IN THE FLORIDA SUPREME COURT

SUPREME CT. CASE NO.: SC10-1068
LOWER TRIBUNAL NO(S).: 1D09-2595
06-001525CAA

RETHELL BYRD CHANDLER, ETC., ET AL.

Petitioners,

vs.

GEICO INDEMNITY COMPANY,

Respondent.

PETITIONERS' INITIAL BRIEF ON THE MERITS

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STATEMENT OF THE CASE

Respondent GEICO INDEMNITY COMPANY (hereinafter referred to as "GEICO") appealed to the First District Court of Appeal the trial court's finding of coverage in favor of Petitioners on their Motion for Summary Judgment. The First District Court of Appeal, in reversing the decision of the trial court, found that the vehicle involved in the single car collision did not qualify as a "temporary substitute vehicle" under GEICO's insurance policy. [App., Ex. 1]. The crux of the District Court's opinion is that the car was being driven without AVIS's permission and therefore did not qualify as a "temporary substitute auto" under the GEICO policy, because Kutasha P. Shazier was the only listed driver on the rental car agreement and Tercina S. Jordan was the driver of the car at the time of the wreck. This Court accepted jurisdiction of this appeal based upon a conflict with *Roth v. Old Republic Insurance Company*, 269 So. 2d 3 (Fla. 1972).

STATEMENT OF FACTS

On August 19, 2006, Kutasha P. Shazier (hereinafter referred to as "Shazier") was listed as the first named insured on a GEICO Family Automobile Policy, which provided liability coverage for automobile collisions for which Shazier was liable as owner or operator. Shazier owned a Ford Expedition, which was listed on the policy. [App. Ex. 1 at 2]. When the Expedition began having

transmission problems, Shazier rented a 2006 Hyundai Sonata from AVIS RENT-A-CAR SYSTEM, LLC, and/or PV HOLDING CORP (hereinafter referred to collectively as “Avis”). [App. Ex. 1 at 3]. Shazier rented the Hyundai Sonata as a temporary substitute for her own vehicle. A vehicle being used as a temporary substitute vehicle is defined by the GEICO policy as an “owned” vehicle for purposes of insurance coverage. [App. Ex. 2 at 9].

Shazier subsequently entrusted the Avis rental vehicle to another person, Frederick Royal, who in turn entrusted it to Tercina Jordan (hereinafter referred to as “Jordan”) who negligently operated the rental vehicle, causing the vehicle to leave the road at a high rate of speed and crash into a tree. [App. Ex. 1 at 3]. At the time of the collision, six minor passengers were seriously injured in the collision and one minor passenger was killed. [App. Ex. 1 at 3-4].

GEICO filed the instant action for declaratory judgment pursuant to Section 86.011, Florida Statutes, seeking a determination whether or not GEICO INDEMNITY COMPANY owes a duty to indemnify and/or defend Kutasha Shazier, the lessee of the vehicle involved in the collision.

PERTINENT GEICO INSURANCE POLICY LANGUAGE

GEICO’s Family Automobile Policy issued to Kutasha P. Shazier reads, in pertinent part, as follows:

SECTION I, LIABILITY COVERAGES of your policy provides, in part, as follows:

LOSSES WE WILL PAY FOR YOU

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

1. ***bodily injury***, sustained by a person…

arising out the ownership, maintenance, or use of the ***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.

[App. Ex. 2, GEICO Policy, emphasis in original].

The significant policy terms are defined as follows:

DEFINITIONS

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

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

    a. a vehicle described in this policy for which a premium charge is shown for these coverages. . .

    d. a ***temporary substitute auto***. . .

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***…when withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction.

PERSONS INSURED

Who is Covered

Section I applies to the following ***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;

[App. Ex. 2, GEICO Policy, emphasis in original].

SUMMARY OF THE ARGUMENT

The dangerous instrumentality doctrine is a unique and imperative part of Florida's law. The doctrine recognizes the importance of extending liability and insurance coverage for the use and operation of automobiles, in order to "provide greater financial responsibility to pay for the carnage on our roads." *Kraemer v. General Motors Acceptance Corp.*, 572 So. 2d 1363, 1365 (Fla. 1990). As this

Court has articulated time and time again: "We are loath to engraft upon this doctrine…further exception[s] that would have such far-reaching consequences." *Id*. This case presents exactly such a circumstance. The First District Court of Appeal's decision below sets forth a new definition of permission and consent under the dangerous instrumentality doctrine and directly conflicts with the cases of *Susco Car Rental System of Florida v. Leonard*, 112 So. 2d 832 (Fla. 1959), *Roth, supra* and *American Fire & Cas. Co. v. Blanton*, 182 So. 2d 36 (Fla. 1st DCA 1966) (relied upon by *Roth*).

Susco, *Roth* and *Blanton* establish the principle under the dangerous instrumentality doctrine that the owner and/or lessor of a vehicle, and likewise the lessee/bailee, cannot escape liability under the dangerous instrumentality doctrine through reliance on a separate third-party agreement that limits the scope of who may operate the vehicle. The core reasoning behind this rule is that the consent of the owner can only be removed by a species of conversion or theft. Thus, where the owner grants permission for the use or operation of his automobile beyond his own immediate control, that permission is vitiated only by a subsequent conversion or theft of the vehicle. A separate contract between the owner and bailee restricting the operation of that vehicle does not negate the liability imposed under the dangerous instrumentality doctrine. The District Court's interpretation of the GEICO policy, however, ignores this precedent and interprets the term

"permission" narrowly. The First District relies upon the rental agreement between Avis and Shazier (which restricts who may operate the vehicle) to vitiate the owner's consent required under the GEICO policy to qualify as a "temporary substitute auto". The meaning of the term permission under the GEICO policy should have been interpreted as coterminous with the meaning of permission under the dangerous instrumentality doctrine. The decision below conflicts not only with the letter of *Roth* and *Susco* but with the public policy underlying the dangerous instrumentality doctrine.

In addition, the opinion conflicts with long standing precedent regarding the interpretation of an insurance contract. Where an undefined term in a policy is susceptible to more than one meaning, that term must be interpreted in favor of the insured and in light of the existing applicable law. The District Court's opinion interprets "permission" narrowly so as to preclude coverage and ignores the applicable and existing law regarding the dangerous instrumentality doctrine. Based upon these direct conflicts with this Court's precedent, the First District Court of Appeal's opinion below should be reversed.

STANDARD OF REVIEW

This Court, in reviewing an order granting summary final judgment, applies "the *de novo* standard of review to determine whether there are genuine issues of material fact and whether the [District] court properly applied the correct rule of

law." *Futch v. Wal-Mart Stores*, 988 So. 2d 687, 690 (Fla. 1st DCA 2008) (citing *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000)).

Like other contracts, contracts of insurance should receive a construction that is reasonable, practical, sensible, and just. *Gen. Star Indem. Co. v. W. Fla. Village Inn, Inc.*, 874 So. 2d 26, 29 (Fla. 2d DCA 2004). "[I]n construing insurance policies, courts should read each policy as a whole, endeavoring to give every provision its full meaning and operative effect." *Auto-Owners Ins. Co. v. Anderson*, 756 So. 2d 29, 34 (Fla. 2000); see *Riveroll v. Winterthur Int'l Ltd.,* 787 So. 2d 891, 892 (Fla. 3d DCA 2001). Florida law holds that the language of insurance policies must be construed broadly in favor of coverage and strictly against the insurer who prepared the policy. *See Purrelli v. State Farm Fire & Cas. Co.*, 698 So. 2d 618 (Fla. 2d DCA 1997). "When dealing with grants of coverage, the courts should interpret the policy language broadly in favor of the existence of insurance, while limitations or exclusions should be interpreted narrowly against the insurer." *Progressive Ins. Co. v. Estate of Wesley*, 702 So. 2d 513, 515 (Fla. 2d DCA 1997).

ARGUMENT

I.

AN AUTOMOBILE LIABILITY INSURER SHOULD NOT BE ALLOWED TO DENY COVERAGE BASED SOLELY UPON A RENTAL AGREEMENT TO WHICH IT IS NOT A PARTY, AS TO DO SO CONFLICTS WITH *ROTH V. OLD REPUBLIC INSURANCE COMPANY,* AND VIOLATES FLORIDA PUBLIC POLICY UNDERLYING THE DANGEROUS INSTRUMENTALITY DOCTRINE.

The First District Court of Appeal reversed the trial court opinion in favor of the Petitioners and held that the car rented by Shazier was not a covered temporary substitute auto, based solely upon the rental car agreement between Shazier and Avis and to which GEICO was not a party. The First District reversed the trial court on the basis that Jordan, the driver of the temporary substitute auto at the time of the collision, was not listed as an authorized driver on the rental agreement between Shazier and Avis. Based upon this third party agreement, the First District Court of Appeal found that Jordan's use of the rental car "automatically" revoked the permission granted to Shazier by Avis.

The GEICO policy language at issue states that GEICO "will pay damages which an ***insured*** becomes legally obligated to pay because of . . . ***bodily injury***, sustained by a person . . . arising out of the ownership, maintenance, or use of the ***owned auto***." An owned auto includes "a vehicle described in this policy for

which a premium charge is shown for these coverages" and "a ***temporary substitute auto***." A temporary substitute auto is defined 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." The First District held that because the rental agreement did not authorize Jordan to drive the rental car, the vehicle was not being used "with the permission of the owner."

Significant to the issue before this Court is that GEICO's policy includes a temporary substitute auto within the types of auto's listed as "owned autos." Thus, when Shazier rented the Avis vehicle as a temporary substitute auto, it became the equivalent of Shazier's listed Ford Expedition with respect to GEICO's policy with Shazier. Under a plain reading of the policy, once the Avis vehicle was legally leased from Avis it took the place of the Ford Expedition and became Shazier's "owned auto" with respect to her GEICO policy. As with her owned Ford Expedition, Shazier had the authority to entrust the rental vehicle (temporary substitute auto) to another person. That permittee then became an "insured" under the policy, as "any other person using the auto with your permission."

Avis is not a party to the contract of insurance between Kutasha Shazier and GEICO. The GEICO policy determines the scope of permissive use as between

Kutasha Shazier and GEICO. Once the Avis Rental Car becomes a "temporary substitute auto" as to Kutasha Shazier it is treated under the GEICO policy identically the same as if it were an owned vehicle under the policy. There is no factual question that Kutasha Shazier rented the Avis Rental Car as a substitute for the Ford Expedition. Likewise, there is no factual question that at the inception of the rental agreement, Kutasha Shazier was driving the Avis Rental Car with the permission of the owner, i.e., with Avis's permission pursuant to the rental agreement. At that point, the rental car became a "temporary substitute auto" with respect to GEICO, pursuant to the terms of the GEICO policy with Kutasha Shazier.

Once the rental car becomes a "temporary substitute auto" pursuant to the GEICO policy, a transformation takes place pursuant to the GEICO policy. The "temporary substitute auto" is treated under the terms of the policy as an "owned auto". In other words, <u>by definition</u> under the GEICO policy the rental car is temporarily substituted as the insured's "owned auto". The insured of course means Kutasha Shazier (not Avis). Once the rental car is substituted for an "owned auto", it is treated under the GEICO policy exactly as if it were an "owned auto" of the insured, Kutasha Shazier. In other words, the "temporary substitute auto" is treated exactly as if it were the Ford Expedition which it was temporarily replacing. A driver, such as Tercina Jordan, who is a permissive user as to Kutasha

Shazier (but who may indeed be an unauthorized driver in relation to the rental agreement between Kutasha Shazier and Avis) is still treated as a "permissive user" under the GEICO policy. Once the Avis Rental Car became an "owned auto" as to Kutasha Shazier, the restriction on its use in the Avis rental agreement has the same legal effect that the Avis rental agreement would have on use of the Ford Expedition, i.e., no effect at all. Avis at that point is an irrelevant third-party as between GEICO and Kutasha Shazier.

Had Tercina Jordan been driving the Ford Expedition owned by Kutasha Shazier, there would have been coverage under the GEICO policy for the subject wreck. Because a "temporary substitute auto" becomes an "owned auto" under the GEICO policy, the same coverage applies as if Tercina Jordan were driving the Ford Expedition. This result is what GEICO and Shazier contracted for. GEICO should not now be allowed to look to a third-party (Avis's) contract to limit coverage to something less than GEICO agreed to in its own contract with Shazier.

GEICO's attempt to rely upon the rental agreement between Shazier and Avis to alter and change the meaning of its policy is in contradiction to well established Florida case law. Agreeing with GEICO, the First District interpreted this coverage provision to mean: (1) that the "owner's permission" to "use" the vehicle, under the GEICO policy, required not only that the titled owner agreed to rent the vehicle to Shazier for her use, but also required the owner's continual consent regarding

who could operate the vehicle; and (2) that such permission is governed by the rental contract to which GEICO is not a party and which is more restrictive than the provisions of the GEICO policy. This interpretation of the GEICO policy conflicts with longing standing precedent of this Court and violates Florida's public policy underlying the dangerous instrumentality doctrine. *See Susco, supra; Roth, supra*; *Stupak v. Winter Park Leasing, Inc.*, 585 So. 2d 283 (Fla. 1991); *Martin v. Lloyd Motor Co.*, 119 So. 2d 413 (Fla. 1st DCA 1960); *American Fire & Cas. Co.; Dubus v. McArthur*, 682 So. 2d 1246, 1247 (Fla. 1st DCA 1996); *Pabon v. InterAmerican Car Rental, Inc.*, 715 So. 2d 1148, 1150 (Fla. 3d DCA 1998). In addition, the interpretation of the policy by the First District is in direct conflict with the precedent of this Court mandating that an insurance policy must be construed in favor of the insured and against the insurer. *See Container Corp. of Am. v. Maryland Cas. Co.*, 707 So. 2d 733, 736 (Fla. 1998); S*tate Farm Fire & Cas. Co. v. CTC Dev. Corp.*, 720 So. 2d 1072, 1076 (Fla. 1998).

A. THE OPINION OF THE FIRST DISTRICT CONFLICTS WITH *ROTH* AND WITH PRIOR PRECEDENT DEFINING THE SCOPE OF THE DANGEROUS INSTRUMENTALITY DOCTRINE.

The opinions of *Roth* and *Susco* and their progeny establish a founding line of Florida precedent under the dangerous instrumentality doctrine. The crux of these opinions is that the owner and lessee of a dangerous instrumentality and his

or her insurer cannot avoid liability under the dangerous instrumentality doctrine through reliance on a separate contract between the owner and lessee/bailee of the automobile. *See Roth, supra; Susco, supra*. This rule is premised upon the principle that the owner and the bailee of a vehicle should be held liable to third parties for injuries arising from negligent operation of the vehicle. To give effectual meaning to this principle, the insurers of the owner and bailee should provide coverage that mirrors their insured's liability. The insurer's contractual agreement to cover its insured's liability, both active and vicarious, under Florida law should not be limited or curtailed by a separate contractual agreement between the owner and the bailee. The conflict between this line of cases under the dangerous instrumentality doctrine, when considered as a whole, and by the First District's opinion in this case is apparent.

Florida's dangerous instrumentality doctrine makes the owner of a motor vehicle liable to third persons for injuries caused by the negligent operation or use of the motor vehicle by the person to whom the owner entrusted the vehicle. *See Southern Cotton Oil Co. v. Anderson*, 80 Fla. 441, 86 So. 629, 637 (1920). In addition to holding owners vicariously liable under the doctrine, the Florida Supreme Court has "recognized the vicarious liability of lessees and bailees of motor vehicles who authorize other individuals to operate the motor vehicles." *Id.* at 63; *see also Martin*; *State Farm Mut. Auto. Ins. Co. v. Clauson*, 511 So. 2d 1085

(Fla. 3d DCA 1987) ("To the same extent as the owner, a bailee (or sub-bailee) of a motor vehicle is liable to third persons under the dangerous instrumentality doctrine for the negligence of one to whom he has entrusted it"). The status of Shazier, who rented the vehicle, must be understood in order to properly apply the principle outlined in these cases to the instant facts. As the person leasing the Avis vehicle, Shazier was in the position of a bailee. *Dubus*, 682 So. 2d at 1247; *Pabon*, 715 So. 2d at 1150 ("Pabon was InterAmerican's bailee as she paid for the rental car and signed the rental agreement which required her to indemnify InterAmerican for all claims and also made her liability and personal injury protection insurance primary for all losses."). As bailee, Shazier was given the indices of ownership, i.e., the dominion and control over the vehicle by Avis during the period of bailment, i.e., Shazier enjoyed a species of temporary ownership. *See id*. Pursuant to the doctrine, knowledge and consent in "entrusting the automobile to another," or authorizing another to use the vehicle are essential elements in establishing liability. *See Pearson v. St. Paul Fire & Marine Ins. Co.*, 187 So. 2d 343 (Fla. 1st DCA 1966). Both Avis, as the owner of the vehicle, and Shazier, as bailee, are held liable to third parties for injuries arising from the operation of the automobile by the permittee, Jordan.

Following this rule of the dangerous instrumentality doctrine, the *Susco* court was faced with similar facts to the instant matter. There an individual rented

an automobile from Susco Car Rental System of Florida, Inc., under a rental contract providing that no one other than the renter would drive the automobile without the express consent of the rental agency. *See Susco, supra*, 112 So. 2d at 834. The renter, however, entrusted the rental vehicle to another individual, who was driving the vehicle at the time of the collision. The issue before the *Susco* court was whether the separate rental contract prohibiting additional drivers relieved the rental company of liability under the dangerous instrumentality doctrine. *See id.* The *Susco* court held that despite the contract prohibiting other drivers, the rental company did voluntarily relinquish control of the automobile to the renter and therefore consent to the use or operation of its vehicle beyond its own immediate control was given. *See id.* at *835*. In support of this holding, the court stated:

> [W]hatever may have been the deviations from this course, the logical rule, and, we think, the prevailing rationale of the cases, ***is that when control of such a vehicle is voluntarily relinquished to another, only a breach of custody amounting to a species of conversion or theft will relieve an owner of responsibility for its use or misuse. The validity or effect of restrictions on such use, as between the parties, is a matter totally unrelated to the liabilities imposed by law upon one who owns and places in circulation an instrumentality of this nature***.
>
> . . .
>
> In the final analysis, while the rule governing liability of an owner of a dangerous agency who permits it to be used by another is based on consent, the essential authority or consent is simply consent to use or operation of such an instrumentality beyond his own immediate

> control. Only to that limited extent is the issue pertinent when members of the public are injured by its operation, and only in a situation where the vehicle is not in operation pursuant to his authority, or where he had in fact been deprived of the incidents of ownership, can such an owner escape responsibility. ***Certainly the terms of a bailment, either restricted or general, can have no bearing upon that question***.

Id. at 835-37 (emphasis added). This principle applies likewise to the liability of the bailee who permits the vehicle to be used by another. *See Frankel v. Fleming*, 69 So. 2d 887, 888 (Fla. 1954).

Following its opinion in *Susco*, the *Roth* court further held that the *lessee's insurance* covered the lessee's permittee, who was the driver of the rental vehicle at the time of the collision, despite the agreement between the rental car company and the lessee prohibiting other persons from operating the rental vehicle. *See Roth, supra*, 182 So. 2d at 7. Relying upon *Susco*, the court stated:

> *Susco* recognizes that a bailee or lessee of a rented automobile, similarly as its owner, may permit another to operate it (and often does) and the latter's negligent operation of it renders the owner vicariously liable, ***together with his liability insurer***, under the dangerous instrumentality doctrine, despite an agreement between the owner and the lessee to the contrary. *See American Fire & Casualty Co. v. Blanton*, Fla.App., 182 So. 2d 36, text. 39. ***A necessary legal corollary to this recognition in Susco is that the owner and the lessee's insurance coverage under financial responsibility (in this instance afforded by Old Republic) covers the lessee's permittee as well***.
>
> . . .
>
> The *Susco* and *Blanton* cases recognize that in the very nature of modern automobile use a lessee of a rental car often has to turn the car

> over to car park, garage, or filling station personnel and others for temporary operation and that ***it would be unreasonable to negate the rental car agency's liability and its insurance coverage in case of accident because of the existence of a collateral or side agreement of the kind here involved.*** Often such permittees of rental car lessees temporarily driving rental cars would not be as fortunate as Roth and have the protection of their own personal auto liability insurance coverage, rendering it even more difficult for injured members of the public to recover their losses arising from the negligence of drivers of rental cars.

id at 6-7 (emphasis added).

This Court then has very broadly defined the "owner's consent" that is necessary to establish liability, and coverage for such liability, under the dangerous instrumentality doctrine:

> [W]hile the rule governing liability of an owner of a dangerous agency who permits it to be used by another is based on consent, the essential authority or consent is ***simply consent to the use or operation of such an instrumentality beyond his own immediate control***.
>
> . . .
>
> [W]hen control of [a rental automobile] is voluntarily relinquished to another *only a breach of custody amounting to a species of conversion or theft* will relieve an owner of responsibility for its use or misuse.

Susco, supra, 112 So. 2d at 837. Further, this Court has found that a rental agreement does not vitiate the liability and coverage where entrustment of the vehicle is given. *See id*. This Court again affirmed this holding in *Stupak*, where the court held that a genuine issue of material fact existed as to whether the driver's use of a rental car beyond the expiration date of the rental agreement was a

theft or conversion of the rental car such as to relieve the owner of liability under the dangerous instrumentality doctrine. *Stupack*, 585 So. 2d at 284.

This requirement of consent or permission is mirrored in the GEICO policy defining "temporary substitute auto":

> ***"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*.

However, GEICO, in reliance upon that language, is attempting to do that which was expressly forbidden by the *Susco*, *Roth* and *Stupak* courts, to escape liability coverage, based upon a separate contract which defines only the scope of who may operate the vehicle. If Avis cannot escape liability under the dangerous instrumentality doctrine based on a contractual limitation as to who may operate its vehicle, then GEICO certainly should not be permitted to rely upon that same contract to escape liability. Rather, the GEICO policy requiring permission of the owner should be interpreted to be coterminous with the dangerous instrumentality doctrine. Thus, when a rental vehicle becomes an "owned" temporary substitute auto of the insured, the insured is covered in every circumstance under which the insured is vicariously liable under the dangerous instrumentality doctrine the same as if the rental vehicle (temporary substitute auto) were the originally insured vehicle that it temporarily replaces. Thus, interpreting the language consistent with this Court's precedent, consent or permission to the use of the auto by the owner is

the consent to "the use or operation of such an instrumentality beyond his own immediate control."

In *Blanton*, relied upon above by the *Roth* court, the First District Court of Appeal considered and decided a case virtually on all fours with the instant facts. *See American Fire & Casualty Co. v. Blanton,* 128 So. 2d 36, 37 (Fla. 1st DCA 1966). *Blanton* involved a coverage dispute for injuries that a minor suffered in an automobile collision, while he was driving an automobile with the consent of the insured's son but in direct violation of the agreement between the insured and his son. *See id.* In denying coverage, the liability insurer relied upon language in the policy proving medical payment coverage as follows:

> To pay all reasonable expenses incurred within one year from the date of accident for necessary medical, surgical, X-ray and dental services, including prosthetic devices, and necessary ambulance, hospital, professional nursing and funeral services:
>
> To or for any other person who sustains injury, caused by accident while occupying:
>
> the owned automobile, while being used by the named insured, by any resident of the same household or by any other person *with the permission of the named insured*.

Id. at 38 (emphasis added). Based on this language, the insurer denied coverage claiming that the named insured had not given permission to the person driving the vehicle at the time of the collision. The insured owned a poultry farm and had given his 13-year-old son permission to drive the insured automobile from his

home to the farm with the express instructions not to allow anyone else to ride with him or drive the vehicle. *See id*. The day of the accident, the insured's son had arranged with his friends, including the plaintiff, to meet him at a filling station and ride with him to the farm. The son also falsely informed his mother that he was going to the farm in the vehicle. The son then gave permission to the plaintiff to drive the vehicle, and the plaintiff was injured while operating the vehicle. *See id*.

Before the First District Court of Appeal, the insurer argued that vicarious liability under the dangerous instrumentality doctrine could not extend *coverage* under the facts of that case because an insurance contract provision expressly required the insured *to give permission to the person using the automobile* and that "implied permission cannot be imposed as a matter of law *in order to attach contract liability under the subject policy provision* where, as in this case, the uncontradicted proofs on the motion for summary judgment show that the insured owner specifically withheld permission for plaintiff to operate the insured vehicle." *Id*. In rejecting this argument, the District Court explained that under the dangerous instrumentality doctrine "the owner of a motor vehicle is relieved from responsibility for its use or misuse only upon a breach of custody amounting to a species of conversion or theft." *Id*. Thus, the *Blanton* court extended the dangerous instrumentality rule to both contract and coverage disputes regarding the

owner's vicarious liability ("if the owner once gives his express or implied consent to another to operate his automobile, he is liable for the negligent operation of it no matter where the driver goes, stops, or starts"). Moreover, this Court expressly relied upon the *Blanton* opinion in deciding the coverage issue in *Roth*.

In further construing the policy provision at issue, the *Blanton* court held that the use of the vehicle was given to the son, who was a resident of the insured's household. In giving permission to the son to "use" the vehicle, the question of whether or not the operator of the vehicle at the time of the injury had permission was not the relevant inquiry.

> The use of an automobile denotes its employment for some purpose of the user; the word 'operation' denotes the manipulation of the car's controls in order to propel it as a vehicle. Use is thus broader than operation. * * * One who operates a car uses it, * * * but one can use a car without operating it.'
>
> The general rule that a permittee may not allow a third party to 'use' the named insured's car does not preclude recovery under the omnibus clause where the second permittee, in using the vehicle, is serving some purpose of the original permittee. Under such circumstances the second permittee is 'operating' the car for the 'use' of the first permittee and such 'use' is within the coverage of the omnibus clause. The operation by a third person under such circumstances falls within the protection of the omnibus clause even where such operation is specifically forbidden by the named insured.

Id. at 39. By corollary, once the owner of a car has given his authorization to use the vehicle, that permission is not revoked simply because the vehicle is subsequently operated by a person not authorized by the owner to do so, provided

that the person with the owner's permission to use the vehicle has given the subsequent driver permission to operate the vehicle. These facts are exactly the circumstances present in the instant case.

Turning to the policy provision at issue here the auto becomes the insured's "owned" auto when it is used by the insured with permission of the owner as a replacement for a listed auto under the policy. Thus, because Avis gave Shazier permission to use the vehicle, the policy should not be interpreted to preclude coverage where the vehicle is operated by a second permittee, even if the operation by that person is contrary to the scope of Avis' separate agreement with Shazier. *See Arnold v. Beacon Ins. Co. of America*, 687 So. 2d 843, 845 (Fla. 2d DCA 1996) (holding that "the significant criterion for coverage under a garage operations policy is whether the vehicle involved is an insured vehicle under the policy, and not the nature of its use when the accident occurred.") Applying these principles of *Blanton*, *Roth*, and *Susco*, when Avis leased the vehicle to Shazier, it gave Shazier permission to use the vehicle. The vehicle then became an "owned" vehicle under the GEICO policy and Shazier could in keeping with the terms of the GEICO policy, entrust the vehicle to another person, i.e., to "…any other person using the auto with your (Shazier's) permission". Applying *Roth*, GEICO cannot deny the coverage afforded to Shazier for this "owned" auto (temporary substitute

auto) through reliance on a provision contained in a third party contract between Shazier and Avis.

Under the First District's interpretation of the language "permission of the owner," the owner's permission or consent was taken away by operation of the rental car agreement, not the GEICO policy, at the time Jordan, rather than Shazier, was behind the wheel. This interpretation in effect allows the vehicle to switch back and forth between being the insured's "owned vehicle" under the policy and alternatively being a vehicle not even covered by the policy due solely to the operation of the third party contract. Under the District Court's interpretation of the GEICO policy, permission to use the vehicle is limited by the operation of a third party contract pertaining to who is authorized to operate the vehicle. Such an interpretation directly conflicts with the meaning of consent for use under the dangerous instrumentality doctrine.

In sum, the cases of *Roth* and *Susco* require the owner's consent, either express or implied, to use the automobile, in order for the dangerous instrumentality doctrine to apply. Likewise the operative policy definition of "temporary substitute auto" relied upon by the District Court and GEICO requires the owner's permission to use the auto. The requirement of consent under the dangerous instrumentality doctrine should be coterminous with the requirement of permission under the GEICO policy. Avis cannot escape liability under the

dangerous instrumentality doctrine by claiming after the fact that its permission was not given to Shazier for use of the auto because she later allowed another operator to drive the vehicle in violation of its rental agreement with A *fortiori* GEICO cannot claim, based upon the same rental agreement, to which GEICO is not even a party, that Avis did not grant permission to Shazier to use the auto.

B. THE DISTRICT COURT DECISION CONFLICTS WITH PUBLIC POLICY UNDERLYING THE DANGEROUS INSTRUMENTALITY DOCTRINE.

Since the adoption of the dangerous instrumentality doctrine, the Florida courts have repeatedly reaffirmed the doctrine and the important public policy upon which it is based, creating only a few exceptions. *See Estate of Villanueva ex rel. Villanueva v. Youngblood*, 927 So. 2d 955, 957 (Fla. 2d DCA 2006) (noting three exceptions to the doctrine: the "shop" exception; the theft or conversion exception; and the "bare naked title" exception).

In *Aurbach v. Gallina*, 753 So. 2d 60, 62 (Fla. 2000), the Florida Supreme Court explained the import of the public policy underlying the doctrine:

> The dangerous instrumentality doctrine seeks to provide greater financial responsibility to pay for the carnage on our roads. It is premised upon the theory that the one who originates the danger by entrusting the automobile to another is in the best position to make certain that there will be adequate resources with which to pay the damages caused by its negligent operation. If Florida's traffic problems were sufficient to prompt its adoption in 1920, there is all

> the more reasons for its application to today's high-speed travel upon crowded highways.

(quoting *Kraemer v. General Motors Acceptance Corp.*, 572 So. 2d 1363, 1365 (Fla. 1990)).

Under the First District's interpretation of the GEICO policy, the significant public policy underlying the dangerous instrumentality doctrine is not served because coverage is only provided to the insured when she is actually driving a rental vehicle and not in those circumstances where she is vicariously liable under the dangerous instrumentality doctrine. By holding that the rental car contract in effect trumps the "flow of protection" (from the lessee, Shazier, to the permittee, Jordan) demanded by public policy, the decision below expressly and directly conflicts with this Court's decision in *Roth*, and *Susco* by announcing a contrary rule of law.

C. THE DISTRICT COURT OPINION CONFLICTS WITH PRECEDENT REGARDING INSURANCE CONTRACT INTERPRETATION.

A general tenet of insurance law is that insureds have the right to know that for which they are contracting. Both under the language of the policy and the application of the dangerous instrumentality doctrine, the insured expected to be covered for her liability for the rental car that she was using as the replacement for her insured vehicle. *See American Strategic Ins. Co. v. Lucas-Solomon*, 927 So. 2d 184 (Fla. 2d DCA 2006) (holding that in interpreting an insurance contract,

courts must consider the intent and reasonable expectations of the parties in entering into the agreement and evaluate not only the insurer's contract form, but also the insured's knowledge and understanding as a layman and his normal expectation of the extent of coverage of the policy).

The GEICO policy does not define "permission" and the term is ambiguous, as "permission" could be interpreted consistent with the meaning of the term under the dangerous instrumentality doctrine or more restrictively to mean ongoing permission as to who could operate the vehicle, as so construed by the First District. This Court has held that "'when an insurer fails to define a term in a policy, . . . the insurer cannot take the position that there should be a 'narrow, restrictive interpretation of the coverage provided.'" S*tate Farm Fire & Cas. Co.*, 720 So. 2d at 1076 (quoting *State Comprehensive Health Ass'n v. Carmichael*, 706 So. 2d 319, 320 (Fla. 4th DCA 1997)). Any interpretation other than one which affords the broadest coverage consistent with the *Roth* and *Susco* definition of permission under the dangerous instrumentality doctrine is an interpretation in favor of the insurer and in conflict with well established precedent on the interpretation of an insurance policy. *See Container Corp. of Am. v. Maryland Cas. Co.*, 707 So. 2d 733, 736 (Fla. 1998) (where policy language is susceptible to differing interpretations, it should be construed in favor of the insured); *National Merchandise Co., Inc. v. United Service Auto. Ass'n*, 400 So. 2d 526, 530 (Fla. 1st

DCA 1981) ("Although the words 'auto' and 'accident' have definite or generally accepted meanings, these two words simply do not convey a meaning so clear and precise, for liability insurance coverage purposes, that one can determine whether a given accident, under many easily imagined circumstances, would or would not be covered. In this sense, the terms are 'ambiguous,' hence the need for construction or interpretation.")

Another long standing tenet of contract and insurance policy interpretation is that ". . . the laws which exist at the time and place of the making of a contract enter into and become a part of the contract made, as if they were expressly referred to and incorporated in its terms, including those laws which affect its construction, validity, enforcement or discharge." *Humphreys v. State*, 108 Fla. 92, 145 So. 858 (1933). Furthermore, "contracts are made in legal contemplation of the existing applicable law." *Southern Crane Rentals, Inc. v. City of Gainesville*, 429 So. 2d 771, 773 (Fla. 1st DCA 1983). As stated by the First District in construing the terms "auto" and "accident" in a liability policy:

> While we acknowledge the duty to give effect to "plain language" of the policy, automobile insurance litigation is infused with considerations of public policy, and our determination of the rights and obligations of the parties must also take into consideration relevant legislative enactments, established custom and usage in the insurance industry, and the body of case law touching upon coverage questions similar to the one before us.

National Merchandise Co., Inc., 400 So. 2d at 530.

Applying these long standing principles of insurance construction to the First District's interpretation of "permission" within the GEICO policy demonstrates a direct conflict with such precedent. The ambiguous term "permission" must be interpreted in favor of Shazier. In addition, the term "permission" must be construed consistently with Florida's dangerous instrumentality doctrine. If GEICO intended the term "permission" to mean the rental car agencies' express and continuing permission to operate the temporary substitute auto, then GEICO certainly could have stated this in its policy. *See, e.g., Budget Rent-A-Car Systems, Inc. v. State Farm Mut. Auto. Ins. Co.*, 727 So. 2d 287, 291 (Fla. 2d DCA Dist. 1999) ("Although there is no general statutory regulation of non-owned auto coverage, section 627.7263(2) makes it very important that Floridians have non-owned automobile coverage that includes typical rental cars; otherwise they will have little or no insurance protection when they rent such a car. If State Farm or any other insurance carrier wishes to exclude coverage for this important risk, it must do so with language far more explicit than the language in this standard contract.").

Thus, the interpretation of the GEICO policy by the First District conflicts with long standing precedent of this Court regarding the interpretation of insurance policy and must be reversed.

CONCLUSION

The First District Court of Appeal's opinion conflicts with long standing precedent of this Court concerning the dangerous instrumentality doctrine and insurance contract interpretation. Additionally, the First District Court of Appeal's opinion conflicts with the public policy reasons for Florida's long standing adherence to the dangerous instrumentality doctrine. Wherefore, Petitioners, respectfully request that this Court reverse the ruling of the First District Court of Appeal below.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail on this 10th day of January, 2011 to all counsel on the Service List.

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CERTIFICATE OF COMPLIANCE

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

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