IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

T. PATTON YOUNGBLOOD,

Petitioner,

vs. **Case No.: SC06-1205**
DCA No.: 2D05-3112

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

Respondent.
_____/

JURISDICTIONAL BRIEF OF THE PETITIONER

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TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF THE CASE AND FACTS

The question presented is whether the "shop" exception to vicarious liability under the dangerous instrumentality doctrine applies where an owner turns over a vehicle to a used car lot for sale on consignment.

On December 4, 2002 Petitioner/Defendant Youngblood delivered his vehicle to Extreme Auto Sales and Accessories, Inc., and consigned it there for sale.[1] (A. 2). Youngblood dealt with one of Extreme Auto's principals, Teddy Aponte. (*Id.*). Youngblood and Aponte discussed the sale price for the car; however, there were no discussions about the use of the vehicle while it was on consignment. (*Id.*). Youngblood did not expect to regain possession of the vehicle; rather, he expected only to receive the sale proceeds. (*Id.*).

On December 24, 2002, Aponte took Youngblood's vehicle from the Extreme Auto lot and drove it home, allegedly to protect it from vandalism. (A. 2-3). From there, he drove it to visit several friends and to purchase beer before going to his sister's house for a Christmas party. (A. 3). On the way to the party, Aponte was involved in an accident that killed the Respondent/Plaintiff's decedent,

[1] The Second District's opinion assumes that the subject vehicle was owned by Youngblood, but notes that such is a matter which remains in dispute. (A. 2, fn 1). The vehicle was originally titled in Youngblood's wife's name; he received possession of it as part of a Final Judgment of Dissolution entered approximately three weeks before Youngblood consigned the vehicle to Extreme Auto. (A. 2).

Reinaldo Villanueva. (*Id.*). Youngblood testified that he never would have consented to this type of use of his vehicle had he known of it. (*Id.*).

Villanueva sued Youngblood on a theory of vicarious liability under the dangerous instrumentality doctrine due to his alleged ownership of the subject vehicle. (*Id.*). The parties filed cross motions for summary judgment. (*Id.*). Youngblood's motion was based on three grounds: The shop exception to the dangerous instrumentality doctrine, the theft or conversion exception to the doctrine, and Youngblood's lack of consent to Aponte's use of the vehicle. (*Id.*). The trial court granted Summary Judgment in favor of Youngblood without providing a specific basis. (*Id.*).

The Second District reversed. The court recognized the shop exception to the dangerous instrumentality doctrine, quoting from this Court's landmark decision in *Castillo v. Bickley*, 363 So. 2d 792 (Fla. 1978), which ruled 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. (A. 5). However, the Second District refused to apply this exception in the present case because it did not consider Extreme Auto an "automobile service agency." (A. 5-6). In so ruling, the Second District acknowledged the following:

> 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. (A. 6-7).

Despite these parallels, the Second District ruled that if the shop exception is to be applied to a vehicle turned over to a car lot on consignment, "the Supreme Court is the most appropriate body to do so." (A. 7).

SUMMARY OF ARGUMENT

The Second District's decision conflicts both with this Court's landmark case on the shop exception and a legally indistinguishable case from the Fifth District.

As this Court has clearly stated, the nature of the service being performed by the company in possession of the vehicle is irrelevant to whether the shop 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 which stores, secures, repairs and test-drives a vehicle. All of the criteria for applying the

rule are present in this case. By failing to do so, the Second District's decision creates a false distinction and conflicts with Supreme Court precedent.

The present decision also conflicts with the Fifth District's proper application of the shop exception in the utterly parallel situation of an owner who turned his vehicle over to an auto auction for sale. Where two cases cannot be reconciled, conflict jurisdiction exists.

The situation in the case at bar is one that will undoubtedly be repeated in the future with serious consequences to the parties involved. The Petitioner respectfully submits that conflicts created by the present decision should be resolved.

STANDARD OF REVIEW

The existence of conflict is determined as a matter of law. The District Court opinion does not have to identify the conflict in order to create jurisdiction. *Ford Motor Company v. Kikis,* 401 So. 2d 1341, 1342 (Fla. 1981).

ARGUMENT

Issue: WHETHER THE DISTRICT COURT'S DECISION CONFLICTS WITH THE SUPREME COURT DECISIONS ON THE "SHOP" EXCEPTION TO THE DANGEROUS INSTRUMENTALITY DOCTRINE AND/OR THE FIFTH DISTRICT'S APPLICATION OF THE EXCEPTION TO A VEHICLE HELD FOR AUCTION AND SIMILAR CASES.

The shop exception to vicarious liability under the dangerous instrumentality doctrine was created by this Court in *Castillo v. Bickley*, 363 So.2d 792 (Fla. 1978), which 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. The *Castillo* decision approved the reasoning in *Harfred Auto Imports, Inc. v. Yaxley*, 343 So. 2d 79 (Fla. 1st DCA 1977), where the trial court carefully analyzed the law in Florida on this issue and opted to follow the nationwide majority rule of owner liability only in cases where the doctrine of *respondeat superior* pertains. In accepting this view, this Court reasoned as follows:

> 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. *Castillo*, 363 So.2d at 793.

All of these considerations apply to the case at bar. Extreme Auto took possession of Youngblood's vehicle on consignment and had exclusive authority and control over the vehicle. It was the car lot personnel who could handle the vehicle, authorize test-drives and otherwise operate it in connection with its presence at the place of business. This is no different than a person who has turned over a vehicle for repairs, thereby ceding authority and control over test-drives and other handling in connection with repairs.

The Second District's decision does not deny that the *Castillo* criteria apply. Instead, the decision is based on the fact that the shop exception has yet to be applied to a consignment sale situation. This is not a legal distinction. Whether a rule of law applies to a certain set of facts does not depend on whether the rule has been applied to an identical set of facts in the past. Every case presents a unique set of facts. The question is whether the facts fit the criteria necessary for application of the given rule. The shop exception is expressly grounded in both

public policy and practical considerations which - - as the Second District properly recognized - - apply to the case at bar.

The fact that the service being performed by a consignment lot is the holding and exhibition of the car for sale, rather than for repair, is utterly irrelevant to the applicability of the shop exception. This observation was specifically made by this Court in *Michalek v. Shumate*, 524 So. 2d 426,427[2] (Fla. 1988):

> 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.

Similarly, 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 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 around the lot to accommodate other vehicles or to provide for safekeeping. By excluding the present case from

[2] 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 or in *Fought.*

the exception, the decision below creates a false distinction and conflicts with *Castillo* and its progeny.

While the conflict with *Castillo* is sufficient to create jurisdiction in this Court, an even clearer case 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 later 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 shop exception since Mullen had entrusted his car to the auction company at the registration desk for the service of auctioning it. Moreover, the court specifically stated, "...<u>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</u>." 609 So. 2d at 727 (citing *Michalek v. Shumate*, 524 So. 2d 426,427 (Fla. 1988)) (Emphasis Added).

Fought is legally indistinguishable from the case at bar and is in diametric conflict with both the ruling and reasoning of the Second District. An auction

service holds a vehicle for exhibition and sale, just as a consignment lot does. The shop exception cannot apply to one and not the other.

The opposite results in the present case and *Fought* can be traced back to the conflicting analysis offered in each opinion. The *Fought* court properly recognized that the type of service being performed for the vehicle owner has no bearing on the applicability of the shop exception. In contrast, the Second District's decision is based solely on an erroneous distinction between services provided by a company that accepts a vehicle for a consignment sale versus other types of vehicle services to which Florida courts have applied the shop exception. As noted above, this view was specifically rejected by this Court *Michalek*. See also, *Fahey v. Raftery*, 353 So. 2d 903 (Fla. 4th DCA 1977)(applying exception to a valet parking service - a ruling cited in *Castillo*) and *Smilowitz v. Russell*, 458 So. 2d 406 (Fla. 3d DCA 1984)(applying exception to vehicle operated by owner of car upholstery company).

Further conflict exists with the factually similar *Roberts v. United States Fidelity and Guaranty Company*, 498 So. 2d 1037 (Fla. 1st DCA 1986), where the accident occurred when a repairman, who had been given the vehicle for the purpose of making repairs, was driving it on a trip to the beach. This situation came within the shop rule exception to owner's liability established in *Castillo* and entitled the owner/defendant to judgment as a matter of law. Hence, conflict exists

regardless of whether Aponte's use of Youngblood's vehicle on the day of the accident was connected to the service (i.e., to avoid vandalism), personal, or a combination of both.

Where two District Court holdings cannot be reconciled, conflict jurisdiction exists. See, e.g., *Aravena v. Miami-Dade County*, 31 Fla. L. Weekly S205 (Fla. April 6, 2006). While the conflict with *Fought* is the most stark and obvious, the Second District's decision is also contrary to the reasoning and rulings of *Michalek*, *Fahey*, *Smilowitz*, and *Roberts*, supra.

Consignment of used cars is a very common occurrence between owners and car lots. The situation in the case at bar is one that will undoubtedly be repeated in countless cases in the future, with serious consequences to the parties involved. The conflicts created by the present decision should be resolved.

CONCLUSION

It is respectfully submitted that the District Court's decision conflicts with several other decisions concerning the shop exception to vicarious liability under the dangerous instrumentality doctrine, and that the Court should accept jurisdiction to resolve the conflicts.

CERTIFICATE OF SERVICE

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

ABBEY, ADAMS, BYELICK, KIERNAN, MUELLER & LANCASTER, L.L.P.

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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