2d 199 (Fla. 3d DCA 1981), a vehicle was entrusted to a serviceman, not only to deliver it to the repairman's facility, but with the specific understanding that the repairman could take it home for the night and drive it to his place of business the next day. The accident occurred on the way between the repairman's home and his place of work.

Lopez falls outside of the Castillo rule because the owner specifically entrusted the identified repairman to use the car to travel to and from work. This is analogous to any owner lending a vehicle to a third party for personal use. This is the category of cases recognized in *Michalek*, where the owner specifically authorized the cleaning service agency employee to transport the automobile to the agency. The owner remained vicariously liable for this use because he exercised control over that specific use. In the present case, it is undisputed that Youngblood turned complete control of the car over to the consignment lot, leaving all

decisions on its use to Extreme Auto. The results in *Michalek* and *Lopez* have no bearing on the case at bar.

Another example is *Grille v. Le-Bo Properties Corp.*, 553 So. 2d 352 (Fla. 2d DCA 1989), where there was an arrangement between the owner and cleaning company was that the owner would call to have a company employee pick up his car and transport it back to the business. This is the classic *Lopez/Michalek* situation, where an owner authorizes another to transport his vehicle to a service agency and hence remains in control of that car and liable for its negligent operation until it is delivered to the agency for service. See also *Jack Lee Buick v. Bolton*, 377 So. 2d 226 (Fla. 1st DCA 1979), rev. denied, 386 So. 2d 638 (Fla. 1980) (concluding that *Castillo* did not apply where accident occurred when cleaning business employee picked up car at request of owner).

The history of the Castillo rule – from its genesis in the district court rulings in the 1960s and 1970s through it interpretation in *Michalek, Fought, Roberts, Smilowitz, Lopez, Grille* and others – presents a consistent, practical and fair body of law from which the instant case departs. A ruling in favor of the Petitioner here does not require an expansion of the rule, but only a proper application of it. Moreover, even if the trial court's ruling were an extension of the rule, it would be fully justified by practical and public policy reasons cited in Florida court opinions

for over 40 years, up to and including the Second District's opinion in the case at bar.

CONCLUSION

The Petitioner respectfully requests that the conflict created by the Second District's ruling be resolved in favor of this Court's decision in *Castillo* and the Fifth and First Districts' proper interpretation of the rule. The Second District opinion should be vacated and the matter remanded for reinstatement of summary judgment in favor of the Defendant/Petitioner.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished via United States Mail to **Kennan G. Dandar,** Dandar & Dandar, P.O. Box 24597, Tampa, Florida 33623-4597, *Attorney for Plaintiff/Appellant/Respondent,* on this _____ day of December, 2006.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Jurisdictional Brief of the Petitioner satisfies the requirements of Florida Rules of Appellate Procedure 9.100(1) and 9.210(a)(2) and is submitted in Times New Roman 14-point font.

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Scot E. Samis