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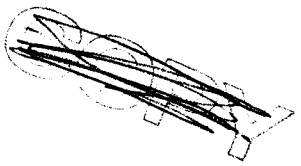

IN THE SUPREME COURT OF FLORIDA

Jeffrey D. Stupak,

Plaintiff/Petitioner,

vs.

Winter Park Leasing, Inc.,

Defendant/Respondent.

_____/

Case Number 76,495
DCA Case Number 89-2122

On Appeal from the District Court of Appeal
Fifth District of Florida

PETITIONER'S INITIAL BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND OF THE FACTS

Plaintiff/Petitioner, Jeffrey D. Stupak, was a passenger in a 1987 Dodge Lancer on November 2, 1987, in Orlando, Florida. Jeff was an E-3 stationed by the U. S. Navy at the Orlando Naval Training Center. That fateful evening, Jeff accepted a ride with David W. Floury, another U. S. Navy enlisted man. Floury rented the 1987 Dodge Lancer from Major Rent-A-Car in Orlando, Florida.

The Dodge Lancer was owned by Winter Park Leasing, Inc. The vehicle's title was issued to Winter Park Leasing, Inc. Winter Park Leasing, Inc., leased the vehicle to Major Rent-A-Car under a Master Lease Agreement. (A-1)

While using his operational seat belt, Jeffrey D. Stupak was seriously injured when Floury negligently drove the Dodge Lancer at a speed in excess of 50 miles per hour into a concrete utility pole.

The lease between Winter Park Leasing, Inc., and Major Rent-A-Car, Inc., was executed on October 8, 1986. That lease agreement constitutes a master lease by which a number of vehicles are leased for various time periods, all for less than seven months, for use by Major Rent-A-Car, Inc., in operating a car rental company located in Orlando, Florida. The lease, with Winter Park Leasing, Inc., as the Lessor, and Major Rent-A-Car, Inc., as the Lessee includes the following provisions:

> 1. LEASED VEHICLES, RENTAL PAYMENT AND TERM. This agreement is one of leasing only and the Lessee shall not have, or acquire any right, title or interest in or to the vehicle except the right to use or operate it as provided herein.

3. INSURANCE. Insurance shall be procured for each vehicle and shall be maintained during the term of the lease as provided in Lessee's Order with companies approved by Lessor. Proof of insurance, as required by Lessor, shall be provided by Lessee prior to delivery of any vehicle. Such insurance shall be endorsed to provide that the Insurer will notify Lessor immediately in the event of the insurance should be materially altered or cancelled.

Lessee and Lessor, their agents or employees, shall comply with all the terms and conditions of said insurance policy, including the immediate reporting of all accidents to Insurer, and do all things necessary or proper to protect or preserve the other party's rights as a named insured in said insurance policies.

All insurance policies covering the vehicles shall be endorsed to protect, as their interest may appear, Lessee, Lessor, and any other person having an interest in the vehicles. Lessor will be named as an additional insured and Chrysler Credit Corporation as loss payee on all such policies.

Insurance shall be provided by the Lessee for the benefit of the Lessor and the Lessee during the lease term, with limits as follows: Automobile liability insurance of $250,000.00 combined single limit for bodily injury and property damage.

6. DELIVERY AND RETURN OF VEHICLES. Delivery and return of the vehicle shall be at Lessor's place of business or as specified in Lessee's Order. The lessee agrees to return the vehicle at the end of the lease term, or any extension thereof, or upon earlier termination of the lease, in good operating condition and working order, free from any collision or other physical damage.

8. USE OF VEHICLES. Lessee shall permit only, safe, careful, licensed and authorized drivers to operate the vehicles. Lessee agrees upon written complaint from Lessor, specifying any excessive collision claims or an indication of any other incompetence by or of any driver, that Lessee will immediately take such actions as necessary to correct these conditions.

> 11. DEFAULT. Time is of the essence of this Agreement and in the event that Lessee fails to pay in full on the date due any rental payment due hereunder, or defaults in the performance of any of the other terms, conditions and covenants encumbered in any way or if at any time, in the exclusive judgment of Lessor, his rights in the leased vehicles in any way shall be prejudiced or rendered insecure, Lessor shall have the right to take immediate possession of the vehicle wherever found... **EMPHASIS SUPPLIED.**

Jeffrey D. Stupak filed a complaint for compensatory damages against Winter Park Leasing, Inc. A Judgment has been entered on the issue of liability as to the Defendant, Major Rent-A-Car, Inc., in this civil action.

Winter Park Leasing, Inc., filed a Motion for Summary Judgment and won. On Appeal from the Fifth District Court of Appeal that court affirmed the Summary Judgment by the trial court citing Kraemer vs. General Motors Acceptance Corporation, 556 So.2n 431 (Fla. 2ndDCA 1989).

The Fifth District Court of Appeal entered its decision adverse to the Petitioner on June 14, 1990, followed by an adverse decision as to the Petitioner's Motion for Rehearing and/or Alternative Motion for Certification to the Florida Supreme Court on July 18, 1990. A Notice to Invoke Discretionary Jurisdiction of the Florida Supreme Court was timely filed on August 14, 1990. The Court graciously granted jurisdiction on the matter and required briefs on the merits in an Order dated December 8, 1990.

SUMMARY OF PETITIONER'S ARGUMENT

In Anderson vs. Southern Cotton Oil Company, 74 So.2nd 975 (Fla. 1917), this Court recognized the common law principle, known as the dangerous instrumentality doctrine, that an owner of a motor vehicle is liable for its negligent use.

The Fifth District Court of Appeal affirmed the Summary Judgment entered by the Trial Court on the authority of Kraemer vs. GMAC, 556 So.2n 431 (Fla. 2ndDCA 1989).

The Florida Supreme Court quashed the District Court's decision in Kraemer vs. GMAC, rejecting the contention that GMAC could not be held liable under the dangerous instrumentality doctrine because of the transfer of beneficial ownership of the automobile under its long term lease. (Kraemer vs. GMAC, number 75,580, slip op. at 11 (Fla. December 20, 1990) (15 FLW S657).

The lease between Winter Park Leasing, Inc., and Major Rent-A-Car, Inc., does not transfer beneficial ownership of the automobile to Major Rent-A-Car under the terms of the lease. It is not a long term lease, but rather it is a master lease which provides for certain vehicles to be leased for certain specified times not to exceed seven (7) months.

As owner, Winter Park Leasing, Inc., should be subject to liability under the dangerous instrumentality doctrine.

ARGUMENT

THE FIFTH DISTRICT COURT OF APPEAL ERRED IN RELYING ON THE AUTHORITY OF KRAEMER VS. GMAC, IN AFFIRMING THE SUMMARY FINAL JUDGMENT IN FAVOR OF WINTER PARK LEASING, INC.

The lease executed between Winter Park Leasing, Inc., and Major Rent-A-Car, Inc., is much different from a conditional sales contract. This lease was an agreement for the delivery of the vehicles described under the master lease to Major Rent-A-Car, under certain limitations, for a specified period of time, after which the vehicles were to be returned to Winter Park Leasing, Inc.

Just as in Kraemer, where the lease prohibited the operation of the automobile by certain drivers, limited the geographic area in which the automobile could be operated, prohibited certain uses of the automobile, and restricted installation of the equipment in the automobile, as in the case at bar, Winter Park Leasing, Inc., provided for specific delivery and return of the vehicle at Winter Park Leasing's place of business, required the vehicles to be operated only by licensed and authorized drivers, and required that insurance be provided under the terms of the policy.

Also as in Kraemer, the Winter Park Leasing, Inc. lease provided specifically under paragraph one that the agreement was one of leasing only, and that Major Rent-A-Car as Lessee shall not have, or acquire any right, title or interest in or to the vehicle except the right to use or operate it as provided herein.

Just as the Lessee, Green, was in default on his payments to GMAC in the Kraemer case, which would have allowed GMAC the contractual right to reacquire possession of that leased automobile

at the time that accident occurred. In the case at bar, it is claimed by Major Rent-A-Car's liability insurer that there was no insurance in effect on the 1987 Dodge Lancer, as required under the provisions of paragraph 3 of the master lease, and that in the event of default, as provided in paragraph 11, in the performance of any of the terms, conditions or covenants, Winter Park Leasing as the Lessor shall have the right to take immediate possession of the vehicle wherever found.

Thus, Winter Park Leasing, Inc., had retained the right to take possession, and did have the right to retake possession of the vehicle, if there was no insurance in effect, as is claimed by the liability insurer of Major Rent-A-Car.

There is no contention by Winter Park Leasing, Inc., that the master lease between Major Rent-A-Car and Winter Park Leasing, Inc., is within the provisions of Florida Statute Section 324.021(9)(b).

As was pointed out in Kraemer, even if the statute was applicable in that case, it would not have helped GMAC, because the liability insurance on the automobile had lapsed when the accident occurred. Similarly, in the case at bar, it is alleged that the liability insurance on the vehicle to be provided by Major Rent-A-Car had lapsed at the time of the accident.

Just as the Court rejected the contention that GMAC could not be held liable under the dangerous instrumentality doctrine because of the transfer of "beneficial ownership" of the vehicle under a long term lease, so too should the Court reject Winter Park