10-19

IN THE SUPREME COURT OF FLORIDA

JUNE H. KOTTMEIER, individually and in her capacity as personal representative of the Estate of CARL KOTTMEIER,

Petitioner,

vs.

GENERAL MOTORS ACCEPTANCE CORPORATION, a corporation,

Respondent.

CASE NO. 76,336

ANSWER BRIEF OF RESPONDENT GENERAL MOTORS ACCEPTANCE CORPORATION

LARRY I. GRAMOVOT, ESQUIRE
Fla. Bar #273570
MALLERY & ZIMMERMAN, S.C.
101 Grand Avenue
P.O. Box 479
Wausau, WI 54402-0479
(715) 845-8234

ATTORNEYS FOR RESPONDENT

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STATEMENT OF THE CASE AND FACTS

On February 18, 1986, Scott Raybuck was operating an automobile which collided with an automobile operated by Plaintiff/Petitioner, Carl Kottmeier. The vehicle operated by Raybuck had been leased by Richard Hersh from Respondent, GENERAL MOTORS ACCEPTANCE CORPORATION (hereinafter "GMAC"). As a result of Mr. Kottmeier's injuries, a negligence action was filed against Raybuck, Hersh and GMAC[1] (R.1-3). Plaintiffs sought to impose liability upon GMAC based solely on its alleged ownership of the vehicle operated by Raybuck.

In its Amended Answer and Defenses GMAC admitted that it held title to the vehicle operated by Raybuck, but specifically denied that it was the beneficial owner of the vehicle (R.22-24). GMAC ultimately moved for summary judgment based upon the contention that the dangerous instrumentality doctrine applied only to the beneficial owner of the vehicle, and not to GMAC -- which merely held title to the vehicle (R.33).

The automobile in question was leased by Richard Hersh for a period of 48 months, with an option to purchase at the expiration of the lease term (R.25-27). The lease was arranged by Potamkin Chevrolet, Inc., and that automobile dealer actually delivered the vehicle to Mr. Hersh (R.106). The Affidavit of Thomas A. Mayer, Leasing Manager for GMAC

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[1] References to the record on appeal will be by the letter "R" followed by the appropriate page numbers.

in Miami Lakes, was filed in support of Appellee's Motion For Summary Judgment. That Affidavit, in part, attests to the following:

> 1. No one from General Motors Acceptance Corporation ever saw the 1985 Chevrolet leased to Richard Hersh, ever modified that vehicle or in any other way handled that vehicle prior to the lessee having taken possession of it.
> 2. At no time did any employee of General Motors Acceptance Corporation control the operation of the 1985 Chevrolet leased to Richard Hersh, nor did any such employee ever have the ability to control or the opportunity to control the use of that vehicle.
> 3. General Motors Acceptance Corporation essentially financed the purchase and lease of the vehicle, and its role in the ownership and operation of that vehicle was confined to matters of finance (R.31-32).

The lease agreement itself provided that the lessee would insure the vehicle, secure the vehicle's registration and provide all maintenance on the vehicle. The manufacturer's warranty inured to the benefit of the lessee, rather than the long-term lessor. All operating expenses were to be paid by the long-term lessee as well (R.25-27).

Pursuant to the lease agreement, the only control exercised by the long-term lessor pertained to protection of the lessor's collateral in the event the lessee elected not to purchase the vehicle at the expiration of the 48-month lease period (R.83). For example, the lease provided that the lessee would not remove the vehicle from the United States or Canada, and would not alter, mark or install equipment in the vehicle without the lessor's written consent. Finally, the lease required that the lessee maintain insurance on the vehicle for the protection of himself, as well as the lessor (R.25-27).

In response to a Request For Admissions dated October 7, 1988, the lessee admitted that at no time subsequent to his having obtained the vehicle did anyone from GMAC ever control its day-to-day use. The lessee also stated that subsequent to entering the lease agreement "I utilized the vehicle described in the lease in all of my activities of daily living where the use of a motor vehicle was required, and for all the purposes to which I would have used the vehicle had I owned it." Moreover, the lessee stated that as long as his obligations under the lease agreement were complied with, "I considered that I had the right of exclusive possession of the vehicle during the lease term." (R.20).

Ultimately the Trial Court granted GMAC's Motion For Summary Judgment, finding that as a matter of law GMAC was not the beneficial owner of the vehicle leased to Mr. Hersh,

and consequently would not be liable under the dangerous instrumentality doctrine (R.298). A timely appeal was subsequently filed in the Second District Court of Appeal.

The Court of Appeal affirmed the summary judgment previously entered in favor of GMAC, and certified the issue to this Court as being of great public importance. As framed by the Court of Appeal, the issue is "whether under circumstances like those recited in Kraemer a long-term lessor of an automobile may be held liable under the dangerous instrumentality doctrine to a plaintiff injured by the operation of the automobile." Kottmeier v. General Motors Acceptance Corporation, 561 So.2d 1369 (Fla. 2d DCA 1990), citing Kraemer v. General Motors Acceptance Corporation, 556 So.2d 431 (Fla. 2d DCA 1989).

ISSUE PRESENTED FOR REVIEW

Respondent would respectfully restate the issue presented for review as follows:

> WHETHER THE SECOND DISTRICT COURT OF APPEAL CORRECTLY RULED THAT A LONG-TERM LESSOR WHICH RELINQUISHES BENEFICIAL OWNERSHIP OF A VEHICLE TO A LONG-TERM LESSEE IS NOT SUBJECT TO LIABILITY UNDER THE DANGEROUS INSTRUMENTALITY DOCTRINE.

SUMMARY OF ARGUMENT

It is clear that under Florida law the beneficial owner of a motor vehicle, rather than the naked legal title holder, is liable in tort pursuant to the dangerous instrumentality doctrine. Beneficial ownership vests in one who has day-to-day control over the use of the vehicle and is, for all practical purposes, the owner of that vehicle. In the instant case, GMAC never had meaningful control over the use of the automobile leased to Richard Hersh, pursuant to the long-term lease agreement. Hersh had exclusive possession and control of the vehicle for a minimum of 48 months, with an option to purchase at the expiration of that term. Hersh had sole responsibility for obtaining insurance on the automobile, renewing the registration, obtaining license plates and doing all maintenance on the vehicle. In addition, Hersh, not GMAC, was the beneficiary of the manufacturer's warranty. Hersh was also responsible for paying all taxes on the vehicle, and was free to operate it in any manner he chose so long as he did nothing to damage the vehicle in the event he elected not to purchase it at the expiration of the lease. Consequently, GMAC was simply not the beneficial owner of the vehicle, and could not be held liable under the dangerous instrumentality doctrine.

Numerous cases in Florida have dealt with the dichotomy between beneficial ownership and legal ownership, primarily under conditional sales contracts. Those cases have

consistently held that the person with beneficial ownership, rather than the title holder, is liable in tort for the use of a motor vehicle. There is no material distinction between a conditional sale and GMAC's long-term lease with option to purchase as they relate to the issue of beneficial ownership, and the applicability of the dangerous instrumentality doctrine. GMAC, like a conditional vendor, has no authority or control over the day-to-day use of the vehicle. Both the vendee and lessee are responsible for maintaining the vehicle, securing all required insurance, licenses and tags and paying all taxes. The conditional vendee and lessee both have exclusive beneficial ownership of the vehicles they possess. In fact, the Florida Legislature has classified long-term lessors with conditional vendors, and has provided that neither is the "owner" of a motor vehicle for purposes of financial responsibility or the application of the uniform traffic laws. To hold GMAC liable under the dangerous instrumentality doctrine because it is a "lessor" rather than a "conditional vendor" is to elevate form over substance.

The dangerous instrumentality doctrine has never been absolute in its application, and has never been expressly applied by any Court of this state to hold a long-term lessor such as GMAC liable. Respondent submits that the doctrine should not now be expanded to hold the title holder, rather than the beneficial owner, liable in this case.

ARGUMENT

THE SECOND DISTRICT COURT OF APPEAL CORRECTLY RULED THAT WHERE GMAC HAD RELINQUISHED BENEFICIAL OWNERSHIP OF A VEHICLE TO A LONG-TERM LESSEE, IT WAS NOT SUBJECT TO LIABILITY UNDER THE DANGEROUS INSTRUMENTALITY DOCTRINE.

The facts of the instant case are not in dispute. Rather, based upon those facts, Petitioner takes the position that GMAC as "owner" of the long-term lease vehicle is responsible for any negligence of Scott Raybuck in the operation of that vehicle. The undisputed facts, however, clearly show that GMAC had relinquished beneficial ownership of the automobile to Richard Hersh, the long-term lessee, and consequently was not the "owner" of the vehicle within the meaning of those cases imposing liability predicated upon the dangerous instrumentality doctrine.

This Court first applied the dangerous instrumentality doctrine to motor vehicles in the landmark case of Anderson v. Southern Cotton Oil Co., 74 So. 975 (Fla. 1917). In that case the Defendant, Southern Cotton Oil Company, owned an automobile which it had permitted its employees to use for the purpose of driving to and from Pensacola to eat their meals. In April 1914 one of Southern Cotton Oil Company's employees, utilizing Southern's automobile with its permission, struck a motorcycle operated by Anderson. Suit by Anderson followed, and the Trial Court directed a verdict

in favor of Southern Cotton Oil Company finding there was no legal basis for imposing liability on that company. 74 So. at 976. On appeal, this Court reversed. In its Decision, the Court initially discussed the fact that although automobiles may not be classified as per se dangerous instrumentalities, because of their speed and weight they may become extremely dangerous by negligent or inefficient use. Id. at 978. The Court went on to note:

> The lawmaking power of the state, in recognition of the many and great dangers incident to their use, has enacted special regulations for the running of automobiles or motor vehicles on the public roads and highways of the state. . . . These regulations relate primarily to duties that are imposed upon the owners of such vehicles. While these regulations do not expressly enlarge the common law liabilities of employers for the negligence of the employees, the statute does impose upon the owners of automobiles and motor vehicles duties and obligations not put upon the owners of other vehicles that are not so peculiarly dangerous in their operation, and specifically requires licenses, numbering, etc., for purposes of identifying the owner, and enacts that automobiles shall not be so operated on a public highway "as to endanger the life or limb of any person." It is also enacted that in the case of accident the name and address of the owner shall be given on request. The owners of automobiles in this state are bound to observe statutory regulations for their use and assume liability commensurate with the dangers to which the owners or their agents subject others in the using of the automobiles on the public highways. The principles of the common law do not permit the owner of an instrumentality that is not dangerous per se, but is peculiarly dangerous in its operation to authorize another to use such instrumentality on the public highways without imposing upon such owner liability for negligent use. . . . In view of the dangers incident to the operation of automobiles and the duties and obligations of the owners of motor vehicles under the statutes of the state, it could not be said that on the facts of this case no question was made for the jury to decide. Id. at 978 (emphasis added, citations omitted).

Clearly, this Court imposed liability without fault upon the owner of the motor vehicle based, in large part, upon the traffic statutes placing various duties upon automobile owners, and the obvious legislative intent behind those traffic statutes. Moreover, there was absolutely no question that Southern Cotton Oil Company had loaned its own automobile, which it had total control over, to one of its employees who then caused injury to the Plaintiff.

This Court again addressed the issue of liability under the dangerous instrumentality doctrine in Palmer v. R. S. Evans, Jacksonville, Inc., 81 So.2d 635 (Fla. 1955), but dealt with facts differing substantially from those in Anderson, supra. In Palmer an individual named Hughes was purchasing an automobile from R. S. Evans, and about 20 minutes after taking the car from Evans' lot, Hughes struck a motorcycle on which Palmer was riding. 81 So.2d at 635. The contract for sale of the vehicle by Evans to Hughes was not executed until the day after the accident occurred. The issue of whether R. S. Evans was liable to Plaintiff was presented to the jury, and the jury returned a verdict in favor of Evans. Id. at 636. In affirming the verdict in favor of Evans, this Court noted that before Hughes drove the automobile out of Evans' lot, "the definite intention existed on the part of Hughes and the Evans representative to make immediate transfer of the beneficial ownership of the vehicle to Hughes. . . ." Id. at 636. Of particular significance, the Court noted:

> Thus legal title to the automobile remained in the seller, R. S. Evans, at the time the accident occurred. But the rationale of our cases which imposed 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 title holder, the authority over the use of the vehicle which reposes in the beneficial owner is absent. Probably because of this fact, the term "owner" is defined in Fla. Stat. §317.74(20), F.S.A., to mean only the conditional vendee, in the case of a vehicle which is the subject of an ordinary agreement for conditional sale. 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. . . . It is therefore apparent that it was necessary for appellee in the case before us to prove only that the beneficial ownership had passed to Hughes before the accident occurred and, as we have indicated above, the proof was adequate upon this point. Id. at 637 (emphasis added, citations omitted).

Clearly, the determinative factor in Palmer, supra, was the fact that Hughes had beneficial ownership of the automobile in question, notwithstanding the fact that R. S. Evans held legal title. It should be noted that once again this Court referred to the fact that the Florida Traffic Statutes (at that time Chapter 317, presently Chapter 316), imposed certain obligations upon the "owners" of motor vehicles, but specifically provided that the conditional vendor was not the "owner"; rather, the conditional vendee was statutorily defined as the owner of the vehicle. See also, Hicks v. Land, 117 So.2d 11 (Fla. 1st DCA 1960); Williams v. Davidson, 179 So.2d 387 (Fla. 1st DCA 1965); McCall v. Garland, 371 So.2d 1080 (Fla. 4th DCA 1979);

Harrell v. Sellars, 424 So.2d 881 (Fla. 1st DCA 1982); Wummer v. Lowary, 441 So.2d 1151 (Fla. 4th DCA 1983).

Presently, the State Uniform Traffic Control Statutes are contained within Chapter 316, Fla. Stat. In part, § 316.002, Fla. Stat. (1985), provides that "it is the legislative intent in the adoption of this chapter to make uniform traffic laws to apply throughout the state and its several counties and uniform traffic ordinances to apply in all municipalities." As with the conditional vendor in Palmer, supra, § 316.003(27), Fla. Stat. (1985), defines "owner" within the meaning of the State Uniform Traffic Control Act:

> OWNER - A person who holds the legal title of a vehicle, or, in the event a vehicle is the subject of an agreement for the conditional sale or lease thereof with the right of purchase upon performance of the conditions stated in the agreement and with an immediate right of possession vested in the conditional vendee or lessee, or in the event a mortgagor of a vehicle is entitled to possession, then such conditional vendee, or lessee, or mortgagor shall be deemed the owner, for purposes of this chapter (emphasis added).

Clearly, the State Uniform Traffic Control Act does not apply to Respondent, GMAC, pursuant to the Legislature's definition of "owner."

In addition, Chapter 324, dealing with financial responsibility, provides in part under § 324.011, Fla. Stat. (1985):

> It is the intent of this chapter to recognize the existing privilege to own or operate a motor vehicle on the public streets and highways of this state when such vehicles are used with due consideration for others and their property, and 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.

Section 324.021(9), Fla. Stat. (1985) then goes on to define "owner" within the meaning of the financial responsibility statute; that definition is verbatim the same as the definition contained within § 316.003(27), Fla. Stat. quoted supra. Once again, the Legislature saw fit to provide that where a vehicle is subject to a conditional sale or lease with a right of purchase upon performance of the conditions stated in the agreement, and with an immediate right of possession vested in the conditional vendee or lessee, it is the vendee or lessee that is the "owner" of the vehicle.

In summary, unlike in Anderson, supra, the Legislature has not imposed upon GMAC the obligation to properly operate the vehicle in question on the roads of this state, nor has it imposed upon GMAC the financial responsibility requirements of Chapter 324. On the contrary, as in Palmer, supra, the Legislature has found fit to specifically provide that the long-term lessee, in this case Mr. Hersh, is the "owner" of the motor vehicle in question. The Legislature obviously recognized that responsibility for use of the vehicle in a long-term lease situation (where the lessee has an option to purchase the vehicle) should be vested in the beneficial owner -- the long-term lessee. In that regard, the Legislature has done little more than codify this Court's Decision in Palmer, supra.

Prior to the Second District Court of Appeal's Decision in Kraemer v. GMAC, 556 So.2d 431 (Fla. 2d DCA 1989), which will be discussed infra, the issue of whether a long-term lessor can be responsible under the dangerous instrumentality doctrine had not been squarely addressed by any Courts of this state. That precise issue was, however, addressed by the U.S. District Court for the District of Columbia in Lee v. Ford Motor Co., 595 F. Supp. 1114 (D. D.C. 1984). In Lee an individual named Fullwood was an employee of the U.S. Government, and he struck the Plaintiff while operating a government vehicle leased from Ford Motor Company pursuant to a long-term lease agreement. The District of Columbia had previously adopted the dangerous instrumentality doctrine by statute, entitled the Motor Vehicle Safety Responsibility Act, D.C. Code § 40-408. Id. at 1114. Of course, suit was filed by Lee against Ford Motor Company, seeking to hold Ford liable under the codified version of the dangerous instrumentality doctrine.

Ford moved for summary judgment contending that it was not the "owner" of the long-term lease vehicle within the meaning of the Motor Vehicle Safety Responsibility Act. In discussing the issue, the District Court initially noted that prior to a definition of "owner" being specifically included within the act itself, the holding of title, with no immediate right of control, was not sufficient to impose liability. Id. at 1115. Rather:

> The judicially developed law under the 1929 Act had substituted a practical test of ability to control a vehicle's use for the more rigid definition of "owner." Id. at 1115.

In that regard, the judicially developed law was quite the same as that developed in Florida. Moreover, as in Florida, Congress had, in 1956, modified the Motor Vehicle Safety Responsibility Act to include a definition of "owner," which is in fact identical to the definitions contained within §§ 316.003(27) and 324.021(9), Fla. Stat. (1985). After discussing the pre-existing case law, and the 1956 modification to the Act itself, the Court stated:

> In the present case, it is undisputed that Ford lacked "dominion and control" over the vehicle in question. The car had been provided to FCA by Ford while one of the vehicles under a long term lease between the parties was being repaired. . . . Under the lease, title remained in Ford but authority to control and operate the vehicle was given to the lessee, FCA. Ford had no immediate right to control the use of the vehicle at the time of the accident. While Ford did indeed "consent" to the operation of its cars by FCA employees, such blanket consent, which is the essence of a contract to lease, does not put Ford in the "position . . . to allow or prevent the use of the vehicle . . ." in any given case. . . . It is this immediate right of control, as an incident of ownership, that is the focus of the act in question. Id. at 1116 (emphasis added, citations omitted).

In summary, when dealing with precisely the same issue as is involved in the instant case, and precisely the same statutory definition of "owner," the Federal District Court in Lee ruled that liability attached to the beneficial owner, the long-term lessee, rather than to the long-term lessor which held title to the vehicle in question. See

also, Moore v. Ford Motor Credit Co., 420 N.W.2d 577 (Mich. App. 1988); Siverson v. Martori, 581 P.2d 285 (Ariz. App. 1978); Riggs v. Gardikas, 427 P.2d 890 (N.M. 1967).

Although Petitioner argues that the Court's Decision in Lee, supra, represents a "distinctly minority view" (Petitioner's Brief at 12), in fact Respondent has been unable to locate any cases, in any jurisdictions, holding to the contrary. Consequently, it appears that Petitioner's position represents the "distinctly minority view."

Recently, the Second District Court of Appeal addressed the issue of whether § 324.021(9)(b), Fla. Stat. (1986 Supp.) was unconstitutional, as violating Appellant's right to access to the Courts. Perry v. GMAC Leasing Corp., 549 So.2d 680 (Fla. 2d DCA 1989), review denied, 558 So.2d 18 (Fla. 1990).[2] Appellant in that case argued that the statutory provision in question deprived him of a pre-existing common law right, and consequently denied him access to the Courts in violation of Article I, § 21 of the Florida Constitution. Id. at 681. Obviously, one of the issues addressed by the Court in Perry was whether in fact a right to maintain a cause of action against a long-term lessor existed at common law.

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[2] The accident giving rise to the lawsuit in Perry occurred after the effective date of § 324.021(9)(b), Fla. Stat., whereas the accident giving rise to the instant case occurred prior to the effective date of that statutory provision; consequently, the statute itself is not an issue in the instant case.

In rendering its Decision in favor of GMAC, the Court initially noted the similarity between conditional vendors and lessors, quoting at some length from Palmer v. R. S. Evans, Jacksonville, Inc., supra. The Court then noted:

> While, as plaintiff argues, the lease also specifically provides that the "lessor remains the owner of the vehicle," nonetheless the fact remains that the lessor retains no control over the operation of the motor vehicle. Accordingly, the lessor has under the lease essentially no more than naked legal title which is all that the above quoted portion of the lease, which is otherwise stated to be included for Federal Income Tax purposes recognizes. 549 So.2d at 682.

The lease agreement involved in Perry was nearly identical to the one involved in the instant case.

Subsequent to its Decision in Perry, supra, the Second District Court of Appeal rendered its Decision in Kraemer v. GMAC, 556 So.2d 431 (Fla. 2d DCA 1989). In Kraemer, unlike Perry, the sole issue before the Court was whether GMAC, under the facts of that case, was the beneficial owner of the vehicle and therefore liable under the dangerous instrumentality doctrine; the applicability of the 1986 amendment to § 324.021(9), Fla. Stat., was not an issue in that case. In all material respects the lease agreement involved in Kraemer was identical to the lease agreement involved in the instant case. In affirming a summary judgment entered in favor of GMAC, the Court of Appeal noted:

> 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 elect not to exercise his option to purchase.

> Appellant confuses the right to repossess with the right to control. Every lending institution that finances an automobile has the right to repossess upon default. This hardly equates with beneficial ownership. Id. at 434.

In a concurring opinion, Judge Altenbernd stated:

> As a practical matter, the modern long-term automobile lease is little more than a method of creative financing. GMAC is technically the legal owner of this car, but its ability to control the use of the car is not significantly different from that of a bank which lends money for the purchase of a car. I completely agree with Chief Judge Campbell that the facts of this case do not warrant a judicial expansion of the dangerous instrumentality doctrine. Id. at 435.

It should be noted that subsequent to the Second District Court of Appeal's Decision in Kraemer, supra, two other District Courts of Appeal had an opportunity to distance themselves from the 2nd DCA in their own Decisions -- but elected not to do so. Rather, the Fourth District Court of Appeal in Folmar v. Young, 560 So.2d 798 (Fla. 4th DCA 1990) cited the 2nd DCA's Decision in Kraemer with approval, and the Third District Court of Appeal in Raynor v. DeLaNuez, 558 So.2d 141 (Fla. 3d DCA 1990) affirmed a summary judgment in favor of a long-term lessor based upon the authority "and reasoning" of the 2nd DCA in Kraemer. To date, no District Court of Appeal in the state of Florida has issued a contrary decision, or a decision even questioning the wisdom of the 2nd DCA.

It is also worth noting that this Court has recognized another exception to the dangerous instrumentality doctrine where the owner of a motor vehicle entrusts that vehicle to

a repairman or serviceman, so long as the owner does not exercise control over the injury causing operation of the vehicle during the servicing, service-related testing or transport of the vehicle, and is not otherwise negligent. Castillo v. Bickley, 363 So.2d 792 (Fla. 1978). This Court apparently recognized, once again, that the party with the ability to control the use of the vehicle should bear responsibility for that vehicle's use. The limited exception was created as a matter "of both social policy and pragmatism." Id. at 793. Of significance, this Court recognized that injured parties would not be left without recourse:

> 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. Id. at 793.

In the instant case, 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 elect not to exercise his option to purchase. The lessee was responsible for obtaining the vehicle's registration, for obtaining license plates, for doing all required maintenance and for obtaining insurance. The lessee was required to pay all applicable taxes, and was the beneficiary of the manufacturer's new car warranty. The long-term lessor, GMAC, was in reality nothing more than an

organization which provided financing for a vehicle it never had physical possession of, and never in fact even saw.

In response to GMAC's position, Petitioner initially argues that a lease transfers only possession, and does not transfer beneficial ownership. Consequently, according to Petitioner, a lease agreement -- by definition -- cannot possibly confer beneficial ownership upon the lessee. In support of this argument Petitioner cites several cases, none of which deal with the issue involved in the instant case. Moreover, the legal proposition espoused by Petitioner is, quite simply, wrong.

The Courts of this state have, on many occasions, pointed out that a lessee can have an interest in property which is essentially equivalent to ownership:

> During the life of the lease herein, Martin holds an outstanding leasehold estate in Rogers' premises which for all practical purposes is equivalent to absolute ownership. Rogers' estate is limited to his reversionary interest which ripens into perfect title at the expiration of the lease. Rogers v. Martin, 99 So. 551, 552 (Fla. 1924) (emphasis added).

Again, in Baker v. Clifford-Mathew Inv. Co., 128 So. 827, 829 (Fla. 1930), this Court stated: "This instrument conveyed to the lessee a leasehold estate in said premises during the life of the lease which for all 'practical purposes' is equivalent to absolute ownership." See also, West's Drug Stores, Inc. v. Allen Inv. Co., 170 So. 447, 449 (Fla. 1936) ("A lessee from a landlord is an assignee of the estate for the term of the lease."); Gray v. Callahan, 197

So. 396, 398 (Fla. 1940) ("We have held that during the life of a lease the lessee holds an outstanding leasehold estate in the premises, which for all practical purposes is equivalent to absolute ownership.") In that regard, the dissenting opinion of Chief Justice Boyd in Storer Cable T.V. of Florida, Inc. v. Summerwinds Apartments, 493 So.2d 417 (Fla. 1986) warrants quoting at some length:

> Moreover, I do not see section 83.66 as providing for the intrusion or occupation of the property of the landlord as perceived by the majority. During the life of a lease of real property, the tenant has the exclusive right of possession of the demised premises. By statute or agreement such possessory right is subject to a right of access as needed for the landlord to perform maintenance functions as required by statute or by the lease. But in all other respects, the tenant's possessory right is the equivalent, during the term of the lease, to ownership of the fee simple title. . . . During the term of the lease, the landlord's ownership is what the law calls a reversionary interest, because absolute ownership will revert back to the landlord upon the termination of the lease at some time in the future.
>
> . . .
>
> When a residential dwelling unit is leased to the tenant, the tenant has the paramount legal, possessory, ownership interest in the use, benefit, and enjoyment of the property as the above authorities show. Thus, during the term of the lease, the interior walls of the unit are the tenant's property.
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> . . .
>
> Because during the term of a residential lease of an apartment or a house the tenant owns the house or apartment and the curtilage surrounding it, no property of the landlord is taken or even touched if the tenant contracts for and obtains the use of a cable for purposes of receiving a television signal. 493 So.2d at 421, 422 (emphasis added).

Once again, Petitioner's analysis is incorrect. The lessee can be, and usually is, the "beneficial owner" of the leased property.

Moreover, it should be noted that if Petitioner's argument is correct, and only the passing of seisin can confer beneficial ownership sufficient to avoid liability under the dangerous instrumentality doctrine, then form will ultimately prevail over substance. According to Petitioner's argument, GMAC could simply retitle its lease agreement an "Agreement For Transfer," and leave all of the conditions the same -- with one exception. Under the revised agreement, the transferee of the automobile would be obligated to purchase the vehicle at the expiration of the 48-month period, for a fixed amount, with an option not to purchase the vehicle should he elect to exercise that option. All the elements of control and ability to control the vehicle would remain the same, but because the lessee (now called a "transferee") would have an option not to purchase, rather than an option to purchase, the dangerous instrumentality doctrine would not apply to GMAC (a promise to transfer seisin having been made). Obviously, under such an agreement liability would flow with verbiage rather than conduct or control. The law of this state has, fortunately, never been so shallow.

Petitioner also argues that the enactment of § 324.021(9)(b), Fla. Stat. (1986 Supp.), demonstrates that GMAC must be liable in this case, because the statutory

amendment creates a narrow exception to the dangerous instrumentality doctrine; "indeed, one might legitimately ask why the legislature bothered to create an exception at all in §324.021(9)(b), if the doctrine to which the exception was tailored did not previously exist." (Petitioner's Brief at 11). This argument is based upon a misperception of the statute in question, as well as of the pre-existing case law.

It must be recognized that the Court below did not hold that long-term lessors, under all circumstances, have no liability under the dangerous instrumentality doctrine. Rather, the Court held, as it did in Kraemer, that where a long-term lessor transfers beneficial ownership to a long-term lessee, it is not the "owner" of the motor vehicle within the meaning of that doctrine. By contrast, § 324.021(9)(b), Fla. Stat. applies to immunize a lessor from liability even if it retains beneficial ownership of a vehicle. The 1986 amendment to the statute actually reads:

> (b) Owner/lessor. -- Notwithstanding any other provision of the Florida Statutes or existing case law, the lessor, under an agreement to lease a motor vehicle for 1 year or longer which requires the lessee to obtain insurance acceptable to the lessor which contains limits not less than $100,000/$300,000 bodily injury liability and $50,000 property damage liability, 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; further, this paragraph shall be applicable so long as the insurance required under such lease agreement remains in effect.

The statutory amendment on its face provides immunity from liability where the lease agreement is for 12 months or longer, and the lessee maintain a certain level of liability insurance coverage. That immunity has absolutely nothing to do with beneficial ownership, as can be demonstrated by a simple example. If a given lessor entered an agreement to lease a vehicle for 13 months, with restrictions providing that the lessee could not take the vehicle outside the city limits of Tallahassee, only the lessee could operate the vehicle and no one else, the lessor would perform all maintenance on the vehicle and would obtain the necessary tags and registration, and in fact the lessee must garage the vehicle on the premises of the lessor during night time hours -- nevertheless the lessor would not be liable under § 324.021(9)(b), Fla. Stat. so long as the lessee maintained the requisite insurance coverage. Clearly, the hypothetical lessor would not have enjoyed immunity from liability under the common law, but would enjoy such immunity under the Legislature's mandate. In short, the 1986 statutory amendment has absolutely nothing to do with the issue of who is the "owner" within the meaning of the dangerous instrumentality doctrine.

Petitioner also asks the rhetorical question: "Does liability under the 'dangerous instrumentality doctrine' cease if the lease is for a week, or does it cease if the lease is for a month? Six months, perhaps -- or maybe a year? Neither Perry nor Kraemer answered that ques-

tion, . . ." (Petitioner's Brief at 23). Perhaps that question was not answered by the Perry and Kraemer Decisions because it is not a relevant question.

As is hopefully clear by now, the issue in the instant case is not how long a lease must be for the dangerous instrumentality doctrine not to apply; rather, the issue is one of ownership, and not duration. Where the lessee has all of the indicia of ownership, but for title, and the lease represents nothing more than an alternate means of financing, the dangerous instrumentality doctrine does not apply -- whether the duration of the lease is 12 months, or 120 months. The key issue is beneficial ownership, and not the length of the agreement.

Oddly, Petitioner also argues that § 627.7263, Fla. Stat. would become meaningless if GMAC does not have liability in the instant case. That statutory provision reads as follows:

> (1) The valid and collectible liability insurance or personal injury protection insurance providing coverage for the lessor of a motor vehicle for rent or lease shall be primary unless otherwise stated in bold type on the face of the rental or lease agreement. Such insurance shall be primary for the limits of liability and personal injury protection coverage as required by ss. 324.021(7) and 627.736.
>
> (2) Each rental or lease agreement between the the lessee and the lessor shall contain a provision on the face of the agreement, stated in bold type, informing the lessee of the provisions of subsection (1) and shall provide a space for the name of the lessee's insurance company if the lessor's insurance is not to be primary.

Petitioner argues that if GMAC had no liability under the dangerous instrumentality doctrine, there would be no purpose in having its insurance coverage be primary as set forth in the above quoted statute. Petitioner appears to argue that somehow insurance coverage and tort liability are synonymous; it will be recalled, of course, that Petitioner argued quite the opposite when it took the position that § 324.021(9), Fla. Stat. as it existed prior to the 1986 amendment applied only to insurance coverage and not to tort liability.

In any event, the simple fact is that § 627.7263, Fla. Stat. obviously has absolutely nothing to do with tort liability, but rather deals only with the issue of whose insurance coverage will be primary, to the limits required by the no-fault statute and the financial responsibility statute. If we assume that the statutory provision means all lessors must of necessity be liable under the dangerous instrumentality doctrine, then pursuant to the terms of the statute can we also shift the burden of the dangerous instrumentality doctrine by merely so stating in "bold type"? The proposition is, clearly, silly. As noted by Judge Altenbernd in Kraemer, supra, dangerous instrumentality and financial responsibility may be first cousins, but they are not identical twins. 556 So.2d at 435.

In the final analysis, the long-term lease involved in the instant case is nothing more nor less than an alternate

means of financing. Beneficial ownership always reposed in the lessee. GMAC was essentially a financing agency which held legal title and, admittedly, obtained certain federal tax benefits. Tax benefits do not, however, equate with beneficial ownership. Under the facts of this case, the dangerous instrumentality doctrine simply does not apply to hold GMAC liable for the conduct of the lessee's permissive user.

CONCLUSION

The undisputed facts in the record clearly show that GMAC did not maintain authority and control over the day-to-day use of the long-term lease vehicle. The Legislature of this state has specifically mandated that GMAC shall not be deemed the "owner" of the leased vehicle within the meaning of Florida Statutes, and the Courts of this state have uniformly held that only the beneficial owner of an automobile can be liable under the dangerous instrumentality doctrine. Because GMAC lacked beneficial ownership of the automobile leased by Richard Hersh, and operated by Scott Raybuck, as a matter of law it cannot be liable to Petitioner in this case. Consequently, the Decision rendered by the Second District Court of Appeal in favor of GMAC was eminently correct, and should be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by regular U.S. Mail this 24th day of September, 1990, to Joel D. Eaton, Esquire, 25 West Flagler Street, Suite 800, Miami, Florida 33130; and Bill Wagner, Esquire, 708 Jackson Street, Tampa, Florida 33602.

LARRY I. GRAMOVOT, ESQUIRE
Fla. Bar #273570
MALLERY & ZIMMERMAN, S.C.
101 Grand Avenue
P.O. Box 479
Wausau, WI 54402-0479
(715) 845-8234

ATTORNEYS FOR RESPONDENT