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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.

original

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JACINTO ABDALA AND MARLEN ABDA

Petitioners,

vs.

CASE NO. 75,966

WORLD OMNI LEASING, INC., et al.,

Respondents.

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REPLY BRIEF OF PETITIONERS TSIKNAKIS AND ABDALA

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## ARGUMENT

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

World Omni begins at 20-21 with several basic propositions with which Petitioners have no quarrel and which are not pertinent to the question certified.[1/] It then claims at 23 that the arguments in Petitioners' initial brief are built on "faulty foundations":

> 1) that Perry and Kraemer held that a lessor had never previously been held liable under the dangerous instrumentality doctrine for the negligence of a lessee; 2) that Perry and Kraemer turn on the issue of short term rentals versus long-term leases; and 3) that Perry was decided on the basis of beneficial ownership.

A review of Petitioners' initial brief demonstrates that the first proposition is in fact true; the second proposition is a reasonable inference from those decisions, although neither one specifi-

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1/ In it introductory argument, World Omni claims that Petitioners have inaccurately stated this issue to be the question certified. It claims that the Third District decided this case solely in the context of Fla.Stat. § 324.021(9)(b). The pertinent portion of the Third District's decision states:

> As was done in Raynor, we note that the question presented affects the rights of the motoring public, and certify the question to the Supreme Court . . . .

The Raynor case did not involve § 324.021 - it only concerned liability at common law of a long term lessor. The same is true of Kraemer, which was also cited in the opinion in this case. In light of those citations, and the Third District's specific reference to Raynor in certifying the question, it would be an unlikely conclusion that the certified question was not intended to encompass common law liability of long term lessors.

cally addressed it; and the third proposition was not set out in Petitioner's brief and makes no sense. In rebuttal of these newly created propositions, World Omni merely sets out a simplistic defense of Perry and Kraemer.[2/] Its arguments do not respond to the arguments in Petitioners' initial brief at 8-12 and Petitioners therefore rely on their initial arguments.

In response to Petitioners' claim that decisions such as Kraemer set up arbitrary distinctions between short term and long term leases, World Omni sets out the factual differences between such leases.[3/] But none of those distinctions relate to the issue of liability. The question of who is responsible for servicing the car or paying taxes is not pertinent to liability under the dangerous instrumentality doctrine. Such issues did not figure into this Court's decision in Southern Cotton Oil, nor into any subsequent decisions on the doctrine. Therefore, what difference does it make if a long term lessee is responsible for providing service and a short term lessee is not?[4/]

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[2/] These misstatements are accompanied by some rather inappropriate language and sarcasm, a problem which pervades World Omni's brief and should better have been written somewhere other than a brief in this Court.

[3/] Both Volvo Finance and World Omni criticize Petitioners' choice of language in referring to short term and long term leases. Volvo Finance finds this inappropriate because those phrases do not appear in the statute or in Perry. But Petitioners selected that phraseology because it appropriately described the circumstances in a short fashion. Volvo Finance's argument on this point in its brief at 14-15 serves no useful purpose in terms of resolving the issues now pending.

[4/] The same question can be asked to World Omni's claim that a long term lessee can select her vehicle, but a short term lessee (continued...)

World Omni then engages in a lengthy dissertation on common law liability of lessors. This discussion is interesting, but irrelevant to any issue in this Court. If the question is whether liability has ever been imposed on a long term lessor under Florida law, World Omni's historical discussion tells the Court nothing it did not previously know from reading Petitioners' brief. If the question is a constitutional one, i.e., whether the legislature could constitutionally abolish a cause of action which had existed at common law, then World Omni's discussion is irrelevant because the true question is whether the cause of action existed before the adoption of the constitution. See argument IIIa at 8-9, infra. Finally, World Omni's discussion is incomplete. It ignores this Court's decision in Susco Car Rental Sys. of Florida v. Leonard, 112 So.2d 832 (Fla. 1959). This omission is quite serious because the primary thrust of World Omni's argument is that vicarious liability under the dangerous instrumentality doctrine is based on possession, dominion and control. World Omni's brief at 30. See also Volvo Finance's brief at 25 ("In Susco . . . the lessor retained control over who could operate the vehicle"). But, according to Susco, that is not the basis for liability. The key is consent, after the relinquishment of control.

> In the final analysis, while the rule governing liability of an owner of a dangerous

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[4]/(...continued)
cannot. Assuming that statement were completely accurate, which it is not, how can vehicle selection relate to liability imposed as a result of public policy? The imposition of liability is not based on whether the individual has leased a sedan or a sports car.

> agency who permits it to be used by another is based on consent, the essential authority or consent is simply consent to the use or operation of such an instrumentality beyond his own immediate control. Only to that limited extent is the issue pertinent when members of the public are injured by its operation, and only in a situation where the vehicle is not in operation pursuant to his authority, or where he has in fact been deprived of the incidents of ownership, can such an owner escape responsibility.

112 So.2d at 837. Possession and control are not the answers to liability under the dangerous instrumentality doctrine.

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

Volvo Finance's first argument concerning the statute's interpretation is found at 7 of its brief. Through underlying selected portions of § 324.021(9)(b), it concludes that the statute states: "the lessor . . . shall not be deemed the owner . . . for the acts of the operator in connection therewith". It claims this phrase clearly and unambiguously relieves the lessor of liability under the dangerous instrumentality doctrine. But this is not what the statute says. Instead, it says:

> The lessor . . . 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 operators in connection therewith . . . .

This phrase is not clear; it is not unambiguous; it says nothing

about liability or the dangerous instrumentality doctrine. Statutes cannot alter common law unless they do so clearly and unambiguously. City of Hialeah v. State ex rel Morris, 136 Fla. 498, 183 So.2d 745 (1938); City of Pensacola v. Capital Realty Holding Co., Inc., 417 So.2d 687 (Fla. 1st DCA 1982). This statute fails that test. Volvo Finance's argument on this point should be rejected.[5/]

World Omni's arguments concerning the statute's interpretation are scattered throughout its brief. First, World Omni perfunctorily relies at 8-10 on Folmar and Perry. The flaws in those decisions are discussed throughout Petitioners' initial brief. Then at 10, it criticizes Petitioners' argument because it claims that argument would make the statute useless and of no purpose. World Omni asks: "If subsection (b) does not relieve the long-term lessor from liability, what is the purpose of the required increase of the lessor's liability insurance?" The answer is: the required increase substitutes for the insurance which the lessor otherwise would have provided. The statute can plainly adjust financial responsibility, i.e., insurance, without altering common law liability.

World Omni then argues at 13-20 that the definition of "owner" contained in § 324.021(9)(a) somehow supports its position that the provisions of this statute operate to limit liability,

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[5/] Volvo Finance presents additional statutory construction arguments at 19-22 where it essentially relies on Folmar and Kraemer. These arguments, and the fallacy of Folmar and Kraemer have been fully addressed in Petitioners' initial brief at 17-20 and will not be repeated here.

not merely affect insurance requirements. Volvo Finance presents a substantially similar argument at 7-10. These arguments are similarly without merit. As noted in Petitioners' initial brief at 16-17, this definition is limited to chapter 324, which only affects insurance requirements.

The out-of-state decisions cited by World Omni do nothing to support its position. If fact, some of those decisions cut against World Omni's arguments. In Lee v. Ford Motor Co., 595 F.Supp. 1114 (D.D.C. 1984), contrary to World Omni's statement at 14, the statute was not identical to § 324.021. The key difference is that the District of Columbia has a statute which imposes liability on vehicle owners, and then sets out a definition of who is an "owner" for purposes of that liability statute. This liability statute altered the common law in the District, under which an owner of an automobile was not liable for damages caused by another who drove the automobile. 595 F.Supp. at 1114. The same is true of the other cases cited in World Omni's brief at 16, 17. Moore v. Ford Motor Credit Co., 420 N.W.2d 577 (Ct.App.Mich. 1988)(statute imposes liability, then defines owner); Siverson v. Martori, 119 Ariz. 440, 581 P.2d 285 (Ct.App.Ariz. 1978)(Arizona does not impose liability under dangerous instrumentality doctrine; court interpreted statute which made it a misdemeanor for a person to drive a vehicle in an unsafe condition). Lee is the only case cited by World Omni which involves a lease. The remaining cases all involve conditional sales. Cowles v. Rogers, 762 S.W.2d 414 (Ct.App.Ky. 1989); Bly v. Mid-Century Ins. Co., 698

P.2d 877 (Nev. 1985); Beatty v. W. Pacific Ins. Co., 445 P.2d 325 (Wash. 1968); Riggs v. Gardikas, 78 N.M. 5, 427 P.2d 890 (1967); High Point Savings and Trust Co. v. King, 253 N.C. 571, 117 S.E.2d 421 (1960); Arter v. Jacobs, 234 N.Y.S. 357 (S.Ct.App.Div. 1929). As explained in Petitioners' initial brief at 9-10, conditional sales are fundamentally different from leases.

World Omni then claims at 31-32 that the dangerous instrumentality doctrine is an integral part of the financial responsibility laws and therefore it is obvious that § 324.021 should be construed as affecting liability, not just financial responsibility. But nothing in its brief supports that conclusion. Chapter 324 regulates insurance requirements. It does not regulate liability. The language is plain on its face.

World Omni also claims that its conclusion as to the intent of § 324.021(9)(b) is supported by the legislative history. But the only "legislative history" on which World Omni relies is an incompetent piece of evidence - a floor debate. World Omni ignores the evidentiary arguments set out in Petitioners' initial brief at 18-20 concerning this debate. It selectively distinguishes the cases which it manipulates to be factually different, e.g., Fields v. Zinman, 394 So.2d 1133 (Fla. 4th DCA 1981), and ignores the ones it cannot distinguish, e.g., State v. Kaufman, 430 So.2d 904 (Fla. 1983); Security Feed & Seed Co. v. Lee, 138 Fla. 592, 189 So. 869 (1939). Petitioners need add nothing to the arguments they originally presented to demonstrate that the only competent legislative history which could be considered supports

the plain meaning of the statute - it does not apply to liability, only to insurance.

b. The statute cannot apply to leases entered into before its effective date.

In large part, World Omni has missed the point of this argument. Abdala does not claim that the statute unconstitutionally affects a preexisting cause of action, as World Omni assumes in its argument at 36-38. Abdala's only argument addresses the improper attempt to affect contractual relationships which arose before the statute's effective date. At the time Jane Carver entered into her lease with World Omni, it shared with her responsibility for any negligent operation of the vehicle. Contrary to World Omni's arguments at 38-39, the statute altered that liability. Therefore, it cannot be constitutionally applied here.

World Omni also claims that Abdala does not have standing to raise this issue because it affects a lease to which he was not a party. But Abdala has been injured by that application. And Carver will be injured if he is left alone to defend this action without World Omni.

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

a. The statute denies access to courts.

First, World Omni claims Petitioners have not been deprived of access to the courts because they are still free to seek re-

dress from Carver.[6/] The answer to this argument is found in Smith v. Dep't of Ins, 507 So.2d 1080 (Fla. 1987) and is fully addressed in Petitioners' initial brief at 27-28. To compare the remaining suit against Carver with the cases which approved the substitution of a state agency as defendant in place of an individual employee of the state is no comparison at all. See World Omni's brief at 41 (citing White v. Hillsborough County Hosp. Auth., 448 So.2d 2 (Fla. 2d DCA 1983)).

Next, World Omni claims that Petitioners have not been deprived of access to the courts because the nature of the right at issue is not the sort which is protected by the constitutional provision. Volvo Finance presents the same arguments in its brief at 23-24. As this Court has recently stated, protection is provided

> where a right of access to the courts for redress of a particular injury has been provided by statute or the common law predating Article I, § 21 of the Constitution . . . .

Sunspan Eng'g & Constr. Co. v. Spring-Lock Scaffold Co., 310 So.2d 4, 7 (Fla. 1975). This Court did not limit that protection to the common law as incorporated by Fla.Stat. § 2.01. As World Omni itself states at 12, "[a]fter all, "common law" is nothing more than case law and statutory law".

Finally, at 42-43, World Omni offers justification for the limits of financial responsibility set out in the statute by re-

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[6/] World Omni notes at 42, n.14 that Petitioners never sued he lessee, Jane Carver. That is not true. Jane Carver was joined as a defendant several months ago.

ference to various hearsay materials submitted in its appendix. These materials are not part of the record in this case. These hearsay materials are certainly not appropriate for consideration on summary judgment. See Fla.R.Civ.P. 1.510(e). Besides, they address Miami and Dade County, but not the rest of the state. Such "evidence" does not provide a justification for altering a state-wide statute.

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

The only justification which World Omni offers for the differing treatment of long term lessors is that the lessor has relinquished control over the vehicle and therefore should be relieved of responsibility for injuries. But relinquishment of control has never been the key to relief from liability under the dangerous instrumentality doctrine. Instead, relinquishment of control forms the basis for liability under that doctrine. See argument, supra at 3-4.

World Omni's only response to Petitioners' discrimination argument based on the irrational differences between long term and short term leases is to claim at 46, n.16 that Petitioners have no standing. This statement makes no sense. Petitioners' cases do not have to involve short term leases for them to have standing to point out the discrimination between long term and short term leases.

Volvo Finance argues at 26-27 that there is no unfair treatment here because the statute mandates that the lessee provide

higher minimum insurance benefits than would otherwise be required. But this argument does not address the problem presented by either of the two arbitrary classifications - distinguishing between short and long term lessees and discrimination against those injured the worst. The statute essentially caps damages for those injured the worst. The fact that it does so at a slightly higher level does not mean it is any less discriminatory.

Further, Volvo Finance claims at 27-28 that the statute bears a reasonable relationship to a legitimate state interest in providing financial security requirements for those who are legally responsible for the operation of a motor vehicle. But owners were legally responsible before the passage of this statute. Now, those owners are not responsible and the injured party's recovery is limited. See Petitioners' initial brief at 28-29.

c. The statute denies substantive due process.

World Omni does not address this issue directly. Volvo Finance argues at 28-29 that the legislative objective is to provide a source of recovery to injured persons - the same argument it makes in its brief at 27-28 to justify its equal protection arguments. Petitioners' reply is the same. Contrary to Volvo Finance's characterization of Petitioners' position, Petitioners have never assumed that those most severely injured are always injured by those who drive leased vehicles. Petitioners have simply posited that example to demonstrate the statute's invalidity and because that is the factual scenario here.

## CONCLUSION

For the foregoing reasons and the reasons stated in the initial brief, 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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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 25th day of September, 1990, to: Edward D. Schuster, Esq., PYSZKA, KESSLER, MASSEY, WELDON, CATRI, HOLTON & DOUBERLEY, P.A., Co-Counsel for Volvo Fin., The 110 Tower, 20th Floor, Ft. Lauderdale, FL 33301; William Douberley, Esq., PYSZKA, KESSLER, MASSEY, WELDON, CATRI, HOLTON & DOUBERLEY, P.A., Counsel for Volvo Finance, 2665 S. Bayshore Drive, 5th Floor, Miami, FL 33133; Jackson F. McCoy, Esq., Counsel for Sangerman, 2900 Middle St., 5th Floor, Miami, FL 33133; Judy Shapiro, Esq., HERZFELD AND RUBIN, Counsel for World Omni Leasing, 801 Brickell Ave., Suite 1501, Miami, FL 33131; Thomas E. Backmeyer, Esq., Hoppe, Backmeyer & Stokes, P.A., Co-Counsel for World Omni Leasing, 66 W. Flagler St., 2nd Fl., Miami, FL 33130; and Frank Angones, Esq., ADAMS, HUNTER, ANGONES, ADAMS, ADAMS & McCLURE, 900 Concord Bldg., 66 W. Flagler St., Miami, FL 33130.

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