IN THE SUPREME COURT OF FLORIDA

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

Petitioner,

vs.

GENERAL MOTORS ACCEPTANCE CORPORATION,

Respondent.

Case No.: 75,580

DCA-2 No.: 88-02372

JURISDICTIONAL BRIEF OF RESPONDENT GENERAL MOTORS ACCEPTANCE CORPORATION

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CITATION OF AUTHORITIES

STATEMENT OF THE CASE AND FACTS

For purposes of this jurisdictional brief Respondent will accept the Statement of the Case as set forth in Petitioner's Jurisdictional Brief. The facts set forth in Petitioner's brief, however, represent a one-sided view of the case and can hardly be considered objective; consequently, Respondent cannot accept Petitioner's factual statement.

However, recognizing that this court disfavors lengthy statements of fact in jurisdictional briefs, Respondent will merely rely upon the objective and unbiased Statement of the Facts as set forth by the Second District Court of Appeal in Kraemer v. General Motors Acceptance Corporation, Case No. 88-02372 (Fla. 2d DCA Dec. 27, 1989), the decision which Petitioner now seeks to have reviewed. A complete copy of that decision is attached as an Appendix to this brief.

SUMMARY OF THE ARGUMENT

Petitioner contends that the decision of the court below "cannot be reconciled" with the previous decisions of this court in Susco Car Rental System of Florida v. Leonard, 112 So.2d 832 (Fla. 1959), and Allstate v. Executive Car Leasing, 494 So.2d 487 (Fla. 1986). In addition, Petitioner argues that the decision of the court below conflicts with the Fifth District Court of Appeal's decision in Racecon, Inc. v. Mead, 388 So.2d 266 (Fla. 5th DCA 1980), and with the First District Court of Appeal's decision in Tribbitt v. Crown Contractors, 513 So.2d 1084 (Fla. 1st DCA 1987). Although not specifically argued, Petitioner implies that the

decision of the court below also conflicts with this court's prior decision in Anderson v. Southern Cotton Oil Company, 74 So. 975 (Fla. 1917).

Even a cursory reading of the decisions relied upon by Petitioner, however, clearly shows that none of those decisions dealt with the issue addressed by the court below, i.e., whether the long term lessor of a motor vehicle, which relinquished beneficial ownership and control of its vehicle to a long term lessee, is liable for the negligence of the lessee's permissive user under the Dangerous Instrumentality Doctrine. Consequently, the controlling principles of law in this court's prior decisions, and in the decisions of the First and Fifth District Courts of Appeal, were not in any way affected by the decision of the court below. On the contrary, the decision of the Second District Court of Appeal in the instant case was actually in perfect harmony with this court's prior decisions in Anderson and Susco, supra, as well as with this court's decision in Palmer v. R.S. Evans, Jacksonville, Inc., 81 So.2d 635 (Fla. 1955). Consequently, this court lacks jurisdiction pursuant to Fla. R. App. P. 9.030(a)(2)(A)(iv).

ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL IN THIS CASE DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH ANY DECISION OF ANOTHER DISTRICT COURT OF APPEAL OR OF THIS COURT ON THE SAME QUESTION OF LAW.

Petitioner seeks to invoke this court's discretionary jurisdiction by alleging that the decision of the court below directly and expressly conflicts with this court's prior decisions in Susco Car Rental System of Florida v. Leonard, 112 So.2d 832 (Fla. 1959) and Allstate v. Executive Car Leasing, 494 So.2d 487 (Fla. 1986). Petitioner also alleges that the decision sought to be reviewed conflicts with prior decisions of the District Courts of Appeal in Racecon, Inc. v. Mead, 388 So.2d 266 (Fla. 5th DCA 1980), and Tribbitt v. Crown Contractors, Inc., 513 So.2d 1084 (Fla. 1st DCA 1987). In reality, however, a review of those decisions clearly shows that no such conflict exists on any point of law, and consequently that this court lacks jurisdiction pursuant to Fla. R. App. P. 9.030(a)(2)(A)(iv).

Initially, it should be noted that this court's jurisdiction cannot be invoked merely to attack the merits of the decision of the court below. Ansin v. Thurston, 101 So.2d 808 (Fla. 1958). It must be demonstrated that the various decisions in question set forth antagonistic principles of law based upon nearly the same facts:

> The conflict must be obvious and patently reflected in the decisions relied on. The conflict must result from an application of law to facts which are in essence on all fours, without any issue as to the quantum and character of proof. Trustees of Internal Improvement Fund v. Lobean, 127 So.2d 98, 101 (Fla. 1961).

The conflict must be of such a nature "that if the later decision and the earlier decision were rendered by the same court

the former would have the effect of overruling the latter." Kyle v. Kyle, 139 So.2d 885, 887 (Fla. 1962).

Petitioner's allegation that the decision of the court below "expressly and directly" conflicts with the decision of the Fifth District Court of Appeal in Racecon, Inc. v. Mead, 388 So.2d 266 (Fla. 5th DCA 1980), can be disposed of quite simply. In Racecon, the Fifth DCA noted:

> The sole question presented to us on this appeal is whether the parties to a motor vehicle lease agreement are free to contract between themselves which of them shall provide the primary liability insurance coverage in the face of the statute as it then existed, which said that the lessee had that obligation. 388 So.2d at 268. (Emphasis added).

The "sole question" before the court in Racecon, supra, related to the ability of the parties to shift financial responsibility by contract under certain circumstances. Even a cursory reading of the Second District Court of Appeal's decision sought to be reviewed in the instant case shows that the issue presented to the Fifth DCA in Racecon was **not** an issue in the court below, and the issue addressed by the court below was never raised to the Fifth District Court of Appeal in Racecon. Quite simply, there cannot be an express and direct conflict between two appellate court decisions on the same question of law within the meaning of Rule 9.030, when the two decisions dealt with totally different legal issues.

Petitioner's argument that the decision sought to be reviewed also conflicts with this court's prior decision in Allstate v.

Executive Car Leasing, 494 So.2d 487(Fla. 1986), can be disposed of with equal ease. In Allstate this court dealt with a situation in which all issues of liability and damages had been resolved at the trial court level, and the only issue on appeal was the priority of coverage among five separate insurance policies. As this court noted: "We are now faced with the task of ordering the five applicable insurance policies." Id. at 488. The issue of beneficial ownership was never addressed in this court's decision, and had absolutely nothing to do with that decision. Recognizing that fact, Petitioner in the instant case notes in its brief that it obtained a certified copy of the lease agreement involved in Allstate, at the trial court level, and found that the lease was for a 36 month period. Petitioner notes that it then filed a copy of the lease agreement in the record of the Second District Court of Appeal in the instant case. Because its investigation disclosed that the lease in Allstate was for a 36 month period, Petitioner concludes that the "holding" of this court in Allstate is in direct conflict with the decision of the court below. Petitioner's reasoning is astounding.

If, hypothetically, through sheer investigative brilliance Petitioner had discovered that the driver of the automobile in Allstate was wearing blue socks--that would hardly mean the "holding" of this court related to drivers of automobiles who wear blue socks. Whether the underlying facts in the Allstate case dealt with a long term lease or short term rental, a Buick or Ford, a yellow or blue car, the fact remains that the holding of this

court had absolutely nothing to do with those facts. This court dealt solely with the issue of how to order payment under five separate insurance policies, and the decision of the court below in the instant case had nothing whatever to do with the ordering of insurance policies. The two decisions would not have the effect of overruling each other, and **"conflict"** simply does not exist.

Petitioner next argues that a conflict also exists between the Second District Court of Appeal's decision in the instant case, and the decision of the First District Court of Appeal in Tribbitt v. Crown Contractors, Inc., 513 So.2d 1084 (Fla. 1st DCA 1987). Unfortunately for Petitioner, it was once again faced with the problem that nowhere in the Tribbitt decision was reference made to a long term lease, or beneficial ownership. Consequently, Petitioner again resorted to cunning investigative techniques, and found that at the trial court level a 36 month lease had actually been involved; Petitioner then filed a certified copy of that lease in the court below. Petitioner chooses to ignore, once again, the fact that because it was forced to resort to investigative techniques in order to determine the nature of the lease involved in Tribbitt, there could not possibly be a conflict between that decision and the decision sought to be reviewed in the instant case. It is the decision of a court which may or may not give rise to conflict--not the underlying, undisclosed facts.

In Tribbitt, the First District Court of Appeal dealt with an entirely different issue than the one addressed by the court below. In Tribbitt, two defendants took the position that they were not

liable for the negligence of a third defendant simply because that third defendant operated a motor vehicle without their knowledge or consent. Affidavits to that effect were filed by the defendants, and those affidavits indicated that although they were unaware of the fact that the third defendant would ultimately use the vehicle, the vehicle was not in fact converted. The Court of Appeal noted:

> [T]he affidavits failed to eliminate as a genuine issue the question as to whether Jacobs' operation of the vehicle constituted a species of conversion or theft. 513 So.2d at 1087.

Once again, the length of the lease involved in Tribbitt was not raised as an issue in that case, was not addressed by the Court of Appeal, and cannot form the basis for conflict jurisdiction in this court.

Petitioner's additional argument that the decision sought to be reviewed conflicts with this court's prior decision in Susco. supra, is equally devoid of merit. Although Petitioner does not specifically argue that the decision of the court below also conflicts with this court's prior decision in Anderson v. Southern Cotton Oil Company, 74 So. 975 (Fla. 1917), that case is in fact cited on Page 5 of Petitioner's brief, and consequently Respondent will address that case as well--gratuitously.

In Anderson, this court deal with the question of whether an employer that loaned its automobile to its employee for his

personal use could ultimately be liable for the employee's negligence. The court, of course, answered that question in the affirmative. 74 So. at 978-979. A long term lease was not involved in Anderson, nor was the issue of beneficial ownership.

In Susco, supra, also relied upon by Petitioner, it was noted:

> The sole issue presented by the parties for determination in the district court was "whether or not the owner company is relieved of responsibility for damages resulting from the operation of the vehicle by someone other than the person to whom it was rented, when such operation is contrary to the expressed terms of the printed contract, and the oral instruction . . . at the time of rental. 112 So.2d at 834 (Emphasis Added).

Once again, this court did **not** address the same principles of law as were addressed by the court below in Kraemer v. GMAC.

Clearly, the Second DCA's opinion, sought to be reviewed, if rendered by this court would **not** have the effect of overruling this court's prior decisions in Anderson or Susco, supra. Consequently, the decision of the court below does not expressly and directly conflict with the court's prior decisions, and cannot form the basis for this court's jurisdiction.[1] Kyle v. Kyle, 139 So.2d 885, 887 (Fla. 1962).

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[1] Moreover, it is obvious from a reading of this court's prior decisions in Anderson and Susco that the facts of those cases bear little resemblance to the facts in the instant case; long term leases were not involved, and the issue of beneficial ownership was never addressed. Consequently, Petitioner's alleged conflict also fails to meet this court's test for jurisdiction as enunciated in Trustees of the Internal Improvement Fund v. Lobean, 127 So.2d 98, 101 (Fla. 1961).

In essence, this court held in Anderson and Susco that the **"owner"** of a motor vehicle is generally liable for the negligence of a permissive user of that motor vehicle. This court did not, however, define **"owner"** in either of those decisions. By contrast, the court below held that the **"owner"** of a motor vehicle is not necessarily the "title holder", and that the Dangerous Instrumentality Doctrine applies only to the **"beneficial** owner." That finding of the court below, based upon the facts of the instant case, was merely a reiteration of this court's holding in Palmer v. R.S. Evans, Jacksonville, Inc., 81 So.2d 635 (Fla. 1955). The absence of an express and direct conflict between the three decisions can clearly be shown by simply synthesizing and articulating the holdings of the three cases:

> The owner of a motor vehicle is liable, under the Dangerous Instrumentality Doctrine, for the negligent use of that motor vehicle by a permissive user. However, the owner of the motor vehicle is not the party holding naked legal title to the vehicle, but rather the beneficial owner who has day-to-day control over the use of that vehicle.

As can readily be seen, the decisions of this court in Anderson and Susco are in complete harmony with the decision of the court below. Consequently, no conflict exists among the three decisions, and this court lacks jurisdiction to review the matter pursuant to Rule 9.030(a)(2)(A)(iv), Fla. R. App. P.

CONCLUSION

Petitioner has failed to demonstrate any express and direct conflict between the decision sought to be reviewed, and the prior

decisions upon which it relies. Consequently, this court lacks discretionary jurisdiction over the instant case, pursuant to Fla. R. App. P. 9.030, and the Petition for Review should be denied.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by regular U.S. Mail this 9th day of March, 1990, to Bard D. Rockenbach, Fox & Grove, One Fourth Street North, Suite 1000, St. Petersburg, FL 33701, Attorneys for Appellants; Stuart J. Freeman, P. O. Box 12349, St. Petersburg, Florida 33733-2349; Thomas P. Fox, 112 South Armenia Avenue, Tampa, Florida 33609; J. Emory Wood, Suite 1430, NCNB Building, 600 N. Florida Avenue, Tampa, FL 33602; Calvin Gary, Inmate #060932, Cross City Correctional Institute, P. O. Box 1500, Cross City, Florida 32628 and Judy D. Shapiro, Herzfeld and Rubin, 801 Brickell Avenue, Suite 1501, Miami, Florida 33131.

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