IN THE SUPREME COURT OF FLORIDA

CONSOLIDATED CASE NOS.: SC10-1068 & SC10-1070

CASE NO.: SC10-1070

MONICA STEELE,
Petitioner,

v.

GEICO INDEMNITY COMPANY,
Respondent.

-AND-

CASE NO.: SC10-1068

RETHELL BYRD CHANDLER, etc., et al.,

Petitioners,

v.

GEICO INDEMNITY COMPANY,

Respondent.

RESPONDENT GEICO'S CONSOLIDATED BRIEF ON THE MERITS

ANGELA C. FLOWERS
KUBICKI DRAPER
Attorneys for Respondent GEICO
1805 SE 16th Avenue, Suite 901
Ocala, FL 34471
Tel: (352) 622-4222

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STATEMENT OF THE CASE AND FACTS

Petitioners were Appellees in the district court of appeal and defendants in the circuit court. Respondent, Geico Indemnity Company ("GEICO"), was the Appellant in the district court of appeal and the plaintiff in the circuit court declaratory judgment action.

This action arises out of GEICO's declaratory judgement action to establish that there was no coverage under a family automobile insurance policy it issued to Kutasha Shazier. [V.I R. 1-45, 63-116]. Shazier carried GEICO coverage on a Ford Expedition she owned. [V.V R. 854 Exh. G]. When the Ford Expedition began experiencing transmission problems, Shazier rented a Hyundai Sonata from Avis Rent-A-Car. [V.V R. 669 Exh. B at 14; 725 Exh. C at 11-12]. The rental car was involved in an accident while being driven by Tercina Jordan. [V.V R. 798 Exh. E at 21-22].

Petitioners moved for summary judgment on the ground that coverage existed because the rental car qualified as a "temporary substitute auto." [V.III R. 471-526, 582-85; V.VII R. 1133-35, 1136-37]. GEICO filed its own summary judgment motion asserting that no coverage existed because the rental car did not qualify as a "temporary substitute auto" as it was not being used with Avis's permission and Petitioners failed to establish that the Ford Expedition was

withdrawn from normal use for breakdown or repair.[1] [V.III R. 587-610; V.IV R. 637-66].

Avis, as the owner of the vehicle, limited permission to use of the vehicle as set forth in the rental agreement. [V.V R. 841 Exh. 1 at 1, 3]. Shazier was the only person authorized to drive the rental car. [V.V R. 841 Exh. 1 at 3]. The Avis rental document states in pertinent part:

> NO ADDITIONAL OPERATORS ARE AUTHORIZED OR PERMITTED WITHOUT AVIS' PRIOR WRITTEN APPROVAL IN ACCORDANCE WITH THE TERMS AND CONDITIONS OF THE RENTAL AGREEMENT OR APPLICABLE STATE LAW

[V.V R. 841 Exh. 1 at 1]. The rental agreement terms and conditions further state:

> A VIOLATION OF THIS PARAGRAPH, WHICH INCLUDES USE OF THE CAR BY AN UNAUTHORIZED DRIVER, WILL AUTOMATICALLY TERMINATE YOUR RENTAL

[V.V R. 841 Exh. 1 at 3]. Shazier is the only authorized driver listed on the rental document. [V.V R. 841 Exh. 1]. Through its cross-claim against Shazier, Avis

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[1] The "temporary substitute auto" provision contains two conditions. Because the district court found that the first condition was not met – used with the permission of the owner – it did not reach the question of whether the owned vehicle was withdrawn from normal use for breakdown or repair. The status of the Ford Expedition was contested and was an unresolved material fact that likewise precluded the summary judgment entered by the trial court. The facts applicable to this alternative ground for reversal of the summary judgment entered by the trial court are set forth under Issue II of the argument section.

acknowledged that Jordan was not an authorized or listed driver. [V.V R. 845 Exh. F].

The trial court entered summary judgment in favor of Petitioners. [V.VII R. 1138-50]. In its well-reasoned opinion, the First District reversed and held that the rental car did not qualify as a "temporary substitute auto." [Sup. Ct. R. 1-5].

> Under the policy, in order for coverage to attach in this case, the "temporary substitute auto" must have been used with the permission of Avis. As the owner, Avis had the authority to define the scope of permissible use of the rental car. *See Duncan Auto Realty, Ltd. v. Allstate Ins. Co.*, 754 So.2d 863, 865 (Fla. 3d DCA 2000) ("[T]he owner of the temporary substitute vehicle, not its user, possesses the authority to define the scope of permissible use of the substitute vehicle."). As evidenced by the rental agreement, Avis did just that. Avis granted Shazier permission to use the rental car so long as she was the only person who did so. Jordan's use of the rental car automatically revoked the permission granted to Shazier by Avis. Therefore, because it was not being used with Avis's permission, the rental car did not qualify as a "temporary substitute auto" and no coverage existed under the policy.

[Sup. Ct. R. 4-5].

Accordingly, the district court reversed and remanded with directions that summary judgment be entered in favor of GEICO. [Sup. Ct. R. 5].

APPLICABLE POLICY LANGUAGE

The GEICO Family Automobile Policy issued to Shazier provides, in

pertinent part:

SECTION I - LIABILITY COVERAGES
Bodily Injury Liability And Property Damage Liability
Your Protection Against Claims from Others

DEFINITIONS

. . . .

4. ***"Insured***" means a person or organization descried under **PERSONS INSURED**.

5. ***"Non-owned auto"*** means a ***private passenger, farm* or *utility auto*** or ***trailer*** not owned by or furnished for the regular use of either ***you*** or a ***relative***, other than a ***temporary substitute auto***. An auto rented or leased for more than 30 days will be considered as furnished for regular use.

6. ***"Owned auto"*** means:

(a) a vehicle described in this policy for which a premium charge is shown for these coverages;
(b) a ***trailer*** owned by *you*;
(c) a ***private passenger, farm,*** or ***utility auto***, ownership of which ***you*** acquire during the policy period, if

(i) it replaces an ***owned auto*** as defined in (a) above; or
(ii) we insure all ***private passenger, farm*** and ***utility autos*** owned by ***you*** on the date of the acquisition and ***you*** ask us to add it to the policy no more than 30 days later;

(d) a ***temporary substitute auto***.

. . . .

8. *"**Relative**"* means a person related to ***you*** who resides in ***your*** household, including ***your*** ward or foster child.
9. *"**Temporary substitute auto**"* means a ***private passenger, farm*** or ***utility auto*** or ***trailer***, not owned by ***you***, temporarily used with the permission of the owner. This vehicle must be used as a substitute for the ***owned auto*** or ***trailer*** when withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction.

. . . .

13. "***You***" means the policy holder named in the declarations and his or her spouse if a resident of the same household.

LOSSES WE WILL PAY FOR YOU

Under Section I, we will pay damages in which an ***insured*** becomes legally obligated to pay because of:

1. ***bodily injury***, sustained by a person, and
2. damage to or destruction of property.

arising out of the ownership, maintenance, or the use of the ***owned auto*** or a ***non-owned auto***. We will defend any suit for damages payable under the terms of this policy. We may investigate and settle any claim or suit.

. . . .

PERSONS INSURED

Who Is Covered

Section I applies to the following as ***insureds*** with regard to an ***owned auto***:

1. ***you***;
2. any other person using the auto with ***your*** permission. The actual use must be within the scope of that permission;
3. any other person or organization for his or its liability because of acts or omissions of an ***insured*** under 1. or 2. above.

Section I applies to the following with regard to a ***non-owned auto***:

1. ***you*** and ***your relatives*** when driving the ***non-owned auto***. Such use must be with the permission, or reasonably believed to be with the permission, of the owner and within the scope of that permission.
2. a person or organization, not owning or hiring the auto, regarding his or its liability because of the acts or omissions of an ***insured*** under 1. above.

The limits of liability stated in the declarations are our maximum obligations regardless of the number of ***insureds*** involved in the occurrence.

[V.V R. 854 Exh. G; Petitioners' Appendix].

SUMMARY OF THE ARGUMENT

No express and direct conflict exists and, therefore, this Court should decline the invitation to exercise discretionary jurisdiction. This case turns on the interpretation of a contractual provision defining "temporary substitute auto." The First District correctly held that GEICO's policy of insurance did not provide coverage under the "owned auto" provisions of the insurance policy where the undisputed facts establish that the rental car did not qualify as a "temporary substitute auto" as needed to trigger the "owned auto" provisions. The cases cited

by Petitioners for conflict jurisdiction do not involve a question of insurance contract interpretation, nor the term "temporary substitute auto." The district court decision not only followed the law regarding contract interpretation, but followed the existing precedent addressing the very issue presented. The law governing tort liability pursuant to the dangerous instrumentality doctrine does not apply to this contract interpretation case and cannot create insurance coverage that otherwise does not exist. In response to the dangerous instrumentality doctrine, the only insurance obligation that the Legislature has sought to impose is that the owner of the vehicle maintain primary insurance. Alternatively, the summary judgment entered by the trial court should be reversed because there were disputed issues of material fact regarding whether the rental car was inoperative or disabled, which disputed facts precluded the entry of summary judgment in favor of Petitioners.

STANDARD OF REVIEW

GEICO agrees with Petitioners that this Court reviews the lower tribunal's summary judgment ruling under the de novo standard. *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126 (Fla. 2000). Further, "A trial court's construction of an insurance policy to determine coverage is a matter of law subject to de novo review." *Barnier v. Rainey*, 890 So. 2d 357 (Fla. 1st DCA 2004).

ARGUMENT

I.

THE FIRST DISTRICT'S DECISION CORRECTLY FOLLOWS THE RULE THAT THE WORD 'PERMISSION' AS USED IN AN AUTOMOBILE INSURANCE CONTRACT'S DEFINITION OF A "TEMPORARY SUBSTITUTE AUTO" REFERS TO THE ACTUAL PERMISSION GRANTED BY THE OWNER AND IS NOT COEXTENSIVE WITH THE EXPANDED DEFINITION OF PERMISSION USED IN APPLYING TORT LIABILITY UNDER THE DANGEROUS INSTRUMENTALITY DOCTRINE

The GEICO family automobile policy issued to Shazier provides liability coverage for insured autos. The policy insures both "owned" and "non-owned" autos. The definitions of "owned" and "non-owned" autos are spelled out in the policy. This case involves the threshold question whether the rental car qualifies as an insured auto, either "owned" or "non-owned." This determination, in turn, directs which omnibus clause defines the scope of persons insured.

Unlike the cases cited by Petitioners, this case does not involve the question of whether the "owned auto" omnibus clause provides coverage to the driver/sub-bailee as a person insured.[2] Rather, in applying the policy language to the

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[2] Where there is a chain of custody involving an automobile, various terms are employed to describe the individuals in the chain. For instance: owner, bailee, sub-bailee; owner, lessee, sub-lessee; or owner permittee, second permittee. Throughout this brief, the driver at the time of the accident, Jordan, will be

threshold question of "owned" versus "non-owned" auto, the subject auto does not qualify as a "temporary substitute auto." Accordingly, as a "non-owned auto," the applicable omnibus clause limits coverage to "you [Shazier] and your relatives *when driving* the non-owned auto." (Emphasis added). It is undisputed that neither Shazier nor a relative was driving the rental car at the time of the accident. Thus, the First District correctly determined that the GEICO policy does not provide any coverage for the subject automobile accident.

Contrary to established law, Petitioners ask this Court to apply an expanded definition of "permission," when applying the "temporary substitute auto" definition. The Court should reject such request and, instead, follow the already well-established law that the vehicle owner's determination of the scope of permission controls whether an auto qualifies as a "temporary substitute auto." Moreover, there is no public policy reason to expand the meaning of "permission" when the term is used in a coverage clause providing auto insurance which is not mandated by Florida law.

A. The First District's decision correctly applied the only existing law on the issue presented and does not expressly and directly conflict with any other Florida law.

The only Florida case to directly construe the phrase "used with the

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referred to as the sub-bailee.

permission of its owner" as found within the "temporary substitute auto" definition is *Duncan Auto Realty, Ltd. v. Allstate Ins. Co.*, 754 So. 2d 863, 865 (Fla. 3d DCA 2000), which the First District followed in holding that there is no coverage under the GEICO policy because the rental car does not qualify as a "temporary substitute auto."

The standard definition for "temporary substitute auto" contains a permissive use limitation. The GEICO policy defines "temporary substitute auto" as:

> a ***private passenger, farm*** or ***utility auto*** or ***trailer***, not owned by ***you***, temporarily used with the permission of the owner. This vehicle must be used as a substitute for the ***owned auto*** or ***trailer*** when withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction.

[Petitioners' Appendix]. The *Duncan* court found the policy definition of "temporary substitute auto" to be unambiguous. 754 So. 2d at 864.

Courts do not have the power to create insurance coverage where none exists on the face of the policy. *Pastori v. Commercial Union Ins. Co.*, 473 So. 2d 40 (Fla. 3d DCA 1985); *Telemundo Television Studios, LLC, v. Aequicap Ins. Co.*, 38 So. 3d 807 (Fla. 3d DCA 2010). There is no statutory requirement that an automobile insurance policy extend any coverage for accidents involving a

"temporary substitute auto." *Pastori v. Commercial Union Ins. Co.*, 473 So. 2d at 41. Thus, the contract provisions concerning a "temporary substitute auto" should be given effect as written and the contracting parties are free to limit such coverage according to a particular type of loss, a particular class of insureds, or a permissive use clause.

In *Duncan*, Mr. Garcia was covered by an automobile insurance policy that provided insurance only to persons using one of the three listed autos. 754 So. 2d at 864. Mr. Garcia drove one of the listed vehicles to an auto dealership in order to shop for a new vehicle. While driving one of the dealership's trucks for a routine test drive, Mr. Garcia caused an accident which injured a third party. *Id.*

In a declaratory judgment proceeding, Mr. Garcia's insurance carrier sought a declaration that coverage was not triggered because the truck did not qualify under the policy as a "temporary substitute auto." *Id*. at 864. Thus, the court was called upon to interpret a standard "temporary substitute auto" provision which provided, in part, that coverage will be extended to "[a]ny 'auto' you do not own while used with the permission of its owner as a temporary substitute for a covered 'auto' you own . . . ." *Id.* The definition is applied to the facts existing "at the time of the accident." *Id.* at 865.

Based upon the plain language of the policy, the court held the subject

vehicle did not meet the definition of "temporary substitute auto" where "the auto dealer only granted [the driver] use of its truck for a routine test drive," *Id*. at 865. Because "the owner of the temporary substitute vehicle, not its user, possesses the authority to define the scope of permissible use of the substitute vehicle," the facts regarding permission were crucial to the court's coverage determination. *Id.* Although Mr. Garcia's vehicle was experiencing serious mechanical problems at the time he test drove the truck, it did not qualify as a temporary substitute vehicle because he was only granted permission to test drive the truck; the auto dealer did not grant permission to use the truck as a substitute in the same manner the insured could have used his owned vehicle. *Id*. at 865.

Likewise, Shazier did not have permission to use the rental car as a substitute in the same manner the insured could have used her owned vehicle. Avis specifically defined the scope of permissible use via its rental agreement. Pursuant to the rental agreement signed by Shazier, she was not permitted to allow any unauthorized driver to use the rental car. Moreover, her permission to drive the rental car was automatically terminated when she allowed an unauthorized driver to use the vehicle. Finally, it is undisputed that Avis did not give Jordan permission to operate the rental car. Applying the plain language of the GEICO policy to the undisputed facts, the rental car cannot qualify as a "temporary

substitute auto" in the absence of Avis's permission as to the use. *See Telemundo Television Studios, LLC, v. Aequicap Ins. Co.*, 38 So. 3d at 809 (an insured's failure to comply with the requirements of the policy is fatal as courts do not have the power to create insurance coverage).

The First District properly followed *Duncan*, the only Florida case to directly construe the phrase "used with the permission of its owner" as found within the "temporary substitute auto" definition, to hold that the rental car did not qualify as a "temporary substitute auto." Because the rental car was not being used with Avis's permission, it did not qualify as a "temporary substitute auto." The rental car was a "non-owned auto" for purposes of applying the persons insured omnibus clause, which only provides coverage to an insured who is actually driving the vehicle.

GEICO respectfully submits that there is no express and direct conflict with any Florida law, and this Court lacks jurisdiction to exercise discretionary review of this matter. *See* Art. V, §3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(iv); *Mystan Marine, Inc. v. Harrington*, 339 So. 2d 200, 201 (Fla. 1976) (conflict review is limited to direct conflicts in the law out of concern for uniformity in decisions as precedent rather than the adjudication of the rights of particular litigants); *Reaves v. State*, 485 So. 2d 829, 830 (Fla. 1986) (conflict "must appear

within the four corners of the majority decision"); *Department of Revenue v. Johnston*, 442 So. 2d 950, 950 (Fla. 1983) (where there is a factual difference between allegedly conflicting cases, jurisdiction will not lie.); *Jenkins v. State*, 385 So. 2d 1356, 1359 (Fla. 1980) (conflict requirements are interpreted restrictively to limit the Court's jurisdiction to those cases where the conflict is express and not implied).

B. Neither *Roth v. Old Republic Ins. Co.*, 269 So. 2d 3 (Fla. 1972), nor *Susco Car Rental System of Florida v. Leonard*, 112 So. 2d 832 (Fla. 1959), has any direct application to the instant case.

Neither *Roth* nor *Susco* was argued in any of Petitioners' First District briefs nor cited in the First District's decision. These cases simply do not apply to the contract interpretation question presented to the Court in this case. The law governing liability pursuant to the dangerous instrumentality doctrine cannot create insurance coverage that otherwise does not exist. *See Kobetitsch v. American Mfrs.' Mut. Ins. Co.*, 390 So. 2d 76, 77 (Fla. 3d DCA 1980) ("an original entrustment which would impose tort liability on the employer, does not - as a matter either of public policy or of the proper construction of the [permissive use] clause in question - alone constitute the 'permission' to operate required by the insurance policy," *citing Ball v. Inland Mut. Ins. Co.*, 121 So. 2d 470 (Fla. 3d DCA 1960)); *Winters v. Phillips*, 234 So. 2d 716 (Fla. 3d DCA), *cert. denied*, 238

So. 2d 424 (Fla. 1970) (tortfeasor operating vehicle without express consent of owner was not an insured under the provisions of the policy and the court refused to carry over the rules of implied consent in tort law to contract actions); *see also Royal Indem. Co. v. Ellsworth*, 2005 WL 2219274 (M.D. Fla. 2005) (vicarious liability arising from ownership of a dangerous instrumentality is inapposite in the context of a permissive use clause in a contract of insurance). For the most part, restrictions on use and contractual rights and duties are unrelated to the third-party tort liability created by the dangerous instrumentality doctrine. *Winters*, 234 So. 2d 716 ("No such policy dictates that, as between the insurance companies, the clear language of the policy or policies should not control.").

The exception occurs when the primary insurance coverage of the owner/legal title holder is involved. As stated in *Roth:* "The insurer of the owner's automobile is therefore primarily liable for injuries inflicted because of the negligent operation of the automobile under our holding in *Susco*." 269 So. 2d at 5. This imposition of insurance coverage arises when control of the vehicle is voluntarily relinquished to another and is sanctioned by Florida's Financial Responsibility Law wherein the Legislature endorsed the concept of vicarious liability and sought to both promote safety and provide financial security, *see* section 324.011, Fla. Stat. (2005), and to impose minimum insurance

requirements, and to limit an owner's financial obligation, *see* section 324.021, Fla. Stat. (2005).

Thus, the owner's insurance coverage obligation exists not solely as a result of common law tort doctrine, but by statutory enactment. In determining the existence or nonexistence of insurance coverage under a policy held by the bailee or sub-bailee, the policy language controls. *See Gabbard v. Allstate Property & Cas.*, 46 So. 3d 147, 148 (Fla. 5th DCA 2010) (where an insurer sought to establish that there was no coverage for an injured third party under a bailee's personal auto policy, the threshold question was whether the borrowed automobile was an owned or non-owned auto under the bailee's policy, recognizing a distinction between applying the definition of "non-owned" auto and the definition of "insured person" because "insured person" defined differently under two alternative scenarios - when an insured auto is owned and when it is non-owned; applying the definitions of owned and non-owned auto, the court determined that the subject vehicle was a non-owned auto and, thus, there was no coverage because the vehicle was furnished for the bailee's regular use). There is no requirement under Florida law that a person carry insurance for or that an insurer provide coverage for a "temporary substitute auto" or a "non-owned" auto. *See Pastori v. Commercial Union Ins. Co.*, 473 So. 2d 40 (Fla. 3d DCA 1985) (no

statutory requirement for "temporary substitute auto" coverage; in the absence of a statutory requirement, "the courts have no power simply to create coverage out of whole cloth"); *Budget Rent-A-Car Systems, Inc. v. State Farm Mut. Auto. Ins. Co.*, 727 So. 2d 287, 291 (Fla. 2d DCA 1999) ("there is no general statutory regulation of non-owned auto coverage").

Both *Susco* and *Roth* are distinguishable on their facts. In *Susco*, the Court held that a rental car owner, along with its liability insurer, is liable to injured third parties for the negligence of any driver in the chain of custody, regardless of the terms of the rental agreement. 112 So. 2d at 836, *citing American Fire & Cas. Co. v. Blanton*, 182 So. 2d 36 (Fla. 1st DCA 1966). Further, as concerns the vehicle owner, implied consent arises by operation of law and cannot be negated by a private contract. 182 So. 2d at 837. In *Susco*, the Court further made note of the Legislature's role in shaping this public policy: "Responsibility under the law was accordingly attached to *ownership* of these instrumentalities, evinced first by registration laws and now by numerous provisions to assure financial responsibility of owners. It is plain that these provisions are based on the assumption that an owner cannot deliver a vehicle into the hands of another without assuming, or continuing, his full responsibility to the public. Such statutory provisions would, of course, be quite nugatory if ultimate liability could

be escaped by contract of the owner." 112 So. 2d at 837 (emphasis in original; footnote omitted). Nevertheless, the Court observed that such duty to the public does not apply "as between the parties to such contract." *Id.*

In *Roth*, the Court recognized that as between the insurer for the rental car owner and the insurer of a sub-bailee, the sub-bailee would receive the benefit of the primary insurance coverage carried by the vehicle owner up to the minimum financial responsibility limits. 269 So. 2d at 6. In *Roth*, the owner's policy had been certified as proof of financial responsibility and conformed to Florida's Financial Responsibility Law. 269 So. 2d at 6 ("The terms of the Old Republic policy protect Roth because of the Financial Responsibility Law and the policy's conformance therewith, and cannot be varied by the collateral [rental] agreement between Yellow and Plax.").[3] Thus, neither the driver, Roth, nor his insurance carrier was liable to pay accident claims, either directly or by indemnification, up to the amount of coverage provided by the primary policy issued to the owner of the vehicle. *Id*. Finally, *Roth* recognizes that the public policy behind imposing

[3] In *Roth*, the Court further states: "the collateral or side agreement between Plax and Yellow Rent-A-Car for public policy reasons cannot vary, circumvent or intercept the flow of protection [afforded by Old Republic's policy] to Roth and injured members of the public emanating from the Financial Responsibility Law which was confirmed by the terms of the policy issued by Old Republic." *Id*. at 7. This holding is limited to situations involving primary insurance coverage listing the subject rental car.

vicarious liability on the owner/car rental agency is based, in part, on the fact that not all bailees will have the benefit of personal automobile insurance coverage to answer for the personal injury caused to third parties. *Id.* at 7. Again, a recognition that there is no Florida law, either statutory or common law, requiring that a bailee carry personal automobile liability insurance on a bailed vehicle.

Petitioners ask this Court to create insurance coverage by applying an expanded definition of the word 'permission' as used in the definition of "temporary substitute auto." Specifically, the expansive definition adopted for the unique purposes of imposing vicarious liability under the common law dangerous instrumentality doctrine.

Despite Florida's strong public policy in favor of strict tort liability for the operation of a motor vehicle, the Legislature has declined to impose insurance coverage requirements which would make automobile coverage coextensive with tort liability for anyone in the chain of custody beyond the owner who holds legal title. If expanded insurance requirements are to be imposed on the citizens of the State of Florida, the imposition of insurance coverage requirements should be by enactment of statutory law emanating from the Legislature after public investigation and debate.

The First District correctly applied the clear and unambiguous terms used in

the definition of "temporary substitute auto" without reference to the dangerous instrumentality doctrine. *See Duncan Auto Realty, Ltd. v. Allstate Ins. Co.*, 754 So. 2d at 864 ("temporary substitute auto" provision unambiguous); *State Farm Mut. Auto. Ins. Co. v. Mashburn*, 15 So. 3d 701, 704 (Fla. 1st DCA 2009) (insurance policy to be interpreted in "reasonable, practical, sensible, and just" manner, giving effect to each contractual provision); *see also Kobetitsch v. American Mfrs.' Mut. Ins. Co.*, 390 So. 2d at 77; *Royal Indem. Co. v. Ellsworth*, 2005 WL at 2219274.

II.

THE FIRST DISTRICT'S RULING VACATING THE SUMMARY JUDGMENT IN FAVOR OF PETITIONERS IS CORRECT ON THE ALTERNATIVE GROUND THAT SUMMARY JUDGMENT WAS ERRONEOUSLY ENTERED WHERE THE RECORD CONTAINS DISPUTED ISSUES OF MATERIAL FACT REGARDING WHETHER SHAZIER'S OWNED AUTO WAS WITHDRAWN FROM NORMAL USE BECAUSE OF ITS BREAKDOWN, REPAIR, SERVICING, LOSS OR DESTRUCTION

In the event that this Court does not affirm the First District opinion on the ground that there is no coverage under the GEICO policy because the rental car did not qualify as a "temporary substitute auto" pursuant to the permissive use provision, the trial court's entry of summary judgment in favor of Petitioners must be reversed because disputed issues of material fact exist regarding whether the rental car was a temporary substitute for an owned auto withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction. This issue was raised on appeal by GEICO, but was not reached once the First District ruled on the first prong of the "temporary substitute auto" definition.

The second part of the policy definition for "temporary substitute auto" provides:

> This vehicle must be used as a substitute for the ***owned auto*** or ***trailer*** when withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction.

[Petitioners' Appendix].

Under Florida law, "temporary substitute auto" provisions are interpreted to require that the substitute vehicle be used in place of a disabled or inoperative owned auto. *Duncan Auto Realty, Ltd. v. Allstate Ins. Co.*, 754 So. 2d at 865; *Industrial Fire & Cas. Ins. Co. v. Cooper*, 372 So. 2d 980, 980 (Fla. 3d DCA 1979), *cert. denied*, 383 So. 2d 1196 (Fla. 1980). Petitioners failed to establish that there were no genuine issues of material fact regarding whether the rental car was a replacement for a disabled or inoperative owned auto.

Petitioners relied below upon certain legal conclusions testified to by Shazier in response to leading questions. As argued below, the legal conclusions, standing alone, cannot support entry of summary judgment in favor of Petitioners, especially where the actual factual testimony does not support Shazier's conclusory statements.

The following quotes from the testimony of Shazier support a finding that her owned auto, the Ford Expedition, was operative:

> A. Actually, **my vehicle wasn't running that great** when I came from Jacksonville, so I rented that Hyundai Sonata.

[V.V R. 661- 888, Exh. B at 14 (emphasis added)].

When asked if she drove the Ford Expedition during that time, she indicated

that it was still working and that she drove it from the rental car agency to her family's property.

Q. And why did you rent the car?

A. . . . actually **my truck wasn't running that great**.

Q. Okay. Where did your - - **did you leave your truck at the airport when you rented that car**?

A. **No, ma'am**.

Q. Okay. **Where did you take your vehicle**?

A. **Back to the land**.

Q. I am sorry, back to where?

A. Back to the land, the family land.

Q. Now, you say it wasn't running that great, was it still working?

A. **It was still working**.

Q. Did you have your vehicle repaired anytime while you were - - while you had the rental car?

A. No, ma'am.

[V.V R. 661- 888, at Exh. C page 12 (emphasis added)].

Q. And you rented that Hyundai because your Expedition needed repair?

A. Yes, sir.

Q. **It wasn't running that great**?

A. No, sir.

Q. What was wrong with it - - I mean, what - -

A. The transmission went out.

Q. Okay. So **in your mind**, when the transmission went out, was that car broken down to where **you didn't feel like it was a reliable car**?

A. Which car?

Q. I am sorry. When the transmission went out on the 2000 Ford Expedition, in your mind, did that mean that the car was broken down?

A. Yes, sir.

[V.V R. 661- 888, at Exh. C page 15 (emphasis added)].

Q. Before you had it repaired, was it - - **earlier you said that the car was still operable when you rented the Hyundai**. Did you drive your vehicle in between the time you returned the rental car and the time that you had your car repaired?

A. No, ma'am.

[V.V R. 661- 888, at Exh. C page 18 (emphasis added)].

Shazier further testified that she obtained the rental car because it was more convenient to have that car than the Expedition; it was more convenient to have a car that was not liable to break down. The following quotes from Shazier's testimony describe the reason she obtained the rental car:

Q. **Did you rent the car because it was more convenient to have that car than your personal car**?

A. Yes, ma'am.

[V.V R. 661- 888, at Exh. C page 13 (emphasis added)].

Q. Just a minute ago you were asked if it was - - you rented the car because it was convenient. **When you said it was convenient, do you mean that it was convenient to have a car that actually worked and wasn't liable to break down**?

A. Yes, sir.

Q. Did you rent the car because **it was more convenient to have that car than your personal car**?

A. Yes, ma'am.

Q. Okay. My understanding, from reading your deposition back in May of 2007, is that you were also going to use that Hyundai to go back to Jacksonville and collect belongings and bring them to Tallahassee?

A. Yes, sir.

[V.V R. 661- 888, at Exh. C page 14-15 (emphasis added)].

Although Shazier testified that, in her mind, the Ford Expedition was broken down and that the transmission went out, she did not establish that the vehicle was disabled or inoperative, especially in light of the fact that she testified that her vehicle was still working. The fact that Shazier believed that her car was liable to break down does not establish that it was disabled or inoperative.

Indeed, Shazier clearly admitted that the Ford Expedition "was still

working." In addition, Shazier gave conflicting testimony regarding whether she drove the Ford Expedition between the time when she picked up the rental car and the time when the Ford Expedition was repaired. Shazier's testimony that her Ford Expedition "was still working," standing alone, precludes summary judgment in favor of Petitioners.

In *Duncan Auto Realty, Ltd. v. Allstate Ins. Co.*, 754 So. 2d at 864, the court held that a "temporary substitute auto" provision nearly identical to the one in the GEICO policy is unambiguous. Pursuant to the plain language of the definition, a vehicle that is still working is not broken down, disabled or inoperative. The contradictory facts surrounding the condition of Shazier's owned auto precluded Petitioners from establishing that the rental car met the definition of a "temporary substitute auto."

When there is conflicting summary judgment evidence, the facts must be construed in the light most favorable to the non-moving party. *Holl v. Talcott,* 191 So. 2d 40, 44 (Fla. 1966). Thus, construing the evidence in the light most favorable to GEICO, the Ford Expedition was not running great, but it was working, and Shazier obtained the rental car for convenience because she wanted to drive a reliable car rather than an unreliable car, especially in light of her trip back to Jacksonville to retrieve her belongings for the move to Midway.

At a minimum, these facts create a genuine issue of material fact from which a jury could determine that the Ford Expedition was not broken down. GEICO's position also finds support in several out-of-state cases that have addressed similar situations. *See Economy Fire & Cas. Co. v. Dean-Colomb*, 646 N.E.2d 288, 289-90 (Ill. Ct. App. 1995); *Purvis v. Progressive Cas. Ins. Co.*, 127 P.3d 116, 120 (Idaho 2005); *Erickson v. Genisot*, 33 N.W.2d 803 (Mich 1948); *Hartman v. State Farm Ins. Co.*, 280 A.D.2d 840, 841-42, 720 N.Y.S.2d 607, 608-09 (N.Y.A.D. 2001).

Petitioners failed to meet the burden of conclusively establishing that the Ford Expedition was disabled or inoperative, and the trial court erred in finding that the rental car was a "temporary substitute auto" in the absence of such proof. Thus, the trial court's summary judgment ruling was properly reversed on this alternative ground and the case should be remanded for further proceedings, including resolution of the factual issues surrounding the condition of the Ford Expedition at the time of the rental.

CONCLUSION

Based upon the foregoing facts and legal authorities, the challenged decision does not expressly and directly conflict with any other Florida law and the Court lacks jurisdiction for discretionary review of the First District's decision,

the case was correctly decided under the authority of *Duncan Auto Realty, Ltd. v. Allstate Ins. Co.*, 754 So. 2d at 863, the case law cited by Petitioners is not applicable to the instant case and, to the extent that Petitioners ask this Court to apply an expanded definition of "permission," the Court should reject such request, and, finally, if this Court does not affirm the First District opinion on the ground that there is no coverage under the GEICO policy because the rental car did not qualify as a "temporary substitute auto" pursuant to the permissive use provision, the trial court's entry of summary judgment in favor of Petitioners must be reversed because disputed issues of material fact exist regarding whether the rental car was a temporary substitute for an owned auto withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction.

Respectfully submitted,
KUBICKI DRAPER
Attorneys for Respondent GEICO
1805 SE 16th Street, Suite 901
Ocala, FL 34471
Tel: (352) 622-4222

By:
ANGELA C. FLOWERS
Fla. Bar # 510408

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing is being furnished by U.S. Mail on this _____ day of March, 2011 to all counsel on the service list below.

By:

ANGELA C. FLOWERS
Fla. Bar # 510408

CERTIFICATE OF COMPLIANCE

In compliance with Florida Rule of Appellate Procedure 9.210(2), counsel for Respondent certifies that the size and style of type used in this Brief are 14 point type, Times New Roman.

ANGELA C. FLOWERS

SERVICE LIST

R. Frank Myers, Esquire
Pearson & Myers, P.A.
703 N. Monroe Street
Tallahassee, Florida 32303
Counsel for: AVIS/PV Holding

James E. Messer, Jr. Esq.
Fonvielle, Lewis, Foote & Messer, P.A.
3375-A Capital Circle NE
Tallahassee, Florida 32308
Counsel for: Monica Steele

Henry J. Graham, II, Esquire
Graham Law Firm, P.A.
122 South Calhoun Street
Tallahassee, Florida 32301
Counsel for: Carolyn Price and Christeegia Price

Henry C. Hunter, Esquire
Henry C. Hunter & Associates, P. A.
The Cambridge Centre
219 East Virginia Street
Tallahassee, Florida 32301
Counsel for: Stanley Marshall, Whitney Marshall and Tenisha Marshall

Gary A. Roberts, Esquire
Gary A. Roberts & Associates,
167 Salem Court
Tallahassee, Florida 32301
Counsel for: Estate of Camelia Y. Byrd

Tercina Senita Jordan, DC N 188113
Lowell Correction Institute
1120 NW Gainesville Rd
Ocala, Florida 34482

David H. Burns, Esquire
Cox, Burns & Giddings, P.A.
122 South Calhoun Street
Tallahassee, Florida 32301-1518
C0-Counsel for Chandler, Price and Byrd

John Derr, Esquire
Quintariors, Prieto, Wood & Boyer, P.A.
215 S. Monroe Street, Ste 510
Tallahassee, Fl 32301-1804
PH: 850-412-1042S
Counsel for: Kutasha P. Shazier

Thomas P. Crapps, Esquire
Crapps Law Firm, P. A.
1018 Thomasville Road, Ste 103
Tallahassee, Florida 32303
Counsel for: Chandler

Kutasha P. Shazier
5502 Memphis Road
Tallahassee, Florida 32304