IN THE SUPREME COURT OF FLORIDA

ROBERT THOMAS KRAEMER, JR. as Personal Representative of the Estate of Marguerite Voorhees Kraemer, Deceased, and ROBERT THOMAS KRAEMER, JR., individually,

Petitioner,

v.

CASE NO. 75,580

GENERAL MOTORS ACCEPTANCE CORPORATION,

Respondent.

AMICUS CURIAE FLORIDA MOTOR VEHICLE LEASING GROUP'S BRIEF ON THE MERITS IN SUPPORT OF RESPONDENT'S POSITION

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STATEMENT OF THE CASE AND FACTS

PETITIONERS seek review of the decision of the Second District Court of Appeal which affirmed Final Summary Judgment in favor of GENERAL MOTORS ACCEPTANCE CORPORATION, and against ROBERT THOMAS KRAEMER, JR., as Personal Representative of the Estate of Marguerite Voorhees Kraemer, Deceased, and ROBERT THOMAS KRAEMER, JR., individually.

GENERAL MOTORS ACCEPTANCE CORPORATION, Counterclaim Defendant/ Appellee will be referred to herein as "GMAC" or "LESSOR."

ROBERT THOMAS KRAEMER, JR., as Personal Representative of the Estate of Marguerite Voorhees Kraemer, Deceased, and ROBERT THOMAS KRAEMER, JR., individually, the Counterclaim Plaintiffs/Appellants will be referred to herein as "PETITIONER."

MICHAEL ANTHONY GREEN, a Counterclaim Defendant in the trial Court below, will be referred to herein as "GREEN" or "LESSEE."

CALVIN GARY, a Counterclaim Defendant in the trial Court below, will be referred to herein as "GARY" or "DRIVER."

Amicus curiae, FLORIDA MOTOR VEHICLE LEASING GROUP ["FMVLG"], is an association, many of whose members are involved in the business of long-term leasing of motor vehicles. These commercial, long-term lessors are directly affected by the issues involved in this matter.

Amicus submits this brief in support of the position of Respondent, GMAC.

The record on appeal will be referred to by the symbol "R", and Amicus' appendix will be referred to as "App."

Amicus presents the following statement of the case and facts to obviate any confusion presented by that of Petitioner.

On May 15, 1986, GREEN entered into a closed-end vehicle lease agreement with GMAC for a 1987 Nissan motor vehicle. (R. 105: App. 10). Pursuant to the lease agreement, in paragraph 8, GREEN was given an option to purchase the subject vehicle. (R. 105: App. 10). GREEN had the immediate right to, and did in fact have, possession of the subject motor vehicle from and after the date he entered into the lease agreement. (R. 132; App. 1). From and after May 15, 1986, GREEN retained possession and control of the subject vehicle. (R. 132: App. 1).

Pursuant to the terms of the lease, GREEN, the LESSEE, was solely responsible for: 1) maintenance of the leased vehicle: 2) repairs to keep the leased vehicle in good working order; 3) insurance on the leased vehicle: 4) any other expenses associated with operating the leased vehicle: 5) servicing the leased vehicle according to the manufacturer's recommendations as set forth in the owner's manual: 6) payment of title expenses: 7) payment of all registration fees: 8) payment of all licensing fees: 9) payment of all inspections of the leased vehicle required by any governmental authority: 10) payment of all excise, use, personal property, gross receipts and other taxes incurred with respect to the operation of the leased vehicle: and 11) indemnification to GMAC as a result of all losses, damages, injuries, claims, demands and expenses arising out of the operation of the vehicle. (R. 105-107).

On May 7, 1987, GREEN allowed GARY to borrow the subject vehicle. (R. 24). GARY, while driving the subject vehicle, was involved in an accident with PETITIONER's deceased. (R. 25).

Thereafter, on October 15, 1987, PETITIONER filed a "Counter-Complaint" against GMAC, GREEN, and GARY for the damages incurred in the automobile accident. (R. 24-28). PETITIONER later amended his pleading on December 22, 1987. (R. 43-48). The sole basis presented by PETITIONER for recovery against GMAC was that GMAC "owned" the motor vehicle being operated by GARY, and leased to GREEN. (R. 44).

On January 19, 1988, GMAC filed its Answer and Affirmative Defenses, denying that it was the beneficial owner of the subject vehicle. (R. 61-64).

On March 2, 1988, GMAC moved for summary judgment, on the grounds that there existed no genuine issues of material fact and that it was not the beneficial owner of the subject vehicle. (R. 87). In support of its Motion for Summary Judgment, GMAC presented the affidavit of Wayne Boyd, Administrative Representative for GMAC. (R. 131-133; App. 1-2). The affidavit shows that GMAC never took possession and/or control of the subject vehicle; possession and control being given to and retained by GREEN, to the exclusion of GMAC. (R. 132; App. 1).

On May 27, 1988, the trial court entered Final Summary Judgment in favor of GMAC and against PETITIONER. (R. 276-277). The Second District Court of Appeal affirmed the Final Summary Judgment. PETITIONER seeks review of that decision.

ISSUE ON APPEAL

I.

WHETHER FINAL SUMMARY JUDGMENT IN FAVOR OF GMAC IS PROPER WHERE, PURSUANT TO SECTION 324.021(9)(a), GMAC IS NOT LIABLE AS THE "OWNER" OF THE LEASED VEHICLE WHERE THE LESSEE WAS GIVEN: 1) IMMEDIATE POSSESSION, AND 2) THE RIGHT OF PURCHASE?

SUMMARY OF ARGUMENT

The Final Summary Judgment entered in favor of GMAC and against PETITIONER is correct. No genuine issues of material fact exist. As a matter of law, and pursuant to Section 324.021(9)(a), Fla. Stat. (1987), GMAC is not to be considered the owner, and therefore not vicariously liable for the vehicle it leased to GREEN, where GREEN was given immediate possession and the right to purchase the vehicle in the lease agreement.

Additionally, GMAC was not the beneficial owner of the leased vehicle on the date of the accident, and therefore not vicariously liable for the negligence, if any, of GARY, the DRIVER.

ARGUMENT

I.

FINAL SUMMARY JUDGMENT IN FAVOR OF GMAC IS PROPER WHERE, PURSUANT TO SECTION 324.021(9)(a), GMAC IS NOT LIABLE AS THE "OWNER" OF THE LEASED VEHICLE WHERE THE LESSEE WAS GIVEN: 1) IMMEDIATE POSSESSION, AND 2) THE RIGHT OF PURCHASE.

A. § 324.021(9)(a).

The thrust of PETITIONER's argument appears to be that unless the case at bar fits into the three exceptions to the dangerous instrumentality doctrine recognized by PETITIONER, the LESSOR, GMAC, must remain liable for the negligence of the LESSEE and/or DRIVER of the leased vehicle. PETITIONER claims that there are only three exceptions to an owner's vicarious liability under the dangerous instrumentality doctrine. According to PETITIONER, the only exceptions are: 1) a seller who retains mere naked legal title as security for payment of a purchase price, Palmer v. R.S. Evans, Jacksonville, Inc., 81 So.2d 635 (Fla. 1955); 2) an owner who surrenders a motor vehicle for repair or service: and 3) the statutory exemption provided by § 324.021(9)(b), Fla. Stat. (1986).[1]

In recognizing only these three exceptions, PETITIONER has totally overlooked § 324.021(9)(a),[2] Fla. Stat. (1987), which

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[1]Other exceptions to an owner's vicarious liability, that PETITIONER has failed to mention, are discussed later in this Brief.

[2]Throughout his Brief, PETITIONER has failed to even acknowledge the existence of § 324.021(9)(a), Fla. Stat. By this omission, or oversight, PETITIONER has painted an inaccurate, legal scenario of the lessor's liability both prior and subsequent to the enactment of § 324.021(9)(b) in 1986.

renders PETITIONER's attempted analysis of the state of the law a structurally deficient "house of cards. Subsection (a) of § 324.021(9), Florida Statutes, enacted in 1955, like its subsequent counterpart, subsection (b), enacted in 1986, relieves the lessor from liability as the "owner" of a motor vehicle where certain conditions have been met. Subsection (a) mandates, that where the lessor has given both immediate possession and a right of purchase of a leased vehicle to the lessee, under those circumstances, the lessee is deemed to be the "owner," for purposes of imposing tort liability, not the lessor.

Section 324.021(9)(a), enacted thirty-one years prior to the enactment of subsection (b),[3] states as follows:

> (a) Owner - A person who holds the legal title of a motor vehicle; or, in the event a motor vehicle is the subject of an agreement for the conditional sale or lease thereof with the right of purchase upon performance of the conditions stated in the agreement and with an immediate right of possession vested in a conditional vendee or lessee, or in the event a mortgagor of a vehicle is entitled to possession, then such conditional vendee or lessee or mortgagor shall be deemed the owner for the purpose of this chapter. (Emphasis added).

The agreement entered into between GMAC and GREEN, gave GREEN the right of purchase, as well as immediate possession. Therefore, pursuant to § 324.021(9)(a), GMAC is not deemed to be the "owner"

[3] As early as 1955, a lessor who afforded a lessee a right of purchase and an immediate right of possession was entitled not to be sued as the owner of the vehicle. Thus, it would seem that effective with the adoption of the Florida Constitution in 1968, incorporating existing statutes, such lessors had a **constitutional riuht not to be** sued.

of the leased vehicle on the date of the accident, for purposes of imposing vicarious liability.

The fact that the **LESSEE/GREEN** may have been in default under the lease agreement on the date of the subject accident is irrelevant. In order to have the **LESSOR** not deemed the "owner," § 324.021(9)(a) merely requires a lease agreement which gives the lessee the right of purchase and immediate possession. Section 324.021(9)(a) nowhere requires a reversion of ownership liability to the lessor, upon non-payment by the lessee. Stated simply, if on the date when the lease is signed, the lessee is given the right of purchase, regardless of whether the lessee ever exercises that right and/or is capable of exercising that right thereafter, the lessor is not liable as the "owner" of the leased vehicle. While the **LESSEE/GREEN** may have been in default under the lease agreement on the date of the subject accident, the lease agreement, itself, was in total compliance with § 324.021(9)(a) upon its execution. Until such time as **GMAC** had retaken possession of the leased vehicle for default, **GMAC** would not be deemed the "owner" of the leased vehicle for purposes of imposing vicarious liability under the dangerous instrumentality doctrine.

Clearly, subsection (a) is a statutory codification of the law set forth in Palmer v. Evans, 81 So.2d 635 (Fla. 1955), decided the same year that subsection (a) was enacted. Palmer held that the mere titleholder, who had transferred beneficial ownership, was not liable under the dangerous instrumentality doctrine for an automobile's negligent operation by another. Section 324.021(9)(a) expanded the law set forth in Palmer, so as to also exclude

lessors, who have given their lessees the rights enunciated in subsection (a), from liability. Thus, in 1955, § 324.021(9)(a) established an exception to the liability imposed by Lynch v. Walker, 31 So.2d 268 (Fla. 1947).

It is noteworthy that the Legislature chose the disjunctive "or" in its definition of "owner" in subsection (a). For purposes of imposing tort liability, the "owner" is the legal titleholder unless there is a lessee who has been given immediate possession and the right of purchase. In that event, only the lessee is deemed the owner. The use of "or" cannot be ignored, as every word in a statute must be given meaning and effect. Vocelle v. Kniaht Bros. Paper Co., 118 So.2d 664 (Fla. 1st DCA 1960).

The question of whether the lease between GMAC and GREEN complies with § 324.021(9)(a), is one of law, not one of fact. Since no ambiguities appear in the contract entered into between GMAC and GREEN, the contract's interpretation is an issue of law, and the summary judgment procedure becomes the appropriate vehicle upon which to decide this cause. Cox Motor Co. v. Faber, 113 So.2d 771 (Fla. 1st DCA 1959).

B. CASES FROM OTHER JURISDICTIONS.

Although there are no Florida cases dealing with the exclusion of lessor liability under subsection (a), there are cases from other jurisdictions with identical or analogous statutory provisions to § 324.021(9)(a) excluding certain lessors from the definition of "owner." In each instance, no insurance requirements were placed upon the lessor prior to being excepted from the definition of "owner." In Lee v. Ford Motor Co., 595 F. Supp. 1114

(D.D.C. 1984), involving a statute identical to subsection (a), the owner/lessor of a vehicle involved in an accident, was held not to be the owner as defined by the Motor Vehicle Safety Responsibility Act. (App. 1-2). The vicarious liability imposed in Florida is "closely allied" with that of the District of Columbia. Hertz Corp. v. Dixon, 193 So.2d 176 (Fla. 1st DCA 1966). The lessor was therefore held not to be vicariously liable for the vehicle's negligent operation.

> In 1956, Congress enacted the present Motor Vehicle Safety Responsibility Act, . . . adding a definition of the term owner;
>
> > [a] person who holds a legal title of a vehicle or in the event a vehicle is the subject of an agreement for the conditional sale or lease thereof with the right of purchase upon performance of a condition stated in the agreement and with an immediate right of possession vested in the conditional vendee or lessee, or in the event a mortgagor of a vehicle is entitled to possession, then such conditional vendee or lessee or mortgagor shall be deemed the owner for the purpose of this chapter. Id. at 1115.

Ford Motor Company was held not to be the "owner" under this statutory provision, for purposes of imposing tort liability for the negligence of the lessee.

> In the present case, it is undisputed that Ford lacked "dominion and control" over the vehicle in question. The car had been provided to FCA by Ford while one of the vehicles under a long-term lease between the parties was being repaired. . . . Under the lease, title remained in Ford but authority to control and operate the vehicles was given to the lessee, FCA. Ford had no immediate right to control the use of the vehicles at the time of the accident. Id. at 1116.

The court imposed "the liability upon the person in a position . . . to allow or prevent the use of the vehicle . . . ." Id. This analysis closely comports with the early Florida decisions dealing with liability under the dangerous instrumentality doctrine, reiterated and adopted in Perry v. G.M.A.C. Leasing Corp., 549 So.2d 680 (Fla. 2d DCA 1989).

Moore v. Ford Motor Credit Co., 420 N.W.2d 577 (Mich. App. 1988), (App. 3-5), is also instructive.

> "Owner" means: (a) any person, firm, association or corporation renting a motor vehicle or having exclusive use thereof, under a lease or otherwise, for a period of greater than thirty days.
>
> (b) A person who holds the legal title of a vehicle or in the event a vehicle is the subject of an agreement for the conditional sale or lease thereof with the right of purchase upon performance of the conditions stated in the agreement and with an immediate right of possession vested in a conditional vendee or lessee or in the event a mortgagor of a vehicle is entitled to possession, then such conditional vendee or lessee or mortgagor shall be deemed the owner.

The court held that although the lessor was the legal titleholder of the vehicle, the lessor was not to be deemed the "owner," as defined by statute, for purposes of imposing tort liability.

> We believe that the second part of subsection (b) qualifies the first part, so that the legal title holder of a vehicle subject to a conditional lease is not an owner for purposes of the civil liability statute. In other words, Section 37 excepts from its definition of "owner" a lessor such as defendant, and deems a lessee, here Darlene Moore, "the owner."
>
> * * *

> If the Legislature had not intended to except lessors such as defendant from the definition of "owner" then the second part of subsection (b) would not have been necessary. Every word of a statute should be given meaning and no word should be treated as surplusage or rendered nugatory if at all possible. Id.

The court held that although Ford Motor Credit was the legal titleholder of the vehicle, it was not the owner, as defined by the Michigan statute, for purposes of imposing vicarious liability.

> [L]egal titleholder of a vehicle subject to a conditional lease is not an owner for purposes of the civil liability statute. In other words, Section 37 excepts from its definition of "owner" a lessor such as defendant, and deems a lessee, here Darlene Moore, "the owner." Id.

Siverson v. Martori, 581 P.2d 285 (Ariz. App. 1978), involves a statute identical to § 324.021(9)(a). The court there held the statute defined the "owner" for both purposes of tort liability and criminal liability for the operation of a motor vehicle.

> We do not read the definition of "owner" in A.R.S. § 28-101(30) [Florida's subsection (a)] to apply to a holder of bare legal title in the context of imposing criminal liability under A.R.S. § 28-921(A). It is inconceivable to us that the Legislature, in enacting A.R.S. § 28-101(30), intended the imposition of either civil or criminal liability on the holder of bare legal title. Id. at 289.

Witkofski v. Daniels, 198 A. 19 (Pa. 1938), deals with a statute identical to § 324.021(9)(a).

> The title to this car was in Adair Motor Company. The latter rented the car to Henry Daniels for $161.00 on or before delivery, leaving a deferred rental of $576.00, which lessee promised to pay at the office of Universal Credit Company in installments of $32.00 each month. After all payments had been made as agreed, the lessee, Henry

> Daniels, had the right to purchase the car for $1.00. . . . Id. at 20.
>
> The Adair Motor Company, the owner of a 1934 Ford 8 Coupe, leased that car to Henry, with the right in the latter of purchase upon performance of the conditions stated in the agreement and with an immediate right of possession vested in [Henry Daniels] the conditional vendee or lessee. That situation made Henry Daniels the "owner" of that car, under the provisions of Section 102 of the Act . . . . Id. at 21. (Emphasis added).

The Washington State case of Beatty v. Western Pacific Insurance Co., 445 P.2d 325 (Wash. 1968), involves a Washington state statute which provides as follows:

> RCW 46.04.380 Owner. "Owner" means a person who holds a title of ownership of a vehicle, or in the event the vehicle is subject to an agreement for the conditional sale or lease thereof with the right of purchase upon performance of the conditions stated in the agreement and with the immediate right of purchase vested in the conditional vendee or lessee, or in the event a mortgagor of a vehicle is entitled to possession, then any such conditional vendee or lessee, or mortgagor having a lawful right of possession or use and control for a period of ten or more successive days.

The court held that the conditional vendee fell squarely within the statute's definition of "owner" for purposes of the financial responsibility act. The conditional vendor was held not to be the "owner" for the imposition of tort liability. The court, in so holding, reasoned that this result was just since:

> The rationale most frequently advanced for this view is that where possession of the automobile has been transferred pursuant to the conditional sales agreement, the conditional vendor no longer owns the vehicle in such a sense as will enable him to give or withhold his consent to the use of the vehicle by the vendee, and that the vendor retains

> title for security purposes rather than for purposes of dominion over the vendee's possession and use of the car. Id. at 331.
>
> * * *
>
> Under the conditional sales transaction herein involved the conditional vendee, Scott, had the lawful right of possession or use and control of the automobile involved for a period in excess of ten (10) days. He, therefore, fell squarely within the foregoing definition and was both the "operator" and the "owner" within the contemplation of the financial responsibility act. The conditional vendor, Sutliff, holding only a security interest, does not come within the thrust of the act. Id. at 333-34.

Cowles v. Rogers, 762 S.W.2d 414 (Ky. App. 1989), involves a statute similar to subsection (a), the only difference being that Kentucky's statute requires a lease of one year or longer. In holding the lessee to be the "owner" of the leased motor vehicle, the court stated:

> The rationale for the rule is that possession of the vehicle is transferred under circumstances which prevent the seller from controlling the use of the vehicle by giving or withholding consent. We believe our jurisdiction's apparent adoption of this general rule by statute is both logical and sound. Id. at 417.

Likewise, the Nevada Supreme Court in Bly v. Mid-Century Ins. Co., 698 P.2d 877 (Nev. 1985), held that a statute identical to Florida's subsection (a) imposes liability only on the conditional vendee.

Arter v. Jacobs, 234 N.Y.S. 357 (App. Div. 1929), involves a statute virtually identical to § 324.021(9)(a). The case held that the lessee of an automobile would be deemed the "owner" of the vehicle, so as to be liable for its negligent operation, where a

lessor retained title, until payment was made in full, and even though the lessor was empowered to repossess the automobile in the event of the lessee's breach.

Riggs v. Gardikas, 427 P.2d 890 (N.M. 1967), involves a New Mexico statute identical to §4 324.021(9)(a). That case held that where trucks were subject to conditional sales or lease contracts, the vendee/lessee, who had the immediate right of possession, would be deemed the "owner" under that state's motor vehicle act. In fact, the court held that the lessee's judgment creditors were entitled to replevy the leased trucks to satisfy the lessee's debts.

High Point Savings and Trust Co. v. King, 117 S.E.2d 421 (N.C. 1960), also involves a statute identical to §4 324.021(9)(a). The court held that the conditional vendee, lessee or mortgagor of a motor vehicle is deemed to be the owner for the purposes of the Motor Vehicle Safety and Financial Responsibility Act, even though legal title is reposed in a third party. Liability on the part of the legal titleholder, i.e., the conditional vendor or lessor, could arise:

> Only by application of the doctrine of respondeat superior, that is, by showing the relationship of master and servant, or employer and employee, or principal and agent. The complaint does not allege facts showing any such relationship. Id. at 422 (emphasis added).

Patently, the Florida Legislature, in excepting lessors such as GMAC from the definition of "owner" in §4 324.021(9)(a), intended that those lessors not be considered "owners" for purposes of imposing tort liability. Thus, under subsection (a), GMAC is not

deemed the "owner" and, therefore, not liable for the negligence of either GREEN and/or GARY under the dangerous instrumentality doctrine. No question of fact exists. As a matter of law, pursuant to § 324.021(9)(a), GMAC is not liable for PETITIONER's injuries.

C. LESSOR EXEMPTION UNDER § 324.021(9)(b).

PETITIONER concedes that § 324.021(9)(b) immunizes a complying lessor from vicarious liability. Apparently PETITIONER does not feel threatened by making this concession since subsection (b)'s insurance requirements were not met. Section 324.021(9)(a) relieves the lessor from liability where, regardless of the term of the lease: 1) the lessee is given immediate possession: and 2) the lessee is given a right of purchase. Subsection (b) relieves the lessor from liability where: 1) the requisite insurance is in effect; and 2) the lease is for one year or longer. Both subsections must be read so as to achieve a consistent goal, i.e., exemption from liability to complying lessors. State v. Sullivan, 43 So.2d 438 (Fla. 1949): State v. Fussell, 24 So.2d 804 (Fla. 1946). Judicial contortions to yield a different conclusion would serve no purpose except to salvage PETITIONER's access to a potential deep-pocket defendant, which is not a constitutionally protected right.

Subsection (b) now states:

> **Notwithstandins any other provision of the Florida Statutes or existing case law,** the lessor, under an agreement to lease a motor vehicle for 1 year or longer which requires the lessee to obtain insurance acceptable to the lessor which contains limits not less than $100,000/$300,000 bodily injury liability and

> $50,000 property damage liability; further, this subsection shall be applicable so long as the insurance required under such lease agreement remains in effect, **shall not be deemed the owner of said motor vehicle for the purpose of determininu financial responsibility for the operation of said motor vehicle or for the acts of the operator in connection therewith**. (Emphasis added.)

Section 324.021(9)(b) has been uniformly interpreted to relieve the lessor from liability for the negligence of the lessee by Florida's appellate courts. Folmar v. Young, 15 F.L.W. D366 (Fla. 4th DCA Opinion filed Feb. 6, 1990), holds that § 324.021(9)(b) does exempt a lessor from liability for the negligent operation of the leased motor vehicle by the lessee, where the requisite insurance coverage is in place, and the lease agreement is for a period in excess of one year.

> The next argument is that section 324.021(9) exempts a lessor only from sanctions for failing to meet the financial responsibility laws related to a motor vehicle covered by liability insurance. The plaintiffs again cite section 324.021(9). They claim that the pertinent portion of that provision is "for the purpose of determining financial responsibility." The plaintiffs contend that the foregoing phrase relates only to the issue of whether the lessor is subject to the sanctions set forth in section 324.051.
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> . . . We believe that the financial responsibility discussed in section 324.021(9) concerns financial responsibility imposed by the dangerous instrumentality doctrine, not statutory penalties for failing to provide proof of financial responsibility. Moreover, there would have been no need to enact section 324.021(9)(b) to require $100,000/$300,000 coverage if its only purpose was to exempt lessors from section 324.051 which requires $10,000/$20,000 coverage.
>
> We conclude that section 324.021(9) constitutes an exception to the dangerous

> instrumentality doctrine in the case of long-term lessors. Id. at D367. (Emphasis added).

The lessor is simply not liable for the vehicle's negligent operation by the lessee. The Fourth District Court of Appeal held that the plain language of § 324.021(9)(b) clearly reflects that it "was enacted to limit the liability of lessors under the dangerous instrumentality doctrine, and we so hold." Id. at D368.

The Second District Court of Appeal, in Perry v. G.M.A.C. Leasing Corp., 549 So.2d 680 (Fla. 2d DCA 1989),[4] held that in a subsection (b) situation, the lessor was not to be considered the owner for purposes of imposing tort liability for the negligent acts of its lessee's driver where all the provisions of subsection (b) had been met. In Perry, it was found that § 324.021(9)(b) mandates that a lessor, shall not be deemed the owner of the motor vehicle for purposes of the dangerous instrumentality doctrine where the provisions of the statute have been met. Id.

> While, as plaintiff argues, the lease also specifically provides that the "lessor

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[4]This Court denied discretionary review in Perry on January 24, 1990. Discretionary review was sought on the grounds that: 1) Perry directly conflicts with Anderson v. Southern Cotton Oil Co., 74 So. 975 (Fla. 1917), Susco Car Rental System of Fla. v. Leonard, 112 So.2d 832 (Fla. 1959) and Racecon, Inc. v. Meade, 388 So.2d 266 (Fla. 5th DCA 1980); and 2) § 324.021(9)(b) is unconstitutional as violating the petitioners' access to the courts.

This Court has held that it would not accept jurisdiction to review an appellate decision which is based upon the authority of a previous appellate decision that this Court declined to review on the merits. Harrison v. Hyster Co., 515 So.2d 1279 (Fla. 1987).

> The anomaly of reviewing a decision because it was decided upon the authority of another decision which was never reviewed on the merits by this Court has caused us to conclude that we should not have accepted jurisdiction of this case . . . . Id. at 1280.

> remains the owner of the vehicle," nonetheless the fact remains that the lessor retains no control over the operation of the motor vehicle. Accordingly, the lessor has under the lease essentially no more than naked legal title which is all that the above-quoted portion of the lease, which is otherwise stated to be included for federal income tax purposes, recognizes.
>
> "[T]here is overwhelming precedent for the proposition that the person that holds legal title to a vehicle will not always be deemed to be the 'owner' under the Motor Vehicle Safety Responsibility Act. Instead, looking to the purpose of the Act, the courts 'place the liability upon the person in a position . . . to allow or prevent the use of the vehicle. . . .'" Indeed, section 324.021(9)(b) may be viewed as enhancing the recoverability of damages from lessees by calling for minimum insurance requirements to be imposed upon lessees. Id. at 682.

Contrary to PETITIONER's contention, the legislative intent and purpose for the enactment of § 324.021(9)(b), would not be defeated by exempting GMAC from liability pursuant to subsection (a) of that very same statute. Subsections (a) and (b) merely provide two different alternatives for lessor exemption, neither of which is mutually exclusive of and/or dependent upon compliance with the other subsection. Subsection (b) provided a second statutory exemption to lessor liability, thirty-one years after subsection (a)'s statutory enactment.

D. THE DANGEROUS INSTRUMENTALITY DOCTRINE WAS NOT ABSOLUTE.

Contrary to what PETITIONER would have this Court accept as true, the halls of justice will not crumble by judicial approval of § 324.021(9)(a)'s exception to the dangerous instrumentality

doctrine. The dangerous instrumentality doctrine is not, and has never been, absolute in its application.

PETITIONER states that he could find only three "solid" exceptions to a motor vehicle owner's liability under the dangerous instrumentality doctrine.[5] Fortunately, Amicus is able to present to this Court other well established exceptions. The doctrine does not apply, and an owner is not liable, for injuries caused by a vehicle's negligent operation by: 1) a repairman, Castillo v. Bickley, 363 So.2d 792 (Fla. 1978); 2) a valet, Fahey v. Raftery, 353 So.2d 903 (Fla. 4th DCA 1977); or 3) a bailee passenger who had entrusted its operation to a negligent driver, Devlin v. Florida Rent-A-Car, Inc., 454 So.2d 787 (Fla. 5th DCA 1984).

As the Court noted in Robelo v. United Consumer's Club, Inc., 14 F.L.W. 2706 (Fla. 3d DCA 1989), an employer is not necessarily liable for injuries an employee causes when using an automobile titled in the name of the employer. Likewise, an employer is not liable as the titleholder of a vehicle, for an employee's intentional torts committed while operating the employer's vehicle. Nye v. Seymour, 392 So.2d 326 (Fla. 4th DCA 1980). Similarly, an owner is not liable where there has been a conversion or theft. Owen v. Wagner, 426 So.2d 1262 (Fla. 2d DCA 1983). GMAC should certainly not be held liable for the alleged criminal act of the driver herein, i.e., fleeing the police after having committed a robbery.

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[5]The earnestness of PETITIONER's search should be examined where PETITIONER did not even discover subsection (a) of § 324.021(9).

None of these exceptions require a relinquishment of control for a certain time period. Notwithstanding PETITIONER's protestations, there is nothing inconceivable about exempting a lessor from liability under § 324.021(9)(a) regardless of lease length, where the law clearly recognizes that an owner is relieved from liability merely by turning over his vehicle to a valet service for five minutes. Interestingly, the same exception recognized by the Second District Court of Appeal in the instant case, was accepted in 1931 by this Court in Engleman v. Traeaer, 136 So. 527 (Fla. 1931).

E. BENEFICIAL OWNERSHIP.

The same indicia of beneficial ownership that the Second District found lacking in GMAC, was also found to be lacking in the Palmer vendor. Palmer and its progeny set forth the principle, clarified by § 324.021(9)(a), that the beneficial ownership of a motor vehicle carries with it the liability for negligent operation. The mere naked legal titleholder is not so encumbered. Recognizing the beneficial ownership doctrine via the conditional vendee, Palmer, supra, states:

> It appears without contradiction that on August 16, 1952, two days before the accident, Hughes selected the car for purchase from R. S. Evans at an agreed price of $1030, paid $50 as a partial down payment, signed an order for the car, and signed a purchaser's statement for the purpose of obtaining credit. Hughes returned to the Evans lot on August 18, 1952, the date of the accident, and paid an Evans salesman $300, the remainder of the down payment. Hughes also signed a conditional sales contract and a power of attorney in blank, whereupon possession of the automobile was delivered to him and he drove it away and was thereafter involved in the accident. . . .

> although the Evans bookkeeper did not date the conditional sales contract until August 19th and did not fill out the Certificate of Title application until August 21st. Id. at 636. (Emphasis added).

Just as the legal titleholder in Palmer was held not liable for the vehicle's negligent operation, GMAC should be held not liable under the Palmer codification, § 324.021(9)(a).

> In the case at bar, the parties intended to enter, did enter, and ultimately memorialized in writing, a conditional sales contract, in which title was retained by the seller until the completion of payment. Thus legal title to the automobile remained in the seller, R. S. Evans, at the time the accident occurred. But the rationale of our cases which impose tort liability on the owner of an automobile operated by another . . . would not be served by extending the doctrine to one who holds mere naked legal title as security for the payment of the purchase price. In such a title holder, the authority over the use of the vehicle, which reposes in the beneficial owner, is absent. Probably because of this fact, the term "owner" is defined in F.S. § 317.74(20), F.S.A. [now 316.0031 to mean only the conditional vendee, in the case of a vehicle which is the subject of an ordinary agreement for conditional sale. Moreover, in jurisdictions having statutes making the owner liable for the negligence of another driving his car with his consent, the term "owner" has been universally construed to eliminate those who hold nothing more than legal title. Id. at 637. (Emphasis added).

To be exempt from liability as the "owner" of the Nissan, GMAC need only prove that it complied with Section 324.021(9)(a), i.e., that GREEN received an immediate right of possession and had an option to purchase. There is no dispute that GREEN had immediate possession of the car upon signing the lease. Upon signing the lease, GREEN also had the right to purchase the vehicle. (The statute requires only that GREEN be given the right of purchase

upon performance of certain conditions stated in the lease agreement. This statute nowhere requires that the option be exercised and/or that the lessee be qualified to exercise that right. Section 324.021(9)(a) merely requires that the lessee be given the right of purchase.)

It is respectfully submitted that the undisputed facts in the case sub iudice, clearly show, without any doubt, that GMAC was not the "owner" of the vehicle for purposes of imposing tort liability. As a result thereof, Final Summary Judgment in favor of GMAC is correct.

Contrary to PETITIONER's theory, naked legal title is not tantamount to automobile ownership for purposes of tort liability. Morgan v. Collier County Motors, Inc., 193 So.2d 35 (Fla. 2d DCA 1966). "Ownership is determined by the party having the beneficial interest with control and authority of the automobile's use." Id. at 37. Although GMAC may have held naked legal title on the date of the accident, GREEN had the beneficial ownership, with possession, control and authority of the Nissan's use prior to the accident. Therefore, as a matter of law, GMAC is not liable for GARY's allegedly negligent operation of the vehicle.

> To permit a party by contract to have possession of and a contractual vested interest in the ownership of a vehicle yet to vest the legal and beneficial title in another and thereby avoid tort liability would be an anomaly in the law. It would be completely illogical to interpret this clause to mean that even though the purchaser has a binding contract, has a vested right therein, accepts delivery, control and authority of use of the vehicle, and has made a substantial down payment thereon, that nevertheless he is not

> the owner in determining his tort liability to third parties.
>
> We therefore hold that the purchaser held a binding contract to purchase pursuant to which he had accepted delivery, made a payment thereon and had control and authority of use thereof; that he was the beneficial owner of the automobile at the time of the accident and was the party liable for any damages resulting therefrom. Cox Motor Co. at 774-75. (Emphasis added).

Florida's legislature, in subsection (a), as have so many other states, found the beneficial ownership analogy appropriate for certain lessors.

PETITIONER contends that since the instant lease agreement prohibited the lessee from transferring his interest in the leased vehicle, there was no transfer of beneficial ownership. However, this prohibition is not dissimilar to those set forth by lenders and others holding title merely as security for payment of a purchase price. Restrictions on transfer of interest do not prevent the transfer of beneficial ownership.

PETITIONER has difficulty discerning the difference between a lessor's liability under a long-term lease and that of a lessor under a short-term rental. However, the realities of the situations presented by the long-term lease versus short-term rental are sufficient in themselves to exempt the long-term lessor from liability, while keeping intact the liability of the short-term renter.

It is clear that the responsibilities and obligations of the long-term lessee are quite different from those of the short-term renter. The LESSEE/GREEN was solely responsible for: 1) main-

tenance of the leased vehicle; 2) repairs to keep the leased vehicle in good working order; 3) any other expenses associated with operating the leased vehicle; 4) servicing the leased vehicle according to the manufacturer's recommendations set forth in the owner's manual; 5) payment of title expenses; 6) payment of all registration fees; 7) payment of all licensing fees; 8) payment of all inspections required by governmental authority; 9) payment of all excise, use, personal property, gross receipts and other taxes incurred with respect to the leased vehicle; and 10) indemnification to GMAC as a result of all losses, damages, injuries, claims, demands and expenses arising out of the operation of the vehicle.

PETITIONER attempts to establish the lack of beneficial ownership in the lessee by stating that the above ten items are not "rights" of beneficial ownership. However, what PETITIONER fails to recognize is that the aforesaid ten items are, in fact, obligations and duties of beneficial ownership, and were imposed upon the lessee herein.

On the other hand, the short-term renter has no such obligations. Additionally, in the vast majority of instances, the long-term lessee selects a vehicle, including make, model and color, as the subject of the lease. The short-term renter normally has no say in the type of vehicle to be rented, with the exception of requesting a compact, deluxe and/or luxury model. The long-term lessee is "stuck" with the vehicle of his choice for the duration of the lease. The short-term renter, subject to vehicle availability, can always obtain a replacement vehicle should the rental vehicle not meet with the renter's approval. Normally, the long-

term lessor never even has possession of the leased vehicle, as the lease is arranged through a dealership.

It is respectfully submitted that it is not for this Court to determine where a short-term rental ends and a long-term lease begins. The legislature has, in **§ 324.021(9)(a),** simply analogized the lessor of a vehicle, under certain leases, to that of a seller who retains title but relinquishes all control and dominion over the motor vehicle.

This is similar to the other limitations, imposed upon the dangerous instrumentality doctrine, that PETITIONER was unable to discover. Just as the owner who delivers his vehicle to a service station, or an owner who delivers his vehicle to a valet parking service, is held not responsible for the vehicle that is out of his control, now too, the lessor who relinquishes control over its vehicle, in the fashion set forth by subsection (a), is relieved of responsibility for injuries caused by the operation of the leased vehicle.

PETITIONER's notions of beneficial ownership are not supported by real property law. A tenant's interest in a leasehold estate during the term of the lease is for all practical purposes the equivalent of absolute ownership and ownership of fee simple title, as the tenant has the exclusive right of possession. Gray v. Callahan, **197** So. **396** (Fla. **1940);** West's Drug Stores, Inc. v. Allen Inv. Co., **170** So. **447** (Fla. **1936);** Baker v. Clifford-Mathew Inv. Co., **128** So. **827** (Fla. **1930);** Rogers v. Martin, **99** So. **551** (Fla. **1924).**

In enacting subsection (a), the Florida legislature recognizes similarities between a lessee and a normal run-of-the-mill owner of a motor vehicle. After all, subsection (a) is nothing more than a statutory codification of the law set forth in Palmer, cast in a more modern, commercial setting, recognizing today's economic realities and the similarities between today's purchasers and lessees. Indeed, an affirmance of Kraemer does away with any fictional distinction between yesterday's installment sales contract and its modern day equivalent, the long-term lease.

F. PERRY WAS CORRECTLY DECIDED.

PETITIONER incorrectly states that the Second District, in the instant case and in Perry, held that "a long-term lessor has no vicarious liability for the negligent use of the lessor's automobile pursuant to the dangerous instrumentality doctrine." It is respectfully submitted that Perry held no such thing. Perry's primaryconcernwas whether subsection (b) of § 324.021(9) exempted a lessor from vicarious liability for the negligence of the lessee, regardless of how or if that liability ever arose. PETITIONER attacks Perry as incorrect because lessors were previously held liable under the dangerous instrumentality doctrine. This over-simplistic approach to demean the holding of Perry, cannot withstand judicial scrutiny. The survival of Perry does not depend upon whether or not a lessor had ever previously been held liable for the negligence of a lessee. Parading citations before this Court to cases where a lessor was held liable, are of no avail where neither subsection (a) nor (b) were in issue. Stated simply, PETITIONER has completely "missed the mark." Perry merely holds

that § 324.021(9)(b) renders a lessor immune for the negligence of a lessee regardless of how or in what manner that liability originally arose. Perry does not hold that henceforth a lessor can never be held vicariously liable for negligence arising out of the operation of the leased vehicle.

The Second District Court of Appeal observed the lack of authority for the proposition that a lessor was vicariously liable at common law.[6] Section 2.01, Florida Statutes, defines "common law" as follows:

> The common and statute laws of England which are of a general and not a local nature, with the exception hereinafter mentioned, down to the Fourth day of July, 1776, are declared to be in force in this state: provided, the said statutes and common law be not inconsistent with the constitution and laws of the United States and the acts of the legislature of this state.

Lessor liability did not exist prior to July 4, 1776. White v. Holmes, 103 So. 623 (Fla. 1925).

> There was no relation of master and servant or of principal and agent between the bailor and the bailee, but a mere bailment for hire by one engaged in the particular business of hiring automobiles without drivers to others for their own purposes.
>
> The facts of this case do not support a rule of liability on the part of the owner of the automobile. . . .
>
> The rules of liability stated in Anderson v. Southern Cotton Oil Co., 73 Fla. 432, 74 So. 975, . . ., and Southern Cotton Oil Co. v. Anderson, 80 Fla. 441, 86 So. 629, . . . have reference to the facts of those cases showing

[6]While the dangerous instrumentality doctrine may have existed, under certain circumstances, at common law, a lessor's liability thereunder did not.

> a relation of employer and employee or principal and agent.
>
> The present statutes of the state, regulating the operation of motor vehicles on the highways in the state, do not require an extension of the rule of liability applicable to owners of motor vehicles as stated in the above-cited cases. Id. at 624. (Emphasis added).

Thus, as of 1925, the date White, supra, was decided, there did not exist, on the part of the lessor, any liability under the dangerous instrumentality doctrine. Therefore, the "notion" that a lessor was liable at common law, under the dangerous instrumentality doctrine, cannot pass muster when this liability had not even been established until almost halfway through the twentieth century.

In summary, "common law" liabilities were those liabilities existing as of July 4, 1776. § 2.01, Fla. Stat. However, until 1947, no liability on the part of a lessor of a motor vehicle existed under the dangerous instrumentality doctrine.

In fact, as of 1931, mere ownership of an automobile did not definitively establish the owner's liability for the negligent operation of the automobile. Engleman v. Traeger, 136 So. 527 (Fla. 1931).

> It may be conceded that the law is to the effect that the mere fact of ownership of a vehicle will not establish a liability of the owner for injuries resulting from the misuse or negligent operation by one to whom the owner has loaned it, and that something more than ownership is ordinarily required to establish agency or the relation of master and servant between the owner and borrower. . . . nor has it been held in Florida that the mere fact that the instrumentality in question is an automobile had per se set up a new rule with regard to how the relationship of principal and agent or master and servant, and

> the rule of liability controlling these relationships is to be applied. We think it may still safely be affirmed that where it is sought to hold one person responsible and civilly liable for the torts committed by another, it must be made to appear by competent evidence that the relationship of principal and aqent or that of master and servant existed between the two at the time the tort was committed, and, in addition to that, that the tortious act complained of was committed in the course of the employment of the servant, or was within the scope of the agency. Id. at **529.** (Emphasis added).

Therefore, in **1931,** the debate went on as to whether mere ownership of an automobile, without more, imposed liability upon the owner for the vehicle's negligent operation by another.

> The rule of the common law which was originally applicable to ox carts, horse-drawn vehicles, and bicycles may still be required by our legal doctrine of "stare decisis" to be applied at this late date to the automobile and aeroplane of modern civilization; but it by no means follows that such common law must be applied to new situations with the same deuree of strict construction and narrow limitations. Such rules as this cannot just be applied to such a dangerous instrumentality in operation as an automobile or an aeroplane in exactly the same way as it would be applied to an innocuous thing such as an ox cart, horse and buggy, bicycle, or a wheel barrow.
>
> In this connection it is of interest to demonstrate that the weight of authority in the United States has favored many different, though varying, applications of these ancient rules of the common law when required to be considered in connection with claims of liability asserted with regard to the negligent operation of motor vehicles. In many decided cases the courts have often made a more liberal application of these rules to automobiles than they have applied to less danuerous instrumentalities. Id. at **530.** (Emphasis added).

Even when liability for mere ownership of an automobile was imposed, the courts still recognized an exception in the case of a lessor/bailor.

> The only effect our holdings have is to recognize that insofar as the operation of an automobile on the highways is concerned, that the owner stands always, as a matter of law, in the relation of "superior" to those whom he voluntarily permits to use his license and to operate his automobile on the highways under it, or those whom he allows to do so with his knowledge and consent. Like all cases of this kind, there is an exception, as we have pointed out. Such exception has been recoanized in the particular case where the statute[7] expressly permitted a bailment for hire, under which the bailee was allowed to procure and operate a hired car as if he were the owner. Under this exception, all liability was transferred to him which would thus have attended his actual ownership if it had existed. Id. at 531. (Emphasis added).

Later, "another era began and the bailor-owner of an automobile for hire lost his immunity . . ." Lynch v. Walker, 31 So.2d at 271. The enactment of subsection (a) in 1955 and subsection (b) in 1986 merely completed the circle; i.e., liability of the lessor became, under certain conditions, exactly what it was in 1946, non-existent.

The imposition of vicarious liability was originally based on possession, dominion and control. Perry, supra.

> The rationale of each of the foregoing decisions adopts as a criteria for determining liability whether or not the person charged had possession of and dominion and control over the vehicle at the time its negligent

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[7]This statute is now embodied in § 320.01(3) defining "owner" to be any person controlling any motor vehicle by right of lease, and § 320.02, which requires the lessee to obtain the vehicle registration, as does the lease in the case at bar.

> operation caused the damages forming the subject matter of the suit. If so, liability is imposed even though the negligent operation of the vehicle was by some third person to whom it was temporarily entrusted. Martin v. Lloyd Motor Co., 119 So.2d 413, 415-16 (Fla. 1st DCA 1960). (Emphasis added).

The unifying thread running through all of these cases required something other than mere ownership prior to the imposition of liability. Proving actual title was unimportant; it was only necessary "to establish who exerted such dominion'' over the vehicle. Wilson v. Burke, 53 So.2d 319, 321 (Fla. 1951); Frank v. Fleming, 69 So.2d 887 (Fla. 1954).

It is respectfully submitted that the cases cited by PETITIONER are inapplicable. While PETITIONER may wish to overlook the fact that none of the cases raise the issue of the difference between a long-term lease and a short-term rental, this Court should not do likewise. Also, none of the cases cited by PETITIONER raised the issue of either § 324.021(9)(a) or the doctrine of beneficial ownership as exempting the lessor from liability.

Although PETITIONER seems to forget, the lessor is not at fault and is not the negligent cause of injury to PETITIONER. PETITIONER's interpretations and view of the law only serve to punish the lessor, who played no role in causing PETITIONER's injuries.

Interestingly, it has taken the courts of this state fifty-two years to establish, via case law exemption and statutory exemption, the same exception for the lessor under the dangerous instrumentality doctrine that was in existence in 1947. In view of

the lessor's long-standing immunity until 1947, PETITIONER's argument carries no weight. PETITIONER has not advanced a single, acceptable theory to impose liability against the long-term lessor. The impetus of PETITIONER's reasoning, i.e. to reach the deep-pocket defendant, provides no basis for ignoring the explicit provisions of § 324.021(9)(a) and the well established legal doctrine that liability follows, and cannot precede, beneficial ownership.

CONCLUSION

Based on the foregoing reasoning and authorities, the decision of the Second District Court of Appeal is eminently correct. It is respectfully submitted that the decision of the Second District Court of Appeal must be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Amicus Curiae, Florida Motor Vehicle Leasing Group, was mailed this 20th day of August, **1990** to: THOMAS P. FOX, ESQ., Thomas P. Fox, P.A., **401** East Kennedy Boulevard, Tampa, Florida **33602,** Co-Counsel for Petitioner; DAVID J. ABBEY, ESQ., Fox & Grove, Chartered, One Fourth Street North, Suite **1000,** St. Petersburg, Florida **33701,** Attorneys for USAA and Co-Counsel for Petitioner; CALVIN GARY, Inmate Number **060932,** Cross City Correctional Institute, Post Office Box **1500,** Cross City, Florida **32628;** LARRY I. GRAMAVOT, ESQ., **101** Grand Avenue, Wausau, Wisconsin **54401;** STUART J. FREEMAN, ESQ., Post Office Box **12349,** St. Petersburg, Florida **33733-2349;** and J. EMORY WOOD, ESQ., **600** North Florida Avenue, Suite **1430,** Tampa, Florida **33602.**

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