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.
_____/

On Discretionary Review of a District Court of Appeal Decision Certified as Being of Great Public Importance

RESPONDENT'S BRIEF ON THE MERITS
(With Separately Bound Appendix)

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INTRODUCTION

The Petitioner, Frank Roca, as Personal Representative of the Estate of Frank J. Roca, Jr., seeks review and reversal of the March 6, 1989, summary final judgment entered in favor of Respondent Volkswagen Credit, Inc., by the Honorable Rosemary Usher Jones, Circuit Court Judge of the Eleventh Judicial Circuit in and for Dade County, Florida, modified by the April 26, 1989 order of the Petitioner's motion for rehearing (R. 59-60; 73-74), and the February 6, 1990 per curiam affirmance by the Third District Court of Appeal on February 6, 1990. (R. 75).

The Petitioner contends that this Court has discretionary jurisdiction to review the Third District Court of Appeal's decision pursuant to that court's certification of an issue as one of great public importance under Article V, Section 3(b)(4), Florida Constitution (1981), and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(v). But see Respondent's Motion to Dismiss Petition for Discretionary Review.

The Petitioner, Frank Roca, as Personal Representative of the Estate Frank J. Roca, Jr., was the Plaintiff in the trial court and the Appellant in the Third District Court of Appeal. The Petitioner will be referred to as the Plaintiff, the Petitioner, or by name in this brief.

The Respondent, Volkswagen Credit, Inc., was a Defendant in the trial court and the Appellee in the Third District Court of Appeal. The Respondent will be referred to as the

Defendant, the Respondent, or by name in this brief.[1]

References to the record on appeal will be designated by the letter "R". References to the Appendix will be designated by the letter "A".

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[1] Mary Beth Saibi was also a Defendant in the trial court. The summary final judgment entered in this case, however, was directed only to Volkswagen Credit, Inc., and the Petitioner's claim against Ms. Saibi is unaffected by the order on review. (R. 59). To the extent that Saibi is referenced in this brief, she will be identified by name.

STATEMENT OF THE CASE AND FACTS

The Petitioner's statement of the case and facts represents a substantially true and correct depiction of the proceedings below, but mischaracterizes certain events and otherwise omits relevant facts necessary to this Court's consideration of the issues on review. For ease of reference by this Court in considering the arguments of the Petitioner, the following facts are deemed by the Respondent to be dispositive of those issues:

In September, 1987, Mary Beth Saibi entered into a retail lease agreement with Potamkin Volkswagen (R. 30-31). Pursuant to the terms of the agreement, Saibi leased the vehicle for a period of sixty (60) months, maintained liability insurance of not less than $100,000/$300,000 for bodily injuries, and $50,000 for property damage, as well as undertook all responsibility for the maintenance, repair, and operation of the vehicle. The lease was thereafter assigned to Volkswagen Credit, Inc., the Respondent in this case.

On June 1, 1988, Plaintiff Frank J. Roca, as personal representative of the Estate of Frank J. Roca, Jr., filed suit against Mary Beth Saibi and Volkswagen Credit, Inc., alleging that Saibi negligently operated a vehicle leased to her by Volkswagen Credit, Inc., which resulted in the death of Frank J. Roca, Jr. Accordingly to the complaint, Volkswagen Credit, Inc., was vicariously liable for the damages resulting from Saibi's use of the leased vehicle. (R. 1-4).

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In its responsive pleading, Volkswagen Credit, Inc. asserted that it had no vicarious liability pursuant to the provisions of Section 324.021, Florida Statutes. (R. 15-17). The Plaintiff responded by denying Volkswagen Credit's affirmative defenses, but did not allege any avoidances. (R. 18).

Volkswagen Credit, Inc. thereafter moved for summary judgment, contending Section 324.021(9)(b), Fla. Stat., rendered it immune from liability on the facts of the case. (R. 23-31). Roca responded by filing a memorandum of law opposing the motion for summary judgment and arguing that Section 324.021, Fla. Stat., related only to "financial responsibility", that the section unconstitutionally violated a plaintiff's right of access to the courts, and that the section violated the equal protection and due process clauses of the Florida and U.S. Constitutions. (R. 42-47).

On February 26, 1989, the trial court entered summary final judgment in favor of Volkswagen Credit, Inc. (R. 59-60; A. 1-2). In doing so, the trial court concluded that Section 324.021(9)(b), Fla. Stat., did not merely relate to an owner's obligations under Chapter 324, Florida Statutes, but also precluded any common law liability of an owner for a vehicle leased to another for a period of one year or longer. Because the vehicle in the instant case was the subject of a long-term lease between Saibi and Volkswagen Credit, Inc. and the necessary insurance was carried, the trial court concluded

Volkswagen Credit, Inc. was entitled to a summary final judgment. Further, the trial court concluded that the Defendants waived their constitutional attack by failing to affirmatively plead the issue and, on the merits, concluded the statute did not violate the state or federal constitutional provisions regarding right of access to the courts, equal protection, and due process. (R. 59-60; A. 2).

After a motion for rehearing was filed by the Plaintiff in the trial court (R. 61-64), the trial judge modified the previous judgment and retreated from the language in the order suggesting a waiver of the constitutional arguments had occurred. (R. 73-74).

The Plaintiff thereafter sought review in the Third District Court of Appeal. (R. 71). On appeal to that court, Roca raised two points. First, Roca contended that the trial court had erred in entering judgment for Volkswagen Credit, Inc. under Section 324.021(9)(b), Fla. Stat., since that statute pertained only to the penalty provisions contained Chapter 324 and did not affect the common law tort liability of owners and lessors of motor vehicles. Second, Roca again raised the argument that Section 324.021(9)(b) was unconstitutional because it violated constitutional right of access, equal protection, and due process guarantees.

In response, Volkswagen Credit argued that Section 324.021(9)(b) clearly and unambiguously called for the result reached in the trial court. In particular, Volkswagen Credit

noted that the plain language of the statute, as well as the legislative history, explicitly required the conclusion that long-term lessors had no liability where the statutory prerequisites were met. Second, Volkswagen Credit argued that Florida law had never extended the dangerous instrumentality doctrine to long-term lease situations. As such, no "common law right of action" had been eliminated by Section 324.021(9)(b). Finally, Volkswagen Credit argued Section 324.01(9)(b) was constitutional and that Roca had waived that argument in any event.

On February 6, 1990, the Third District Court of Appeal affirmed. (R. 75; A. 3). In reaching this result, the entire ruling of that court was as follows:

> Affirmed. Palmer v. R.S. Evans, Jacksonville, Inc., 81 So.2d 635 (Fla. 1955); Kraemer v. General Motors Acceptance Corporation, ___ So.2d ___ (Fla. 2d DCA Case No. 88-2372, opinion filed, December 27, 1989) [15 FLW D81].

After Roca filed motions for rehearing, clarification, and rehearing en banc, the Third District Court of Appeal entered an order of denial as to those matters on April 24, 1990.

On May 2, 1990, Roca filed a motion to amend the rehearing denial. The basis of the motion was that the Third District Court of Appeal had recently certified a similar case as a question of great public importance. On or about May 22, 1990, the Third District Court of Appeal simply entered an order granting the motion to amend, but did not certify a question as

one of great public importance at that time. (R. 76).

On May 23, 1990, the Petitioner filed its notice to invoke discretionary jurisdiction.

On June 12, 1990, after it had been divested of its jurisdiction by the filing of the notice to invoke discretionary review[2], the Third District Court of Appeal entered the following order:

> Appellant's motion to amend order on rehearing is hereby granted. It is hereby certified to the Supreme Court of Florida that this case involves the question of great public importance heretofore certified in Raynor v. De La Nuez, 558 So.2d 141 (Fla. 3d DCA 1990).
>
> (A. 4).

The Petitioner filed an amended notice to invoke discretionary review on July 10, 1990, and this Court entered its order on briefing schedule on July 25 1990.

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[2] See Petitioner's Motion to Dismiss Petition for Discretionary Review.

POINTS ON APPEAL

I. WHETHER THE THIRD DISTRICT COURT OF APPEAL ERRED IN AFFIRMING THE TRIAL COURT'S ENTRY OF A SUMMARY FINAL JUDGMENT IN FAVOR OF THE OWNER/LESSOR OF A VEHICLE ON THE FACTS OF THE INSTANT CASE WHERE SECTION 324.021 (9)(b), FLORIDA STATUTES, (1986), CLEARLY AND UNAMBIGUOUSLY CALLED FOR SUCH A RESULT AND APPLICATION OF THE STATUTE DID NOT OPERATE TO IMPAIR ANY COMMON LAW RIGHT OF ACTION AGAINST A LONG-TERM LESSOR (Restating Points I and II of Petitioner).

II. WHETHER THE THIRD DISTRICT COURT OF APPEAL ERRED IN AFFIRMING THE TRIAL COURT'S CONCLUSION THAT SECTION 324.021(9)(b), FLORIDA STATUTES, WAS CONSTITUTIONAL WHERE THE ISSUES WAS WAIVED IN The TRIAL COURT AND THE PETITIONER FAILED TO DEMONSTRATE A VIOLATION OF THE ACCESS TO THE COURTS, EQUAL PROTECTION, OR DUE PROCESS OF LAW PROVISIONS OF THE STATE AND FEDERAL CONSTITUTIONS (Restating Petitioner's Point III).

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SUMMARY OF THE ARGUMENT

I. The plain and unambiguous language utilized by the Florida Legislature in enacting Section 324.021(9)(b), Florida Statutes, is merely a legislative recognition of the fact that a long-term lessor, who maintains no authority or control over the day-to-day use of a motor vehicle, is not that vehicle's beneficial owner. Under the statute, the Legislature had made explicit what the common law has implicitly stated for years: A long-term lessor is not deemed the owner of a vehicle under the dangerous instrumentality doctrine and accordingly should not be liable for any injuries resulting from an accident involving that automobile. To date, each appellate court which has addressed this issue has concurred in this analysis. As such, the need to exercise this Court's discretionary jurisdiction to review the instant case simply does not exist.

The Legislature's purpose in enacting Section 324.021(9)(b) was to relieve a lessor/legal title holder from any potential liability as an owner of a motor vehicle when there is in existence a lease for one year or longer and the lessee complies with the maintenance of minimum required insurance limits.

Florida law has never recognized a common law right of action under the dangerous instrumentality doctrine against a long-term lessor of a motor vehicle. Because Volkswagen Credit, Inc. had no ability to use the leased vehicle, relinquished complete control to the lessor, and never

exercised any day-to-day dominion, the underlying rationale of the dangerous instrumentality doctrine is clearly absent. Because both the trial court and the Third District Court of Appeal construed the instant case consistent with both common and statutory law, affirmance is warranted.

II. The Petitioner contends in Point III that Section 324.021(9)(b), Florida Statutes, violates the access to the courts, equal protection, and due process of law provisions of the state and federal constitutions. Aside from the fact that these issues have consistently been resolved adversely to the Petitioner in the lower courts, this Court should note that the Petitioner waived these arguments by failing to raise them in the pleadings of the case. Even if the issues were properly presented, however, a review of the section's provisions demonstrates that no common law right of action was abolished, a "reasonable alternative" for redress of injuries was provided, and a substantial public policy purpose was served by the statute's enactment. Under such circumstances, the Petitioner cannot demonstrate a basis for review or reversal.

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ARGUMENT

I. THE THIRD DISTRICT COURT OF APPEAL DID NOT ERR IN AFFIRMING THE TRIAL COURT'S ENTRY OF A SUMMARY FINAL JUDGMENT IN FAVOR OF THE OWNER/LESSOR OF A VEHICLE ON THE FACTS OF THE INSTANT CASE WHERE SECTION 324.021 (9)(b), FLORIDA STATUTES, (1986), CLEARLY AND UNAMBIGUOUSLY CALLED FOR SUCH A RESULT AND APPLICATION OF THE STATUTE DID NOT OPERATE TO IMPAIR ANY COMMON LAW RIGHT OF ACTION AGAINST A LONG-TERM LESSOR (Restating Points I and II of Petitioner).

As has been noted in both briefs, as well as in the Petitioner's motion to dismiss petition for discretionary review, the instant case comes to this Court with a somewhat unique procedural history. In fact, there is no "formal" certified question at all. While the Petitioner's summary of the argument suggests the certified issue is whether long-term lessors are liable under the dangerous instrumentality doctrine, Petitioner's brief on the merits, p. 6, that only tells part of the story. To appropriately determine what the "certified issue" really is, this Court must review a number of lower court decisions and ultimately surmise the issue before it. The Respondent suggests that that fact alone provides a substantial reason to decline to exercise discretionary review in this case.

If this Court is to engage in the necessary guesswork, however, the determination of what issue has been certified as one of great public importance must begin with the Third District Court of Appeal's opinion below. As noted in the

Respondent's statement of the case and facts, the Third District Court of Appeal merely affirmed the instant matter without opinion and simply cited the cases of Palmer v. R.S. Evans, Jacksonville, Inc., 81 So.2d 635 (Fla. 1955), and Kraemer v. General Motors Acceptance Corp., 556 So.2d 431 (Fla. 2d DCA 1989). Nothing about the ruling of the Third District Court of Appeal gives any indication as to the issues being litigated or the basis for the court's ruling. As such, the initial opinion of the Third District Court of Appeal sheds no light on the matters being reviewed or the question certified.

Next, this Court must examine the Third District's subsequent opinion. On June 12, 1990, the Third District amended its order denying rehearing and stated:

> It is hereby certified to the Supreme Court of Florida that this case involves the question of great public importance heretofore certified in Raynor v. De La Nuez, 558 So.2d 141 (Fla. 3d DCA 1990).

Under such circumstances, this Court must then look to the Raynor decision.

Unfortunately, the Third District did not "formally" certify a question as one of great public importance in Raynor either. In fact, the entire opinion in Raynor is as follows:

> The summary judgment in favor of the lessor is affirmed on authority and reasoning of Perry v. G.M.A.C. Leasing Corp., 549 So.2d 680 (Fla. 2d DCA 1989) and Kraemer v. G.M.A.C. Leasing Corp., 556 So.2d 431 (Fla. 2d DCA 1989). Because the question affects the rights of the motoring public, we certify our decision to the Supreme Court

> of Florida as one of great public importance pursuant to article V, section 3(b) and 4 of the Florida Constitution.
>
> Raynor v. De La Nuez, 558 So.2d 141 (Fla. 3d DCA 1990).

Because Raynor did not specifically certify a question and instead simply adopted reasoning from the Second District Court of Appeal's decisions in Perry and Kraemer, the certified question must be gleaned from those two cases.

In Perry, the Second District's holding directly dealt with the construction and application of Section 324.021(9)(b), Fla. Stat. (1987), to a long-term lease. Kraemer, however, was a case arising prior to the enactment of Section 324.021(9)(b) and instead involved the construction of a long-term lease under the dangerous instrumentality doctrine adopted by the courts in Florida. Where Perry addressed the Legislature's enactments in this area, the Kraemer decision involved the common law issues.

The foregoing represents a somewhat confusing tracing of the issues presented by the instant petition for review. If, given this tortured history, this Court accepts jurisdiction, it should be noted that the issues on review include not only the common law liability of a long-term lessor for injuries inflicted by the lessee on a third party, but also the effect of Section 324.021(9)(b) on that purported common law liability. Under such circumstances, each issue is addressed separately in this brief.

Whether the Judicially-Created Dangerous Instrument Doctrine Applies to Long-Term Lessors.

While the proponents of applying the dangerous instrumentality doctrine assert that it has applied to long-term lessors for a substantial period of time, they cannot direct this court's attention to any decision which supports that proposition. Indeed, a review of the cases which have directly addressed the issue have uniformly concluded that the policy behind the dangerous instrumentality rule is not served by application of it to such facts. As such, the Petitioner's arguments regarding the existence of a common law right of action against a long-term lessor under circumstances like those found in the instant case is fatally flawed.

In Kraemer v. General Motors Acceptance Corp., 556 So.2d 431 (Fla. 2d DCA 1989), the Second District Court of Appeal directly addressed the contention that long-term lessors are liable under the dangerous instrumentality doctrine. In Kraemer, the plaintiff argued that holding record title alone is a sufficient nexus to a vehicle to cause that titleholder to be liable under the dangerous instrumentality doctrine in the event that the car causes an injury to a third person. Citing Anderson v. Southern Cotton Oil Co., 73 Fla. 432, 74 So. 975 (1917) (Anderson I) and Southern Cotton Oil Co. v. Anderson, 80 Fla. 441, 86 So. 629 (1920) (Anderson II), the plaintiff urged that an owner who rents or leases to another is liable

regardless of the extent of dominion or control exercised over that automobile, unless the vehicle was stolen from the lessee.

GMAC, on the other hand, argued that a long-term lease was the functional equivalent of a transfer of beneficial ownership. After leasing the vehicle, GMAC contended a long-term lessor does not have the indicia of ownership necessary for application of the dangerous instrumentality doctrine.

In a detailed opinion, the Second District concluded that a long-term lessor could not be liable for injuries caused by an owned vehicle under the dangerous instrumentality doctrine. In reaching this result, the Second District examined the history behind the state's judicial adoption of the dangerous instrumentality doctrine and the limitations placed on that rule over the years:

> The Anderson I case imposed liability upon the owner based largely on the fact that the traffic statutes placed various duties on "owners" . . . . In Palmer v. R.S. Evans, Jacksonville, Inc., 481 So.2d 635 (Fla. 1955), the court found that although a contract for sale of the vehicle was not executed until the day after the accident, "the definite intention existed on the part of [the buyer] and [the seller's] representative to make immediate transfer to the beneficial ownership of the vehicle to [the buyer] . . . " Palmer, 81 So.2d at 636.
>
> The determinative factor in the Palmer exception to the dangerous instrumentality doctrine was the fact that the buyer had beneficial ownership of the automobile, notwithstanding the fact that the seller

> held legal title. See, also, Hicks v. Land, 117 So.2d 11 (Fla. 1st DCA), cert. denied, 120 So.2d 617 (Fla. 1960).
>
> Kraemer, supra, 556 So.2d at 433-434.

After noting that the issue had not been squarely addressed in this state, the Second District noted other courts have found no liability under identical facts:

> While this issue has not been squarely addressed in Florida, the United States District Court for the District of Columbia in Lee v. Ford Motor Co., 595 F.Supp. 1114 (D.D.C. 1984) decided this very issue. There, when dealing with precisely the same issue as is involved here, the federal district court ruled that liability attached to the beneficial owner, the long-term lessee, rather than to the long-term lessor who held title to the vehicle in question. See, also, Moore v. Ford Motor Credit Co., 166 Mich. App. 100, 420 N.W.2d 577 (1988). We do not deem it necessary to rely upon Florida's traffic regulation statutes and financial responsibility laws to conclude that the record titleholder as lessor under a long-term lease is not liable for the negligence of the lessee under the dangerous instrumentality doctrine.
>
> Kraemer, supra, 556 So.2d at 434.

Finally, after discussing this Court's various limitations placed on dangerous instrumentality doctrine, the Second District appropriately concluded that title alone is not sufficient to impose liability on a long-term lessor:

> Moreover, the Florida Supreme Court has recognized another exception to the dangerous instrumentality doctrine where the owner of the motor vehicle entrusts that vehicle to a repairman or service man, so long as the owner does not exercise control over the injury causing operation of the vehicle during the servicing and is

> not otherwise negligent. Castillo v. Bickle, 363 So.2d 792 (Fla. 1978). The court again recognized that the party with beneficial ownership or control over the vehicle's use at the time of the accident should bear responsibility for the vehicle's use. This limited exception was created "as a matter of social policy and pragmatism." Michalek v. Shumat, 524 So.2d 426, 427 (Fla. 1988).
>
> Here, GMAC maintained none of the indicia of beneficial ownership. The long-term lessee was free to use the vehicle in any way he chose, consistent with protecting the long-term lessor's financial interest should the lessee not elect to exercise his option to purchase.
>
> * * *
>
> [T]itle alone is not sufficient to impose liability under the dangerous instrumentality doctrine.
>
> Kraemer, supra, 556 So.2d at 434.

The Second District's decision in Perry v. G.M.A.C. Leasing Corp., 549 So.2d 680 (Fla. 2d DCA 1989), review denied, 558 So.2d 18 (Fla. 1990), further supports the Kraemer result. While the court in Perry construed the applicability of Section 324.021(9) to long-term lessors, it nonetheless recognized that no cause of action existed at common law against long-term lessors:

> Furthermore, plaintiff has not shown, other than pointing to dicta in Racecon, Inc. v. Mead, 388 So.2d 266 (Fla. 5th DCA 1980), that there ever was a common law right of action under the dangerous instrumentality doctrine in Florida against a long-term lessor of a motor vehicle. Mead involved "the sole question" of whether, notwithstanding the fact that Section 627.7263, Florida Statutes (Supp. 1976), obligates a lessee to carry primary

> liability insurance, a lessor and lessee could contract for the lessor to provide such coverage. Id. at 266-268. Mead does not appear to have litigated the issue of whether a long-term lessor has, in contrast to a conditional vendor, a sufficient ownership interest for the purpose of the dangerous instrumentality doctrine. Accordingly and contrary to Plaintiff's argument, it may be concluded that he was not deprived of a right established under Florida law to sue a lessor in these circumstances because it does not appear that such a right had been established.
>
> Perry, supra, 549 So.2d at 682.

Given the foregoing analysis in Perry and Kraemer, it is clear that the dangerous instrumentality doctrine has never been applied to the long-term lessor situation presented by modern-day automobile sale and leasing transactions.[3]

Perry and Kraemer's historical analysis of the judicial development of the dangerous instrumentality doctrine is an accurate one. While Anderson I and Anderson II may have turned on issues of mere ownership, subsequent decisions have refined that analysis. When the refinements are examined, it becomes clear that the judicially-applied dangerous instrumentality doctrine changed from one of mere ownership causing liability to the courts holding that something more was necessary.

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[3] A review of the cases are cited by the Respondent, such as Lynch v. Walker, 31 So.2d 268 (Fla. 1947); Fleming v. Alter, 69 So.2d 185 (Fla. 1984); Susco Car Rental System of Florida v. Leonard, 112 So.2d 832 (Fla. 1959); and Racecon, Inc. v. Mead, 388 So.2d 266 (Fla. 5th DCA 1980), show they did not involve any discussion or analysis of the precise issue raised by these modern day car contracts. As such, the cases have no precedential value and contribute nothing to a well-reasoned resolution of this question.

For example, in Palmer v. R.S. Evans, Jacksonville, Inc., 81 So.2d 635 (Fla. 1955), this Court construed a statute which provided that conditional vendors of motor vehicles under certain circumstances were not to be deemed the owners of those motor vehicles for the purpose of the dangerous instrumentality doctrine. In addressing the potential tort liability of similarly situated conditional vendors, this Court noted:

> [T]he rationale of our cases which impose tort liability upon the owner of an automobile operated by another . . . 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 such a titleholder, the authority over the use of the vehicle which reposes in the beneficial owner is absent. Moreover, in jurisdictions having statutes making the owner liable for the negligence of another driving his car with his consent the term "owner" has been universally construed to eliminate those who hold nothing more than naked legal title.
>
> Palmer v. Evans, supra, 81 So.2d at 637.

See, also, Lee v. Ford Motor Co., 595 F.Supp. 1114, 1116 (D.D.C. 1984) (Person that holds legal title vehicle will not always be deemed the "owner" under the Motor Vehicle Safety Responsibility Act. Instead, looking to the purpose of the Act, the courts "placed the liability upon the person in a position . . . to allow or prevent the use of the vehicle . . . ."); Moore v. Ford Motor Credit Co., 420 N.W.2d 577 (Mich. App. 1988) (long-term lessor not liable as owner of vehicle involved in an accident).

Since Palmer, the courts of this state have taken a much

more restrictive view of the dangerous instrumentality doctrine. In Fry v. Robinson Printers, Inc., 155 So.2d 645 (Fla. 2d DCA 1963), it was held that an employee of a gas station could not recover from the owner of a car which struck him while being driven by another employee on the premises. Explaining the holding, the Second District stated:

> [W]e find nothing in the decisions applying the "dangerous instrumentality doctrine" to justify a holding that where an owner leaves his automobile at a service station for repairs or servicing he is liable solely by reason of ownership for the negligent operation thereof by one employee resulting in injury to another employee of the service station, both being engaged in performing duties in connection with servicing or repairing the automobile at the time of injury.
>
> Fry v. Robinson Printers, Inc., supra, 155 So.2d at 646. (Emphasis added in original).

In Fahey v. Raftery, 353 So.2d 903 (Fla. 4th DCA 1977), the Fourth District held the owner of an automobile could not be held liable under the dangerous instrumentality doctrine for injuries suffered by an employee of a valet parking lot concession when he was struck by a co-employee during the rendition of the valet parking services:

> [T]he parking of the car in the instant case was indeed the independent service contracted for, nor did this accident occur on the public highway. In conclusion, we can do no better than repeat the language of Patrick v. Faircloth Buick, 185 So.2d 522, 524 (Fla. 2d DCA 1966): "The dangerous instrumentality doctrine as applied to automobiles in Florida has always been grounded exclusively upon respondeat superior. [citation omitted]. The complaint in the present instance

> affirmatively shows that the automobile was not being operated by an agent or servant of the defendant, owner, but on the contrary that it was being operated by a person under the direction and control of the (valet parking lot concession). We hold therefore that the complaint fails to state a cause of action against the owner.
>
> Fahey v. Raftery, supra, 353 So.2d at 905.

This Court's opinion in Castillo v. Bickley, 363 So.2d 792 (Fla. 1978) also clearly refutes the Petitioner's argument that the dangerous instrumentality doctrines applies to long-term lessors. In Castillo, this Court recognized, within the context of repair and service, that the rationale behind the dangerous instrumentality doctrine is not served by application of that rule to such a situation:

> Decisions of the district court since Susco revealed a reluctance to apply the broad rule of owner liability there announced in situations where a master-servant type relationship does not exist - that is, where the permissive user of the owner's vehicle would not be acting under the direction and control of the owner so as to characterize the user as tantamount to an "employee" as opposed to an "independent contract" of the owner. . . .
>
> * * *
>
> Our decision to pare back the dangerous instrumentality doctrine in service station and repairmen situations stems from considerations of both social policy and pragmatism. An automobile owner is generally able to select the persons to whom a vehicle may be entrusted for general use, but he rarely has authority and control over the operation or use of the vehicle when it is turned over to a firm in the business of service and repair. Moreover, an owner often has no acceptable alternative to relinquish control of his

> vehicle to a service center, after which he has no ability to insure the public safety until the vehicle is returned to his dominion. Persons injured by the acts of garage and service repair agency are not, however, without protection for their losses. They can and in logic should look to the perpetrator of the injury, who frequently is better able to use due care and to insure against the financial risks of injury.
>
> Castillo v. Bickley, supra, 363 So.2d at 793.

See, also, Michalek v. Shumate, 524 So.2d 426 (Fla. 1988).[4]

Given the foregoing, it is clear that the courts must look to questions of legal and beneficial ownership. Indeed, contrary to the suggestion of the Petitioner, issues of possession and control do play a part in analyzing appropriate application of the dangerous instrumentality doctrine. Whether a long-term lease has an option to purchase at the end or not is no moment. In modern automobile transactions, there is no meaningfully distinction between an outright sale and a long-term lease, with or without an option to purchase. In each instance, the seller or lessor has no legal right to exercise dominion or control over the vehicle. In each instance, beneficial ownership has been transferred to either the purchaser or lessee. In situations involving long-term leases, the lessor has no interest in the leased vehicle, other than to

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[4] Under such circumstances, the Petitioner's heavy reliance on Susco and the Anderson decisions is misplaced where subsequent case law developments indicate a modification of those cases' analysis.

repossess it a number of years later. While the lease is in place, however, it is the lessee, not the lessor, who has all indicia of ownership.

Under such circumstances, considerations of social policy and pragmatism, in today's modern society, dictate that the perpetrator of the injury, not the mere naked legal titleholder, bear the responsibility for injuries that may occur from the vehicle's operation. It is the perpetrator of the injury, the only party able to use due care, who should bear the financial risks of injury. Accordingly, this Court should not disturb the uniform treatment of this issue by the district courts of appeal and should affirm in the instant case.

Section 324.021(9)(b) Florida Statutes

Even if this Court were to conclude that a common law right of action existed under the dangerous instrumentality doctrine against a long-term lessor, a point vehemently disputed by the Respondent in this case, affirmance would nonetheless be warranted because of the Florida Legislature's enactment of Section 324.021(9)(b), which provides:

> 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 of 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. (Emphasis added).

While the Petitioner would have this Court reference all sorts of rules to glean the legislature's intent, no such efforts are necessary. In Heredia v. Allstate Insurance Company, 358 So.2d 1353 (Fla. 1978), this Court made clear that where the words of a legislative enactment are clear and unambiguous, judicial interpretation cannot substitute for application of the law's unequivocal meaning:

> In matters requiring statutory construction, courts always seek to effectuate legislative intent. Where the words selected by the legislature are clear and unambiguous, however, judicial interpretation is not appropriate to displace the expressed intent. Foley v. State ex rel Gordon, 50 So.2d 179, 184 (Fla. 1981); Platt v. Lanier, 127 So.2d 912, 913 (Fla. 2d DCA 1961). It is neither the function nor prerogative of the courts to speculative on constructions more or less reasonable, when the language itself conveys an unequivocal meaning.
>
> Heredia v. Allstate Insurance Company, supra, 358 So.2d at 1354-1355.

See also, Shelby Mutual Insurance Company of Shelby, Ohio v. Smith, 556 So.2d 393 (Fla. 1990) (the plain meaning of statutory language is the first consideration of statutory construction). Where the language of a statute is clear, unambiguous, and conveys a clear and definite meaning, there is no reason to resort to rules of statutory construction for

interpretation because the statute must be given its plain and obvious import. Buick v. State, 501 So.2d 72 (Fla. 5th DCA 1987).

Rules of statutory construction are only useful in cases of doubt and such rules should never be used to create such doubt, but only to remove it. State v. Egan, 287 So.2d 1 (Fla. 1973). Legislative intent must be determined primarily from the language of the statute. If the intent of the legislature is clear and unmistakable from the language used, it is a court's duty to give effect to that intent. In short, a statute is to be taken, construed, and applied in the form enacted. Blount v. State, 102 Fla. 110, 138 So. 2 (1931).

Section 324.021(9)(b) is plain, clear, and unambiguous. The lessor of a motor vehicle, leased for a year or longer, whose lessee complies with the insurance requirements set forth by the statute, is not considered the owner of the motor vehicle for the purpose of determining financial responsibility for the motor vehicle's operation and/or for the acts of the operator of the leased motor vehicle. The language implemented by the Florida Legislature could not have been more explicit.

Section 324.021(9)(b) is a legislative recognition that a long-term lessor, who maintains no authority over the day-to-day use of a motor vehicle, is not the beneficial owner of that motor automobile. Under the statute, the lessor is not deemed the owner of the vehicle and accordingly should not be liable for any injuries resulting therefrom. As such, the

Florida Legislature has placed long-term lessors in the same category as conditional vendors. See, Section 324.021(9)(a), Florida Statutes; Palmer v. Evans, 81 So.2d 635 (Fla. 1955).

Indeed, application of the most appropriate rules of statutory construction to the facts of this case demonstrates that the lower courts have reached the correct result. Probably one of the foremost rules of legislative interpretation is that a statute must be construed in its entirety and effect given to every part of the provision under construction as well as every part of the statute as a whole. State v. Gale Distributors, Inc., 349 So.2d 150 (Fla. 1977); Wilensky v. Fields, 267 So.2d 1 (Fla. 1972). To apply the Petitioner's interpretation of Section 324.021(9)(b), the courts of this state would have to simply ignore that the Legislature provided the section apply notwithstanding any other provision of the Florida Statutes or existing case law. The section does not simply limit its applicability to "financial responsibility for the operation of a motor vehicle" as contended by the Petitioner, but instead continues by providing that the long-term lessor is not responsible "for the acts of the operator in connection therewith." Giving effect to the entire statutory provision, the only proper interpretation precludes the conclusion that the section's applicability is limited to liability insurance obligations.

The courts which have addressed this issue uniformly agree with the Respondent's interpretation. In 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 Second District Court of Appeal, on facts identical to those presented in the instant case, was called upon to determine whether Section 324.021(9)(b), Florida Statutes, supported a summary judgment in favor of a long-term lessor of an automobile which had been negligently operated by the lessee and which resulted in a wrongful death. In upholding the validity of Section 324.021(9)(b) and its applicability to those facts, the Second District affirmed the summary judgment and concluded that Section 324.021(9)(b) is clear and unambiguous in its effect:

> Accordingly and contrary to plaintiff's argument, it may be concluded that he was not deprived of a right established under Florida law to sue a lessor in these circumstances because it does not appear that such a right has been established. That is, it appears that the parameters of the common law right of action against the owner of a motor vehicle under the dangerous instrumentality doctrine has not been fully established in Florida in this regard prior to the enactment of Section 324.021(9)(b), and that that section established those parameters for the first time.
>
> Perry v. G.M.A.C. Leasing Corp., supra, 549 So.2d at 682.

The Petitioner's suggestion that Section 324.021(9)(b) is limited to sanctions for failing to meet the financial responsibility laws was directly rejected by the Fourth District Court of Appeal in Folmar v. Young, 560 So.2d 798

(Fla. 4th DCA 1990). In addressing that argument, the Fourth District held:

> Such an argument requires this court once again to construe the foregoing statute, and we must look not only at the plain language of the statute, but also its history. Carawan v. State, 515 So.2d 161 (Fla. 1987). Although Section 324.021(9)(b) is in the financial responsibility chapter, we do not believe that the specific penalties provided for in Section 324.021 apply. Section 324.021 clearly concerns sanctions against individuals in automobile accidents who do not have insurance coverage. We believe that the financial responsibility discussed in Section 324.021(9) concerns financial responsibility imposed by the dangerous instrumentality doctrine, not statutory penalties for failing to provide proof of financial responsibility. Moreover, there would have been no need to enact Section 324.021(9)(b) to require $100,000/$300,000 coverage if its only purpose was to exempt lessors from Section 324.021 which requires $10,000/$20,000 coverage.
>
> We conclude that Section 324.021(9)(b) constitutes an exception to the dangerous instrumentality doctrine in the case of long-term lessors.
>
> * * *
>
> In conclusion, the legislature by this amendment was attempting to limit liability under the dangerous instrumentality doctrine for long-term lessors. The plain language of the statute and the legislative history indicate that Section 324.021(9) was enacted to limit the liability of lessors under the dangerous instrumentality doctrine and we so hold.
>
> Folmar v. Young, supra, 560 So.2d at 799-801.

In reaching its result, the Folmar court engaged in a detailed analysis of the Legislature's discussion. After reviewing the extensive legislative history on the issue, the Folmar court again concluded that the Legislature's intent was clearly to except long-term leases from possible dangerous instrumentality doctrine applicability.[5]

The Petitioner's criticism of the Folmar court's ignoring the statute's plain language, Petitioner's brief on the merits, p. 15, is truly curious when this Court considers the actual language of the statutory section itself.[6] For all of the criticism and suggestions that the statutory language relates solely to financial responsibility laws, that is not what the statute says. The statutory language plainly does not draw the line at financial responsibility, but includes the liability for an owner in connection with any long-term lease:

> [T]he 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 wherewith.

In light of the fact that the dangerous instrumentality

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[5] The Folmar decision quotes in detail various legislator's statements. Rather than reproduce those statements for this Court, a copy of the Folmar decision is contained in this brief's appendix and those legislative statements are incorporated here by reference. (A. 5).

[6] Petitioner's brief suggested that the Fourth District Court of Appeal has Folmar under reconsideration which is inaccurate. A motion for rehearing has been filed but the court has taken no action.

doctrine's applicability has historically turned on the ability of the owner to control the acts of the operator of his vehicle, it is clear that this statute excepts long-term lessors from any possible applicability of the doctrine.

Finally, the Petitioner places great importance in the fact that the 1987 Legislature rearranged certain wording in Section 324.021(9)(b). See, Chapter 88-370, Laws of Florida. A review of the statutory modifications, which occurred subsequent to the facts and circumstances of the instant case, demonstrate no substantive change in text. Indeed, the senate staff analysis and economic impact statement does not indicate that the section has been improperly construed by the courts of this state. As such, the reference to the changes are superfluous, were made solely to fix grammatical difficulties, and contribute nothing to this Court's analysis of these issues.

In conclusion, Judge Altenbernd's concurrence in Kraemer, is worthy of note. After observing that Florida's judicial attempt to address the issue of responsibility for injuries caused by motor vehicles has clearly been an uncommon, minority approach, 7A Am.Jur.2d Automobiles and Highway Traffic Section 641 (1980), Judge Altenbernd applauded the judiciary's efforts in this area, but nonetheless recognized that the weighing of societal goals and priorities are best left for legislative action:

> From a historical perspective, one cannot fault the courts of Florida for their interest in solving the problems arising from the motorized horse at the beginning of the twentieth century. On the other hand, one cannot help wondering whether our judicial actions during the days of the Model T have allowed the legislature to avoid a careful legislative examination of the roles which vicarious liability and insurance can and should best serve in this state's efforts to protect the public from both the danger and the damages created by the motor vehicle. As one member of the judiciary, I would welcome the legislature's decision to replace the judicial doctrine of dangerous instrumentality with a well-conceived, comprehensive statutory alternative.
>
> Kraemer, supra, 556 So.2d at 436 (Altenbernd, J., concurring).

While Section 324.021(9)(b) may not be the comprehensive statutory scheme envisioned by Judge Altenbernd, it is nonetheless the Legislature's appropriate evaluation of liability for motor vehicles in one area: long-term leases. Given that fact, the Respondent submits this Court will appropriately give due respect to the Legislature's enactment in this area and uphold the various lower courts' rulings on this issue. Gates v. GMAC, 564 So.2d 640 (Fla. 1st DCA 1990); Tsiknaskis v. Volvo Finance North America, Inc., 15 FLW 992, ___ So.2d ___ (Fla. 3d DCA April 17, 1990); Abdala v. World Omni Leasing, Inc., 15 FLW 992, ___ So.2d ___ (Fla. 3d DCA April 17, 1990); Raynor v. De La Nuez, 558 So.2d 141 (Fla. 3d DCA 1990); Folmar v. Young, 560 So.2d 798 (Fla. 4th DCA 1990); Kraemer v. GMAC, 556 So.2d 431 (Fla. 2d DCA 1989); Perry v.

GMAC, 549 So.2d 680 (Fla. 2d DCA), review denied, 558 So.2d 18 (Fla. 1990).

Affirmance is warranted.

II. THE THIRD DISTRICT COURT OF APPEAL DID NOT ERR IN AFFIRMING THE TRIAL COURT'S CONCLUSION THAT SECTION 324.021(9)(b), FLORIDA STATUTES, WAS CONSTITUTIONAL WHERE THE ISSUES WAS WAIVED IN THE TRIAL COURT AND THE PETITIONER FAILED TO DEMONSTRATE A VIOLATION OF THE ACCESS TO THE COURTS, EQUAL PROTECTION, OR DUE PROCESS OF LAW PROVISIONS OF THE STATE AND FEDERAL CONSTITUTIONS (Restating Petitioner's Point III).

The Petitioner also attacks the constitutionality of Section 324.021(9)(b) by contending that the section violates Article I, Section 21 of the Florida Constitution regarding access to the courts, as well as contravenes the equal protection and due process clauses of the Florida and United States Constitutions. A review of these issues demonstrates that the trial court and the Third District Court of Appeal were eminently correct in rejecting the Petitioner's arguments.

It is well-settled that the burden upon a party challenging the constitutionality of a statute is to clearly demonstrate the act is in fact invalid. Village of North Palm Beach v. Mason, 167 So.2d 721, 726 (Fla. 1964). It is equally true that any legislative enactment carries a strong presumption of constitutionality and every presumption must be indulged in favor of its validity. Gulfstream Park Racing Association, Inc. v. Department of Business Regulation, 441 So.2d 627 (Fla. 1983); Powell v. State, 345 So.2d 724 (Fla. 1977); Burnsed v. Seaboard Coast Line Railroad Co., 290 So.2d

13 (Fla. 1974).

First, it should be noted that these arguments were waived in the trial court. When Volkswagen Credit, Inc. filed its answer and affirmative defenses in this case and raised the issue of Section 324.021(9)(b) applicability, the Petitioner did nothing more than deny the affirmative defenses' allegations and made no attempt to avoid the statute's applicability by asserting the constitutionality arguments. Once the issues had been framed, the Petitioner should not have been heard to belatedly raise constitutionality questions not set forth by those pleadings.

It is axiomatic that the issues in litigation are framed solely by the pleadings. Hart Properties, Inc. v. Slack, 159 So.2d 236 (Fla. 1963); Griffin v. Griffin, 463 So.2d 569 (Fla. 1st DCA 1985). Once the issues have been fixed by the pleadings, they may be changed only by (a) stipulation of the parties, (b) consent or acquiescence of the parties, (c) motion and order, or (d) by express or implied agreement to conform to the evidence. Griffin v. Griffin, supra; Provident National Bank v. Thunderbird Associates, 364 So.2d 790 (Fla. 1st DCA 1978). When a plaintiff simply denies affirmative defenses, he is not entitled at trial to raise new matters in avoidance thereof. North American Philips Corp. v. Boles, 405 So.2d 202 (Fla. 4th DCA 1981). Because the Petitioner in the instant case failed to allege the constitutionality argument as an avoidance, the argument was not properly presented in the trial

court and should resultingly be deemed waived. See e.g., Trushin v. State, 425 So.2d 1126 (Fla. 1983); Brady v. State, 518 So.2d 1305 (Fla. 3d DCA 1987).

Access To The Courts

Turning to the merits, the Petitioner fares no better. Once again, the Petitioner's argument that the Legislature had violated Article I, Section 21 of the Florida Constitution must fail because the Petitioner erroneously assumes that a common law right to recover damages from the owner of a motor vehicle on facts such as those in the instant case previously existed. It did not. See, Palmer v. Evans, 81 So.2d 635 (Fla. 1955); Perry v. G.M.A.C. Leasing Corp., 549 So.2d 680, (Fla. 2d DCA 1989), review denied, 558 So.2d 18 (Fla. 1990). Because no common law right to recover from a long-term lessor under the dangerous instrumentality doctrine existed at the time of the enactment of Section 324.021(9)(b), Florida Statutes, the Legislature did not abolish a common law right.

The Petitioner correctly sets forth the test on this issue from Kluger v. White, 281 So.2d 1 (Fla. 1973). Kluger provides that the common law cannot be abolished by the Legislature unless an alternative protection for the victim is established. The Kluger test, however, is completely inapplicable to the instant facts. Kluger applies only when the Legislature has abolished an existing right of access. Because no such "right"

existed, the Kluger decision provides no support for the Petitioner's position.

Assuming, arguendo, that Article I, Section 21, of the Florida Constitution and the Kluger test apply to the instant case, Section 324.021(9)(b) passes constitutional muster. Rather than alter any common law rights, the statute in question merely alters the complexion of the lawsuit involving certain leased vehicles. A plaintiff can no longer attempt to sue a non-negligent lessor simply because the lessor owned the vehicle involved in the accident. The injured plaintiff retains, however, the full right to sue the driver of the automobile and any other active tortfeasor. Because an injured plaintiff retains a right of action against the negligent tortfeasor, Section 324.021(9)(b), Florida Statutes, neither abolishes existing common law rights nor fails to leave a "reasonable alternative" for persons to redress their injuries.

A "reasonable alternative", as required by application of the Kluger test, is further demonstrated by the fact that a lessor's immunity from liability is conditioned on the lessee obtaining a $100,000/$300,000 liability insurance policy's coverage. In requiring the insurance, the Legislature has provided a fund of readily accessible insurance proceeds from which an injured plaintiff can recover. By enacting Section 324.021(9)(b), Florida Statutes, the Legislature has guaranteed a readily available sum in the event a plaintiff recovers judgment against a lessee.

The mechanism of establishing a guaranteed sum in exchange for the relinquishment of possible legal rights has previously been addressed in the no-fault context. In Lasky v. State Farm Insurance Co., 296 So.2d 9 (Fla. 1974), the Florida Supreme Court found the tort immunity provisions of the no-fault statute to pass the Kluger test because the insurance requirement assured that the injured party would obtain prompt payment of certain expenses. According to the Florida Supreme Court, such a guarantee was a "reasonable alternative" to any common law right of recovery. Lasky v. State Farm Insurance Co., supra, 296 So.2d at 15. As in Lasky, the Florida Legislature has provided a reasonable alternative to any recovery by requiring substantial insurance to be in place.

Under such circumstances, parties injured by the operation of long-term leased vehicles are guaranteed the existence of collectible funds in the event they succeed in obtaining a judgment.

In determining the reasonableness of an alternative remedy, this Court should not lose sight of the fact that the dangerous instrumentality doctrine was originally developed to hold vehicle owners liable for injuries resulting when the owner authorized use by another and the vehicle was used in a negligent manner. Liability attached to the owner because the courts deemed the owner to have ultimate responsibility over the day-to-day right of access by others. See e.g., Anderson v. Southern Cotton Oil Co., 74 So.2d 975 (Fla. 1917). In the

present day, however, no ability to exercise dominion or control exists under modern long-term leases. Like situations involving repairmen, Castillo v. Bickley, 363 So.2d 792 (Fla. 1978), valet parking, Fahey v. Raftery, 353 So.2d 903 (Fla. 4th DCA 1977), or conditional vendors, Palmer v. R.S. Evans, Jacksonville, Inc., 81 So.2d 635 (Fla. 1955), the purpose and reasoning for the doctrine has been found lacking because those situations evince the absence of the ability to exercise dominion or control. As such, no liability has been applied by the courts under such circumstances. Because a long-term lessor has no greater ability to exercise dominion or control over a vehicle than the other examples discussed above, the rationale for fixing liability simply does not exist. See, Perry v. G.M.A.C. Leasing Corp., supra.

Citing Smith v. Department of Insurance, 507 So.2d 1080 (Fla. 1987), the Petitioner apparently suggests that Section 324.021(9)(b) unconstitutionally caps damages. In Smith, this Court held that a provision of the Tort Reform Act that created an absolute cap of $450,000.00 on non-economic losses improperly limited common law rights of recovery without providing for a reasonable alternative. The provisions of Section 324.021(9)(b), however, operate not as a cap, but as a guaranteed floor of dollars readily available for collection in the event that a plaintiff successfully proves a lessee's liability. By enacting that provision, however, nothing precludes an active tortfeasor from a judgment in excess of the

policy limits. As such, it cannot be said that this case involves the kind of "absolute cap" situation encountered by this Court in Smith.

The Respondent submits that the analysis of the Second District Court of Appeal in Perry v. G.M.A.C. Leasing Corp., 549 So.2d 680 (Fla. 2d DCA 1989), review denied, 558 So.2d 18 (Fla. 1990), should govern. In Perry, the identical arguments raised by the Petitioner here were rejected by the Second District Court of Appeal when it found that Section 324.021(9)(b) did not violate Article I, Section 21 of the Florida Constitution:

> Plaintiff, citing Smith v. Department of Insurance, 507 So.2d 1080 (Fla. 1987), and Kluger v. White, 281 So.2d 1 (Fla. 1973), contends on appeal that § 324.021(9)(b) infringes upon his right of access to the courts in violation of article I, section 21 of the Florida Constitution by effectively placing a cap upon his damages and depriving him of his right to sue the lessor.
>
> We affirm. Unlike the statutes involved in Smith and Kluger, § 324.021(9)(b) does not place a cap upon damages. It does not limit plaintiff's right to recover damage from the lessee who controls the operation of the vehicle. Nor does it place a cap upon those damages. It essentially only mandates that a long-term lessor shall not under certain circumstances be deemed the owner of the motor vehicle for purposes of the dangerous instrumentality doctrine.
>
> Perry v. G.M.A.C. Leasing Corp., supra, 549 So.2d at 681.

Volkswagen Credit, Inc. would submit that the Second District Court of Appeal's analysis in Perry is well-reasoned and

reaches the appropriate result on these facts.

The Fourth District Court of Appeal has also rejected the Petitioner's argument on this issue. In Folmar v. Young, 560 So.2d 798 (Fla. 4th DCA 1990), the Fourth District considered the unconstitutional right of access argument and summarily dismissed it:

> It is also argued that the statute is unconstitutional and violative of article I, section 21 of the Florida Constitution, which provides for the right of access to the courts. Although several circuit courts have held that section 324.021(9) is unconstitutional, the Second District in Perry v. G.M.A.C. Leasing Corp., 549 So.2d 680 (Fla. 2d DCA 1989), recently held that the statute was not unconstitutional. The reasoning of the court was that section 324.021(9) does not place a cap on damages. It only mandates that a long-term lessor shall not under certain circumstances be deemed the owner. The statute does not limit or cap a plaintiff's right to recover damages from the lessee. We, therefore, do not believe the statute violates article I, section 21, although it is true that it eliminates a possible deep-pocket.
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> Folmar v. Young, supra, 560 So.2d at 801.

Under such circumstances, it is clear that the Petitioner's argument in this regard has no substance.[7]

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[7] Although the Petitioner may not agree with those courts which have considered this exact issue, the suggestion that neither the Perry nor Folmar courts considered this issue properly because they found no pre-existing common law right does great disservice to those courts and ignores the fact that the issues were fully addressed by those courts in their opinions. Under such circumstances, the Petitioner's suggestion at page 20 of its brief on the merits that the Perry and Folmar opinions do not contain proper "analysis of this issue" should fall on deaf ears.

The Petitioner's argument that the Legislature has not shown an "overpowering public necessity" misconstrues the nature of the Legislature's obligations. The law of this state has never recognized a guarantee for a litigant to a "deep pocket". Instead, the Legislature has taken appropriate steps to place the liability for operation of a motor vehicle on those who should bear it--the negligent operators and those who can exercise dominion and control. Because the enactment of Section 324.021(9)(b) does not infringe on the right of access to the courts, no constitutional violation of Article I, Section 21 of the Florida Constitution has been demonstrated.

Equal Protection

The Petitioner's equal protection argument is deficient for a number of reasons. First, it again warrants noting that there cannot be an indiscriminate class treatment where no right of recovery against a long-term lessor under the dangerous instrumentality doctrine existed in the first place. As such, the enactment of Section 324.021(9)(b) does not cause disparate treatment in any way.

Second, it is inexplicable how the Petitioner can assert that the statute discriminates against persons injured by leased vehicles. The insurance provisions of Section 324.021(9)(b) do not create a ceiling of recovery, but instead provide a statutory minimum amount readily available for

injured persons upon the establishment of their claims. Indeed, it could easily be asserted that Section 324.021(9)(b) extends additional benefits to persons injured by long-term leased vehicles not available to other citizens of this state--that they have a guaranteed fund from which to collect at least $100,000/$300,000 for their injuries. Accordingly, the Petitioner should not be heard to complain.

Finally, the Respondent disputes the Petitioner's assertion that there is no legitimate legislative purpose to the enactment of Section 324.021(9)(b). While the Petitioner may object to the loss of a potential "deep pocket", the fact of the matter is that the Legislature has correctly recognized, as a matter of public policy, that where an owner has no right to dominion or control over a vehicle for an extended period of time due to the existence of a long-term lease, no rational basis exists for holding that owner liable for that vehicle's misuse.

Again, the Fourth District Court of Appeal fully considered this argument as part of the constitutional attack on Section 324.021(9)(b) lodged in Folmar v. Young, supra. The analysis of Judge Letts, writing for the court, is both well-reasoned and thoughtful:

> It is also argued that the statute is constitutionally infirm because it violates plaintiff's due process and equal protection rights. As to this, the test is whether a statute bears a reasonable relationship to a permissive legislative objective and is not discriminatory, arbitrary or oppressive. Village of North

> Palm Beach v. Mason, 167 So.2d 721 (Fla. 1964); Loxahatchee River Environmental Control District v. School Board of Palm Beach County, 496 So.2d 930 (Fla. 4th DCA 1986), affirmed, 515 So.2d 217 (Fla. 1987). The legislation was enacted, in part, to eliminated the imposition of double premiums. Although the plaintiffs argue that the statute creates a discriminatory classification, since lessors remain liable on short-term leases, the legislative history indicates that leases exceeding one year are nothing more than alterative financing agreements which provide a tax advantage to the lessee. Therefore, there is a rationale basis for the classification. It would not appear to be unfair to excuse the long-term lessor from vicarious liability when the lessor has no control over the vehicle. See, also, Kraemer v. General Motors Acceptance Corporation, 556 So.2d 431 (Fla. 2d DCA 1990).
>
> Folmar v. Young, supra, 560 So.2d at 801.

Accordingly, the statutory classification created by Section 324.021(9)(b) is neither arbitrary, unreasonable, nor in violation of the equal protection provisions of the state and federal constitutions.

Due Process

Instead of beating a dead horse, the Respondent will simply again note to this Court that Section 324.021(9)(b) is nothing more than a legislative recognition of the fact that long-term lessors have never been held to be responsible under the dangerous instrumentality doctrine nor should they be. The Legislature took steps to guarantee that substantial liability

insurance would be in place to cover a lessee's negligent use of a lease vehicle. In doing so, the Legislature in fact served the public welfare by providing a fund from which injured tortfeasors can recover. As a result, the people of this state have gained, not lost, as a result of the Legislature's actions. For the same reasons Section 324.021(9)(b) does not deny equal protection, it does not deny due process of law.

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CONCLUSION

Based upon the foregoing rationale and authority, this Court should exercise its discretion by denying the Petitioner's petition for review. Alternatively, should this Court elect to consider this matter on the merits, it is clear that the Third District Court of Appeal appropriately rejected the Petitioner's arguments and properly affirmed the summary final judgment entered in favor of the Respondent, Volkswagen Credit, Inc. Under such circumstances, this Court should follow that same well-supported path and affirm as well.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 11th day of September, 1990 to: JANIS BRUSTARES KEYSER, ESQ., Reid, Ricca & Regell, P.A., 500 South Australian Avenue, Clearlake Plaza, 9th Floor, P.O. Drawer 2926, West Palm Beach, Florida 33402-2926.

By _____
G. BART BILLBROUGH

GBB/bj