IN THE SUPREME COURT OF FLORIDA

CASE NO. 76,336

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.

_____/

ON CERTIFICATION FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

PETITIONER'S REPLY BRIEF ON THE MERITS

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I.
ARGUMENT

Our initial brief contains its own adequate reply to GMAC's responsive arguments. The issue before the Court in this case has also been briefed in several similar cases. Our reply will therefore be brief.

We note first that GMAC has simply ignored the half-dozen decisions of this Court (discussed at pages 7-9 of our initial brief) which hold -- without drawing any distinction whatsoever between long-term leases and short-term leases -- that vehicle lessors *are* liable under Florida's "dangerous instrumentality doctrine". Ignoring these decisions cannot make them go away, however. The only recent decision of this Court which GMAC has even bothered to discuss is *Castillo v. Bickley*, 363 So.2d 792 (Fla. 1978). However, as we noted in our initial brief (at page 7, fn. 2), *Castillo* was limited to its unique facts (further entrustment by the initial entrustee) in this Court's subsequent decision in *Michalek v. Shumate*, 524 So.2d 426 (Fla. 1988) -- a decision which GMAC has also ignored.

We also note that GMAC has been unable to explain the numerous decisions applying §627.7263, Fla. Stat. (cited at page 10 of our initial brief), except to point out that the statute deals with the question of whether a lessor's insurance coverage will be primary or secondary, rather than the threshold issue of whether a lessor is liable under the "dangerous instrumentality doctrine". The observation is correct, but it misses the point entirely. The point is that a lessor's insurance coverage can never be primary or secondary unless the lessor is liable under the "dangerous instrumentality doctrine" in the first place, so the statute makes sense *only* if it contains an underlying legislative recognition that the doctrine *does* apply to lessors -- which is all that we argued in our initial brief.

GMAC also argues that the definitions of "Owner" in §§316.003(27) and 324.021(9), Fla. Stat. (1985), mean that it is *not* the owner of the leased vehicle in issue here. This, as we explained in our initial brief, is incorrect. The definition of "owner"

in both of these statutes is carefully limited by the phrase "shall be deemed the owner, for purposes of this chapter". The most that these definitions can mean is therefore this: lessees, although not the actual owners of the vehicle, are "deemed" to be owners "for purposes of" compliance with the requirements set out in Chapters 316 and 324. There is no way that these carefully phrased definitions can be stretched to support GMAC's assertion that it is *not* the owner of the vehicle in issue (especially since GMAC *admitted* on the record below that it *is* the owner of the vehicle). The definitions in these statutes also have no relevance to application of the common law's "dangerous instrumentality doctrine" -- a point which this Court explicitly made in another decision which GMAC has simply ignored in its brief: *Insurance Company of North America v. Avis Rent-A-Car System, Inc.*, 348 So.2d 1149 (Fla. 1977).

GMAC has also collected a handful of decisions from other jurisdictions which have interpreted language similar to §324.021(9), Fla. Stat. (1985), as exempting owner/lessors from application of the "dangerous instrumentality doctrine". Some courts have apparently looked to legislative pronouncements on financial responsibility to define the scope of their own "dangerous instrumentality doctrine". In other cases, the language similar to §324.021(9) is found in a liability statute, rather than a financial responsibility statute. And in some states, the issue is far from settled. For example, the reasoning in the Michigan decision upon which GMAC relies -- *Moore v. Ford Motor Credit Co.*, 166 Mich. App. 100, 420 N.W.2d 577 (1988) -- was not followed by a different intermediate appellate court in Michigan. *See Miller v. Massulo*, 172 Mich. App. 752, 432 N.W.2d 429 (1988).

GMAC has also quarreled with our observation (at page 12, fn. 4) that the decisions upon which it relies represent a "distinctly minority view". According to GMAC, it can find no decisions, in any jurisdiction, imposing liability upon owner/lessors for the negligent operation of their vehicles by lessees -- and it therefore characterizes *our* position as the "distinctly minority view". Apparently, the petitioner did not bother

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to read the decisions collected in the authority which we cited in support of our assertion: Annotation, *Car Rental Regulation*, 60 A.L.R.4th 784 (1988) (and later case service). We stand by our initial assertion. Because Chapter 324 says what it says, and because this Court has always recognized that the financial responsibility requirements of Chapter 324 are *independent* of the common law's "dangerous instrumentality doctrine", it seems to us that no useful purpose would be served by exploring the intricate details of this issue against the specific statutory schemes in other states, or the judicial decisions construing those statutes. Because Florida law clearly governs the issue presented here, and because this Court has a long line of its own authority upon which to base its decision in the instant case, we will stick to Florida law -- which brings us to GMAC's primary responsive position here.

GMAC's primary position here is that its long-term lease transferred "beneficial ownership" of the vehicle to the lessee in the same way that a conditional sale contract would have transferred "beneficial ownership". The various indicia of ownership upon which it relies are merely incidents which attach to exclusive "possession and control", however; they do not amount to "beneficial ownership". Neither do the decisions upon which GMAC relies -- which observe that a leasehold estate is "for all practical purposes" the equivalent of "absolute ownership" -- hold to the contrary. They merely observe that the "possession and control" transferred by a lease amounts to a transfer of most of the sticks represented by the bundle of sticks known as ownership. None of them holds that a lease transfers "beneficial ownership" as well as "possession and control".

As we took considerable pains to demonstrate in our initial brief (at pages 12-16), "beneficial ownership" is a term of art in the law of property, representing a claim to title which a law court will not enforce but which will be enforced in a court of equity. The term represents an entirely different concept than mere "possession and control", and GMAC's insistence upon equating the two entirely different concepts is simply wrong. A lease, by definition, transfers only "possession and control"; as a matter

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of law, it does not transfer "beneficial ownership".

The same error infects GMAC's response to a critical point in our initial brief (at page 11) -- our assertion that "one might legitimately ask why the legislature bothered to create an exception at all in §324.021(9)(b), [Fla. Stat. (1986 Supp.),] if the doctrine to which the exception was tailored did not previously exist". According to GMAC, the new exception can be rendered consistent with the prior law by a holding that prior law immunized only owner/lessors who transferred "beneficial ownership" of their vehicles to their lessees, but the new law immunizes all owner/lessors (including those who retain "beneficial ownership" in themselves). However, if we are correct that a lease, by definition, transfers *only* "possession and control" and does *not* transfer "beneficial ownership", then this attempt to harmonize the legislature's recent amendment with GMAC's erroneous view of the prior law is legally impermissible. We continue to insist that the recent exception to the "dangerous instrumentality doctrine" enacted by the legislature is proof positive of the legislature's understanding that, prior to enactment of the exception, Florida's "dangerous instrumentality doctrine" *did* apply to owner/lessors leasing vehicles under long term leases.

Most respectfully, if application of the "dangerous instrumentality doctrine" is to continue to turn upon ownership, rather than mere "possession and control" -- as this Court explicitly held in *Susco Car Rental System of Florida v. Leonard*, 112 So.2d 832 (Fla. 1959) -- then there can be no question here that the district court's decision (which turns exclusively upon its earlier decisions in *Perry* and *Kraemer*, which confuse the concept of "beneficial ownership" with "possession and control") is in error, and should be quashed.

II.
CONCLUSION

We respectfully submit once again that the district court erred in concluding that Florida's "dangerous instrumentality doctrine" is inapplicable to owner/lessors leasing

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vehicles under long-term leases; that the district court's decision should be quashed; and that the case should be remanded to the district court with directions to reverse the summary judgment entered in GMAC's favor by the trial court.

III.
CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 16th day of October, 1990, to: Larry I. Gramovot, Esq., Mallory & Zimmerman, P.O. Box 479, Wausau, Wisconsin 54401; and to Roland J. Lamb, Esq., Williams, Brasfield, Wertz, Fuller & Lamb, P.A. 2553 First Avenue North, Post Office Box 12349, St. Petersburg, Fla. 33733-2349.

Respectfully submitted,

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