IN THE SUPREME COURT OF FLORIDA

CASE NO.: 76,074

FRANK ROCA, as Personal Representative of the Estate Of Frank J. Roca, Jr., deceased,

Petitioner,

vs.

VOLKSWAGEN CREDIT, INC., a foreign corporation,

Respondent.

FILED
SID J. WHITE
AUG 20 1990
CLERK, SUPREME COURT
By
Deputy Clerk

PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

On November 19, 1987, the decedent, Frank J. Roca, Jr., was operating a motorcycle when Mary Beth Saibi negligently operated the vehicle she was driving so as to collide with the motorcycle operated by the decedent. (R. 3) As a result of Ms. Saibi's negligence, Frank J. Roca, Jr. was killed. The vehicle operated by Mary Beth Saibi was owned by Respondent, Volkswagen Credit, Inc., and leased to Mary Beth Saibi on September 18, 1987. (R. 30)

The lease agreement between respondent and Mary Beth Saibi was for a period of sixty months and required the lessee to obtain automobile liability insurance with limits of not less than $100,000.00 for any one person for bodily injury or death, $300,000.00 for any one accident for bodily injury or death and $50,000.00 for property damage liability coverage. (R. 30) At the time of the accident in this case, Mary Beth Saibi had a policy of automobile insurance from State Farm Mutual Automobile Insurance Company providing liability insurance coverage on the vehicle in question and said policy was in full force and effect on November 19, 1987. (R. 26-27) This policy of insurance contained bodily injury limits of $100,000.00 per person and $300,000.00 per accident and property damage liability coverage of $50,000.00. (R. 26-27) The lease stated that it was a true lease and that the lessor remained the owner of the vehicle. (R. 31). The lease included the following provisions:

> R. LEASE ONLY - NO OPTION TO PURCHASE: I agree that this agreement is one of lease and not of sale. There is no option for me to purchase the vehicle.

L. OWNERSHIP: This is a lease only and you remain the owner of the vehicle. I will not transfer, sublease, rent or do anything to interfere with your ownership of the vehicle.

K. USE:
1. **I will** allow only licensed drivers to operate the vehicle.
2. **I will** keep the vehicle free of all fines, liens and encumbrances.
3. **I will not** use the vehicle illegally, improperly or for hire.
4. **I will not** use the vehicle to pull trailers.
5. **I will not** remove the vehicle from the United States or Canada.
6. **I will not** alter, mark or install equipment in the vehicle without your written consent and I agree to remove same at my sole cost.

M. RETURN OF THE VEHICLE: At the end of this Lease, I will return the vehicle in good condition to you at the address shown on the front of this Lease or to such other place as VCI may direct and pay any amounts I owe under this Lease.

Petitioner, Frank Roca, as Personal Representative of the Estate of Frank J. Roca, Jr., deceased, filed suit against Mary Beth Saibi and Volkswagen Credit, Inc. on June 27, 1988. (R. 2-4). The complaint alleged that Mary Beth Saibi negligently operated or maintained the leased vehicle so as to cause it to collide with the motorcycle operated by the decedent and as a direct proximate result of the defendant's negligence, Frank J. Roca, Jr. was killed. (R. 3) The complaint further alleged that Mary Beth Saibi was operating this vehicle with the consent and knowledge of its owner, Respondent, Volkswagen Credit, Inc.

Volkswagen Credit moved for final summary judgment on the grounds it was not the legal owner of the automobile in question and therefore had no liability or obligation to the petitioner pursuant to Section 324.021(9)(b), Florida Statutes. (R. 15-17). The basis

for this motion was that Section 324.021(9)(b), which was enacted in 1986, rendered it immune from the vicarious liability which petitioner attempted to impose. (R. 23-31) Subsection 9(b) 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."

Petitioner argued below that the statute does not eliminate the lessor's tort liability under the dangerous instrumentality doctrine but rather only relieves a long term lessor of its obligation to provide proof of financial responsibility under Chapter 324. Petitioner also argued that the statute was unconstitutional because it denied access to the courts, equal protection, and substantive due process.

The trial court entered summary judgment in favor of Volkswagen Credit, Inc. and held that Section 342.021(9)(b) does not merely affect an owner's obligations under Chapter 324, Florida Statutes, but eliminates the lessor's common law liability as owner of the vehicle, if the vehicle is leased for a period of one year or longer and the required insurance policy limits of not less than $100,000/$300,000 bodily injury liability and $50,000.00 property damage liability are in effect. (R. 59) The trial court also rejected petitioner's argument that Section 324.021(9)(b) is unconstitutional and held that the statute was constitutional as applied. (R. 60)

The judgment was appealed to the District Court of Appeal, Third District. (R. 71) Petitioner's initial brief addressed the above issues decided by the trial court. At the time the initial brief was filed, the Second District Court decided Perry v. G.M.A.C. Leasing Corp., 549 So.2d 680 (Fla. 2d DCA 1989), review denied, 558 So.2d 18 (Fla. 1990). The issue in Perry was whether section 324.021(9)(b) was constitutional and in resolving this question, the court determined that long-term lessors were not liable under the dangerous instrumentality doctrine prior to 1986. Volkswagen Credit, Inc.'s answer brief relied primarily on the Second District Court of Appeal's decision in Perry.

Before the petitioner's reply brief was filed, the Second District also decided Kraemer v. General Motors Acceptance Corp., 556 So.2d 431 (Fla. 2d DCA 1989), (Supreme Court case no. 75,870) which holds that, prior to 1986, owner/lessors leasing their vehicles under long term leases were not liable under Florida's dangerous instrumentality doctrine. Therefore, the argument in petitioner's reply brief was devoted to demonstrating why Perry and Kraemer were wrongly decided. Petitioner also distinguished the facts of those cases from the facts of this case. Unlike the conditional sale leases in Perry and Kraemer, the lease in this case did not contain an option to buy. The Third District Court of Appeal filed a per curiam affirmance decision in this case citing Palmer v. R.S. Evans, Jacksonville, Inc., 81 So.2d 635 (Fla. 1955), and Kraemer, supra. Accordingly, the Third District's decision was based on its conclusion that a long term lessor is not liable under the dangerous

instrumentality doctrine. (Supreme Court case no. 75,870)

Petitioner filed a motion for rehearing and requested that the Third District Court certify the issue to this court. However, this motion was denied. In the meantime, the Third District had issued its opinion in Raynor v. Equilease Corporation, 15 FLW D694 (Fla. 3d DCA Mar. 13, 1990), certifying its decision to this Court as one of great public importance pursuant to Article 5, sections 3(b) and (4) of the Florida Constitution. A few weeks later the Third District also certified this question in Tsiknakis v. Volvo Finance North America, Inc., 15 FLW D992 (S. Ct. Case No. 75,968, 75,966). Accordingly, petitioner filed a motion to amend order on rehearing to also certify the issue in this case to this Court which was subsequently granted by opinion filed June 12, 1990. A copy of this decision is included in the appendix to this brief. (A. 1)

SUMMARY OF THE ARGUMENT

The question certified by the Third District to this Court is whether long term lessors are liable under the dangerous instrumentality doctrine for injuries caused by the negligence of lessees. Florida courts have long held that the dangerous instrumentality doctrine applies to hold lessors liable for negligent operation of a vehicle and no distinction was made between long term and short term leases. This Court recognized in Susco Car Rental System of Florida v. Leonard, 112 So.2d 832 (Fla. 1959), that control over a motor vehicle has never been the crucial factor in a determination of liability under the dangerous instrumentality doctrine. An owner is not responsible under the dangerous instrumentality doctrine only when he no longer has beneficial ownership of the vehicle. A lease, unlike a conditional sale, does not transfer "beneficial ownership" but only "possession and control". Accordingly, the dangerous instrumentality doctrine applies to hold a long term lessor liable for injuries caused by the negligence of the lessee.

Section 324.021(9)(b), Florida Statutes (1986), does not abrogate the dangerous instrumentality doctrine with respect to owners/lessors who comply with this statute. This statute fails to indicate that the legislature intended to change or modify the application of the dangerous instrumentality doctrine with respect to an owner's liability for the use of its automobile. Section 324.021(9)(b) operates only to relieve a long term lessor of its obligation to provide proof of financial responsibility under chapter 324.

The dangerous instrumentality doctrine, which has applied to automobiles since 1920 in Florida, is protected by the access to courts provision set forth in Article I, Section 21 of the Florida Constitution. The legislature may not abolish this right without providing a reasonable alternative to protect the rights of the people of this state unless the legislature shows that there is no alternative method of meeting such public necessity and an overpowering public necessity for the abolishment of this right. The statute fails to meet this test and is thus in violation of Article I, Section 21 of the Florida Constitution.

The statute clearly discriminates against persons injured by leased vehicles as compared to others injured by a motor vehicle. No legitimate legislative purpose is served by denying victims of a leased vehicle accident the same redress available to all other victims injured in a motor vehicle accident. The statute does not promote the health, safety or welfare of the people, but actually infringes upon the injured victim's right of redress for injuries. The statute promotes the interest of the leasing industry at the expense of all other motor vehicle owners, lessors and injured victims. Accordingly, the statutory classification created by section 324.021(9)(b) is arbitrary and unreasonable and thus violates the equal protection and due process clauses of the Florida and United States Constitutions.

Argument

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

The Third District relied on the decisions of Palmer v. R.S. Evans, Jacksonville, Inc., 81 So.2d 635 (Fla. 1955) and Kraemer v. G.M.A.C., 556 So.2d 431 (Fla. 2d DCA 1989), in concluding that a long term lessor was not liable under the dangerous instrumentality doctrine. However, the Third District overlooked this Court's emphasis in Palmer upon the fact that a sale was involved "and that the sale had been completed" before the accident in suit. 81 So.2d at 637. Petitioner respectfully adopts and incorporates the arguments concerning the Second District's misinterpretation of Palmer contained in Perry and Kraemer presented by the Petitioner in Raynor v. Equilease, case no. 75-870.

Prior to Perry and Kraemer, Florida courts had held that the dangerous instrumentality doctrine applied to hold lessors liable for negligent operation of a vehicle and no distinction was made between "long term" and "short term" leases. See: Lynch v. Walker, 31 So.2d 268 (Fla. 1947); Fleming v. Alter, 69 So.2d 185 (Fla. 1954); Susco Car Rental System of Florida v. Leonard, 112 So.2d 832 (Fla. 1959); Racecon, Inc. v. Mead, 388 So.2d 266 (Fla. 5th DCA 1980). In Perry and Kraemer, the Second District latched onto the concept of beneficial ownership set forth in Palmer. However, it is apparent the Second District confused the concept of "benefical ownership"

with that of "possession and control". A conditional sale, as in Palmer, creates beneficial ownership whereas 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 chattel to owner).

Here, the lease at issue is not conditional. In contrast to a conditional sales agreement, the lease in this case states that "[t]his is a lease only and you remain the owner of the vehicle. I will not transfer, sublease, rent, or do anything to interfere with your ownership of the vehicle." (R. 31) Paragraph R of the lease agreement specifically provides:

> LEASE ONLY-NO OPTION TO PURCHASE: I agree that this agreement is one of lease and not of sale. There is no option for me to purchase the vehicle.

(R. 31) In addition, the lease imposes significant restrictions on the lessee's use of the vehicle. (R. 31) Accordingly, in contrast to the conditional sale in Palmer, Volkswagen Credit, Inc. did not transfer beneficial ownership of the vehicle and clearly enjoys more than "naked legal title" as security for payment.

The foregoing demonstrates that the conclusions reached in Perry and Kraemer that a long term lessor stands in the same position as a conditional seller is without any legal or factual support.

In enacting section 324.021(9)(b), Florida Statutes, the Florida Legislature recognized the liability of long term lessors under the dangerous instrumentality doctrine which was first established by this Court in 1920. Southern Cotton Oil Company v. Anderson, 81 Fla.

441, 86 So. 629 (1920). Petitioner submits that the court in Perry and Kraemer failed to recognize the key distinction between leases and conditional sales. As aptly stated by the Petitioner in Raynor, a lease, by definition, does not transfer any ownership, beneficial or otherwise, but rather only transfers possession. A lease leaves both legal and beneficial ownership in the owner/lessor. The Second District Court's decision in Perry and Kraemer overlooked the fact that this Court has recognized that control over a motor vehicle has never been the crucial fact in a determination of liability under the dangerous instrumentality doctrine See: Susco Car Rental System of Florida v. Leonard, 112 So.2d 832 (Fla. 1959). In Susco, this Court concluded:

> In the final analysis, while the rule governing liability of an owner of a dangerous 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 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. Certainly the terms of a bailment, either restricted or general, can have no bearing upon that question.

Id. at 837. See also: Union Air Conditioning, Inc. v. Troxtell, 445 So.2d 1057 (Fla. 3d DCA) review denied, 453 So.2d 45 (Fla. 1984); Tribbitt v. Crown Contractors, Inc., 513 So.2d 1084 (Fla. 1st DCA 1987).

This Court made it clear in Susco that an owner cannot deliver a vehicle into the hands of another without continuing his full civil

liability for negligent use of the motor vehicle and an owner cannot escape such liability by contract. 112 So.2d at 837. Based on the foregoing, petitioner respectfully submits that this court should find that a long term lessor is liable under the dangerous instrumentality doctrine.

II. THE TRIAL COURT ERRED IN ENTERING JUDGMENT IN FAVOR OF THE OWNER/LESSOR PURSUANT TO SECTION 324.021(9)(b), FLORIDA STATUTES BASED ON ITS FINDING THAT THIS STATUTE ABROGATED THE COMMON LAW TORT LIABILITY OF THE OWNERS/LESSORS OF MOTOR VEHICLES.

Petitioner submits that the legislature did not intend, by the enactment of section 324.021(9)(b), Florida Statutes (1986), to abrogate the dangerous instrumentality doctrine with respect to owners/lessors who meet the requirements of the statute. Initially, the common law obligation of vehicle owners under the dangerous instrumentality doctrine is independent of any requirement of the financial responsibility law upon which respondent relies. Insurance Company of North America v. Avis Rent-A-Car Systems, Inc., 348 So.2d 1149, 1153 (Fla. 1977). See also: Racecon, Inc. v. Mead, 388 So. 2d 266, 268 (Fla. 5th DCA 1980) (independent of any insurance requirement 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 vehicles in the course of its intended use). In addition, nowhere in the statute is there any direct expression by the legislature that it intended to abolish the 70 year old dangerous instrumentality doctrine. It is generally presumed that no change in the common law was intended by

the legislature unless the statute explicitly states otherwise. Carlisle v. Game and Freshwater Fish Commission, 354 So.2d 362, 364 (Fla. 1977).

An equally well established principle of statutory construction is that even where a statute is designed to supersede or modify rights provided by the common law to some degree, such a statute must be strictly construed and will not be interpreted so as to displace the common law any further than is expressly declared. Arias v. State Farm Fire and Casualty Company, 426 So.2d 1136 (Fla. 1st DCA 1983); Allstate Mortgage Company of Florida v. Strausser, 277 So.2d 843 (Fla. 3d DCA 1973); Graham v. Edwards, 472 So.2d 803 (Fla. 3d DCA 1985); Rudolph v. Unger, 417 So.2d 1095 (Fla. 3d DCA 1982). The failure of new subsection (9)(b) to expressly state that it intended to abolish the dangerous instrumentality doctrine indicates that such a radical change was not intended by the legislature.

Petitioner submits that the legislature only intended to shift the requirement of showing proof of financial responsibility under Chapter 324 from the lessor to the lessee where the lessor requires the lessee to maintain a minimum of $100,000/$300,000 in bodily injury limits of insurance. While the statute shifts the burden of coverage for the first $100,000/$300,000 to the lessee from the lessor, petitioner submits it leaves intact the liability of the lessor and its financial responsibility for amounts in excess of the mandatory minimum coverage. For example, the amendatory language itself is self-limiting. Section 324.021 specifically provides that the definitions contained therein are to be used only "for the

purpose of this chapter".

The purpose of Chapter 324 is stated in section 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 section 324.051(2) shall respond for such damages and show proof of financial ability to respond for damages ..."

Chapter 324 does not regulate or control the extent to which a driver is liable to injured third parties. Rather, the purpose of this chapter is to require those who are legally liable to make adequate financial provision to discharge that liability. The purpose of this chapter is to promote highway safety and secure compensation for injured victims of motor vehicle accidents, Harrison v. Larson, 133 So.2d 446 (Fla. 1st DCA 1961), and not to immunize automobile owners/lessors from tort liability.

The amended language states in pertinent part that "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 operator in connection therewith". The term "financial responsibility" has a specific meaning as used therein and throughout Chapter 324. For example, subsection (7) of section 324.021, defines "proof of financial responsibility" as "that proof of ability to respond in damages for liability on account of accidents arising out of the use of a motor vehicle", and subsection (8) speaks in terms of an owner's or

operator's policy of liability insurance being furnished as proof of "financial responsibility". Section 324.031 discusses the means by which an operator or owner of a vehicle may prove his "financial responsibility by furnishing evidence of insurance, posting a bond, depositing cash or securities, or furnishing a certificate of self-insurance."

It is a well established rule of statutory construction that words must be interpreted in the specific context in which they are used. Variety Children's Hospital, Inc. v. Perkins, 382 So.2d 331, 337 (Fla. 3d DCA 1980). As this court noted in Ocasio v. Bureau of Crimes Compensation Division of Worker's Compensation, 408 So.2d 751 (Fla. 3d DCA 1982):

> Technical words and phrases that have acquired a peculiar and appropriate meaning in law, cannot be presumed to have been used by the legislature in a loose popular sense. To the contrary, they have been presumed to have been used according to their legal meaning. They will ordinarily be interpreted not in their popular, but in their fixed legal sense and with regard to the limitations the law attaches to them. Where legal terms are used in a statute, unless a plainly contrary intention is shown, they must receive their technical meaning.

Id. at 753. See also: City of Tampa v. Thatcher Glass Corporation, 445 So.2d 578 (Fla. 1984).

Accordingly, it is apparent that section 342.021(9)(b) simply provides that the long term lessor of a vehicle is not considered to be its owner for the purpose of establishing his "financial responsibility" (i.e. his duty to comply with the provisions set forth elsewhere in Chapter 324) for either the operation of the leased vehicle or for the acts of its operator. In other words, the

owner is no longer obligated to carry liability insurance on the vehicle and is not subject to the penalties provided in Chapter 324 as long as the lessee maintains the required levels of insurance. This strict interpretation of the statute comports not only with the well established principles of statutory construction set forth above, but also with the legislature's specific limiting language at the beginning of section 324.021 which expressly restricts the scope of that section.

In entering final summary judgment in favor of Volkswagen Credit, Inc. and rejecting the foregoing argument asserted by the petitioner, the trial court violated yet another rule of statutory construction. Where a statute is fairly susceptible to two interpretations, one of which would render the statute unconstitutional, the court should avoid the unconstitutional interpretation and adopt a construction that renders the statute valid. Vildibill v. Johnson, 492 So.2d 1047 (Fla. 1986); Miami Dolphins, Ltd. v. Metropolitan Dade County, 394 So.2d 981, 988 (Fla. 1981). Any interpretation of section 324.021(9)(b) contrary to that set forth above, would have the effect of abolishing the dangerous instrumentality rule, immunizing the automobile leasing industry from liability and would violate a number of constitutional provisions.

The Fourth District in Folmar v. Young, 560 So.2d 798 (Fla. 4th DCA 1990), addressed the issues set forth in Points II and III of this brief. The decision in Folmar is presently being reviewed by the Fourth District on rehearing en banc. The court in Folmar disregarded the plain language of the statute and instead relied on

portions of the house debate on adoption of this provision in concluding that the legislature was attempting to limit liability under the dangerous instrumentality doctrine. 560 So.2d at 800-801. In so doing, the Fourth District failed to follow the well-settled case law that courts should never resort to rules of construction where the legislative intent is plain and unambiguous. See: Carawan v. State, 515 So.2d 161 (Fla. 1987). Consideration of this Florida debate violates the "first rule of statutory construction" that the legislative history of an act is to be consulted only when there is doubt as to what is meant by the language of the statute itself. Rinker Materials Corporation v. City of North Miami, 286 So.2d 552, 554 (Fla. 1972). Legislative intent is to be determined primarily from the language of the statute itself and not from conjecture as to the subjective intent of the legislature. Board of Commissioner of State Institutions v. Tallahassee Bank and Trust Company, 108 So.2d 74 (Fla. 1st DCA 1958).

Moreover, it is important to note that the 1987 legislature after receiving a staff recommendation to revise the statutory amendment 324.021(9)(b) "to remove confusion that will arise due to the confusing language in the provision, and to properly evidence the legislative intent underlying it", rearranged the wording of Subsection(b) and titled that amendment "An act relating to motor vehicle liability insurance... clarifying applicability of insurance requirements to owners/lessors". Chapter 88-370 laws of Florida. (A. 3). It is proper for this court to consider subsequent amendments which were intended to clarify the legislature's

intention. Ivey v. Chicago Insurance Co., 410 So.2d 494, 497 (Fla. 1982).

The title given to the act is significant because it defines the scope of the act as well as providing evidence of the legislative intent. See: Finn v. Finn, 312 So.2d 726 (Fla. 1975); Parker v. State, 406 So.2d 1089 (Fla. 1981). The 1986 amendment to section 324.021 was part of a larger bill; Chapter 86-229, Laws of Florida; the primary purpose of which was to amend the "Motor Vehicle Warranty Enforcement Act" (Chapter 681, Fla. Stat.) by expanding its protection to those consumers who lease motor vehicles rather than purchase them.

The Senate staff analysis and economic impact statement supports the argument that the maximum intended scope of the amendment to section 324.021(9) was only for the purposes of Chapter 324. (A. 2-3). The only economic impact foreseen by the drafters of that document was in relation to the warranty provisions of the bill. Legislative staff summaries and analysis are accorded significant respect by courts as extrinsic aids to statutory interpretation. Ellsworth v. Insurance Company of North America, 508 So.2d 395 at 401, n.3 (Fla. 1st DCA 1987).

The foregoing demonstrates that the legislature did not intend to totally abolish the tort liability on the part of the auto leasing industry in enacting section 324.021(9)(b). Accordingly, the trial court's entry of final summary judgment in favor of the respondent should be reversed.

III. THE TRIAL COURT ERRED IN HOLDING THAT SECTION 324.021(9)(b) WAS CONSTITUTIONAL.

a. Section 324.021(9)(b) Unconstitutionally Violates the Right of Access to the Courts in Violation of Article I, Section 21 of the Florida Constitution by Abolishing the Right to Recover from the Owners/Lessors of Dangerous Instrumentalities.

Where a right of access to the court for redress for a particular injury has been provided by statutory or common law, the legislature is without power to enact legislation to abolish that right without providing a reasonable alternative to protect that right unless the legislature can show an overpowering public necessity for the abolishment of that right, and that no alternative method of meeting such public necessity can be shown. Kluger v. White, 281 So.2d 1 (Fla. 1973). In Kluger, this Court stated that any attempt to abolish such rights by the legislature violates Article I, Section 21 of the Florida Constitution.

As stated previously, an accident victim's common law right to recover damages from the owner of a motor vehicle has been established since 1920. The doctrine applies to both short term and long term lessors. Southern Cotton Oil Company v. Anderson, 80 Fla. 441, 86 So. 629, 631 (Fla. 1920). See: Susco Car Rental Systems of Florida v. Leonard, 112 So.2d 832 (Fla. 1959); Avis Rent-a-Car Systems, Inc. v. Garmas, 440 So.2d 1311 (Fla. 3d DCA 1983); Racecon, Inc. v. Mead, 338 So.2d 266 (Fla. 5th DCA 1980). If the amendment to section 324.021(9)(b) is interpreted by this court to abolish that right, the statute clearly violates the access to courts provision of

the Florida Constitution, unless this court also finds that the legislature has provided some "reasonable alternative or commensurate benefit". No such alternative benefit has been provided by the legislature, and thus, this amendment violates Article I, Section 21 of the Florida Constitution.

The no-fault insurance statute is an example of a statute which was upheld because the legislature provided a reasonable alternative. That statute denied recovery for pain and suffering unless the plaintiff was able to meet the applicable threshold. This Court upheld that statute only because the legislature provided a "reasonable trade-off", i.e., the victim received the right to recover uncontested benefits and the right not to be sued himself in exchange for giving up the right to sue for minimal injuries. Smith v. Department of Insurance, 507 So.2d 1080, 1088 (Fla. 1987), discussing Lasky v. State Farm Insurance Company, 296 So.2d 9 (Fla. 1974).

With respect to the enactment of section 324.021(9)(b), the legislature has provided accident victims with no trade-off at all. The fact that the statute requires a vehicle lessee to carry liability insurance of $100,000/$300,000 certainly does not qualify as a reasonable alternative for giving up the valuable right to sue the vehicle owners and/or lessors who would be the defendants most likely to have the ability to respond to an award of damages. In contrast to the no-fault statute, the victim in this case must still prove liability; he is giving up the right to collect his full damages and receives nothing in return.

The argument that the legislature may constitutionally limit the victim's recovery, as long as it does not abolish it entirely, has been specifically rejected by this Court in Smith v. Department of Insurance, supra. In Smith, this Court struck down the statutory cap on non-economic damages as unconstitutional and noted that if damages could be legislatively capped at $450,000, there would be no discernible reason why it could not recap the recovery at some other figure such as $50,000.00, $10,000.00 or even $1.00. Likewise, if the legislature can constitutionally destroy a victim's cause of action against the motor vehicle owner in exchange for $100,000.00 insurance policy, there is no reason why the cause of action could not be abolished for some other amount of insurance such as $50,000.00, $10,000.00 or even $1.00. Although Perry and Folmar disagree with this conclusion, neither decision contains an analysis of this issue.

It is apparent that a reasonable alternative has not been provided by merely requiring the lessee to carry liability coverage of $100,000.00. The Perry and Folmar decisions did not address this issue based on the conclusion reached in those cases that the statute did not eliminate any preexisting right.

Respondent argued below that the statute does not violate the access to courts provision of the Florida Constitution because the victim continues to have a cause of action against the driver. This argument entirely overlooks the requirement in Kluger that if the legislature deprives a citizen of a preexisting common law right, it must in return provide him a reasonable alternative benefit. A

victim of vehicular negligence has always had the right to sue the driver and the owner of a motor vehicle, and therefore, this argument is without merit. Acceptance of Volkswagen Credit's, Inc.'s argument would mean the legislature could abolish the entire concept of "respondeat superior" and "agency" in all cases in order to eliminate corporate liability completely without implicating the access to courts provision of the Florida Constitution.

The "reasonable alternative benefit" in this case (i.e., $100,000.00 insurance coverage) is simply not commensurate to the common law right that is being abolished. The petitioner in this case lost his teenage son as a result of the negligence of a driver of a leased vehicle. By eliminating the right to sue the corporate owner and the lessor of the leased vehicle, the most catastrophically injured victims will be left without any meaningful redress for their injuries.

A requirement of $100,000.00 in insurance coverage to insure the liability of the lessee is not a "reasonable alternative benefit" for an innocent accident victim. The cost of purchasing a higher limits policy was a cost of doing business (the business of leasing out vehicles to the general public) and it served to protect the public welfare. It is unreasonable to impose on the most seriously injured victims of automobile negligence the burden of supporting the automobile leasing industry.

The legislature has not shown an "overpowering public necessity" for abolishing this right of access to the courts. In fact, the preamble to the bill is completely silent in this regard. When the

legislature abolishes a cause of action it usually recites circumstances in the preamble in support of its action. For example, in Smith, this Court noted how the legislature had set forth detailed findings in the preamble to the 1986 tort reform act concerning a perceived financial crisis in certain lines of commercial liability insurance. See also: Pinillos v. Cedars Eleven Hospital Corp., 403 So.2d 365 (Fla.1981).

The constitution requires the legislature not only to recite in the preamble to the bill why there is overpowering public necessity to abolish a previously recognized cause of action but also to show an overpowering public necessity. See: Pinillos, 402 So.2d at 367. In the statutory amendment at issue in this case, the legislature has not recited any reason in the preamble to the bill for abolishing a previously recognized common law action against the title owner of a leased vehicle. This supports petitioner's argument as set forth in Point II, that the legislature did not intend to abolish a common law action and thus the trial court misinterpreted the statute.

One consequence of Volkswagen Credit's interpretation of this new statutory amendment is that for the most serious injuries, most of the leased vehicles will be underinsured. As a result, this statute will not save money by lowering insurance premiums. Rather, it will simply shift the burden from the leasing company where it belongs to the potential innocent tort victim who now faces an increased risk of being injured by an underinsured motorist. Uninsured motorist's premiums will undoubtedly increase to compensate for the greater UM exposure.

In conclusion, this statute, which abolishes a common law cause of action in the absence of a reasonable alternative and in the absence of any overpowering public necessity, should be declared unconstitutional because it violates Article I, Section 21, of the Florida Constitution.

b. Section 321.024(9)(b) Florida Statutes Violates the Equal Protection Clause of the Florida and the United States Constitutions.

In order to comply with the requirments of the Equal Protection Clause, statutory classifications must be reasonable and non-arbitrary, treating all persons in the same class alike, and the difference between those included in the class and those excluded from it must bear a substantial relationship to a permissible legislative purpose. Lasky v. State Farm Insurance Company, 296 So.2d 9 (Fla. 1974). Section 324.021(9)(b) denies persons damaged by leased vehicles their constitutional right to equal treatment under the law, and it is particularly offensive because it not only discriminates against people injured by leased vehicles, but discriminates against those injured the worst.

The statute clearly discriminates against persons injured by vehicles under a lease over a year as compared to others injured by a motor vehicle. Statutory classifications are permissible only when they rest on some difference that bears a just and reasonable relation to the statute in question. Gammon v. Cobb, 335 So.2d 261 (Fla. 1976). By virtue of the fortuitous circumstances of being injured by a leased vehicle, an injured party's right to recover from the vehicle owner is abolished.

The Fourth District Court of Appeal addressed this issue in Folmar and noted that the classification is reasonable because leases exceeding one year are nothing more than alternative financing agreements which provide a tax advantage to the lease. Although a five year lease that contains an option to buy for a nominal amount at the end of the lease may be considered an alternative financing arrangement, a one year or more lease which contains no option to buy cannot be characterized as an alternative financing agreement. Thus, the Fourth District's finding of a rational basis for the classification is simply wrong. The Fourth District also concluded that it was not unfair to excuse a long term lessor from vicarious liability where it has no control over the vehicle. 560 So.2d at 801. This conclusion, however, overlooks the fact that no owner who gives his car to another to drive has control over the vehicle. As recognized by this Court in Susco, control has never been the crucial fact in a determination of liability under the dangerous instrumentality doctrine. 112 So.2d at 837.

No legitimate legislative purpose is served by denying victims of a leased vehicle accident the same redress available to all other victims injured in a motor vehicle accident. The statute impermissibly places an undue burden on the most severely injured negligence victims in order to provide special relief to a specific interest group, the automobile leasing industry. The statute takes away the injured victim's right to sue the lessor/owner but does not restrict in any manner the ability of the lessor/owner to maintain an action against the injured victim for recovery of damage to a leased

vehicle.

Accordingly, the statutory classification created by section 324.021(9)(b) is arbitrary and unreasonable and in violation of the Equal Protection Clause. The statute allows the corporate owner all of the legal and financial benefits of ownership without shouldering any of the burden.

c. Section 324.021(9)(b) Violates the Right of Due Process of Law of the Flordia and United States Constitutions.

A statute violates the due process provision of Article I, Section 9, of the Florida Constitution and the Fourteenth Amendment to the United States Constitution when it is shown that the statute is not in any way designed to promote the people's health, safety, or welfare, or that it has no reasonable relationship to a legitimate state purpose. Department of Insurance v. Dade County Consumer Advocate's Office, 492 So.2d 1031 (Fla. 1986). In order to be valid, legislation must serve the public welfare as distinguished from the welfare of a particular group or class. United Gas Pipe Company v. Bevis, 336 So.2d 560 (Fla. 1976).

Section 321.024(9)(b) denies the right to due process of law for many of the same reasons why it violates the Equal Protection Clause. As set forth above, the statute arbitrarily discriminates against injured victims of an accident involving leased vehicles by eliminating their cause of action against the lessor/owner. The statute clearly does not promote the health, safety or welfare of the people, but actually infringes upon the injured victim's right of redress for injuries. The statute does not promote any identifiable

public interest. Rather, it promotes the interest of the leasing industry at the expense of all other motor vehicle owners, lessors and injured victims.

It is apparent that the statute in question is special interest legislation which serves only to benefit the automobile leasing industry at the expense of the public in general. Thus, it should be stricken as violative of Article I, Section 9, of the Florida Constitution and the Fourteenth Amendment of the United States Constitution.

CONCLUSION

For the above-stated reasons, Petitioner respectfully requests this Court to reverse the summary judgment and hold that long term lessors are liable under the dangerous instrumentality doctrine and that section 324.021(9)(b) does not limit a long term lessor's common law liability under the dangerous instrumentality doctrine. In the alternative, petitioner submits that this Court should determine that section 324.021(9)(b) is unconstitutional.

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