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,

CASE NO. 75,580

v.

GENERAL MOTOR ACCEPTANCE CORPORATION,

Respondent.

BRIEF OF AMICUS CURIAE
FLORIDA AUTOMOBILE DEALERS ASSOCIATION

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Introduction

Florida Automobile Dealers Association [FADA] is an association of approximately 900 new car dealers in Florida. FADA is familiar, through its membership, with the customs and business practices of the automobile industry, and particularly with the practices of dealers regarding the leasing of cars and the procurement of insurance coverage for those leased cars. This Amicus Brief is submitted in support of the position of Respondent, GMAC.

Statement of Case and Facts

Amicus generally adopts the Statement of Case and Facts submitted by Respondent, GMAC. Amicus would, however, emphasize that the four (4) year, long-term lease involved in this case gave the right to immediate possession of the car to the lessee, and also granted the lessee a right to purchase the car. Furthermore, the terms of the lease provided that the car was to be maintained and serviced by the lessee, and that all licenses, registration, and insurance were to be acquired by the lessee. The lease essentially indicated on its face that it was a financing device designed to secure a "credit risk". In sum, the lease gave complete right of possession and control to the conditional lessee and protected only the financial interest of the lessor, a finance company.

Summary of Argument

Petitioner's major premise is that the owner's authority to control a vehicle is an irrelevant issue for determining the scope of vicarious liability under Florida's dangerous instrumentality doctrine. This premise is, however, flawed. The rulings of this Court have repeatedly recognized that the key to assessing owner vicarious liability is the authority to control a vehicle. This logic derives from the purpose of the doctrine: to encourage an owner to ensure that his vehicle is properly operated on the public highways. This liability is based on the concept of respondeat superior, under which principles of control are essential for inputing an agent's negligence to the principal. Once the Petitioner's premise is undercut, it is apparent that the long-term lessor in this case lacked any significant authority to control the car involved here. Petitioner does not contend otherwise.

Furthermore, the principles announced in Palmer v. R.S. Evans, Jacksonville, Inc., 81 So.2d 635 (Fla. 1955), which were codified in Section 324.021(9), Florida Statutes, in 1955, exclude the lessor in this case from vicarious liability. Under the terms of the lease, the conditional lessee was given immediate possession and the right to purchase the car. Therefore, Section 324.021(9) designates the lessee to be the "owner" for purposes of the dangerous instrumentality doctrine.

This statutory provision recognizes, based on Palmer, that a lease can be nothing more than a means of financing the purchase

of a vehicle. In the circumstances of the lease in this case, complete control of the vehicle was transferred to the lessee, and only the financial interest of the lessor was protected by the lease. Thus, this transaction should logically be treated the same as this Court treated a conditional sale in Palmer, and vicarious liability should not be imposed on a lessor who lacks any practical authority to control the instrument of liability.

Araument

I.

The Long-Term Lessor In This Case Had Insufficient Authority To Control The Use Of The Car, And Therefore Could Not Be Vicariously Liable Under The Dangerous Instrumentality Doctrine.

The basic premise of Petitioner's entire argument is that the underlying principles of the dangerous instrumentality doctrine are not concerned with the potentially liable party's ability to control a vehicle. This argument is fundamental to Petitioner's entire position. This argument, however, is exactly contrary to the holding of this Court in Palmer v. R.S. Evans, Jacksonville, Inc., 81 So.2d 635 (Fla. 1955), in which this Court directly stated that the parameters of this doctrine of vicarious liability must logically be limited by a party's authority to control the use of a vehicle:

> But the rationale of our cases which impose tort liability upon the owner of an automobile operated by another, e.g., Lynch v. Walker, 159 Fla. 188, 31 So.2d 268, Boggs v. Butler, 129 Fla. 324, 176 So. 174, Holstun v. Embry, 124 Fla. 554, 169 So. 400, and Southern Cotton Oil Co. v. Anderson, 80 Fla. 441, 86 So. 629, 16 A.L.R. 255, would not be served by extending the doctrine to one who holds mere naked legal title as security for payment of the purchase price. In such a titleholder, the authority over the use of the vehicle which reposes in the beneficial owner is absent.

Id. at 637 (emphasis supplied).

This principle that vicarious liability was founded upon the authority to control was first articulated by this Court in the case originally establishing the dangerous instrumentality

doctrine for vehicles, when this Court stated: "The liability grows out of the obligation of the owner to have the vehicle . . . properly operated when it is by his authority on the public highway.'' Anderson v. Southern Cotton Oil Co., 73 Fla. 432, 74 So. 976, 978 (1917). Of course, in order to ensure that his vehicle is "properly operated", an "owner" must have sufficient control over a vehicle. Likewise, in Cox Motor Co. v. Faber, 113 So.2d 771 (Fla. 1st DCA 1959), the court recognized this same rationale for imposing vicarious liability only on the "beneficial owner" who has received "delivery, control and authority of use" of a vehicle. Id. at 774.

The growing recognition of this rationale which limits vicarious liability based on limited control caused this Court to expressly recede from a broader liability intimated in Susco Car Rental System v. Leonard, 112 So.2d 832 (Fla. 1959). In Castillo v. Bickley, 363 So.2d 792 (Fla. 1978), this Court recognized that "authority and control" were key elements for imposing vicarious liability, and expressly receded from Susco Car Rental. The logic for the holding in Castillo refused to allow imposition of liability on a car owner who had relinquished control of his car to a repair shop:

> An automobile owner is generally able to select the persons to whom a vehicle may be entrusted for general use, but he rarely has authority and control over the operation or use of the vehicle when it is turned over to a firm in the business of service and repair.

Id. at 793 (emphasis supplied). This Court concluded that under these circumstances an owner had "no ability to ensure the public

safety." Id.

Thus, Petitioner is mistaken in its position that there has been no rationale which limited the scope of vicarious liability based upon the authority to control a vehicle. The dangerous instrumentality doctrine is not strictly a means to provide a plaintiff with another defendant to sue. Rather, the doctrine reflects a social policy designed to encourage parties with authority to control the use of a dangerous instrumentality to carefully exercise that authority. Otherwise, imposition of vicarious liability would be totally arbitrary, irrational, and constitutionally unsupportable. Although vicarious liability may rationally be imposed without fault, it may not reasonably be imposed without at least the authority to control the instrument of liability, as for example in a principal-agent situation. See May v. Palm Beach Chemical Co., 77 So.2d 468, 472 (Fla. 1955) ("doctrine of vicarious liability on the part of an automobile owner . . . is bottomed squarely upon the doctrine of respondeat superior arising from a principal and agent relationship implied in law".) The vestiges of this principle are exactly what this Court explained in Anderson, Palmer, and Castillo.

The rationale expounded in Palmer was codified in 1955 by the enactment of what appears today as Section 324.021(9)(a), Florida Statutes. This law provides that a conditional lessee with the right of possession and the right to purchase a vehicle is deemed to be the "owner":

> (9) OWNER; OWNER/LESSOR.--
> (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 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.

This provision has recognized since 1955 that a conditional lessee could be the owner of a vehicle for purposes of financial responsibility and liability under the dangerous instrumentality doctrine. Thus, Petitioner has apparently overlooked this provision when it argues that GMAC as well as all lessors were liable under the dangerous instrumentality doctrine, regardless of their ability and authority to control the vehicle. This position ignores that lessors who could meet the requirements of Palmer and subparagraph **(a)** could be excluded from vicarious liability. In addition, subparagraph (b) also creates another more explicit exemption for leases over one-year with minimum insurance requirements.[1]

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[1] Section 324.021(9)(b), which was added in 1986, provides:

> (b) Owner/lessor.--Notwithstanding 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, shall not be deemed the owner of said motor vehicle for the purpose of determining financial responsibility for the operation of said motor vehicle or for the acts

Thus, a major basis for Petitioner's argument is undercut by the exception already provided in Palmer and Section 324.021(9)(a). Petitioner incorrectly assumes that vicarious liability was necessarily imposed on all long-term lessors under the dangerous instrumentality doctrine, because in 1986 the Legislature made the effort to further exempt certain long-term lessors from such liability. Such an assumption is obviously unwarranted since many long-term lessors (including GMAC) already qualified for exclusion since 1955 from vicarious liability under the rationale of Palmer, as codified in Section 324.021(9)(a). Thus, the holding of the District Court here, that vicarious liability did not extend to certain long-term lessors who lacked significant control over a vehicle, is consistent with both the rationale of Palmer and the historic provisions of Section 324.021(9)(a).

Also consistent with Palmer and the decision in this case, several other jurisdictions have construed statutory provisions nearly identical to Section 324.021(9)(a) to exempt certain lessors from dangerous instrumentality liability. In Moore v. Ford Motor Credit Co., 166 Mich. App. 100, 420 N.W.2d 577 (1988) (App. A), the Michigan court held that, under a conditional lease which allowed the lessee to purchase the automobile, the lessor was not the owner for purposes of imposing owner vicarious

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of the operator in connection therewith; further, this paragraph shall be applicable so long as the insurance required under such lease agreement remains in effect.

liability.[2] In Lee v. Ford Motor Co., 595 F.Supp. 1114 (D.D.C. 1984) (App. B), the federal court held that because Ford had leased a car under a long-term lease, it lacked "dominion and control" over the car for purposes of a statutory provision imposing vicarious liability on owners. The court reached the conclusion despite the lack of a specific statutory exclusion for long-term lessors. The court noted that one of the purposes of owner vicarious liability is to place liability on the person in a position to prevent use of the vehicle. Id. at 1116. Since a significant degree of dominion and control was conveyed to the long-term lessee, the purposes of the owner vicarious liability statute would not be furthered by holding Ford liable.

These cases all demonstrate the growing awareness that a commercial lease transaction is a means of financing ownership of a vehicle. In recent years, the use of the lease transaction has become more and more common as an alternative means of structuring financing. Indeed, this growing custom in the automobile industry was exactly what convinced the Legislature that another, more explicit statutory exemption was needed for ensuring that certain long-term lessors were clearly excluded from potential vicarious liability. As quoted by the Fourth District Court of Appeal in Folmar v. Young, 560 So.2d 798 (Fla. 4th DCA 1990), the Legislature gave clear indications when it

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[2] See ~~also~~ Klein v. Leatherman, 270 Cal.App.2d 792, 76 Cal. Rptr. 190 (1969) (lessor under lease containing option to purchase for nominal consideration was not liable under statute imposing owner vicarious liability).

enacted the 1986 amendment to Section 324.021(9) that it recognized a long-term lease as the commercial equivalent of a conditional sales transaction:

> In the legislative discussions concerning this amendment, the representatives repeatedly discussed the fact that leases for more than one year are nothing more than alternative methods for financing the purchase of a car. As Representative Gallagher stated:
>
> > What he is saying is that we are treating a lease that is for one year or more very similar to a purchase, and that's what it is, that's the latest way of handling cars is to lease them.
>
> Representative Silver stated:
>
> > Many times it's to the advantage of businesses to lease automobiles for a year or more, all it is, is a tax advantage to that particular business.
>
> He later added:
>
> > Most of the people who are doing this type of arrangement are doing it as an alternative financing arrangement.
>
> Under these circumstances, there is no reason to distinguish between the liability of the person who sells the vehicle as opposed to the lessor who leases it.

Id. at 800. In order to alleviate any uncertainty remaining after Palmer as to whether certain long-term lessors were exempt and to address the growing use of leases as a financing tool, the Legislature in the 1986 amendment provided specific criteria for certain long-term leases which would explicitly qualify for exemption. However, this 1986 amendment did not, as Petitioner appears to argue, imply the opposite, i.e. that all long-term lessors had always been liable under the dangerous

instrumentality doctrine.

Indeed, Palmer and Section 324.021(9)(a) preclude such an assumption under the facts of this case. Here, the 4-year lease gave practically complete control and possession to the lessee, who was also given the right to purchase the vehicle. Because all practical control over the vehicle (including maintenance, use, storage, etc.) had been transferred to the lessee, the provisions of Section 324.021(9)(a) and the logic of Palmer operate to designate the lessee here as the "owner" for purposes of the dangerous instrumentality doctrine. Furthermore, the terms of the lease make it clear that the lease itself was nothing more than a financing transaction. Thus, the lessee here is a conditional lessee who is intended by Section 324.021(9)(a) to be designated as the "owner".

Contrary to Petitioner's assertion, other cases have not "expressly" held that all long-term lessors are vicariously liable under the dangerous instrumentality doctrine. The court in Racecon, Inc. v. Mead, 388 So.2d 266 (Fla. 5th DCA 1980), was concerned with the "sole question" of whether the lessor's insurance provided primary coverage, as provided in the lease, in spite of a statute generally indicating that the lessee's insurance coverage was primary. Id. at 268. The issue of dangerous instrumentality was addressed only in dicta, and the scope of a long-term lessor's liability under Palmer was never even mentioned. See Perry v. G.M.A.C. Leasing Corp., 549 So.2d 680, 682 (Fla. 2d DCA 1989) (rejecting argument that Racecon had

dealt with a long-term lessor's vicarious liability under the dangerous instrumentality doctrine), review denied, 558 So.2d 18 (Fla. 1990). Other cases which Petitioner cites support its proposition similarly do not directly deal with the issue at hand.

Once the inappropriate assumptions on which Petitioner bases its argument are brought into sharp focus, the muddled conclusions it draws about Perry v. G.M.A.C. Leasing Corp., 549 So.2d 680 (Fla. 2d DCA 1989), review denied, 558 So.2d 18 (Fla. 1990), and this case may be quickly dispelled. In Perry, the Second District addressed the constitutionality of the 1986 amendment, Section 324.021(9)(b), Florida Statutes, and as an alternative basis for upholding the amendment merely noted that the "parameters of the common law right" to sue a long-term lessor in the circumstances of that case (i.e. lessee had the right to immediate possession and the right to purchase) had not been "fully established in Florida." Id. at 682. Thus, the Second District merely noted the uncertainty of any common law right to sue the long-term lessor in that case. This alternative basis for its holding is entirely consistent with the rationale of Palmer and Section 324.021(9)(a) which already excluded from Florida's judicially created doctrine certain lessors who transferred sufficient control and authority to a lessee who would be deemed the beneficial owner.

The Second District in this case examined the terms of a particular 4-year lease which gave the lessee the right to

purchase the car, and required the lessee to acquire all licenses, registration, and insurance and to maintain the car. After analyzing the provisions of the lease, the Second District concluded as a matter of law that GMAC, the lessor and technical owner, did not have sufficient control over the car under the terms of the lease to warrant imposition of vicarious liability under the dangerous instrumentality doctrine. The Second District correctly concluded that the lessor was little more than a secured party, and the lease was designed solely to protect its financial interest.[3]

This case is, thus, consistent with the historic position of this Court, as well as with Palmer and Section 324.021(9)(a), in construing a particular long-term lease to have transferred beneficial ownership to the lessee. This precedent, when applied to the instant case, requires a court to examine the lease at issue to determine if, as a matter of law, the lease effectively transfers beneficial ownership to the lessee. The District Court in this case was entirely correct in its legal assessment that the terms of the lease involved here sufficiently transferred authority and control of the vehicle to the long-term lessee to preclude imposing vicarious liability on the lessor.

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[3] Petitioner attempts in vain to draw any practical distinction between long-term leases and conditional sales as security agreements. But most (if not all) finance companies or banks would also impose similar requirements to ensure the security of their collateral.

Conclusion

Amicus submits that the Second District's opinion is consistent with a long history of cases and law recognizing that vicarious liability will not be imposed without some authority over the instrument of liability. To impose liability on a party who has no basic right of authority or control over a vehicle would not further the purposes of the dangerous instrumentality doctrine. Accordingly, the decision of the Second District Court of Appeal in this matter should be affirmed.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Federal Express to DAVID J. ABBEY and ELIZABETH G. REPAAL, Fox & Grove, One Fourth Street North, Suite 1000, St. Petersburg, Florida 33701; THOMAS P. FOX, 401 East Kennedy Boulevard, Tampa, Florida 33602; STUART J. FREEMAN, P. O. Box 12349, St. Petersburg, Florida 33733-2349, J. EMORY WOOD, 600 North Florida Avenue, Suite 1430, Tampa, Florida 33602; and LARRY I. GRAMOVOT, Mallery & Zimmerman, S.C., 101 Grand Avenue, P. O. Box 479, Wausau, Wisconsin 54402-0479, on this the 14 day of August, 1990.

Attorney