IN THE SUPREME COURT OF FLORIDA

THEODOR TSIKNAKIS and
KIKI TSIKNAKIS, his wife,

Petitioners,

vs. CASE NO. 75,968

VOLVO FINANCE NORTH AMERICA,
INC., a foreign corporation,
and JEANMARIE SANGERMAN,

Respondents.

JACINTO ABDALA AND MARLEN ABDALA,

Petitioners,

vs. CASE NO. 75,966

WORLD OMNI LEASING, INC., et al.,

Respondents.

BRIEF OF PETITIONERS TSIKNAKIS AND ABDALA

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INTRODUCTION

Plaintiffs/Petitioners JACINTO ABDALA and MARLEN ABDALA will be referred to as they stand before this Court, as they stood before the trial court and by name. Defendant/Respondent WORLD OMNI LEASING, INC. will be referred to as it stands before this Court, as it stood before the trial court and as WORLD OMNI. The remaining Defendants/Respondents are only nominal parties to these proceedings.

Plaintiffs/Petitioners THEODOR TSIKNAKIS and KIKI TSIKNAKIS will be referred to as they stand before this Court, as they stood before the trial court and by name. Defendant/Respondent VOLVO FINANCE NORTH AMERICA, INC. will be referred to as it stands before this Court, as it stood before the trial court and as VOLVO FINANCE. JEANMARIE SANGERMAN is only a nominal party to these proceedings.

"R" refers to the record on appeal. "A" refers to the attached appendix. Emphasis is supplied by counsel unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The context of these cases. These are proceedings to review a certified question from the Third District Court of Appeal. That court did not set out a precise question. However, based on the cases it cited, and the issues before it, the critical question is whether a "long term" lessor of a motor vehicle is liable for the negligent operation of that vehicle by a permissive user. That issue was certified in these appeals from final summary judgments which determined that Fla.Stat. § 324.021 (defining the financial responsibility of "long term" lessors) was constitutional and applied the statute to preclude the Abdalas' recovery from World Omni and the Tsiknakis' recovery from Volvo Finance.[1/]

Effective August 6, 1986, the legislature amended Fla.Stat. § 324.021, which defines certain words "for the purpose of this chapter [financial responsibility]". Subsection (9)(b) now provides that if a lessee under a lease one year or longer maintains $100,000/$300,000 insurance the lessor is not considered the owner of the vehicle "for the purpose of determining financial responsibility for the operation of said motor vehicle or for the acts of the operator in connection therewith". Interpretation of this section, and the constitutionality of this section, turn on the underlying question of whether such lessors had any liability under the law before the statute was passed. Although the only

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1/ The Third District certified the question in this case only a few weeks after it certified the question in Raynor v. Equilease Corp., case no. 75,870, which is presently pending before this Court. The certified question is common to all cases. But Raynor does not involve the statute at issue here.

question certified pertains to the underlying question of liability at common law, Petitioners will also address the statutory issues because this Court has discretion to review those issues, Freund v. State, 520 So.2d 556, 557, n.2 (Fla. 1988), and because these issues are in themselves questions of great public importance.

The Abdala case. In February 1989, Mr. Abdala was seriously injured in a motor vehicle accident when Defendant Jerry Carver hit him. (R. 2-4). Carver's car had been leased from World Omni in April 1985. The lease was for a period in excess of a year. (R. 5-6). In accordance with the lease, the lessee maintained insurance of $100,000/$300,000 for bodily injury and $50,000 for property damage. (R. 5).

World Omni moved for summary judgment on the ground that it could not be liable for Abdala's injuries because it was not the "owner" of the vehicle under the provisions of § 324.021. (R. 7-14). Abdala argued that World Omni incorrectly interpreted the statute to eliminate tort liability when it applied only to proof of financial responsibility. He also argued that the statute should not apply to this case because the lease here was entered into before the statute's effective date. It would be unconstitutional to apply the statute retroactively. Finally, Abdala argued the statute was unconstitutional because it denied access to the courts, denied equal protection and denied substantive due process. The trial court found that the statute eliminated the lessor's common law liability under the dangerous instrumentality

doctrine and entered summary judgment. (R. 42). The Abdalas appealed. (R. 41).

The Tsiknakis case. Tsiknakis was injured in an accident with Jeanmarie Sangerman. Volvo Finance owned the car. (R. 44). Sangerman operated the car under a long term lease and maintained $100,000/$300,000 coverage. (R. 44-46, 54).

Tsiknakis sued Sangerman and Volvo Finance. (R. 44-46). Volvo Finance moved for summary judgment under Fla.Stat. § 324.021(9)(b). (R. 48). The trial court found the statute eliminated the lessor's common law liability under the dangerous instrumentality doctrine and was constitutional. It entered summary judgment. (R. 43A). Tsiknakis appealed. (R. 55).

The Third District consolidated the Abdala and Tsiknakis appeals. It affirmed the summary judgments and certified the question to this Court. (R. 57-58).

SUMMARY OF ARGUMENT

The certified question is whether a "long term" lessor is liable under the dangerous instrumentality doctrine for injuries caused by the negligence of the lessee. This Court should find that the lessor is liable. Since the time this Court found that the dangerous instrumentality doctrine applied to motor vehicles, and applied to bailments of various kinds, this Court has never distinguished between "long term" and "short term" leases. This Court has made it plain that the lessor of a motor vehicle is responsible for the negligence of the lessee (or permittee) as a matter of public policy because the lessor has allowed the operation of the vehicle on the highways. This Court reiterated some time ago in Susco Car Rental Sys. of Florida v. Leonard, 112 So.2d 852 (Fla. 1959) that it does not matter whether the lessor has relinquished possession and control of the vehicle to the lessee. An owner divests himself of responsibility under the dangerous instrumentality doctrine only when he sells the vehicle to another, either by outright sale or by conditional sale with a retention of title as security.

The 1986 amendment to Fla.Stat. § 324.021(9)(b) is not what Defendants claim in both the Abdala and Tsiknakis cases. The statute, though inartfully written, does not eliminate the liability of long term lessors under the dangerous instrumentality doctrine. It only eliminates the long term lessor's obligation to demonstrate financial responsibility by shifting that burden to the lessee.

In any event, the statute does not apply to the Abdala case because the lease here was entered into before the statute's effective date. Retroactive application of a statute to a contract is unconstitutional.

Even if the statute applies to Abdala and Tsiknakis, it denies access to the court because it eliminated a venerable common law remedy without providing any reasonable alternative to the injured party. The statute also denies equal protection because there is no rational basis for the legislature's action in distinguishing between long term lessors and all other owners. Finally, the statute denies substantive due process because it is not rationally related to any valid legislative purpose and it is arbitrary and discriminatory.

ARGUMENT

I. THE DISTRICT COURT ERRED IN CONCLUDING THAT A "LONG TERM" LESSOR WAS NOT LIABLE UNDER THE DANGEROUS INSTRUMENTALITY DOCTRINE.

The district court apparently concluded that the lessor under a lease in excess of a year was not liable under the dangerous instrumentality doctrine. The court relied solely on the decisions of the Second District in Perry v. G.M.A.C. Leasing Corp., 549 So.2d 680 (Fla. 2d DCA 1989) and Kraemer v. Gen. Motors Acceptance Corp., 556 So.2d 431 (Fla. 2d DCA 1989). This Court must therefore decide whether Perry and Kraemer correctly created an arbitrary distinction between short term and long term leases (neither of which terms are defined anywhere) and equated "beneficial ownership" with "possession and control". This Court should conclude that the Second District's decisions in those cases were incorrect because they are contrary to 70 years of case law in this state on the dangerous instrumentality doctrine and because they will have untoward effects on basic principles of law in other fields such as property, tax or bankruptcy.

At the outset, Abdala and Tsiknakis respectfully adopt and incorporate the essential arguments presented by Petitioner in Raynor v. Equilease, case no. 75,870. Until Perry and Kraemer, every court in this state had found lessors liable for negligent operation of a vehicle under the dangerous instrumentality doctrine and no court in this state had ever distinguished between "long term" and "short term" leases. E.g., Lynch v. Walker, 159 Fla. 188, 31 So.2d 268 (1947); Fleming v. Alter, 69 So.2d 185

(Fla. 1954); Susco Car Rental Sys. of Florida v. Leonard, 112 So.2d 832 (Fla. 1959). And why should any court have made such a distinction?

What is the critical fact that summarily relieves one type of owner, the so-called "long term" lessor, from liability under the dangerous instrumentality doctrine, but does not relieve an owner who allows another to use his vehicle under a different type of bailment. Certainly, it is not the fact that the lessor holds "mere naked legal title", because individuals who hold "mere legal title" are liable under the dangerous instrumentality doctrine. Penn Nat'l Mutual Cas. Ins. Co. v. Ritz, 284 So.2d 474 (Fla. 3d DCA 1973); Hertz Corp. v. Dixon, 193 So.2d 176 (Fla. 1st DCA 1966). Compare Avis Rent-A-Car Sys., Inc. v. Garmas, 440 So.2d 1311 (Fla. 3d DCA 1983).

Perry and Kraemer declare that the distinction between those lessors held liable under the dangerous instrumentality doctrine and those who are not held liable under that doctrine is found in the distinction between "short term lessors" and "long term lessors". But what is that distinction?

Perry involved a five year lease. Kraemer involved a four year lease. If these are "long term leases", what about a one year lease. Is one year a "long term" lease under which the owner is not liable or a "short term" lease under which liability is imposed? If one year is "long term", what about a six month lease, or a three month lease, or a one month lease? Where is the line between liability and no liability. Because there is no

logical difference between a one year lease and a one month lease simply because of the time period involved, that line simply does not exist. The labels of "short term lease" versus "long term lease" are meaningless.[2/]

Perry and Kraemer relied on Palmer v. R.S. Evans, 81 So.2d 635 (Fla. 1955), a case which involved a conditional sale. From that case they selected and applied the concept of "naked legal title". They miss the critical point. Palmer did not say that one who holds "mere naked legal title" is not liable under the dangerous instrumentality doctrine. Instead, it said:

> [T]he rationale of our cases which impose tort liability upon the owner of an automobile operated by another [citations omitted], 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 fact, such a result would be mandated today under the Uniform Commercial Code. Fla.Stat. § 672.401(1)("Any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest").[3/] Thus, Palmer merely distinguishes between

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[2/] It must be remembered that this question is one of common law liability without regard to Fla.Stat § 324.021(9)(b) which arbitrarily selects one year as the cutoff point.

[3/] In essence, the Second District's analysis has confused the concept of "beneficial ownership" with that of "possession and control". A conditional sale creates beneficial ownership. A lease agreement only transfers possession and control. See W.E. Johnson Equipment Co., Inc. v. United Airlines, Inc., 238 So.2d 98, 100 (Fla. 1970)("a sale transfers ownership and a lease or bailment merely transfers possession and anticipates future return of the chattel to the owner"); Burnett v. Thomas, 349 So.2d 1208 (Fla. 2d DCA 1977)(lease transfers only possessory interest to (continued...)

owners generally and those who are really conditional vendors, i.e., "who hold mere naked legal title as security for payment of the purchase price".

Here, the defendants are two owners, not conditional vendors. These were not conditional sales. Volvo Finance and World Omni did not hold "naked legal title as security for payment". In fact, the language of the lease agreements here specifically differs from a conditional sales agreement. The contract in Abdala states:

> 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 the lessor receive the benefits of ownership [IRC sec. 168(f)(8)].

(R. 20).[4/] It then states that "there is no option to purchase". (R. 20). Similarly, the contract in Tsiknakis states: "I acknowledge that I will have no equity or other ownership rights in the vehicle and that my only right will be to exercise the purchase option".[5/] (R. 51).

Neither the law, nor the facts, support the conclusion in

[3/](...continued)
lessee; lessor retains all ownership interests); In re Ludlum Enterprises, Inc., 510 F.2d 996, 999-1000 (5th Cir. 1975).

[4/] Defendant's position should be seen for what it really is. They seek to claim the benefits of ownership in the form of tax benefits, while at the same time disclaiming ownership when it comes to liability.

[5/] There is no evidence in the record that this purchase option was ever exercised.

Perry and Kraemer that a long term lessor stands in the same position as a conditional seller.

Finally, how, then, does Fla.Stat. § 324.021(9)(b)fit into the picture? It is a recognition by the legislature that lessors under leases in excess of a year may be liable under the dangerous instrumentality doctrine. The statute may be interpreted in two ways. It may have been intended to shift the burden of coverage for the first $100,000/$300,000 to the lessee from the lessor under leases in excess of a year, but leave intact the liability of the lessor and its financial responsibility for amounts in excess of the mandatory minimum coverage. Or it may have been intended to eliminate the liability of the lessor under such leases and impose the entire burden on the lessee with a guarantee of only the mandatory coverage required by the statute. See generally, Argument II, infra.[6/] But under either interpretation, it is plain that the legislature understood the "long term" lessor to be liable under the dangerous instrumentality doctrine. See Crenshaw Bros. Produce Co., Inc. v. Harper, 142 Fla. 27, 194 So. 353 (1940)(legislature's creation of narrow exemption from dangerous instrumentality doctrine was legislative approval of the doctrine previously announced in case law).

Petitioner in Raynor has hit the key to the distinction be-

6/ In this respect, Tsiknakis and Abdala differ with the position presented by Petitioner's brief in Raynor. Petitioner in that case relies on the interpretation of the statute which eliminates the liability of a long term lessor. TSIKNAKIS and ABDALA proffer instead that the legislature only intended to limit the financial responsibility of that lessor, not eliminate it.

tween leases and conditional sales when he states that a lease, by definition, does not transfer any ownership, beneficial or otherwise. A lease only transfers possession. It leaves both legal and beneficial ownership only in the owner/lessor. This analysis demonstrates the fault of Perry and Kraemer in relying on a case which involves a conditional sale. This Court's decisions concerning liability under the dangerous instrumentality doctrine have consistently held that the transfer of only possession and control, rather than ownership, is not enough to eliminate liability under the dangerous instrumentality doctrine. E.g., Susco Car Rental Sys. of Florida v. Leonard, supra (court rejected lessor's claim that dangerous instrumentality doctrine should not apply because lessor relinquishes "possession and control"; "possession and control" is irrelevant issue because dangerous instrumentality doctrine is a question of public policy which creates financial responsibility to protect the public). This Court should conclude that a "long term" lessor remains as liable under the dangerous instrumentality doctrine as any other owner and as liable as any "short term" lessor.

II. THE TRIAL COURTS ERRED IN FINDING FLA.STAT. § 324.021 APPLIED TO THESE CASES SO AS TO ELIMINATE THE LESSOR'S COMMON LAW LIABILITY UNDER THE DANGEROUS INSTRUMENTALITY DOCTRINE.

Once this Court finds that a "long term" lessor is liable under the dangerous instrumentality doctrine, this Court must address Fla.Stat. § 324.021(9)(b). This Court should find that the statute on its face does not do what World Omni and Volvo

Finance claim it does. Though inartfully written, the statute only limits the financial responsibility requirements of a long term lessor. It does not eliminate the tort liability imposed on such a party under the dangerous instrumentality doctrine. At the least, the statute does not apply in Abdala because the contract/long term lease in that case was entered into before the statute's effective date.

Several district courts have ruled on this statute. E.g., Folmar v. Young, 560 So.2d 798 (Fla. 4th DCA 1990); Perry v. G.M.A.C., 549 So.2d 680 (Fla. 2d DCA 1989). Folmar ruled on all but one of the issues raised in this brief. Perry only ruled on one issue. Both these decisions will be discussed in the particular argument section to which the decision is pertinent.

a. The statute does not limit liability. It only limits financial responsibility requirements.

The first issue is one of statutory interpretation - did the legislature intend to limit, or eliminate, liability. Fla.Stat. ch. 324 is titled "Financial Responsibility". It deals with the requirements imposed on owners and operators of motor vehicles to show proof of insurance or other financial security, and provides penalties for those who fail to do so. The purpose of the chapter is stated in § 324.011.

> It is the intent of this chapter . . . to promote safety and provide financial security requirements for such owners or operators whose responsibility it is to recompense others for injury to person or property caused by the operation of a motor vehicle. Therefore, it is required herein that the operator of a motor vehicle involved in an accident or

> convicted of certain traffic offenses meeting the operative provisions of s. 324.051(2) shall respond for such damages and show proof of financial ability to respond for damages . . . .[7/]

Section 324.021 provides definitions for various terms used throughout the chapter, including the term "owner". Subsection (9)(b) was a 1986 amendment to § 324.021. The amendment was part of a larger bill, Fla.Laws ch. 86-229, the primary purpose of which was to amend the "Motor Vehicle Warranty Enforcement Act", Fla.Stat. ch. 681, by expanding its protection to consumers who lease motor vehicles rather than purchase them. The preamble to Fla.Laws ch. 86-229 said nothing whatever about abolishing the dangerous instrumentality doctrine. See 49 Fla.Jur.2d Statutes § 154 at 187 ("While the legislature's policy as declared in the statutory provisions is not necessarily binding upon the courts, such a declaration is persuasive and will be upheld unless clearly contrary to the judicial view").

Subsection (9)(b) simply defines an "owner/lessor", as that term is used in chapter 324.

7/ Where a statute is susceptible to two interpretations, one of which would render it unconstitutional, the courts should avoid the unconstitutional interpretation and adopt a construction that makes the statute valid. A statute is presumed to be constitutionally valid. If possible, it should be construed to avoid not only an unconstitutional interpretation, but also one which even casts doubt on the statute's validity. E.g., Spencer v. Hunt, 109 Fla. 248, 147 So. 282 (1933); State ex rel. Shevin v. Metz Constr. Co., Inc., 285 So.2d 598, 600 (Fla. 1973); Schultz v. State, 361 So.2d 416 (Fla. 1978); Durring v. Reynolds, Smith & Hills, 471 So.2d 603 (Fla. 1st DCA 1985).

This statutory construction issue avoids the interpretation which would require a ruling on the statute's unconstitutionality.

> 324.01 Definitions; minimum insurance required.
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> The following words and phrases when used in this chapter shall, for the purposes of this chapter, have the meanings respectively ascribed to them in this section, except in those instances where the context clearly indicates a different meaning.
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> (9) OWNER; OWNER/LESSOR
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> (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; 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 determining financial responsibility for the operation of said motor vehicle or for the acts of the operator in connection therewith.

This subsection only relieves a long term lessor of its obligation to provide proof of financial responsibility under chapter 324. It does not eliminate the lessor's tort liability under the dangerous instrumentality doctrine. The term "financial responsibility" has its own special meaning under chapter 324. See § 324.021(7). No provision in chapter 324 purports to speak to the different subject of who has common law liability to whom. See Ins. Co. of N. Am. v. Avis Rent-A-Car, 348 So.2d 1149, 1153 (Fla. 1977)("Independent of this insurance requirement [of financial responsibility] is the common law obligation of vehicle owners

under the dangerous instrumentality doctrine").

The courts presume that the legislature does not intend a change in the common law unless the statute explicitly states otherwise. Carlisle v. Game and Freshwater Fish Comm'n, 354 So.2d 362, 364 (Fla. 1977). The 1986 statutory amendment to § 324.01 does not state that it intended to abolish a common-law doctrine which has been followed for years. The simple conclusion from this omission is that the legislature did not intend such a radical change. A proper reading of the statute shows that the legislature only intended to shift the requirement of proving financial responsibility from the lessor to the lessee when a long term lessor requires the lessee to maintain certain minimum limits of insurance coverage. If the legislature had intended to alter common law liability, it could have said so. And, the logical place for such a statute would be chapter 768, "Negligence", rather than chapter 324, "Financial Responsibility". Compare Fla.Laws ch. 86-160 (Tort Reform and Insurance Act of 1986 placed all alterations of, and limitations on, tort liability in ch. 768).

Fla.Stat. § 324.021 begins by stating that "[t]he following words and phrases when used in this chapter shall, for the purposes of this chapter, have the meanings respectively ascribed . . ." There is no indication that the legislature intended the statutory definitions to apply outside the "chapter" so as to affect common law liability. To the contrary, the legislature in clear and unequivocal language limited the definition to usage within the "chapter". Courts cannot ignore summarily this limiting language.

The Fourth District in Folmar did ignore the plain language of the statute, however. The Fourth District reviewed selected portions of the debate on adoption of this provision on the floor of the House. 560 So.2d at 800-01. Based on those discussions, and based on what the court summarily referred to as the "plain language of the statute", the court concluded that the legislature was attempting to limit liability under the dangerous instrumentality doctrine.

There are several problems with Folmar's analysis on this issue. First, the court's conclusion is at odds with the plain language of the statute, as set out above. The Fourth District specifically omitted any reference to the introductory phrase to the definitions contained in subsection (9). That introduction specifically limits the definitions in a manner completely contrary to the court's opinion: "[t]he following words and phrases when used in this chapter shall, for the purposes of this chapter, have the meanings respectively ascribed . . .".

The Fourth District also looked to a debate on the floor of the House. There are several impediments to its doing so. First, the court should not look to any extrinsic material to interpret a statute unless the statute is ambiguous. The Fourth District stated: "we must look not only at the plain language of the statute, but also its history". 560 So.2d at 799 (citing Carawan v. State, 515 So.2d 161 (Fla. 1987)). Carawan in fact stated: "The courts never resort to rules of construction where the legislative intent is plain and unambiguous". 515 So.2d at 165. See also

Florida State Racing Comm'n v. McLaughlin, 102 So.2d 574 (Fla. 1958)(court cannot look outside statute to find an ambiguity and then use extraneous reason as basis for giving statute meaning different than that conveyed by language chosen by legislature); McDonald v. Roland, 65 So.2d 12 (Fla. 1953)("Where the legislature's intention is clearly discernible, the court's duty is to declare it as it finds it, and it may not modify or shade it, out of any consideration of policy or regard for untoward consequences"). This statute is plain on its face. There was no need to use any extrinsic evidence.

Second, the court could not rely on a transcript of a House debate. It is not competent evidence of legislative intent. As this Court has stated:

> Both houses of the legislature record floor debates, but "the manner of recordation and storage makes these tapes informal working tools rather than official records of legislative proceedings."

State v. Kaufman, 430 So.2d 904, 906, n.4 (Fla. 1983)(quoting Rhodes, White & Goldman, The Search for Intent: Aids to Statutory Construction in Florida, 6 Fla.St.U.L.Rev. 385, 399 (1978)).[8/] In fact, there is no evidentiary basis for considering such materi-

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[8/] In fact, no case in Florida has relied on similar evidence in construing a statute. The cases rely on matters such as the legislative journal which is required by Fla.Const. Art. III, § 4, staff analyses, messages from the executive to the legislature and similar materials. See generally 49 Fla.Jur.2d Statutes § 160 at 193-94. See, e.g., State v. Kaufman, 430 So.2d 904 (Fla. 1983)-(reference to legislative journal); Dep't of Health & Rehabilitative Serv. v. Shatto, 487 So.2d 1152 (Fla. 1st DCA 1986)(court would rely on staff report); Fields v. Zinman, 394 So.2d 1133, 1135 (Fla. 4th DCA 1981)(court relied on committee report).

als. They are not public records.

> "A public record is one required by law to be kept, or necessary to be kept in the discharge of a duty imposed by law, or directed by law to serve as a memorial and evidence of something written, said or done." [citation omitted]. The legislature is not required by law to make or keep electronic recordings of its proceedings, and the instant records and transcripts are not public records.

430 So.2d at 906. See also Security Feed & Seed Co. v. Lee, 138 Fla. 592, 189 So. 869 (1939)(testimony of members of Senate is of doubtful veracity, if at all admissible, to show what was intended by a statute); Fields v. Zinman, 394 So.2d 1133 (Fla. 4th DCA 1981)(court cannot consider affidavits of legislators as evidence of legislative intent).[9/]

Finally, as a procedural matter, this "transcript" of the House debate is a piece of evidence which was never introduced in the trial court. Although a trial court may have discretion to take judicial notice of such a document, an appellate court should not do so. See Ellsworth v. Ins. Co. of N. Am., 508 So.2d 395 (Fla. 1st DCA 1987)("Because we conclude that appellate judicial notice of a legislative Staff Summary and Analysis would be incompatible with traditional standards of appellate practice, we deny appellants' motion to take judicial notice"); Dep't of Health & Rehabilitative Serv. v. Shatto, 487 So.2d 1152 (Fla. 1st DCA 1986)(same). Shatto was based in part on the rationale that an

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9/ There is no real difference between a legislator's affidavit as to what he thought a statute intended and a legislator's statement on the floor at the time of the statute's passage. One is no more reliable than the other about the intent of the body as a whole.

evidentiary hearing before a trial court would permit the opponent of the legislative materials to challenge their authenticity or to offer contrary evidence of legislative intent. That rationale is quite appropriate here. One of the pieces of competent evidence of legislative intent under the above cases is a staff report. The staff report for this particular bill, SB 902, strongly indicates that the legislature did not intend to abrogate the dangerous instrumentality doctrine. The economic impact statement of that report simply refers to the benefit conferred by amendments to the Lemon Law. It does not mention the substantial detrimental impact which will result from an statute which eliminated liability of long term lessors under the dangerous instrumentality doctrine.[10/]

In sum, there are substantial problems with the Fourth District's construction of this statute. This Court should reject its interpretation.

This is not the best statute every written by the Florida legislature. (A. 9)(referring to statute as "nonsensical"). Subsection (9)(b) is grammatically poor and somewhat confusing. Punctuation appears in inappropriate places. Descriptive phrases are not located directly after the language they are intended to describe. But the statute is not ambiguous insofar as it is necessary to determine its intent. After sorting through all

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[10/] In the spirit of having a complete record, and for the Court's convenience, Petitioners have attached the entire transcript of the House debate (A. 1-5), and the staff reports (A. 6-12) to this brief as a numbered appendix, without admitting the competence of the House debate.

those problems, it is apparent that the statute simply does not do what World Omni and Volvo Finance claim. The statute only defines "owner/lessor" "for the purpose of determining financial responsibility". The statute says nothing about tort liability. The statute says nothing about the dangerous instrumentality doctrine. This Court should hesitate before reading elimination of basic tort liability concepts into a statute written as poorly as this one, in light of the serious constitutional ramifications of doing so. This Court should hold that § 324.021(9)(b) does not apply to these cases so as to eliminate the lessor's common law liability for the negligence of its drivers under the dangerous instrumentality doctrine.

b. The statute cannot apply to leases entered into before its effective date.[11/]

The statute's applicability is tied to the leasing/contractual arrangement between the long term lessor and the long term lessee. The lease in Abdala was entered into in April 1985. The statute was not effective until August 1986. The statute simply does not apply.[12/]

Unless a statute clearly expresses that it will operate retroactively, the statute is presumed to be prospective only.

[11/] This subsection only applies in the Abdala appeal. The Tsiknakis lease was signed after the statute's effective date. Neither Perry nor Folmar address this issue.

[12/] Petitioners include this argument, even though it may be more properly presented by Carver, since it is in his best interests to assure that World Omni remains responsible. Carver filed no brief in the Third District. Petitioners do not know if that will also be the case in this Court.

Fleeman v. Case, 342 So.2d 815 (Fla. 1977). In Fleeman, the legislature passed a statute which prohibited escalation clauses in leases for condominium recreational facilities or in management contracts. The legislature said nothing about the statute's applicability. This Court held that it did not apply to contracts entered into before the statute's effective date.

> With respect to the first question posed by asserted retroactive application of the statute, we fail to find in the enactment any basis to apply the law to pre-existing contracts. Statutes are presumed to be prospective in application unless the Legislature manifests an intention to the contrary. E.g., Keystone Water Co. v. Benivs, 278 So.2d 606 (Fla. 1973). . . . We can restrict the debate on a legislative "intent" for retroactivity to the floor of those chambers, as well as avoid judicial intrusions into the domain of the legislative branch, if we insist that a declaration of retroactive application be made expressly in the legislation under review. By this means the forward or backward reach of proposed laws is irrevocably assigned in the forum best suited to determine that issue, and the judiciary is limited only to determining in appropriate cases whether the expressed retroactive application of the law collides with any overriding constitutional provision.
>
> There being no express and unequivocal statement in this legislation that it was intended to apply to leases and management contracts which antedate its enactment, we hold the statute inapplicable to the contracts in these consolidated proceedings.

342 So.2d at 817-18.[13/]

[13/] Retroactive application of a statute to contracts entered into before its effective date would be an unconstitutional impairment of contract. State Farm Mut. Auto. Ins. Co. v. Gant, 478 So.2d 25 (Fla. 1985)(amendment which permitted insured to stack uninsured motorist coverage could not constitutionally be applied to insurance policies issued before amendment's effective date).

The bill which enacted § 324.021(9)(b) (1986) said nothing about retroactive application. It simply stated: "This act shall take effect July 1, 1986".[14/] Fla.Laws ch. 86-229 § 4. Fleeman requires that any intent to apply a statute to contracts entered into before its effective date must be stated in an "express and unequivocal" fashion. There is no such statement here. The statute is therefore presumed to apply only to contracts entered into after August 6, 1986. The statute does not apply to the contract in Abdala which was entered into in April 1985.[15/]

III. IF THE STATUTE APPLIES, IT IS UNCONSTITUTIONAL. THE STATUTE VIOLATES THE CONSTITUTIONAL PROVISIONS FOR ACCESS TO COURTS, EQUAL PROTECTION AND DUE PROCESS.

The trial court in both Abdala and Tsiknakis applied the statute and rejected their arguments on its unconstitutionality. But the statute denies access to the courts without providing any reasonable alternative or compelling necessity. It denies equal protection to seriously injured plaintiffs by treating them differently from those with less severe injuries and by distinguish-

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[14/] Although this section states July 1 is the effective date, by operation of law the date is in fact August 6. In re Advisory Opinion to Governor, 374 So.2d 959, 967 (Fla. 1979)(the appropriate effective date is the 60th day after adjournment of the legislature); Fla.Const. Art. III §§ 3, 9.

[15/] A finding that the statute does not apply would certainly not leave World Omni without a remedy. Both the lease agreement itself, and the case law, provide World Omni with indemnification rights against Carver for any "losses, damages, injuries, claims, demands and expenses arising out of the condition, maintenance, use or operation of the vehicle". (R. 20). See also Ins. Co. of N. Am. v. Avis Rent-A-Car, 348 So.2d 1149 (Fla. 1977)(owner has indemnity action against driver of lease vehicle).

ing between long term lessors and other vehicle owners without a rational basis. And the statute denies due process because it has no reasonable relationship to a permissible legislative objective and is discriminatory and arbitrary.

a. The statute denies access to courts.

The access to courts provision of the Florida constitution guarantees that an individual will not be deprived of a right recognized at common law unless the legislature grants the individual a reasonable alternative or demonstrates an "overpowering public necessity". Fla.Const. Art. I § 21.

> [W]here a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, or where such right has become a part of the common law of the State pursuant to Fla.Stat. § 2.01, F.S.A., the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.

Kluger v. White, 281 So.2d 1, 4 (Fla. 1973), quoted in Overland Constr. Co. v. Sirmons, 369 So.2d 572, 573 (Fla. 1979). See also Sunspan Eng'g & Constr. Co. v. Spring-Lock Scaffold Co., 310 So.2d 4 (Fla. 1975).

There are two primary questions to be resolved here: did an injured plaintiff have the right to sue long term lessors as owners under the dangerous instrumentality doctrine; and does the abolition of such right deny access to the courts.

If this Court reaches this issue of the statute' constitutionality, then it must necessarily have decided that there was a right to sue these long term lessors under the dangerous instrumentality doctrine. Therefore the answer to the first question must be that injured plaintiffs have always had the right to sue long term lessors as owners under the dangerous instrumentality doctrine. An owner's liability under the dangerous instrumentality doctrine predates the adoption of the constitution. As this Court stated in applying the doctrine to automobiles:

> The rule is not a new one . . . it is but the application of an old and well-settled principle to new conditions.
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> In the early development of this very salutary doctrine, the dangerous agencies consisted largely of fire, flood, water, poisons . . . [and] loaded firearms . . . . The underlying principle was not changed but other agencies were included in the classification. Among them are locomotives, push cars, street cars, etc., ... The reasons for putting these agencies in the class of dangerous instrumentalities apply with equal, if not greater, force to automobiles.
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> * * *
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> This is the doctrine of the common law applied to a new instrumentality imminently dangerous to the persons using the public highway.

S. Cotton Oil Co. v. Anderson, 80 Fla. 441, 86 So. 629, 631 (1920). The reason for the doctrine is sound, id.:

> The liability grows out of the obligation of the owner to have the vehicle, that is not inherently dangerous per se, but peculiarly dangerous in its use, properly operated when it is by his authority on the public highway.

The doctrine is not limited to a particular class of owners. It applies to bailors. Martin v. Lloyd Motor Co., 119 So.2d 413 (Fla. 1st DCA 1960)(dangerous instrumentality doctrine applies where owner gave car to corporation to sell on owner's behalf and corporation allowed another to drive car and cause accident). It applies to rental car agencies that lease their cars on a short term basis. Susco Car Rental Sys. of Florida v. Leonard, 112 So.2d 832 (Fla. 1959); Avis Rent-A-Car Sys., Inc. v. Garmas, 440 So.2d 1311 (Fla. 3d DCA 1983). It applies to long term lessors as well. Racecon, Inc. v. Mead, 388 So.2d 266 (Fla. 5th DCA 1980)(in case involving long term lease, 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").[16/] As previously argued in detail at 7-12, "long term" lessors are liable.

Therefore Abdala and Tsiknakis meet the first prong of Kluger. They had a right at common law to sue World Omni and Volvo Finance, the long term lessors.

The next question is whether the statute's limitation on recovery "eliminated" that right within the meaning of Kluger and

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16/ Until the Fifth District's decision in Racecon, no court had ever even mentioned categories of lessors based on the length of the lease. There are some cases, however, in which one can infer that the courts applied the dangerous instrumentality doctrine automatically to long term lessors. E.g., Canal Ins. Co. v. Continental Cas. Co., 489 So.2d 136 (Fla. 2d DCA 1986). Certainly, until the Second District's decision in Perry, no court had ever refused to apply the doctrine to a long term lessor.

Art. I § 21. It did. Smith v. Dep't of Ins., 507 So.2d 1080 (Fla. 1987). In Smith, this Court held unconstitutional the portion of the 1986 Tort Reform Act that placed a $450,000 cap on noneconomic damages in most tort actions. Although the limitation did not completely abolish the claim, this Court held that the limitation violated the access to courts provision.

> Article I, Section 21 . . . must be read in conjunction with section 22 "Trial by jury." Access to courts is granted for the purpose of redressing injuries. A plaintiff who receives a jury verdict for, e.g. $1,000,000, has not received a constitutional redress of injuries if the legislature statutorily, and arbitrarily, caps the recovery at $450,000. Nor . . . is the plaintiff receiving the constitutional benefit of a jury trial as we have heretofore understood that right. Further, if the legislature may constitutionally cap recovery at $450,000, there is no discernible reason why it could not cap the recovery at some other figure, perhaps $50,000, or $1,000, or even $1. None of these caps, under the reasoning of appellees, would "totally" abolish the right of access to the courts. . . . If it were permissible to restrict the constitutional right by legislative action, without meeting the conditions set forth in Kluger, the constitutional right of access to the courts for redress of injuries would be subordinated to, and a creature of, legislative grace of or, . . . "majoritarian whim."

507 So.2d at 1089.[17/]

Under the plain language of Smith, Abdala's and Tsiknakis' right to recover have been "eliminated" within the meaning of the

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[17/] Perry and Folmar disagree with this conclusion. Neither contains any analysis of the issue. Folmar simply adopts Perry. But Smith speaks for itself and provides the most articulate response to the claim that a limitation on recovery is equivalent to the elimination of a claim.

access to courts provision.[18/] Although the cap in Smith did not completely abolish a plaintiff's right to sue, it sufficiently limited that right for this Court to conclude that it violated the access to courts provision. By the same token, the complete elimination here of the right to sue a party who previously had been responsible is no less a violation of a plaintiff's right of access to the courts.

The next question then is whether the statute which abolished the right to sue the long term lessor has provided a reasonable alternative to protect the rights of persons injured by drivers of long term leased vehicles.[19/] The statute leaves only the driver responsible and requires $100,000 in insurance. Limiting a person's recovery to $100,000 is wholly unreasonable. Smith, supra. The amount is inadequate to compensate a large number of automobile accident victims.

World Omni and Volvo Finance will claim that the victims can simply look to the driver's assets. But that remedy is illusory. If the driver had assets to pay any judgment, the statute would be unnecessary. Under the common law, an owner held liable for the driver's negligence under the dangerous instrumentality doctrine is entitled to indemnity from the driver. See Ins. Co. of N. Am.,

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[18/] Nor can the statute avoid scrutiny simply because the negligent driver remains subject to suit. Otherwise, the legislature could abolish the concept of agency in all cases and eliminate corporate liability entirely. Such a result could not stand.

[19/] Neither Perry nor Folmar addressed this issue because each concluded that the statute had not eliminated any pre-existing right.

supra, 348 So.2d at 1154. Thus, under the common law, if the driver is solvent, he, not the owner, will bear the ultimate judgment. In this situation, the statute does nothing for the owner that the common law does not already do.

The statute has an impact only when the driver is unable to pay the judgment. Under the common law, the injured party would be able to recover from the owner and the owner would be left with the worthless paper judgment against the driver. But under the statute, the owner is absolved and the plaintiff is left with the paper judgment. The sole effect of the statute is to shift the risk of a driver's insolvency from the owner, who had that risk under common law, to the injured party.[20/] World Omni's and Volvo Finance's claim that the statute preserves the plaintiff's claim against the driver is a myth.[21/]

In sum, the statute practically guarantees that the severely injured victim will be left with no meaningful redress for his

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[20/] This runs contrary the precise purpose of the dangerous instrumentality doctrine - to place on the owner the obligation to ensure the fiscal responsibility for its operation. S. Cotton Oil, supra, 86 So. at 632.

[21/] Defendants' arguments that the injured plaintiff may look to the driver for recompense ignores the reality of this special interest piece of legislation. Who are long term lessors? Corporations that are generally large and more than solvent. Who are long term lessees? The average persons who operate automobiles. If the assets of the driver/lessee were such an adequate remedy, why did the long term lessors need to convince the legislature to change the law and place the onus on the injured party, rather than the corporate lessor, to seek compensation from the driver/lessee? The answer is obvious. Yet the cost of covering such incidents is better allocated to the business which owns the vehicle and makes its money from leasing the vehicle, than it is to the innocent injured victim. In that fashion, the cost can be minimized better by spreading it through the industry.

injuries. It provides "no reasonable alternative".

In Sunspan, supra, the legislature amended a provision of the worker's compensation laws in an attempt to eliminate the liability of an employer to a third party tortfeasor, as well as the traditional elimination of liability to an employee. This Court found this attempt to eliminate liability an infringement on the tortfeasor's right of access to court in seeking indemnity or contribution from the employer for any damages the third party tortfeasor may have paid to the injured employee. This Court further found that the legislature had no "overpowering or compelling necessity" to support abolition of the tortfeasor's right. 310 So.2d at 7. The purposes to be achieved by the worker's compensation act were to secure wage compensation and medical payments without the expense and delay incurred in determining fault and to spread the employer's risks and pass on such losses as a cost of business. The limitation on the tortfeasor's contribution/indemnity rights did not serve those purposes. It gave the tortfeasor no alternative remedy yet it deprived him of his common law right to sue the employer. The statute was therefore unconstitutional.

The result here should be no different. This statute is unlike worker's compensation or automobile no-fault statutes. Unlike those statutes, this statute has no "no fault" element, as described in Sunspan. The injured person is given no similar quid pro quo for the loss of his rights. Section 324.021(9)(b) is simply part of the financial responsibility laws. Relieving long term lessors of liability does not further the purposes of those

laws. As this Court has stated:

> In our view, the financial responsibility law is only relevant to situations such as this insofar as it is necessary to protect the public from uncompensated losses arising from the use of motor vehicles. To this end the law requires motor vehicle owners to provide liability insurance coverage for the operation of their motor vehicles on the highways of this state. Independent of this insurance requirement is the common law obligation of vehicle owners under the dangerous instrumentality doctrine.

Ins. Co. of N. Am. v. Avis Rent-A-Car, supra, 348 So.2d at 1153.

Since injured persons are given no reasonable alternative under this statute to the loss of their common law right to sue the owner of the dangerous instrumentality, the final question is whether the legislature has an "overpowering public necessity" for abolishing the right.[22/] Generally, the legislature sets out such a necessity when it passes an act which limits rights in such a severe fashion. E.g., Smith, supra, 507 So.2d at 1084 (citing Preamble, Fla.Laws ch. 86-160); Carter v. Sparkman, 335 So.2d 802, 805-06 (Fla. 1976)(citing Preamble, Fla.Laws ch. 75-9 which established medical malpractice mediation panels based on a perceived insurance crisis).

Here, the preamble to the bill is silent on the legislature's intent vis-a-vis the dangerous instrumentality doctrine. It only refers to "an act relating to leasing of motor vehicles" and amendments to the "Motor Vehicle Warranty Enforcement Act".

22/ The legislature also must show that it had no less onerous alternatives to the one it selected. There is nothing even to indicate if the legislature considered alternatives here.

Therefore this Court must "divine" whether there is an overpowering necessity to eliminate long term lessors' tort liability. There is no evidence of one. There is no related insurance crisis. In fact, the practical result of this statute is simply to shift the burden of purchasing insurance from the leasing company, where it belongs and where it can be more easily paid for, to the potential innocent tort victim, who now faces an increased risk of being injured by an underinsured motorist and must compensate by purchasing increased uninsured motorist benefits.

In sum, this statute violates the access to courts provision of the Florida constitution. It should be invalidated.

b. The statute denies equal protection because it contains two improper classifications.

The statute is also invalid because it denies equal protection. Fla.Const. Art. I § 2; 14th amend., U.S.Const. Equal protection requires that statutory classifications be reasonable and not arbitrary. Any difference between those included in a class and those excluded from it must bear a reasonable relationship to a permissible legislative purpose. In re Estate of Reed, 354 So.2d 864 (Fla. 1978); Lasky v. State Farm Ins. Co., 296 So.2d 9 (Fla. 1974).

The statute here sets up two classifications. It distinguishes between those injured by vehicles held under long term leases and those injured by other vehicles. And it discriminates against those injured the worst. There is no rational basis for permitting minimally injured persons to obtain full recovery, yet

arbitrarily limit those who are more seriously injured. There is no rational basis for providing special treatment to long term lessors, as opposed to other owners including short term lessors. And there is no rational basis for eliminating the injured person's right to sue the long term lessor while still permitting the long term lessor to sue others for damage to the vehicle.

Folmar addressed this issue, and purportedly found a permissible legislative objective by referring to a legislative discussion concerning the elimination of double insurance premiums. In that discussion, one legislator argued that insurance was purchased by both the lessor and lessee, the cost of the lessor's insurance was passed on to the lessee and as a result the lessee paid twice for insurance. 560 So.2d at 800-01. The argument is nonsense. The lessor could require the lessee to purchase an insurance policy which names both the lessor and lessee as insureds.[23/] Or the lessor can purchase an insurance policy which names the lessees as insureds. In either event, there is a single premium charge; the specter of "double premiums" does not exist.[24/]

[23/] Both the Tsiknakis lease and the Abdala lease require the lessees to purchase insurance naming the lessors as additional insureds.

[24/] The court also noted that the classification is reasonable because the leases which exceed one year are nothing more than alternative financing agreements which provide a tax advantage to the lessee. This determination is simply wrong. A five year lease in which the lessee can purchase the vehicle at the end of the lease for a nominal amount may well be nothing more than an alternative financing arrangement. But a one year lease in which the lessee has no contractual right to purchase the vehicle at the end of the lease is no such thing. The legislative classification cannot be justified on the basis of "alternative financing".

Finally, the Folmar court concluded that it was not unfair to excuse a long term lessor from vicarious liability because it has no control over the vehicle. This is no answer at all. No owner who gives his car to another to drive has control over the vehicle. But vicarious liability is imposed in any event. That is the purpose of the dangerous instrumentality doctrine. The question here is whether it is fair or reasonable to take leases for more than a year out of the picture. Since there is no difference between a long term and a short term lease insofar as the element of control is concerned, there is no reason to exempt the former from liability while retaining liability for the latter.

This Court should reject the Fourth District's rationale and conclude that the statute denies equal protection.

c. The statute denies substantive due process.

Substantive due process guarantees that a statute will be reasonably related to a permissible legislative objective and is not discriminatory, arbitrary or oppressive. Fla.Const. Art. I § 9; 14th amend., U.S.Const.; Vildibill v. Johnson, 492 So.2d 1047 (Fla. 1986)(statutory classification cannot be wholly arbitrary); Lasky v. State Farm Ins. Co., 296 So.2d 9 (Fla. 1974). Such a statute may also be invalidated if it is not designed in any way to promote the public health, safety or welfare or the statute has no reasonable relationship to its announced purpose. Dep't of Ins. v. Dade County Consumer Advocate Office, 492 So.2d 1032 (Fla. 1986).

The sole purpose of § 324.021(9)(b) is to immunize a select

class of motor vehicle owners at the expense of individual rights. The legislature did not even bother to express any reason for doing this. Such action is not a legitimate exercise of the legislature's authority to promote the public health, safety or welfare. The statute is simply not even in the public interest. There is no rational reason to single out the most severely injured victims of automobile accidents and eliminate their most likely source of recovery. The statute is discriminatory, arbitrary and oppressive and denies substantive due process.[25/]

[25/] Folmar's response to this issue was identical to its response to the equal protection issue. Appellants therefore adopt the arguments presented supra at 27-28 concerning the weaknesses in Folmar's position.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request this Court to reverse the summary judgments, find that "long term" lessors are liable under the dangerous instrumentality doctrine and find that Fla.Stat. § 324.021(9)(b) does not apply to these cases so as to limit the lessor's common law liability under the dangerous instrumentality doctrine. In the least, this Court should find the statute is unconstitutional.

Respectfully submitted,

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