IN THE SUPREME COURT OF FLORIDA

Case No. SC10-1070
Lower Tribunal No.: 1D09-2595

MONICA STEELE,

Petitioner,

v.

GEICO INDEMNITY COMPANY, ET AL.,

Respondent.
_____/

On appeal from the Court of Appeal, First District

L.T. CASE NO.: 1D09-2595

BRIEF ON THE MERITS OF PETITIONER MONICA STEELE

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STATEMENT OF THE CASE

Petitioner Steele (hereinafter referred to as "Steele") appeals a decision of the Court of Appeal, First District, which reversed a final declaration of insurance coverage entered in favor of Steele (and other defendants) on her Motion for Summary Judgment.

GEICO filed a declaratory judgment action with the trial court seeking a declaration that there was no coverage afforded to the driver for the injuries suffered by Steele while a passenger in the vehicle. [V.I R. 1-45, 63-116]. Steele answered and counter-claimed for coverage. [V.I R. 133-141].

GEICO then filed a first Motion for Summary Judgment seeking a declaration that the vehicle involved in the crash was defined as a "non-owned auto" for which the Shazier-issued policy did not provide coverage to her, the driver or the owner. [V. I R. 154-225; V. II R. 226-99]. Steele responded to the motion noting that GEICO's allegation that the matter did not involve an "owned auto" was misplaced because the rented vehicle, while not titled in Shazier's name, was defined as an owned vehicle by the language of the GEICO policy thereby providing coverage for the incident. [V. I R. 415-16].

Following the hearing on GEICO's First Motion for Summary Judgment the Court issued an Order denying the motion without prejudice and permitting additional discovery regarding the applicability of the term "temporary substitute

auto." [V. I R. 453]. The Court permitted discovery to determine the extent Shazier's "owned auto" was "withdrawn from normal use because of breakdown, repair, servicing, loss or destruction" as may or may not be applicable. [V. I R. 453].

After additional discovery [V. I R. 721-45, second Shazier deposition] Steele filed her own Motion for Summary Judgment claiming Shazier rented the AVIS vehicle as her car "needed repair" because "the transmission went out" and it was "broken down" and it was used on a temporary basis as a substitute vehicle because she could not afford to immediately fix her car. [V. V R. 735-36]. Steele argued the AVIS rental (1) met the definition of "owned vehicle" under policy and that (2) once Shazier rented the vehicle for this manner, she became the owner of the vehicle for purposes of insurance coverage. [V. III R. 487].

GEICO responded to Steele's Motion for Summary Judgment with its own Motion for Summary Judgment seeking a ruling that the policy did not provide coverage for her with respect to the crash of August 19, 2006. [V. IV R. 638]. GEICO argued that (1) the rental vehicle did not meet the definition of "temporary substitute vehicle" pursuant to the policy and (2) that the operator did not have permission of the title holder/owner of the vehicle, AVIS, to use the vehicle. [V. III R. 587-610; V. IV R. 637-66].

The Trial Court ultimately held there was no genuine issue of material fact in dispute and that GEICO was obligated to defend and indemnify Shazier and Jordan. [V. VII R. 1149]. GEICO's appeal followed. [V. VII R. 1151-65].

On March 10, 2010 the Court of Appeal, First District, reversed and remanded the Trial Court's entry of Summary Judgment in favor of Steele with direction to enter final summary judgment in favor of GEICO. *GEICO Indemnity Co. v. Shazier*, 34 So. 3d 42 (Fla. 1st DCA 2010). The Court denied a timely filed Motion for Rehearing on May 4, 2010. This appeal followed.

STATEMENT OF FACTS

On August 19, 2006, Petitioner Kutasha P. Shazier was listed as the first named insured on a GEICO Family Automobile Policy No. 4029-01-30-44 which provided liability coverage in the amount of $10,000 per person/$20,000 per occurrence effective June 18, 2006 to December 18, 2006. [V.V R. 1-12]. The policy had an effective period from June 18, 2006 to December 18, 2006. [V. III R. 492]. On or about August 16, 2006 Shazier rented a 2006 Hyundai Vehicle Identification Number 5NPEU46F16H081535, bearing Florida Tag #S598UC (hereinafter "the vehicle") from AVIS RENT-A-CAR SYSTEM, LLC, and/or PV HOLDING CORP. [V. I R. 36-38]. Shazier rented the 2006 Hyundai Sonata as a temporary, substitute, replacement vehicle for her own vehicle. [V. I R. 735-36]. At the time, Shazier was in the process of moving from Jacksonville to Midway,

Florida [V. V R. 725] but she also had to be in the Tallahassee-area to attend her father's funeral. [V. V R. 675-76]. Although Shazier owned a 2000 Ford Expedition, she rented the Hyundai because her 2000 Ford "wasn't running that great." [V. V. R. 677-78, Shazier First Deposition]. In fact, the Expedition had suffered a transmission failure and was broken down. [V. V R. 735, Shazier Second Deposition]. The vehicle was withdrawn from use. [V. V R. 736-37]. The Hyundai was a temporary substitute vehicle. [V. V R. 736-37]. It was a substitute for the 2000 Ford Expedition because Shazier could not afford to repair her vehicle. [V. V R. 736-37]. She parked it out on the family land and withdrew it from normal use. [V. V R. 736-37]. She did not drive it between the time it was parked and it was repaired. [V. V R. 738].

Pursuant to the GEICO policy, any vehicle being used as a temporary substitute vehicle is defined by the policy as an owned vehicle for purposes of insurance coverage. [V. I R. 503, Liability Coverages, Definitions, 9].

Having rented the temporary, substitute vehicle and driven it to the family land, Shazier then entrusted the rental vehicle to Petitioner Fredrick Royal when he asked for the keys. [V. V R. 685]. Shazier entrusted the vehicle to Royal to listen to the radio. [V. V R. 709]. Shazier entrusted the vehicle to Royal to start the car and listen to the radio. [V. V R. 709]. Shazier entrusted the vehicle to Royal to drive the car. [V. V R. 709; V. V R. 686-87]. In fact, Shazier entrusted the car to

him to operate as he decided. [V. V R. 677-78; V. V R. 709-10] and [V. V R. 735; V. V R. 778]. Shazier also permitted Fredrick Royal to entrust the vehicle to a third party, Curtis Royal to go to the liquor store. [V. V R. 778]. Shazier never limited the scope of who was permitted to use the rental vehicle, [V. V R. 710; V. V R. 785], nor did she tell Royal not to let other people use the vehicle. [V. V R. 710].

After Curtis Royal returned from the liquor store with the vehicle, Fredrick Royal then entrusted the vehicle to Petitioner Tercina Jordan. [V. V R. 779]. Petitioner Jordan neither threatened, struck or stole the keys from Curtis Royal. [V. V R. 779]. According to Royal, he gave Jordan permission to drive to the store and "come on back." [V. V R. 779]. Jordan agreed noting Royal told her to take them to the store and come right back from the store. [V. V R. 810]. Jordan then negligently operated and/or negligently maintained the rented vehicle causing the vehicle to leave the road on Brickyard Road, Midway, Florida, at a high rate of speed crashing into a tree. [V. V R. 816-17].

Monica Steele was a passenger in the rented vehicle at the time that Tercina Jordan crashed the vehicle into the tree. V. V R. 813-14]. Monica Steele was injured in the crash. [V. I R. 151].

GEICO is an insurance company incorporated in the State of Maryland, registered to do business in Florida, and maintaining its principal place of business

at 5620 Western Avenue, Chevy Chase, MD 20815-0799. [V. I R. 150]. GEICO filed the instant action for declaratory judgment pursuant to Section 86.011, Florida Statutes, seeking a determination whether or not GEICO INDENMITY COMPANY owes a duty to indemnify and/or defend Kutasha Shazier. [V. I R. 63-116].

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:
>
> DEFINITIONS
>
> 4. ***"Insured"*** means a person or organization described 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 acquisition and you ask us to add it to the policy not more than 30 days later;

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

8. ***"Relative"*** means a person related to ***you*** who reside in ***your*** household, including ***your*** ward or foster child.

9. ***"Temporary substitute auto"*** means a ***private passenger***, ***farm*** 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.

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, and
2. damage to or destruction of property.

arising out the ownership, maintenance, or 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.

[V.I R. 21, GEICO Policy, emphasis in original].

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;

3. any other person or organization for his or its liability because of act 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 her liability because of 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. I R. 21-23][GEICO Policy, emphasis in original].

SUMMARY OF THE ARGUMENT

The dangerous instrumentality doctrine is a unique part of Florida's law and 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 previously articulated: "We are loath to engraft upon this doctrine…further exception[s] that would have such far-reaching consequences." *Id*. The decision of the District Court creates just such a circumstance.

The First District Court of Appeal's decision sets forth a new definition of permission and consent under the dangerous instrumentality doctrine and directly conflicts with *Susco Car Rental System of Florida v. Leonard*, 112 So. 2d 832 (Fla. 1959), *Roth v. Old Republic Ins. Co.*, 269 So. 2d 3(Fla. 1972) 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. In its opinion, 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 correspondent 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.

THE COURT OF APPEAL FOR THE FIRST DISTRICT INCORRECTLY DETERMINED THAT THE AVIS RENTAL CAR WAS NOT A TEMPORARY SUBSTITUTE VEHICLE FOR KUTASHA SHAZIER BECAUSE A VIOLATION OF THE RENTAL CONTRACT DOES NOT DEPRIVE THE INSURED OF INSURANCE COVERAGE FOR THE CRASH OF THE RENTAL CAR

The Court of Appeal for the First District erred when it reversed the trial court's finding of insurance coverage based on its finding that 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. Relying on this third party agreement, the Court reversed and held the use of the rental car by anyone other than the renter "automatically" revoked the permission granted to Shazier by Avis. The *Shazier* decision expressly and directly conflicts with this court's holding in *Roth v. Old Republic Insurance Company,* 269 So. 2d 3 (Fla. 1972) and should be reversed.

A. The Rental Auto Was Used As A Temporary Substitute Vehicle As Defined By The GEICO Policy Because Petitioner's Auto Had Been Withdrawn From Normal Use Because of It's Breakdown, Repair, Servicing, Loss or Destruction

In its Complaint, Amended Complaint, First Motion for Summary Judgment, denied without prejudice, its Second Motion for Summary Judgment, denied with prejudice and appeal, GEICO has asserted that this case did not involve an owned auto because the rental car obtained by Shazier was not a "temporary substitute auto" as defined by the policy.

The policy language, however, shows that the rental vehicle does meet the definition of an owned vehicle pursuant to the GEICO policy for purposes of insurance coverage for Kutasha Shazier. In fact the GEICO 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.

The policy language is clear. In Section I – LIABILITY COVERAGES, under definitions, number 6., an "owned auto" is defined as

(a) a vehicle described in this policy for which a premium charge is shown for these coverage and;

- - -

(d) a temporary substitute vehicle.

In the same definitional section, in part 9.:

> ***"Temporary substitute auto"*** means a ***private passenger***, ***farm*** 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.

Again, in the same definitional section, in part 13, "you" is defined as "the policy holder named in the declarations . . ."

Kutasha Shazier is listed as a named insured on the policy of insurance issued by GEICO. She is a covered (person) policy holder.

Kutasha Shazier owns a 2000 Ford Expedition which is a listed vehicle on the GEICO policy of insurance. The 2000 Ford Expedition meets the definition of owned auto pursuant to definitional section 6.(a).

In her deposition Ms. Shazier responded:

Q: Let me see if I can sort of sum things up. The Hyundai that you rented from Avis was being used as a temporary substitute automobile because your vehicle, that 2000 Expedition, had been withdrawn from normal use because, in your mind, it was broken down and needed repair?

A: Yes, sir.

[V. V R. 734-36].

As noted previously, section 9, the clear language of the definitional section of the GEICO policy, which defines temporary substitute vehicle, illustrates the Shazier vehicle was used for that specific purpose. A rental vehicle meets that definition if used as a temporary substitute. *Newbern Distr. Co. v. Canal Ins. Co.*, 124 So. 2d 721, 724 (Fla. 2d DCA 1960).[1] Moreover, once 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 rented from Avis it took the place of the Ford Expedition and became Shazier's "owned auto" with respect to her GEICO policy. As the "owner" she could entrust the rental car to whomever she wished - - as supported by this Court's case law herein.

[1] In its Brief to the First District the Respondent incorrectly relied on *Newbern* as support for the definition of a "temporary substitute vehicle." *Newbern*, however, did not involve a temporary substitute vehicle. Instead, the Court in *Newbern* noted the case involved an "additional" motor vehicle and in no way constituted a "replacement" or "substitute" motor vehicle within the meaning of the respective insurance policies. *Id*. at 981.

B. The District Court's Opinion Directly Conflicts with *Roth v. Old Republic Insurance Company* Where the Supreme Court Held An Insurer Can Not Escape Liability For Negligent Operation of A Rental car By Someone Other Than The Authorized Driver

GEICO claims that because Shazier permitted someone other than herself, the authorized driver of the rental vehicle, to use the rental vehicle, it has no obligation to provide coverage for the crash. GEICO's position conflicts with the law of this Court.

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 v. Old Republic Ins. Co.*, 269 So. 2d 3 (Fla. 1972), *Susco Car Rental Sys. Of Florida v. Leonard*, 112 So. 2d 832 (Fla. 1959).

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*, 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 v. Lloyd Motor Co*., 119 So. 2d 413, 415 (Fla. 1st DCA 1960); *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"). Shazier's status, as the renter, is important in properly applying the principle outlined in these cases to the instant facts.

As the renter of the AVIS vehicle, Shazier was in the position of a bailee. *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) ("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, such as dominion and control over the vehicle by Avis during the period of bailment. Shazier enjoyed a species of temporary ownership. *See id*. 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. 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. 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. 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. *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. 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.

269 So. 2d 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, 112 So. 2d at 837. Further, this Court has found that a rental agreement does not cut off liability and coverage where entrustment of the vehicle is given. *See id*. This Court again affirmed this holding in *Stupak v. Winter Park Leasing, Inc.*, 585 So. 2d 283 (Fla. 1991), 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. 585 So. 2d at 284.

This requirement of consent or permission is reflected 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*.

[V.I R. 21, GEICO Policy]. GEICO, however, in reliance upon that language, is attempting to do that which was expressly forbidden by the *Susco*, *Roth* and *Stupak* courts. GEICO wishes to escape liability coverage, based upon a separate contract, with a separate company, which defines only the scope of who may operate the vehicle. Just as Avis cannot escape liability under the dangerous instrumentality doctrine based on a contractual limitation as to who may operate its vehicle, then GEICO certainly can not be permitted to rely upon that same contract to escape liability. Rather, the GEICO policy requiring permission of the owner must be read in conjunction with the dangerous instrumentality doctrine. 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. This Court's decisions illustrate that 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." *Susco*, 112 So. 2d at 837.

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. *Id.* 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. *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. *Id.* 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. *Id.*

At 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*. (emphasis added).

The Supreme Court rejected the same argument, explaining 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. Once the owner of a car has given 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. *See also McDowell v. Rodriguez*, 822 So. 2d 14, 15 (Fla. 5th DCA 2002)(When there is a chain of custody of the automobile, as a dangerous instrumentality, indemnity flows between the vicariously liable tortfeasors so that ultimate vicarious liability rests with the tortfeasor who entrusted the negligent driver with the vehicle. This is true even if the act of entrustment was not negligent). These are the facts before this Court.

With respect to the insurance policy before this Court, the AVIS auto became the insured's "owned" auto when it was used by the insured with permission of the owner as a replacement for a listed auto under the policy. Because Avis gave Shazier permission to use the vehicle, the policy may 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) ("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.

Using the First District's interpretation of the language "permission of the owner," however, 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.

Moreover, pursuant to 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. This interpretation directly conflicts with the meaning of consent for use under the dangerous instrumentality doctrine.

In order for the dangerous instrumentality doctrine to apply, as noted in *Roth* and *Susco*, this Court has required the owner's consent, either express or implied, to use the automobile. Similarly, 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 identical with the requirement of permission under the GEICO policy. As titled owner of the rental car, Avis cannot escape liability under the dangerous instrumentality doctrine by claiming it did not give permission for anyone other than Shazier to use the auto. Likewise the case law is clear that GEICO cannot use a third-party rental agreement to void coverage for the auto "owned by Shazier and entrusted to a third party. As the owner under the policy, coverage attaches.

In the case of Kutasha Shazier, whether she is defined under the policy of insurance as the "owner" of the AVIS vehicle for purposes of coverage or she is a bailee, *Susco* sets out the rule of law that coverage attaches to her and anyone entrusted with the vehicle.

The *Susco* Court recognized 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.

Kutasha Shazier had a GEICO insurance policy on her Expedition. If Kutasha Shazier entrusted her Expedition to someone else, her GEICO policy

would provide coverage. Kutasha Shazier rented a temporary replacement vehicle car to replace her car. Because she rented it to replace a broken-down vehicle it became an owned vehicle for purposes of coverage. Pursuant to this Court's holding as set out in *Susco*, her GEICO coverage attaches, whether as owner of the car or as bailee and renter from AVIS. And just as with her car, and just as stated in *Susco*, she can entrust the vehicle to others and no side agreement, absent a species of theft or conversion, will deprive her of insurance coverage.

The decision of the Court of Appeal for the First District should be reversed and decision of the Trial Court should be reinstated.

C) The District Court's Reliance on *Duncan v. Allstate* Was Misplaced Because The Duncan Case Did Not Involve A Temporary Substitute Vehicle

Despite the clear holding in *Roth*, the district court below held that the coverage determination was rested on the rental car company's permission to use its vehicle. *GEICO Indemity Co. v. Shazier,* 34 So. 3d 42, 44 (Fla. 1st DCA 2010), *see also, Duncan Auto Realty, Ltd. et. al v. Allstate Ins. Co., et. al,* 754 So. 2d 863 (Fla. 3d DCA 2000)

In *Duncan* the issue of temporary substitute vehicle was explored. *Id*. Garcia was the owner of a company with business vehicles, all listed as "covered autos" under an auto policy issued to the company. *Id*. The policy contained a standard "temporary substitute auto" provision which extended coverage to:

> 3. Any "auto" you do not own while used with the permission of its owner as a temporary substitute for a covered "auto" you own that is out of service because of its: (a) breakdown, (b) repair, (c) servicing, (d) loss or (e) destruction.

Id. at 864.

When a company truck began to experience serious mechanical problems, Garcia decided to use it as a trade-in for a new pick-up trick. *Id*. Garcia asked and was granted permission by the auto dealer to test drive truck. *Id*. During the test drive Garcia had a collision with a moped rider. *Id*.

The moped rider sued Garcia and Allstate filed a complaint for declaratory judgment alleging that it owed no duty to defend and/or indemnify since its policy provided no coverage to the company or Garcia for the damages sustained by the moped rider. *Id*. Allstate moved for summary judgment, in part, on the basis that no coverage existed because the truck driven by Garcia at the time of the accident wasn't a "temporary substitute auto". *Id*. The trial Court entered summary judgment and the appellate court affirmed. *Id*.

In doing so the appellate court stated, "we believe that a "temporary substitute auto" in this policy clearly refers to a vehicle that is used in the place of a disabled or lost insured vehicle." *Id*. at 865. In order for coverage to attach the "temporary substitute vehicle" must have been performing a function that the disabled insured vehicle would have been performing but for its temporary disability. *Id*.

Furthermore, the appellate court noted that the word "temporary" in the policy's "temporary substitute auto" clause meant a substituted vehicle's use was to be of limited duration, at the conclusion of which the substitute vehicle was to be discarded, and the named vehicle is to resume its usual function. *Id*. The key to *Duncan* is that there was never any intent that the test-drive vehicle was to be used as a temporary substitute vehicle. *Id*. at 864. It was to be, after the test drive, a substitute. *Id*. At the time of the incident, however, it was not a temporary substitute vehicle. *Id*. Nor was it an after-acquired vehicle. Because it was on a test drive, neither policy definition was met. *Id*.

The reasoning of the Appellate Court supports the ruling of the Trial Court in the instant matter on Steele's Motion for Summary Judgment. Shazier did not test-drive the vehicle nor was she buying the vehicle. Shazier rented the Hyundai as a temporary substitute vehicle.

Q: Let me see if I can sort of sum things up. The Hyundai that you rented from Avis was being used as a temporary substitute automobile because your vehicle, that 2000 Expedition, had been withdrawn from normal use because, in your mind, it was broken down and needed repair?

A: Yes, sir.

(Second Shazier dep. p. 17, ll. 3-9).

A temporary substitute vehicle is defined in the GEICO policy as an owned vehicle:

Section I – LIABILITY COVERAGES, definitions, number 6., "owned auto" means . . .

(d) a temporary substitute vehicle.

GEICO/Shazier policy, p. 3 of 17.

Although Respondent claims that the testimony in the case that the transmission went out did not establish that the vehicle was disabled or inoperative, neither term is used in the definitional section of the policy. The key words in the policy definitions, and in the testimony of record, are "withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction."

Assuming that GEICO's interpretation of Petitioner Shazier's testimony that her personal auto had suffered a transmission failure does not necessarily mean that the vehicle is inoperative or disabled, "where policy language is subject to differing interpretations, the term should be construed liberally in favor of the insured and strictly against the insurer." *Koikos v. Travelers Ins. Co.*, 849 So. 2d 263, 271 (Fla. 2003), *quoting State Farm Fire and Cas. Co. v. CTC Development Corp.*, 720 So. 2d 1072, 1076 (Fla. 1998). Further, any ambiguities in the contract are construed against the drafter; in this case, GEICO. *Planck v. Traders Diversified, Inc.*, 387 So. 2d 440 (Fla. 4th DCA 1980).

D. 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 but 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 eroded 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.

Because the decision of the Court of Appeal for the First District also conflicts with the public policy of the Supreme Court, the decision of the appellate Court should be reversed.

CONCLUSION

Based upon the foregoing facts and authority, Petitioner Steele respectfully requests that the Court reverse the decision of the Court of Appeal for the First District and affirm the declaration of coverage by the Trial Court.

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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 ___ day of January, 2011 to all counsel on the service list.

_____

James E. Messer, Jr.

CERTIFICATE OF COMPLIANCE

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

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