IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

T. PATTON YOUNGBLOOD,

Petitioner,

vs. Case No. SC06-1205
DCA No.: 2D065-3112

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

Respondent
_____/

JURISDICTIONAL ANSWER BRIEF OF RESPONDENT

KENNAN G. DANDAR, ESQ.
DANDAR & DANDAR, P.A.
550 North Reo Street, Suite 106
Post Office Box 24597
Tampa, Florida 33623-4597
813-289-3858/Fax: 813-287-0895
Florida Bar No. 289698
Attorney for Respondent

TABLE OF CONTENTS

TABLE OF CITATIONS

SUMMARY OF ARGUMENT

The instant case does not conflict with any decision of any court. A used car dealer taking a car under consignment is not providing a service related activity to the owner. Therefore, the shop rule exception to the dangerous instrumentality doctrine does not apply.

Alternatively, if consignment of a vehicle to a used car dealer is a service related activity, the facts in this case show the vehicle was being driven by the person to whom the vehicle was entrusted and driven to a place to secure it for the convenience of the owner, thereby making the owner liable for its negligent operation. *Michalek v. Shumate*, 524 So.2d 426 (Fla 1988).

The 2nd District was correct in refusing to create yet another exception to the dangerous instrumentality doctrine, something only this court can do.

ARGUMENT

SHOP RULE EXCEPTION DOES NOT APPLY TO CONSIGNMENT OF VEHICLE TO USED CAR DEALER

Since there is no conflict between this case and any other case, this court lacks jurisdiction.

A. Consignment is not a service.

> In this case, Youngblood did not turn the Lexus over to an "automobile service agency" for repair or service. Rather, he consigned the Lexus to a used car dealer for sale. While Youngblood argues that Extreme Auto was providing the service of selling the car, all of the cases applying the "shop" exception have involved servicing or repairing the motor vehicle itself--not providing a service to the owner. For the "shop" exception to retain its meaning, it cannot be extended to a bailment by the vehicle owner to any entity other than a service or repair shop. Instead, it must be limited to those situations specifically contemplated by the supreme court. Thus, because the facts of this case do not fall within the "shop" exception to the dangerous instrumentality doctrine, summary judgment in favor of Youngblood on this basis was improper.

Estate of Villanueva ex rel. Villanueva v. Youngblood, 927So.2d 955, 958-959 (Fla.2dDCA,2006).

This is a case of first impression. The above holding presents no conflict. Since consignment of a vehicle to a car dealer is not a service related activity, the shop rule exception to the dangerous instrumentality doctrine simply does not apply.

> "The *Castillo* exception applies only to the vehicle's negligent use during servicing, service-related testing, or service-related transport of the vehicle. *Accord Jack Lee Buick* (*Castillo* limited to vehicle's negligent use is "under the control and direction of repair and service agencies during their work related operations"). We decline to further extend the exception. An owner who authorizes another to transport his car to a service agency remains in control thereof and ultimately liable for its negligent operation until it is delivered to an agency for service."

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

In all of the cases cited by the Petitioner which apply the shop rule exception to the dangerous instrumentality doctrine, there is a customary servicing of a vehicle. Those cases all involve the shop being in the business of servicing or working on the vehicle, including valet parking.

The main case relied upon the Petitioner in his attempt to show conflict, *Fought v. Mullen*, 609 So.2d 726 (Fla. 5th DCA 1992), involves an auction service company in the business of selling cars from one dealer to another dealer. The auction company gets paid its fee whether or not the vehicle is sold. This is another form of fee-for-service related activity, similar to paying any other vehicle service/garage company for repair. In the instant case, the car dealer is not being paid a fee. The owner simply told the dealer what amount he needed to clear so that he could pay-off the loan and that the dealer could keep the rest. The dealer

and the owner were in this business deal together, unlike any scenario involving "servicing, service-related testing, or service-related transport of the vehicle." *Michalek.* On the other hand, *Fought* creates another exception t the Dangerous Instrumentality Dcotrine, since an auction is not the type of service contemplated by this court in *Michalek.*

Fought can also be distinguished by its facts, where an employee of the auction struck another auction employee rather than a third party. However, if this court concludes that the circumstances in the instant matter amount to servicing the vehicle, then the decision below is indeed in conflict with *Fought.* This would greatly expand the definition of vehicle servicing, eroding once more the dangerous instrumentality doctrine.

B. Convenience of the owner maintains owner liability.

Even if the dangerous instrumentality doctrine may apply in its broadest form, the owner does not escape liability when the serviceman is driving the owner's car for the convenience of the owner.

> But where the operation of the vehicle is primarily for the accommodation or convenience of the owner, see, e.g., *Jack Lee Buick, Inc. v. Bolton*, 377 So.2d 226 (Fla. 1st DCA 1979), cert. denied, 386 So.2d 638 (Fla.1980); *Jordan v. Kelson*, 299 So.2d 109 (Fla. 4th DCA 1974), cert. denied, 308

> So.2d 537 (Fla.1975), or otherwise totally unrelated to its repair, see, e.g., *Lopez v. DeMaria Porche-Audi,* 395 So.2d 199 (Fla. 3d DCA 1981), courts have refused to apply the shop rule exception to owner liability.

Smilowitz v. Russell, 458 So.2d 406, 407 (Fla. 3rd DCA, 1984).

In the instant matter, the car dealer, the same person to whom the owner entrusted the vehicle, is driving the vehicle from the car lot to his sister's house for safekeeping. The dealer is safekeeping the car for the convenience of the owner and the car dealer, i.e., protecting the asset for the mutual benefit of owner and car dealer. Petitioner admits that he never placed any restrictions on the use of his vehicle. The owner is therefore liable. There is no conflict.

CONCLUSION.

The Second District was correct in concluding that it disagreed with Petitioner "that this court should take this opportunity to extend the "shop" exception to consignment-for-sale situations." *Estate of Villanueva*, at 959. This court must deny jurisdiction since there is no conflict.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copy of the foregoing has been furnished this 3rd day of July, 2006, by U.S. Mail to SCOTT E. SAMIS, ESQ., Post Office Box 1511, St. Petersburg, Florida, 33731-1511.

/s/ Kennan G. Dandar, Esq.
KENNAN G. DANDAR, ESQ.
DANDAR & DANDAR, P.A.
550 North Reo Street, Suite 106
Post Office Box 24597
Tampa, Florida 33623-4597
813-289-3858/Fax: 813-287-0895
Florida Bar No. 289698
Attorney for Respondent

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Answer to Jurisdictional Brief 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.

/s/ Kennan G. Dandar, Esq.
KENNAN G. DANDAR. ESQ.