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' REPLY BRIEF

David H. Burns, Esq.
Florida Bar No.: 350028
COX, BURNS & GIDDINGS, P.A.
122 South Calhoun Street
Tallahassee, Florida 32301-1518
(telephone) 850-561-1106
(facsimile) 850-561-0206
Counsel for Chandler, Price and Parker

Henry J. Graham, Esq.
Florida Bar No.: 0085308
THE GRAHAM LAW FIRM, P.A.
122 South Calhoun Street
Tallahassee, Florida 32301-1518
(telephone) 850-222-9700
(facsimile) 850-561-0206
Counsel for Price

Henry C. Hunter, Esq.
Florida Bar No.: 219215
HUNTER & ASSOCIATES
219 E. Virginia St.
Tallahassee, FL 32301
(telephone) 850-222-1343
(facsimile) 850-681-6159Counsel for Whitney and Tenisha Marshall

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

Statutes

TABLE OF AUTHORITIES (CONT'D)

Other Authorities **Page**

ARGUMENT

I. THE CASE OF *DUNCAN AUTO REALTY, LTD. V. ALLSTATE INS. CO.*, IS NOT APPLICABLE PRECEDENT TO THE ISSUE BEFORE THIS COURT AND WAS MISAPPLIED BY THE FIRST DISTRICT COURT OF APPEAL.

GEICO asserts in its Answer Brief that this Court should not consider the merits of this appeal and that no conflict exists because the First District's opinion properly applies the only Florida case on point – *Duncan v. Auto Realty, Ltd. v. Allstate Ins. Co.*, 754 So. 2d 863, 865 (Fla. 3d DCA 2000). While *Duncan* is the only Florida case to interpret the meaning of "used with permission of its owner" within the "temporary substitute auto" definition, both the facts and holding of *Duncan* makes the case's application and relevance to the instant case of little import. *See id*. In *Duncan,* the insured was in a collision while he was on a routine test drive of a truck he was considering purchasing as a replacement for another vehicle. *See id*. The court explained that such a test-drive is not a "temporary" replacement of an owned vehicle:

> the word "temporary" in the policy's "temporary substitute auto" clause means that a substituted vehicle's use is to be of limited duration, at the conclusion of which the substitute vehicle is to be discarded, and the named vehicle is to resume its usual function. *See id*. at § 117:79 (stating that "the word 'temporary' in the context of the temporary

> substitution clause is an antonym for the word 'permanent.' Thus, there will be no coverage under the temporary substitute clause where the use of an automobile is not temporary, but regular and permanent[.]") (Footnotes omitted). The record here clearly indicates that had Garcia purchased a truck from the auto dealer, Garcia would have immediately traded in the insured truck and used the newly purchased truck as its permanent replacement, not a temporary substitute.FN1 Thus, applying any definition of "temporary substitute" to the facts of this case leads to the same conclusion; at the time of the accident, the Dodge was not a temporary substitute vehicle but rather a prospective permanent replacement vehicle. Hence, no coverage was triggered under this provision of the policy.

Id. at 865. Thus based upon the fact that the truck was only being used by the driver on a routine test drive, the court held that it did not qualify as a temporary substitute auto. By comparison, Shazier here had rented the vehicle from Avis to use as a replacement for her owned auto, which was to be repaired.

In attempting to draw a parallel between the *Duncan* case and the instant case, GEICO and the First District opinion single out one statement made by the *Duncan* Court in considering whether the truck that was being test driven at the time of the collision was a temporary substitute automobile, wherein the Court considers:

> Moreover, the owner of the temporary substitute vehicle, not its user, possesses the authority to define the scope of permissible use of the substitute vehicle. 8 Russ & Segalla, Couch on Insurance, § 117:86. In this case, without question, the auto dealer only granted Garcia use of its truck for a routine test drive. Garcia did not have permission to utilize the auto dealer's truck in Southwind's business affairs in the

same manner that he could have used the Ford F250.

Id. Despite the First District's and GEICO's reliance upon the first part of this quote, significantly this statement of law does ***not*** conflict with the definition of "permission" advanced by Petitioners here or supported by the cases of *Roth* and *Susco*. Rather this definition of "permission" addresses only the owner's authority to define the purpose or "scope" for which the vehicle is used. In fact, section 117:86, which is cited by the Third District for this proposition here, states:

> The permission required under the temporary substitute clause relates only to the purpose for which permission was given by the owner of the substitute automobile and ***not to the identity of the operator, and will cover use of the substitute automobile by another individual, regardless of whether that person has express or implied authorization*** to drive the car, provided such use is for a permitted purpose.

8 Russ & Segalla, Couch on Insurance, § 117:86 (2010) (emphasis added). Further the Third District's opinion itself relates only to the purpose for which the vehicle could be used, explaining that the driver did not have permission to use the truck in his business affairs but only for a test drive. Thus, the fact that Tercina Jordan was driving the temporary substitute auto is irrelevant with respect to the analysis in *Duncan*, because the purpose of the rental had not changed. Only the specific operator of the vehicle had changed. The vehicle was still being operated for its original purpose, i.e., a personal auto used as a temporary replacement for Kutasha

Shazier's Ford Expedition that was in need of repair. Simply put, GEICO's and the First District's reliance upon *Duncan* is misplaced.

Thus, the *Duncan* opinion does not address in any manner the significant issue before this Court, i.e., the First District's interpretation of GEICO's coverage provision to mean (1) that the "owner's permission" to "use" the vehicle, under the policy, necessitated a continual or ongoing agreement by Avis for the operation of the vehicle, as opposed to Avis' agreement with Shazier to rent the vehicle and (2) that this permission is governed by the rental contract to which GEICO is not a party and which is more restrictive that the provisions of the policy. It is this interpretation of the GEICO policy that conflicts with longing standing precedent of this Court and violates Florida's public policy underlying the dangerous instrumentality doctrine. Thus, *Duncan*'s holding concerning an owner's ability to limit "the purpose for which permission" is given to operate his vehicle has no applicability to the issue before this Court.

II. GEICO'S POLICY DOES *NOT* DEFINE PERMISSION AND PERMISSION SHOULD BE DEFINED IN LINE WITH FLORIDA'S PRECEDENT UNDER *ROTH* AND PRIOR PRECEDENT CONCERNING THE DANGEROUS INSTRUMENTALITY DOCTRINE.

GEICO argues that Petitioners are asking this Court "to create insurance

coverage by applying an expanded definition of the word 'permission' as used in the definition of 'temporary substitute auto.'" (Answer Brief at 18.) However, Petitioners here are not asking this Court to create insurance coverage nor are they asking for an "expansive" definition of permission. In fact, GEICO's policy does **not** define permission at all. Thus, Petitioners are only arguing to this Court that the First District's *interpretation* of the GEICO's policy is in conflict with this Court's precedent. This Court's long standing precedent has defined an owner's consent or permission within the context of a rental car agreement as follows:

> [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 specie of conversion or theft* will relieve an owner of responsibility for its use or misuse.

Susco Car Rental System of Florida v. Leonard, 112 So.2d 832, 837 (Fla.1959). If GEICO had wanted to define "permission" more narrowly where its insured was renting a vehicle as a substitute auto, then GEICO could have chosen to do so within its policy. However, GEICO did not choose to define "permission" within its policy and under Florida's long standing precedent, GEICO should not be permitted to rely upon the Avis third party rental agreement to limit the definition

of permission. *See Roth v. Old Republic Insurance Company*, 269 So. 2d 3 (Fla. 1972); *Martin v. Lloyd Motor Co*., 119 So.2d 413 (Fla. 1st DCA1960); *American Fire & Cas. Co. v. Blanton*, 182 So. 2d 36 (Fla. 1st DCA 1966).

The operative policy definition relied upon by the district court and GEICO requires the owner's permission to use the auto, in order for the auto to qualify as a temporary substitute auto. In interpreting this undefined term in the policy, the First District ignored the precedent of *Susco, Roth* and *Blanton* and interpreted the term narrowly to require the ongoing express consent by Avis to each person operating the vehicle rather than the initial permission of Avis in renting the vehicle to Shazier. This interpretation by the First District is inconsistent with the meaning of permission and consent under the dangerous instrumentality doctrine, as established in the holdings of cases noted above and discussed thoroughly in the Initial Brief. Where a term in an insurance contract is undefined and remains subject to more than one reasonable interpretation, it should be interpreted in favor of the insured and consistent with Florida's law on the dangerous instrumentality doctrine. *See, e.g., Merchandise Co., Inc. v. United Service Auto. Ass'n*, 400 So. 2d 526, 530 (Fla. 1st DCA 1981); *Budget Rent-A-Car Systems, Inc. v. State Farm Mut. Auto. Ins. Co*., 727 So. 2d 287, 291 (Fla. 2d DCA Dist. 1999).

III. THE ISSUE OF WHETHER SHAZIER'S OWNED AUTO WAS WITHDRAWN FROM NORMAL USE BECAUSE OF BREAKDOWN, REPAIR, SERVICING, LOSS OR DESTRUCTION IS BEYOND THE BASIS OF THIS COURT'S CONFLICT JURISDICTION.

The issue before this Court is whether the First District's opinion is in conflict with the long standing precedent under Florida's dangerous instrumentality doctrine, as discussed in *Roth v. Old Republic Insurance Company*, 269 So. 2d 3 (Fla. 1972) and its progeny. The issue of whether or not there exists an alternative ground for reversing the trial court's order of summary judgment is not the issue before this Court. *See* Fla.R.App.P 9.030(a); *see also Marsh v. Valyou*, 977 So. 2d 543, 546 (Fla. 2007) (declining to address issue outside the scope of the certified conflict); *Borden v. East-European Ins. Co.*, 921 So.2d 587, 596 n. 8 (Fla.2006) (recognizing an issue as beyond the scope of the certified conflict); *Kelly v. Cmty. Hosp. of the Palm Beaches, Inc.*, 818 So.2d 469, 470 n. 1 (Fla.2002) (declining to address issues beyond the basis for the Court's conflict jurisdiction).

Furthermore, this "alternative" issue was fully briefed before the First District, which found in its opinion that when the "Ford Expedition began experiencing transmission problems, Shazier rented a Hyundai Sonata from Avis Rent-A-Car System, LLC." [App. Ex. 1 at 3.] Thus, pursuant to the opinion of the First District,

the car was rented when Shazier's car began experiencing mechanical problems. In other words, the car was "withdrawn from use" because of problems that Shazier was having with its transmission and its need for repair. GEICO within its Answer Brief is asking this Court to take up this issue, outside of the certified conflict, and interpret its policy language defining a temporary substitute auto as vehicle that is a substitute for an owned vehicle when it is "withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction" to mean that the car must be completely "inoperative" and "disabled". [App. Ex. 2.] (Answer Brief at 21.) The GEICO policy does not employ the terms "disabled" or "inoperative" and there is simply no issue of disputed fact that Shazier had withdrawn her owned auto from normal use because of its need for repair due to the transmission being out on the Ford Expedition.

CONCLUSION

In sum, Petitioners are simply asking this Court to interpret GEICO's undefined and ambiguous policy consistent with Florida's long standing dangerous instrumentality doctrine precedent, as established by *Susco*, *Roth* and *Blanton*.

Wherefore, Petitioners, respectfully requests that this Court take jurisdiction of this appeal and reverse the opinion of the First District Court of Appeal.

David H. Burns, Esq.
Florida Bar No.: 350028
COX, BURNS & GIDDINGS, P.A.
122 South Calhoun Street
Tallahassee, Florida 32301-1518
(telephone) 850-561-1106
(facsimile) 850-561-0206
Counsel for Chandler, Price and Parker

Henry J. Graham, Esq.
Florida Bar No.: 0085308
THE GRAHAM LAW FIRM, P.A.
122 South Calhoun Street
Tallahassee, Florida 32301-1518
(telephone) 850-222-9700
(facsimile) 850-561-0206
Counsel for Price

Henry C. Hunter, Esq.
Florida Bar No.: 219215
HUNTER & ASSOCIATES
219 E. Virginia St.
Tallahassee, FL 32301
(telephone) 850-222-1343
(facsimile) 850-681-6159
Counsel for Whitney and Tenisha Marshall

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail on this 21st day of March, 2011 to all counsel on the Service List.

_____

David H. Burns

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.

_____

David H. Burns

SERVICE LIST

David H. Burns, Esq.
Cox, Burns & Giddings, P.A.
122 South Calhoun Street
Tallahassee, FL 32301
Attorneys for Price, Chandler and Parker

Henry J. Graham, Esq.
The Graham Law Firm, P.A.
122 South Calhoun Street
Tallahassee, FL 32301
Attorney for Price

Henry C. Hunter, Esq.
Hunter & Associates
219 E. Virginia St.
Tallahassee, FL 32301
Attorney for Whitney Marshall
and Tenisha Marshall

James E. Messer, Jr., Esq.
Fonvielle Lewis Foote & Messer
3375-A Capital Cir. NE
Tallahassee, FL 32308-1532
Attorney for Steele

R. Frank Myers, Esq.
Pearson & Myers, P.A.
703 N. Monroe St
Tallahassee, FL 32303-6138
Attorney for Avis/PV Holdings

John S. Derr, Esq.
Quintairos, Prieto, Wood & Boyer, P.A.
215 S. Monroe St., Ste. 510
Tallahassee, FL 32301-1804
Attorney for Shazier

Angela C. Flowers, Esq.
Kubicki Draper
1805 SE 16th Ave., Suite 901
Ocala, FL 34471
Attorney for GEICO

Gary A. Roberts, Esq.
Gary A. Roberts & Associates, LLC
130 Salem Court
Tallahassee, FL 32301
Attorney for Parker

Tercina Senita Jordan, DCN 188113
Lowell Correction Institute
1120 NW Gainesville Road
Ocala, FL 34482
Pro Se