IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

Case No.: 76,241
DCA Case No.: 89-415

DENISE G. LEAPAI and
MABEL EKEROMA,

Appellant/Defendant,

vs.

JAMES DEAN MILTON, individually
and for the use and benefit of
STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

Appellee/Plaintiff.
_____/



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**APPELLANT'S REPLY BRIEF**

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## PRELIMINARY STATEMENT

In his Answer Brief Appellee raises the issue of the propriety of the Summary Judgment previously entered in the Trial Court and affirmed by the Fifth District Court of Appeal. Although Appellee did not file a Notice of Cross Appeal, the lack of a notice is not jurisdictional and such issue may be raised in the Answer Brief.

Appellant therefore replies to Appellee's issue on its Cross Appeal and urges this Court to affirm the Summary Judgment entered by the Trial Court and affirmed by the Fifth District Court of Appeal.

**WHETHER THE TRIAL COURT ERRED IN ENTERING SUMMARY JUDGMENT IN FAVOR OF APPELLANT, LEAPAI**

Florida Rule of Civil Procedure 1.510 provides for application and determination of a Motion for Summary Judgment. More specifically, Rule 1.510(b) provides that:

> "A party against whom a claim . . . is asserted or declaratory judgment is sought may move for Summary Judgment in his favor as to all or any part thereof at anytime with or without supporting affidavits."

Rule 1.510(c) provides that:

> "The Motion shall state with particularity the grounds for which it is based and the substantial matters of law to be argued . . . . The adverse party may then serve opposing affidavits prior to the day of hearing. The Judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to Judgment as a matter of law . . . ."

Apart from any question as to causation, Plaintiff's sole claim against the Defendant, Denise G. Leapai, was that she was the owner of an automobile which was involved in an accident and, therefore, liable to Mr. Milton for any damages suffered in the accident. (R. 1-2)

The only issue in Denise G. Leapai's Motion for Summary Judgment to avoid such vicarious liability, was whether there existed any dispute as to the material fact of Ms. Leapai's alleged transfer of ownership of the automobile in question. (R. 19-20)

In support of her Motion for Summary Judgment, Ms. Leapai submitted an affidavit as to her transfer and sale of the

automobile to Mr. Seven Ekeroma on December 6, 1985 (R.26); a photocopy of an endorsed and notarized Florida Motor Vehicle Certificate of Title transferring title of the described vehicle to Mr. Seven Ekeroma on December 6, 1985 (R. 27-28); the affidavit of the Notary confirming her witnessing and notarizing the original Certificate of Title on December 6, 1985 (R. 21-23); and a supplemental affidavit that Ms. Leapai had delivered physical possession of the automobile in question to Mr. Ekeroma on December 6, 1985, and that she had no further contact with, dealings with, or interest in the automobile until after she received notice of Plaintiff's claim. (R. 30-31)

Florida Statutes Chapter 319 provides the manner for transfer of title to motor vehicles so as to be relieved of liability arising from the mere ownership of a motor vehicle. The statute provides, in section 319.22(2) that:

> "An owner or co-owner who has made a bona fide sale of transfer of a motor vehicle or mobile home and has delivered possession thereof to a purchaser shall not, by reason of any of the provisions of this chapter, be deemed the owner or the co-owner of such vehicle or mobile home so as to be subject to civil liability for the operation of such vehicle or mobile home thereafter by another when such owner or co-owner has fulfilled either of the following requirements:
>
> (a) When such owner or co-owner has made proper endorsement and delivery of the Certificate of Title as provided by this chapter. Proper endorsement shall be:
>
> 1. When a motor vehicle or mobile home is registered in the names of two or more persons as co-owners in the alternative by the use of the work "or," such vehicle shall be held in joint tenancy. Each co-owner shall be

> deemed to have granted to the other co-owner the absolute right to dispose of the title and interest in the vehicle or mobile home, and the signature of any co-owner shall constitute proper endorsement. Upon the death of a co-owner, the interest of the decedent shall pass to the survivor as though title or interest in the vehicle or mobile home was held in joint tenancy. This provision shall apply even if the co-owners are husband and wife."

The affidavits and supporting documents submitted by Appellant in support of her Motion for Summary Judgment proved that she had complied with the statute and transferred title to Mr. Seven Ekeroma on December 6, 1985, more than 60 days prior to the accident for which Plaintiff sought to impose liability upon Ms. Leapai.

The burden then fell upon the Plaintiff/Appellee to come forward with competent evidence in opposition to the Motion for Summary Judgment so as to create a genuine issue of material fact as to compliance with the statute. This Appellee absolutely failed to do.

Viewed in the light most favorable to the Plaintiff, the record before the Trial Court in opposition to the Motion for Summary Judgment consisted solely of an unsworn general allegation of ownership of the automobile (R. 1-2); a Pre-Trial Compliance containing a photocopy of an unsworn traffic accident report (R.9-12) and a photocopy of a printout listing Denise G. Leapai as the owner of the vehicle in question, but which shows that the registration referred to, expired on August 5, 1985. (R.13) The court will also note that the accident report shows the tag to have been expired. (R. 10)

The initial burden of proving the non-existence of a material fact is upon the party moving for Summary Judgment. Once that initial burden has been met, it is incumbent upon the opponent of the summary judgment to go forward and to present competent, admissible evidence to demonstrate a dispute as to a material fact. Landers v. Milton, 370 So.2d 368, (Fla. 1979).

In Landers, this Court considered the showing necessary to support a Motion for Summary Judgment. The issue for determination was the movant's burden to support a Motion for Summary Judgment. In Landers, Plaintiff sued Defendants for injuries arising from an automobile accident. Defendants answered, pleaded the statute of limitations in defense and moved for summary judgment. The Trial Court granted summary judgment and the 4th District Court of Appeals reversed. This Court granted certiorari and reversed the appellate court. In so doing the Court held:

> "A movant for summary judgment has the initial burden of demonstrating the nonexistence of any genuine issue of material fact. But once he tenders competent evidence to support his motion, the opposing party must come forward with counter evidence sufficient to reveal a genuine issue. **It is not enough for the opposing party merely to assert that an issue does exist.** (Emphasis Supplied) Id. at 370.

In Landers, Defendants demonstrated the requisite lapse of time. Then it became Plaintiff's burden to show an alleged tolling of the statute of limitations. Although Plaintiff filed opposing affidavits attempting to avoid the statute of limitations, such affidavits were inadequate to create an issue because they were based upon supposition. Id. See also Ham v. Heintzelman's Ford,

Inc., 256 So.2d 264, (Fla. 4th D.C.A. 1971); and Insurance Company of North America vs. Julien P. Benjamin Equipment, Co., 481 So.2d 511 (Fla. 1st D.C.A. 1985), both holding that summary judgment is proper where the non-moving party seeks to rely on his pleadings and/or makes no effort to contradict the sworn facts submitted by the movant by offering affidavits, depositions, or other competent evidence.

Appellee relies upon Johnson v. Studstill, 71 So.2d 251, (Fla. 1954), and Harris v. Mosteller, 271 So.2d 204, (Fla. 2nd D.C.A. 1973) as being cases virtually "on all fours" and which he urges mandate reversal of the summary judgment entered herein. Upon closer reading of Johnson, supra, the facts reveal that a counter-affidavit in opposition to the motion for summary judgment was filed which tended to show that the title to the motor vehicle involved in the accident was still in the Defendant, Studstill. Id. at 251. When faced with the counter-affidavit, there remained a disputed issue of material fact as to the truth of the matters asserted in the opposing affidavits. Such is not the case here as the Appellee chose to make no response and to file no competent evidence in opposition to Appellant's Motion for Summary Judgment.

In Harris, supra, a claim was brought against the driver of an automobile and the alleged owner. The alleged owner, Mr. Fritter, moved for summary judgment which was granted in his favor. On Appeal, the Second District Court of Appeals reversed and held that although Mr. Mosteller and Mr. Fritter both executed affidavits that the vehicle had been sold and transferred to Mr.

Mosteller on March 10, 1970, and although there was a receipt for payment for the automobile filed in support of the Motion for Summary Judgment, the Plaintiff had offered in opposition a letter from the Florida Department of Motor Vehicles stating that no Florida tag and title had been issued; a Florida license tag registration certificate showed ownership by Fritter; and a certified copy of an application for a Florida certificate of title to be issued in the name of Fritter. Id. at 216. The contradiction between the affidavits of Mosteller and Fritter attesting to a sale and transfer and the application for certificate of title in the name of one, but signed by the other, precluded the entry of Summary Judgment and the Trial Court was reversed.

On the record before this Court, there is no such conflict. As Appellee states in his brief "A Title Certificate showing ownership of a motor vehicle is prima facie evidence of such ownership . . ." (Appellee's Answer Brief, page 13). In the instant case the affidavits and documentary evidence included a photocopy of the Title Certificate showing that title was transferred pursuant to statute from Denise G. Leapai to Seven Ekeroma. Appellant failed absolutely to present anything in opposition to this record evidence.

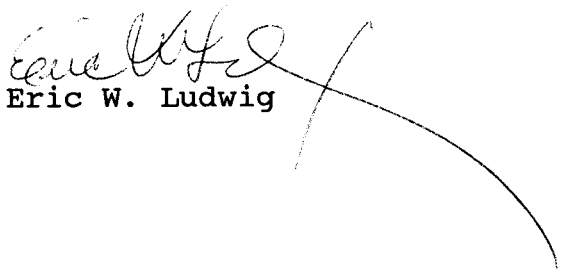
There being no competent or admissible evidence to dispute Appellant's claim of compliance with the statute, (notwithstanding Milton's assertion in his original appeal brief that a "certified title was received by Appellee's attorney" [Appellant's brief in

the Fifth District Court of Appeal, page 3], no such certified document appears in the record) the Trial Court properly entered summary judgment in favor of Denise G. Leapai and against James D. Milton and the Fifth District Court of Appeal properly affirmed.

## CONCLUSION

Based upon the foregoing, Appellant respectfully submits that there was no genuine issue of material fact and that Appellant was entitled to Summary Judgment, that Summary Judgment was properly entered in Appellant's favor and that neither the Trial Court nor the Fifth District Court of Appeals committed error on this issue.

Very respectfully submitted,



Eric W. Ludwig

## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that a true copy of the foregoing has been furnished by U. S. Mail, to JAMES O. DRISCOLL, ESQUIRE, 3222 Corrine Drive, Orlando, Florida 32803, THOMAS R. PEPPLER, ESQUIRE and KEITH R. WATERS, 250 North Orange Avenue, 11th Floor, Orlando, Florida 32801 this 16 day of August, 1990.

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