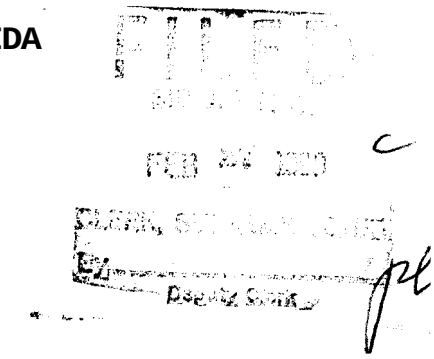
IN THE SUPREME COURT OF FLORIDA



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

Defendants, Petitioners,

vs.

GENERAL MOTORS ACCEPTANCE CORPORATION,

Plaintiff, Respondent.

Case No. 75,580

ON APPEAL FROM THE SECOND DISTRICT COURT OF APPEAL SECOND DISTRICT OF FLORIDA

JURISDICTIONAL BRIEF OF THE PETITIONERS

FOX & GROVE, CHARTERED

THOMAS P. FOX, ESQUIRE
112 S. Armenia Avenue
Tampa, Florida 33609
(813) 254-2200
Fla. Bar 218510
Co-Counsel for Defendants, Petitioners

DAVID J. ABBEY, ESQUIRE and
ELIZABETH G. REPAAL, ESQUIRE
One Fourth Street North
Suite 1000
St. Petersburg, FL 33701
(813) 821-2080
Fla. Bar #228222
Fla. Bar #821667
Counsel for Defendants, Petitioners

TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF THE CASE AND FACTS

In April of 1986, Michael Anthony Green entered into a contract with GMAC to lease a 1987 Nissan Maxima from GMAC. The term of the lease was 48 months. (A **1-3).** The lease, with GMAC as the lessor, and Michael A. Green as the lessee, included the following provisions:

> "17. USE. You will allow only licensed drivers to operate the vehicle. You will keep the vehicle free of all fines, liens and encumbrances. You agree to pay any such fines or remove any such liens and encumbrances immediately. If you do not, Lessor may do so and any amounts paid by Lessor shall be an additional amount owed by you under this lease. You will not use the vehicle illegally, improperly or for hire. You will not use the vehicle to pull trailers. You will not remove the vehicle from the United States or Canada. You will not alter, mark or install equipment in the vehicle without Lessor's written consent.
>
> 19. RETURN **OF** VEHICLE AT SCHEDULED LEASE TERMINATION. At the end of the lease, if you do not purchase the vehicle, you will return the vehicle to Lessor at point of delivery in good condition without damage or excessive wear and use and pay any amounts you may owe under this lease.
>
> 24. OWNERSHIP. This is a lease only and Lessor remains the owner of the vehicle. You will not transfer, sublease, rent, or do anything to interfere with Lessor's ownership of the vehicle. You and Lessor agree that this lease will be treated as a true lease for Federal Income Tax purposes and elect to have Lessor receive the benefits of ownership (IRC sec. 168(1)(8).
>
> 28. ASSIGNMENT. You agree that this lease or any rentals may be assigned by Lessor. You have no right to assign this lease."

A little over a year after the lease was executed, on May 6, 1987, Calvin Gary, an acquaintance of Michael A. Green, borrowed the automobile. While using the car, Gary was involved in an automobile accident on May 7, 1987, killing petitioner's decedent, Marguerite Voorhees Kraemer.

GMAC filed a Complaint for declaratory judgment seeking a declaration that GMAC was not liable for Marguerite Voorhees Kraemer's death because GMAC did not have beneficial ownership of the car. Petitioner filed an Answer, Defenses and a Counterclaim against GMAC, Green and Gary, seeking money damages from GMAC for Gary's negligence on the basis of GMAC's vicarious liability as the owner and lessor. GMAC filed a Motion for Summary Judgment on the grounds that it was not the beneficial owner and, therefore, could not be liable under the Dangerous Intrumentality Doctrine. GMAC admitted in their Memorandum of Law in support of the Motion for Summary Judgment that there were no Florida appellate decisions dealing with the applicability of the Dangerous Instrumentality Doctrine to a long-term lessor, but argued that GMAC should have no vicarious liability pursuant to the Florida appellate cases holding conditional vendors or financial institutions have no vicarious liability when a vendor or institution retains naked legal title as security for payment. The petitioner, in opposition to GMAC's Motion for Summary Judgment, argued that the term of the lease was irrelevant and that the owner of a vehicle who rents or leases it to another is liable for the injuries caused by its operation subject to certain exceptions, pursuant to Florida appellate decisions dealing with the Dangerous Instrumentality Doctrine.

The trial court entered final Summary Judgment in favor of GMAC, finding that there were no disputed issues of material fact, that GMAC was not the beneficial owner of the vehicle and that GMAC had no vicarious liability for the negligent use of the motor vehicle pursuant to the Dangerous Instrumentality Doctrine. (A **4** and **5).**

Petitioner presented the same arguments on appeal to the Second District Court of Appeal, but the final Summary Judgment entered by the trial court was affirmed. Kraemer v. General Motors Acceptance Corp., Case No. **88-02372** (Fla. 2d DCA 1990)**(A 6-17).** The district court entered its decision adverse to the Petitioner on December **27, 1989,** followed by an adverse decision as to the Petitioner's Motion for Rehearing, Clarification and/or Certification on February **7, 1990.** (A **18).** Notice to Invoke Discretionary Jurisdiction of this Court was timely filed.

SUMMARY OF PETITIONER'S ARGUMENT

In Anderson v. Southern Cotton Oil Co., **74** So. **975** (Fla. **1917),** this court recognized the common law principle, known as the Dangerous Instrumentality Doctrine, that an owner of a motor vehicle is liable for its negligent use. In Palmer v. R.S. Evans, Jacksonville, Inc., 81 So.2d **635** (Fla. **1955),** this court created an exception to the Dangerous Instrumentality Doctrine by holding that a seller who retains mere naked legal title as security for payment of the purchase price is not vicariously liable for the negligence of the buyer as the "beneficial ownership of the vehicle passed to the buyer prior to the accident." Palmer, 80 So.2d at **636.**

In this case, the Second District Court of Appeal found the "Palmer exception to the Dangerous Instrumentality Doctrine" was applicable as "GMAC maintained none of the indicia of beneficial ownership." Therefore, the Second District held GMAC "as lessor under a long-term lease is not liable for the negligence of the lessee under the Dangerous Instrumentality Doctrine."

The Second District Court of Appeal erred in stating that the issue of whether a long-term lessor is vicariously liable for the negligent operation of the leased motor vehicle "has not been squarely addressed in Florida..." The Second District's decision cannot be reconciled with the previous decision of this court in Susco Car Rental System of Florida v. Leonard, 112 So.2d 832 (Fla. 1959); the decision of the court in Racecon, Inc. v. Mead, 388 So.2d 266 (Fla. 5th DCA 1980); the decision of this court in Allstate v. Executive Car Leasing, 494 So.2d 487 (Fla. 1986); and with the decision of Tribbitt v. Crown Contractors, 513 So.2d 1084 (Fla. 1st DCA 1987).

JURISDICTIONAL STATEMENT

The Florida Supreme Court has discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with a decision of the Supreme Court or another district court of appeal on the same point of law. Art. V, Section 3(b)(3) Fla. Const. (1980); Fla. R. App. P. 9.030(a)(2)(A)(i).

ARGUMENT

THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL DIRECTLY AND EXPRESSLY CONFLICTS WITH SUSCO CAR RENTAL SYSTEM OF FLORIDA v. LEONARD, 112 So.2d 832 (Fla. 1959), RACECON, INC. V. MEAD, 388 So.2d 266 (Fla. 5th DCA 1980), ALLSTATE V. EXECUTIVE CAR LEASING, 494 So.2d 487 (Fla. 1986) AND TRIBBITT V. CROWN CONTRACTORS, INC., 513 So.2d 1084 (Fla. 1st DCA 1987).

This court held in Anderson v. Southern Cotton Oil Co., 74 So. 975 (Fla. 1917), that the common law Dangerous Instrumentality Doctrine applied to automobile owners, rendering them liable for injuries arising from the negligent misuse of their automobiles by others. Anderson dealt with the liability of a corporate automobile owner which allowed its employee to use the vehicle to travel to and from work.

In Palmer v. R.S. Evans, Jacksonville, Inc., 81 So.2d 635 (Fla. 1955), this court created an exception to the Dangerous Instrumentality Doctrine by holding a seller who retains mere naked legal title as security for payment of the purchase price is not vicariously liable for the negligent use of the motor vehicle as the beneficial ownership passes to the buyer upon the seller's surrender of possession. Id. at 636. In this case, the Second District Court of Appeal held the "Palmer exception to the Dangerous Instrumentality Doctrine" was applicable to a long-term lease as the long-term lessor relinquishes beneficial ownership of a motor vehicle. The Second District Court of Appeal's statement that the issue of whether a long-term lessor is vicariously liable for the negligent use of the leased vehilce "has not been squarely addressed in Florida" is contrary to the decisions of the Florida Supreme Court, the Fifth District Court of Appeal and the First District Court of Appeal in Susco, Racecon, Allstate and Tribbitt.

The Susco case dealt with the liability of a corporate owner of a vehicle which leased the vehicle for a period of days. This court applied the Dangerous Instrumentality Doctrine to the owner without regard to, or comment about, the term or duration of the lease. Therefore, the Susco case specifically applies the Dangerous Instrumentality Doctrine to a renter of an automobile and the decision does not limit the liabilty dependent upon the duration of the lease. The Second District Court of Appeal's holding in this case expressly and directly conflicts with this court's ruling in Susco that a lessor has vicarious liability for the negligent use of the leased motor vehicle.

In Racecon, the Fifth District Court of Appeal held a lessor, who had leased a vehicle to a lessee for one year, to be vicariously liable for its negligent operation. The district court stated:

> Independent of any insurance requirement, and by virtue of the dangerous instrumentality doctrine, there is a common law obligation of owners of motor vehicles which makes them responsible for injuries caused by such vehicle in the course of its intended use.

Racecon, 388 So.2d at 268. The Fifth District Court of Appeal's clear application of the Dangerous Instrumentality Doctrine to hold a lessor under a one-year lease vicariously liable clearly demonstrates that the holding in Racecon is in express and direct conflict with the decision of the Second District Court of Appeal in this case.

In Allstate, the Florida Supreme Court primarily dealt with issues regarding layers of motor vehicle insurance coverage. Executive Car Leasing owned the vehicle involved in the accident,

and was insured by Industrial Indemnity. In reaching its decision, the court held "Industrial insured a vicariously liable party," Executive Car Leasing. Allstate, 494 So.2d at 489. It is clear from the decision that vicarious liability was based upon the Dangerous Instrumentality Doctrine. Although the Allstate opinion does not mention the term of the lease, Petitioner filed a certified copy of the 36-month lease obtained from the Allstate record with the Second District Court of Appeal along with a Notice of Supplemental Authority and Motion for Judicial Notice. The holding that the long-term lessor in Allstate was vicariously liable for the negligent use of the leased vehicle is expressly and directly in conflict with the decision of the Second District Court of Appeal in this case.

In Tribbitt, the First District Court of Appeal reversed a summary judgment entered by the trial court in favor of a long-term owner/lessor. The plaintiff sued the owner/lessor Crown: the lessee, Ensco; and the driver, Brasher. The trial court entered summary judgment for Crown stating that the owner/lessor was not vicariously liable for the negligent use of the vehicle as the owner had no consent to use the vehicle. In reversing the summary judgment, the First District held the issue of vicarious liability was for a jury as there was a factual issue as to the owner/lessor's knowledge of, and consent to, the use of the vehicle. Of course, this holding clearly assumes Florida law places vicarious liability on the owner/long-term lessor if knowledge and consent were found by a jury. A certified copy of the 36-month lease was filed with the Second District Court of Appeal along with a Notice of Supplemental

Authority and Motion for Judicial Notice as the body of the case did not clearly indicate the length of the lease. The holding in Tribbitt expressly and directly conflicts with the decision of the Second District Court of Appeal in this case.

STATEMENT IN SUPPORT OF SUPREME COURT'S EXCERCISE OF ITS DISCRETIONARY JURISDICTION

The Second District Court of Appeal's application of the "beneficial ownership" exception to the Dangerous Instrumentality Doctrine to negate the vicarious liability of long-term lessor is contrary to the fundamental policy of the Dangerous Instrumentality Doctrine which is "based upon the assumption that an owner cannot deliver a vehicle into the hands of another without assuming, or continuing, his full responsibility to the public." Susco, 112 So.2d at 837. In conflict with this policy and the cases cited above, the Second District Court of Appeal has held a long-term lessor is entitled to be treated as a conditional vendor or financial institution who retains "bare legal title" as security for payment. The terms of the lease cited earlier in this brief clearly demonstrate GMAC retained "ownership"; substantially limited the lessee's use of the vehicle; provided for a definite surrender of the possession of the vehicle; and prevented assignment, transfer or sale of the lessee's interest in the vehicle. "Beneficial ownership" did not pass to the lessee contrary to the opinion of the Second District Court of Appeal. This arrangement is not uncommon.

Twenty, or even ten years ago, when a Florida resident wanted to own a motor vehicle, he or she commonly walked into the local car dealership and purchased a car which was financed by a bank or other such institution. The financial institution perfected a security interest in the motor vehicle to insure payment. One needs only to consult the daily newspaper to learn that the manner in which one "buys" a motor vehicle has fundamentally changed. Automobile manufacturers, such as General Motors in this case, commonly use their dealers as long-term leasing agents. A company subsidiary, such as GMAC, is the "owner" and the "lessor." This court should entertain jurisdiction because of the present prevalence of such long-term leases and the uncertainty created by the conflicting decisions of Florida appellate courts. Further, independent of the conflict between the Second District's decision in this case and the other Florida cases cited above, the Second District Court of Appeal's opinion raises more questions than it answers.

Why should a company who is in the business of bailing Dangerous Instrumentalities to lessees for any period escape the application of the Dangerous Instrumentality Doctrine? If a "short-term" lease should be distinguished from a "long-term" when applying the Dangerous Instrumentality Doctrine, what is the duration of the lease which distinguishes the "short-term" lease such as involved in Susco from a "long-term" lease? Does the Dangerous Instrumentality Doctrine apply to leases for a period of days, weeks, months, a year, or some other period of time? The Second District Court of Appeal draws an uncertain distinction

between short-term leases and long-term leases contrary to the cases cited above, the underlying policy of the Dangerous Instrumentality Doctrine, and a common sense application of the Doctrine.

CONCLUSION

The decision of the district court, by holding that a long-term owner/lessor is not vicariously liable under the Dangerous Instrumentality Doctrine creates a conflict on the same question of law with the Florida Supreme Court and district courts of appeal as to a point of law commonly encountered in Florida civil cases. Accordingly, this court should exercise its discretion and accept the case for review.

Respectfully submitted,

FOX & GROVE, CHARTERED

THOMAS P. FOX, ESQUIRE
112 S. Armenia Avenue
Tampa, Florida 33609
(813) 254-2200
Fla. Bar #218510
Co-Counsel for Defendants,
Petitioners

DAVID J. ABBEY, ESQUIRE and
ELIZABETH G. REPAAL, ESQUIRE
One Fourth Street North
Suite 1000
St. Petersburg, FL 33701
(813) 821-2080
Fla. Bar #228222
Fla. Bar #821667
Counsel for Defendants,
Petitioners

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to LARRY I. GRAMAVOT, ESQUIRE, 705 East Kennedy Boulevard, Tampa, FL 33602; STUART J. FREEMAN, ESQUIRE, P.O. Box 12349, St. Petersburg, FL 33733-2349; J. EMORY WOOD, ESQUIRE, 600 North Florida Avenue, Suite 1430, Tampa, FL 33602: and CALVIN GARY, Inmate No. 060932, Cross City Correctional Institute, P.O. Box 1500, Cross City, FL 32628, this 26th day of February, 1990.

FOX & GROVE, CHARTERED

DAVID J. ABBEY, ESQUIRE and
ELIZABETH G. REPAAL, ESQUIRE
One Fourth Street North
Suite 1000
St. Petersburg, FL 33701
(813) 821-2080
Fla. Bar #228222
Fla. Bar #821667
Co-Counsel for Appellants