IN THE SUPREME COURT OF FLORIDA

ROBERT THOMAS KRAEMER, JR., Etc., Et Al., Petitioners, vs. GENERAL MOTORS ACCEPTANCE CORPORATION, Respondent.	CASE NO. 75,580 DISTRICT COURT OF APPEAL, 2ND DISTRICT - No. 88-02372

PETITIONERS' REPLY BRIEF

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STATEMENT OF THE CASE AND FACTS

Petitioners rely on the Statement of the Case and Facts as set forth in Petitioner's Brief on the Merits.

SUMMARY OF ARGUMENT

In their Briefs, GMAC and Amicus Curiae have failed to accurately describe the historical development of the Dangerous Instrumentality Doctrine by citing Florida cases which have been overruled or distinguished by this Court. None of the recognized exceptions to the Dangerous Instrumentality Doctrine apply to the facts of this case. Further, S324.021 (9)(a), Fla. Stat., does not provide an exception to the Dangerous Instrumentality Doctrine contrary to the arguments of GMAC and Amicus Curiae, Florida Motor Vehicle Leasing Group. Petitioners have not waived any arguments set forth in their Initial Brief as suggested by GMAC by failing to make such arguments to the trial court or the Second District.

ARGUMENT

The issues raised by GMAC's Answer Brief and the two Amicus Curiae Briefs addressed in this Reply Brief are identified in the subheadings below.

I. Development of Dangerous Instrumentality Doctrine and the Palmer Exclusion.

GMAC and Amicus Curiae suggest the initial Brief presents an incorrect analysis of the development of the Dangerous Instrumentality Doctrine and the Palmer Exception. Petitioners submit the case law as set forth in the initial Brief correctly summarizes both concepts.

Amicus Curiae Florida Motor Vehicle Leasing Group cites White v. Holmes, 103 So. 623 (Fla. 1925) for the proposition "lessor liability did not exist prior to July 4, 1776." Petitioners will agree motor vehicles did not exist prior to 1776, let alone lessor liability. Amicus Curiae did not need to cite a case which was overruled by this Court in Lynch v. Walker, 31 So.2d 268 (Fla. 1947) to make this point.

Since the Court first applied the Dangerous Instrumentality Doctrine to motor vehicles over 70 years ago, this Court has not consistently applied the Dangerous Instrumentality Doctrine to owners who were not employers of the negligent drivers. The decisions of this Court issued between 1925 and 1947 which limit the application of the Dangerous Instrumentality Doctrine are noted

in Note: The Dangerous Instrumentality Doctrine: Unique Automobile Law in Florida, U. Fla. L. Rev. 412 (1952) (hereinafter "Note"). (A 1-16). This fine article tracks the "swing away" from a broad application of the Dangerous Instrumentality Doctrine and this Court's "swing back" to a broad application by 1947.

The article also notes only Florida courts have applied the Dangerous Instrumentality Doctrine to automobiles. Note, at 413. This statement finds support in Prosser's respected Horn Book on Torts: "Only the courts of Florida have gone the length of saying that an automobile is a "Dangerous Instrumentality" for which the owner remains responsible when it is negligently driven." Prosser and Keeton on the Law of Torts, 524 (5th Ed., 1984). (A 17-20). The significance of Florida's unique position will be discussed further below. At this point, it is sufficient to say that the Dangerous Instrumentality Doctrine as applied to motor vehicles was not a part of the common law of England on July 4, 1776. However, Florida courts have applied the Doctrine to motor vehicles without a statutory mandate. To this extent, the Dangerous Instrumentality Doctrine is a judicial doctrine and is a part of Florida's common law.

Amicus Curiae Florida Motor Vehicle Leasing Group attacks Petitioners' statement that the Dangerous Instrumentality Doctrine as applied to motor vehicles has only three exceptions. After reviewing Amicus Curiae's arguments, Petitioners will concede this Court recognized a fourth exception in Enterprise Leasing Company v. Almon, 15 F.L.W. S171 (Fla. Mar. 30, 1990). In resolving a conflict in the Florida courts, this Court held an owner/lessor of a vehicle

is not liable for injury sustained by a passenger who had leased the vehicle and allowed another to drive. Of course, just as with the other three exceptions, this fourth exception does not apply to the facts presented in the present Appeal.

GMAC and Amicus Curiae further argue the Petitioners have misinterpreted or misstated the development of the Palmer Exception (i.e., the beneficial ownership exception to the Dangerous Instrumentality Doctrine). Petitioners adopt the historical analysis of the development of and the conceptual basis for, the Palmer Exception set forth in the Petitioners' Brief on the Merits in Raynor V. Equilease, et al., Case No. 75,870, presently pending before this Court. (A 21-46). The Brief further supports the arguments made by Petitioners in the Initial Brief.

11. Application of §324.021(9)(a), Fla. Stat.

GMAC and Amicus Curiae argue Petitioners have completely ignored the application of §324.021 (9)(a), Fla. Stat., to the instant case. GMAC did not argue the Statute applied in the trial court. It was first suggested the Statute applied on Appeal to the Second District. In any event, S324.021 (9)(a), Fla. Stat., does not prevent GMAC from being held vicariously liable pursuant to the Dangerous Instrumentality Doctrine as:

S324.021 (9)(a), Fla. Stat., provides:

> "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."

5324.011, Fla. Stat., entitled "Purpose of Chapter," provides it is "the intent of this Chapter to recognize the existing priviledge to own or operate a motor vehicle ... and provide financial security requirements for such owners or operators whose resposibility it is to recompense others for injury..." 5324.021 (9)(a), Fla. Stat., clearly states a lessee with an option to purchase "shall be deemed the owner ~~for~~ purposes of this Chapter." The stated purpose of Chapter 324, Fla. Stat., is financial responsibility - not establishing defenses to the tort liability of an owner or operator.

The Second District in the instant case refused to accept the argument §324.021 (9)(a), Fla. Stat., can be used to determine an owner's tort liability, and no other Florida case since the Statute was enacted in 1955 has endorsed such a construction of the Statute. However, GMAC and Amicus Curiae have suggested this Court should look to the construction given similar statutes by the courts of the District of Columbia and states other than Florida. This Court would commit grave error if this suggestion were followed as not one of these other jurisdictions have judicially applied the Dangerous Instrumentality Doctrine to motor vehicles, as does Florida.

Therefore, the liability of the lessor and lessee in these other jurisdictions is determined by Statute. Unlike §324.021 (9)(a), Fla. Stat., these Statutes address tort liability as well as financial responsibility.

The case of Lee v. Ford Motor Co., 595 F. Supp. 1114 (D.D.C. 1984) cited by GMAC offers an example. One section of the District of Columbia's Motor Vehicle Safety Responsibility Act provided owners were vicariously liable for the negligent operation of their motor vehicles. Another section of the same chapter provided lessees who had a right to purchase were to be deemed the owner "for the purpose of this chapter." Hence, the District Court held a lessor who provided a purchase option to a lessee had no vicarious liability. Again, Florida's Financial Responsibility Law does not address the tort liability of owners.

As addressed in Petitioners' Initial Brief on the Merits, Folmar v. Young, 560 So.2d 798 (Fla. 4th DCA 1990) contains a portion of the arguments on the floor of the House of Representatives at the time §324.021 (9)(b), Fla. Stat., was debated. It is clear from the debate, the Legislature was not unaware that a lessor who provided a lease option had no vicarious liability for the negligent operation of the lease vehicle as suggested by GMAC and Amicus Curiae.

Further, 5324.021 (9)(a), Fla. Stat., applies only to "leases" with the right of purchase upon performance of the conditions stated in the agreement and with an immediate right of possession vested in the .... lessee." As the Greens failed to make monthly payments for some five months prior to the May 7, 1987

accident, the Greens had no right of purchase or a right to possess the vehicle at the time of the accident. Therefore, S324.021 (9)(a), Fla. Stat., is inapplicable.

If, in spite of the arguments presented above, this Court were to determine §324.021 (9)(a), Fla. Stat., does apply to relieve GMAC from vicarious liability, the Statute cannot overcome the same constitutional limitations which prevent the enforcement of S324.021 (9)(b), Fla. Stat., which are identified in the Petitioners' Brief on the Merits in Roca v. Volkswagon Credit, Inc., Case No. 76,074 presently pending before this Court. (A 47-80).

111. Application of Palmer Exception.

Throughout the Briefs submitted by GMAC and Amicus Curiae, the argument has been made that the Palmer Exception should apply to relieve GMAC of liability as GMAC, in leasing the vehicle to the Greens, was not acting substantially different from a financial institution and/or a conditional vendor. We invite GMAC and/or Amicus Curiae to supplement their Briefs with appendixes containing conditional sales and/or security agreements which:

1. limit the area the vehicle is to be operated:
2. identify any class of drivers who may not operate the vehicle;
3. prevent the vehicle from being used for hire;
4. prevent the vehicle from being used to pull a trailer;

5. prevent the installation of another radio or other equipment:
6. prohibit transfer by the debtor or conditional vendee of the debotr's or vendee's interest in the vehicle:
7. provide the creditor remains the "owner" of the vehicle; and
8. provide the creditor or conditional vendor with all tax benefits from ownership.

There is no evidence in the record that a financial institution and/or conditional vendor maintains similar rights, dominion, or control over a vehicle as does GMAC in its lease.

IV. Waiver of Argument of Factual Issue and Application of §324.021 (9)(a), Fla. Stat., Application.

A. Factual Issue:

GMAC in the Answer Brief, footnote 3, p. 10, states:

> In its Brief, Petitioner argues, inter alia, that at a minimum the summary judgment entered in favor of GMAC should be reversed for a trial on the issue of whether GMAC in fact had beneficial ownership of the vehicle in question. Petitioner's Brief fails, however, to point out any disputed issues of material fact regarding beneficial ownership, and Respondent submits that the omission was due to the fact that none exist. Moreover, a review of the record on appeal will disclose that at no time did Petitioner ever take the position that disputed facts of a material nature exist, and the issue has therefore been waived in any event.

Contrary to GMAC's suggestion, the argument that this case presented a factual issue (if Petitioners were not entitled to Partial Summary Judgment) was made:

1. in the trial court at hearing on the Motion for Rehearing:

> MR. FOX..."I think those facts can be interpreted in different ways by reasonable people, and I think that under those circumstances, Summary Judgment should not be granted." (R, 340).
>
> MR. ABBEY: "Your Honor, there's three ways the Court can determine my motion submitted in this case, one, that G.M.A.C. is the owner and vicariously liable as a matter of law, two, that G.M.A.C. does not have vicarious liability as a matter of law or, three, that there is a factual issue, which is properly submitted to the jury concerning beneficial ownership or lack thereof.
>
> I'll ask the Court to review the Florida Standard Jury Instructions concerning vicarious liability. It clearly states that one of the factual issues recognized by the Florida Supreme Court €or the jury's determination is whether a person owns or has a right of control of a specific motor vehicle at a period of time. I think that, at the least, there is a factual issue here for the jury to determine, under that Conditional Sales Contract, whether, during that four-year period, they had the right to control the use of that motor vehicle. There's all kinds of language in there concerning G.M.A.C.'s right to do this and do that during a period of time." (R 351 and 352).

2. In the Second District Court of Appeal in Petitioners' Reply Brief at page 12:

> "The trial court was erroneous in granting summary judgment against the plaintiff. There was no legal basis for the court's decision, and even if there was a legal basis, there

existed a genuine issue of fact regarding who the "owner" of the vehicle was on the date of Mrs. Kraemer's death. Factual issues, such as Mr. Green's default on the contract, his failure to provide insurance, and their effect on the ownership of the vehicle exist, and should be decided by a jury."

And again at page 17:

> "The appellant therefore requests that this Court reverse the Order of the trial court granting the Motion for Summary Judgment in favor of GMAC and reverse the Order denying the appellant's Motion for Partial Summary Judgment. In the alternative, the appellant requests that this Court find that a material issue of fact exists, reverse the Order granting Summary Judgment in favor of GMAC, and remand this case to the trial court for determination of the factual issue by the jury."

3. In the Second District at oral argument: and

4. In the Second District in Petitioners' Motion for Rehearing, Clarification and/or Certification at page 10:

> "WHEREFORE, the Appellant requests this Court to enter its order:
> 1. Granting rehearing which reverses the summary judgment entered by the trial court for the Appellee, GMAC, and remands the case to the trial court with directions to grant the Appellants motion for partial summary judgment;
> 2. Granting rehearing which reverses the summary judgment entered by the trial court for the Appellee, GMAC, and remands the case to the trial court with directions for trial on the issue of vicarious liability..."

In light of the above references, undersigned counsel are uncertain which portions of the record GMAC's counsel would

have reviewed in determining "at no time did Petitioners ever take the position that disputed facts of a material nature exist." However, as with GMAC, Amicus Curiae also failed to respond to Petitioners' argument in the Brief on the Merits that the instant case presents a factual issue for determination by a jury. Petitioners submit GMAC and Amicus Curiae failed to respond to this argument, because no arguments can be made in response. As noted in Petitioners' Brief on the Merits, the decisions of this Court giving rise to the "Palmer Exception" merely affirmed a jury verdict for a title holder conditional vendor. Palmer v. R.S. Evans, Jacksonville, Inc., 695 So.2d 342 (Fla. 1954) and 81 So.2d 635 (Fla. 1955). The Palmer decisions and Register v. Redding, 126 So.2d 289 (Fla. 1st DCA 1961) clearly stand for the proposition that the issue of beneficial ownership is for the jury.

B. Application of S324.021 (9)(b), Fla. Stat.

GMAC's Answer Brief filed with this Court states at footnote 2 on page 8:

> "Petitioner's Brief argues that Respondent's liability is in some way affected by S324.021 (9)(b), Fla. Stat. (1986). Petitioner's argument is the subject of a Motion to Strike previously filed by Respondent. The Motion to Strike is based upon the fact that if the statutory provision in question relates to this case at all, that issue was specifically waived by Respondent at the Trial Court level, and again in the Second District Court of Appeal. Consequently, Respondent's Brief will not address that non-issue.

GMAC's initial Motion to Strike filed with this Court states at page 3:

> "A review of the record in the instant case will reveal that the issue of the applicability of §324.021 (9)(b), Fla. Stat. (1986), was never raised at the Trial Court level, nor in the Second District Court of Appeal. Rather, Petitioner seeks to raise the issue for the first time before this Court."

Recognizing, in part, this statement was incorrect, GMAC's counsel filed an Amended Motion to Strike with this Court stating at page 2:

> "In paragraph two on page three of Respondent's Motion it was stated that the applicability of 5324.021 (9)(b), Fla. Stat. (1986) was never raised at the Trial Court level, nor in the Second District Court of Appeal. That statement was partially incorrect. In fact, the Statute in question was initially raised by Petitioner in opposition to Respondent's Motion For Summary Judgment. However, the Statute was not actually argued at the hearing, and was never again mentioned by Petitioner. On appeal to the Second District Court of Appeal Petitioner abandoned that argument both in its brief and at oral argument, as noted in the decision to be reviewed. In all other respects, Respondent's initial Motion to Strike is accurate."

The "review of the record" invited by GMAC's counsel reveals S324.021 (9)(b), Fla. Stat., was argued in the trial court in the Petitioner's Motion for Partial Summary Judgment (R 95) and Petitioner's Response to GMAC's Motion for Summary Judgment (R 102).

The Briefs of the Petitioners to the Second District did not make reference to §324.021 (9)(b), Fla. Stat., as:

1. the trial court clearly ruled on the basis of "The Palmer Exception" to the Dangerous Instrumentality Doctrine and not the exception to the Dangerous Instrumentality Doctrine set forth in 15324.021 (9)(b), Fla. Stat.:

2. the Greens failed to maintain liability insurance as required by §324.021 (9)(b), Fla. Stat. Therefore, GMAC has never argued it is entitled to obtain the benefit of the Exception to the Dangerous Instrumentality Doctrine set forth in $324.021 (9)(b), Fla. Stat.; and

3. §324.021 (9)(b), Fla. Stat., became effective July 1, 1986. The case law interpreting the Statute has rapidly developed since Petitioners submitted their Briefs and made argument to the Second District. Oral argument was made to the Second District during October 1989. The Fourth District's opinion in Folmar v. Young, 560 So.2d 798 (Fla. 4th DCA 1990) which construed §324.021 (9)(b), Fla. Stat., and set forth the legislative debate was published February 6, 1990. The Third District's opinion in Tsiknakis v. Volvo Finance of North America, Inc., 15 F.L.W. D992 (Fla. 3d DCA Apr. 17, 1990) was puslished April 17, 1990. Of course, Petitioners had no ability to cite cases to the Second District which had yet to be decided.

However, to the extent Judge Altenbernd in his concurring opinion suggests Petitioners agreed S324.019 (9)(b), Fla. Stat., has "no application" to the case at bar, Judge Alterbernd is incorrect. Kraemer v. General Motors Acceptance Corporation, 556 So.2d 431 at 435 (Fla. 2d DCA 1989). Petitioners merely admitted at oral argument to the Second

District that GMAC's lessee failed to obtain the liability coverage required by S324.021 (9)(b), Fla. Stat., in order for GMAC to avoid liability pursuant to the Dangerous Instrumentality Doctrine.

CONCLUSION

Amicus Curiae, Florida Motor Vehicle Leasing Group, suggests Petitioners are attempting to hold GMAC liable as a "deep pocket." However, GMAC's liability in this case as with other owners of motor vehicles, is based on Fla. Std. Jury Instr. (Civ.) 3.3(a). One who owns and/or has a right of control over a motor vehicle has vicarious liability for its negligent use. For GMAC to escape liability in this case leaves the Kraemer Estate with no remedy against a lessor who was in the business of profiting from entrusting vehicles to another for a price. Further, David J. Abbey of Fox & Grove, Chartered, is co-counsel in this matter with Tom Fox, as USAA paid Uninsured Motorist benefits to the Kraemer Estate. GMAC, not an Uninsured Motorist carrier, should be held responsible for the negligent use of the vehicle GMAC leased when GMAC's lessee failed to maintain the liability insurance required by S324.021 (9)(b), Fla. Stat.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the Petitioners' Reply Brief and Appendix to Petitioners' Reply Brief has been furnished this 27 day of August, 1990, by U.S. Mail to LARRY I. GRAMAVOT, ESQUIRE, 101 Grand Avenue, Wausau, Wisconsin 54401; STUART J. FREEMAN, ESQUIRE, P.O. Box 12349, St. Petersburg, FL 33733; J. EMORY WOOD, ESQUIRE, 600 North Florida Avenue, Suite 1430, Tampa, FL 33602; CALVIN GARY, Inmate No. 060932, Charlotte Correctional Institute, 33123 Oil Well Road, Punta Gorda, FL 33955; JEFFREY B. SHAPIRO, ESQUIRE and JUDY D. SHAPIRO, ESQUIRE, 801 Brickell Avenue, Suite 1501, Miami, FL 33131; and WILLIAM C. OWEN, ESQUIRE and F. TOWNSEND HAWKES, ESQUIRE, 410 First Florida Bank Building, P.O. Drawer 190, Tallahassee, FL 32302.

Respectfully submitted,

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