IN THE SUPREME COURT OF FLORIDA

Jeffrey D. Stupak,

Plaintiff/Petitioner/
Appellant,

vs.

Winter Park Leasing, Inc.,

Defendant/Respondent/
Appellee.

_____/

Case Number 76,495
DCA Case Number 89-2122

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

REPLY BRIEF ON THE MERITS OF JEFFREY D. STUPAK

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STATEMENT OF THE FACTS

Winter Park Leasing, Inc. makes the statement that Major Rent-A-Car, Inc. had leased the vehicle on a long term basis from Winter Park Leasing, citing appendix two of the Initial Brief of the Appellant as to the length of the Master Lease Agreement. (AB-2)

This is not correct. The longest term of the lease of any vehicle according to the Master Lease Agreement that was attached as an appendix is seven months. That term, seven months, is not a long term lease within the meaning of Florida Statute Section 324.021(9).

Winter Park Leasing refers to the rental agreement between the renter, Major Rent-A-Car and the rentee, David Flory, which was attached as Exhibit "A" to Winter Park's Motion for Summary Judgment, as a lease. (AB-2, paragraph 3) It is not a lease. It is a daily rental agreement.

Winter Park Leasing claims that it is undisputed that Flory violated the terms of the rental agreement. (AB-5) This is not correct. There is a major factual dispute about whether or not Flory was in violation of the rental agreement at the time of the accident.

POINT ON APPEAL

As the Appellee has conceded that the Fifth District Court of Appeal erred in relying on the authority of Kraemer vs. GMAC, in affirming the Summary Final Judgment, the Fifth District Court of Appeal's per curiam affirmed decision should now be reversed on the basis that there are genuine issues of material fact concerning the issue of permission and consent which should not have been resolved by Summary Judgment by the Trial Court.

SUMMARY OF ARGUMENT

In its Answer Brief on the merits, Winter Park Leasing admits that the Trial Court granted the Summary Judgment in this action on the issue of permission and consent of the driver, David Flory to drive the Major rental car on the night of the accident.

Since the Fifth District Court of Appeal's opinion affirmed the Trial Court solely on the authority of Kraemer vs. GMAC, 556 So. 2d 431, (Fla. 2nd DCA 1989), the issue for determination by this Honorable Court is whether or not the initial decision by the Trial Court is capable of being affirmed on appeal by the Fifth District Court of Appeal.

Jeffrey D. Stupak contends that the affirmance by the Fifth District Court of Appeal was error because there are genuine issues of material fact as to the issue of permission and consent which should not be resolved by a Summary Judgment at the Trial Court level.

ARGUMENT

THE FIFTH DISTRICT COURT OF APPEAL ERRED IN AFFIRMING THE FINAL JUDGMENT ENTERED BY THE TRIAL COURT IN FAVOR OF WINTER PARK LEASING, INC.

Jeffrey Stupak respectfully submits to the Florida Supreme Court that the Final Judgment that was reviewed by the Fifth District Court of Appeal was clearly erroneous. The only reason the Fifth District Court of Appeal affirmed the judgment of the Trial Court was because of the Fifth District Court of Appeal's adoption of the decision by the Second District Court of Appeal in Kraemer vs. GMAC. (Supra).

Without dispute, Winter Park Leasing was the legal title owner of the rental vehicle, the 1987 Dodge Lancer, being driven negligently by David Flory on the night of the accident.

Without dispute Flory had rented the vehicle from Major Rent-A-Car.

Now that Kraemer vs. GMAC, 572 So. 2d 1363 (Fla. 1990), has resolved the issue of the liability of a lessor of a vehicle that holds title in its name, such as Winter Park Leasing, Inc., the only way Winter Park Leasing can avoid liability in this civil action is to argue that Flory did not have the permission and consent of Major to drive the rental car on the night of the accident.

First, Winter Park Leasing itself did not restrict David Flory in any way in driving the Dodge Lancer. This is because the Master

Lease Agreement between Winter Park Leasing and Major Rent-A-Car does not require a specific rental term by any individual rentee as a restriction of any type on the driver who rented the vehicle.

Therefore, Winter Park Leasing is not relying for its Summary Judgment upon any of its own restrictions in the operation, maintenance or use of the leased vehicle. Instead, Winter Park Leasing is relying upon the language of the rental agreement between its lessee, Major Rent-A-Car and the rentee, David Flory, in arguing the permission and consent issue.

The Trial Court has already entered a partial Final Summary Judgment on the issue of liability against Major Rent-A-Car. Therefore, the permission and consent issue has been determined adversely to Winter Park Leasing's agent, Major Rent-A-Car, as a matter of law. Winter Park Leasing was successful in convincing the Trial Court that it could raise the issue of permission and consent even though that issue had been resolved adversely to its agent, Major Rent-A-Car. In short, Winter Park Leasing, not a signatory to the rental agreement between Major Rent-A-Car and David Flory, was able to argue solely on the language of the rental agreement itself that Flory was a thief, or alternatively had converted the rental car to his own use at the time of the accident.

On page 8 of its Answer Brief, Winter Park Leasing argues that Winter Park Leasing did not consent to David Flory keeping the car past the due date. Of course, Winter Park Leasing had no knowledge of David Flory renting the vehicle in the first place.

If Winter Park Leasing's position is sustained by the Florida Supreme Court, the rental car industry will always be capable of denying liability for automobile accidents that occur after the pre-printed contract time and date has expired for the return of the vehicle.

It is conceded in the Answer Brief by Winter Park Leasing that the language of the rental agreement was the sole basis for the Trial Court's opinion that David Flory was a thief or a converter within the meaning of those cases best represented by Susco Car Rental Systems vs. Leonard, 112 So. 2d 832 (Fla. 1959).

The Answer Brief of Winter Park Leasing on page 10 concludes with an argument that first, there was no ambiguity in the rental agreement itself as to the contract term, and second there is not a factual dispute as to permission and consent.

Jeffrey Stupak strongly disagrees with both conclusions and respectfully requests the Court to reverse the Trial Court's Summary Judgment and to reverse the Fifth District Court of Appeal's affirmance of that Summary Judgment.

First, the record was incomplete at the time of the Summary Judgment hearing. The Trial Court incorrectly relied on a document, the rental agreement, that had not been admitted into evidence. At a Summary Judgment hearing, the record evidence in support of the Motion must be admissible at trial, and the rules of evidence are applicable to evidence which is offered at a hearing for a summary judgment. See RCP 1.510(e). Evan vs. Borkowski, 139 So. 2d. 472, (Fla. 1st DCA 1962), reviewed denied

146 So. 2d 378 (Fla. 1962).

The alleged copy of the rental agreement was not authenticated in any regard at the time of the hearing. The Motion for Summary Judgment was not verified under oath. There were no depositions taken nor affidavits filed to support the authenticity or genuineness of the rental agreement. It is Winter Park Leasing's burden to establish that the document is admissible evidence at the time of the hearing.

There are inferences even from the rental agreement itself that David Warren Flory did not convert the 1987 Dodge Lancer or steal it.

Even assuming that Exhibit "A" to Winter Park Leasing's Motion for Summary Judgment, the rental agreement itself, may be considered by the Trial Court and the Fifth District Court of Appeal as genuine, there are inferences of fact from the document's language itself which provide evidence that would allow a jury to rule against Winter Park Leasing. Therefore, as there were genuine issues of material fact as to the language of the agreement, Summary Judgment should not have been granted.

Specifically, there are a number of inferences which may be made by a jury from the fact that there was a rental agreement between David Warren Flory and Major Rent-A-Car which was to terminate on November 1, 1987. The language of the agreement itself refers to holding over possession of the car that is being rented by not returning on the specific due date. This indicates that Major Rent-A-Car and David Warren Flory had bargained in the

rental agreement a cost that David Warren Flory would be charged if late in returning the vehicle, if he elected to continue to rent the vehicle past the due date listed on the rental agreement.

The rental agreement itself actually contemplates an individual who has rented the vehicle holding over beyond the due date. This was pointed out specifically to the Trial Court during the hearing. On paragraph 7 of the reverse side of the rental agreement it states in pertinent part as follows:

> 7. "Renter agrees that if he has not returned said vehicle to the station from which it was rented within twenty-four (24) hours after the date and time herein agreed upon for its return, or if the vehicle is abandoned he will bear all expenses incurred by the company in attempting to locate and recover said vehicle, and hereby waives all recourse against the company or other person responsible for renter's arrest and prosecution even though renter may consider such arrest or prosecution to be false, malicious and unjustified".

The clear inference from that language in paragraph 7 of the reverse side of the rental agreement is that for the first twenty-four (24) hours after the due date upon which was agreed the vehicle would be returned, which is when the subject accident occurred in this case, Major Rent-A-Car is not taking any affirmative action. There is no expense incurred by the company in attempting to locate and recover the vehicle, and the rentee is only responsible for additional costs which will be charged on an hourly basis.

Since the company tells you that you have twenty-four (24) hours after the date that it is to be returned before all expenses will begin to be incurred against you, it can hardly be argued by

Winter Park Leasing that someone who does not return the vehicle approximately two hours after its due date has committed theft or conversion by holding it over. Again, it is emphasized that Major Rent-A-Car made no such argument at the Trial Court level. Winter Park Leasing was the only entity asserting this position.

In addition, there was no testimony or evidence from Major Rent-A-Car as to its customer's habits concerning individuals who have rented Winter Park Leasing owned vehicles and held them over beyond the due date of return. There was no evidence as to any restriction upon David Warren Flory's use of the rented vehicle by Major Rent-A-Car or Winter Park Leasing other than the rental agreement itself.

It cannot be reasonably argued that the mere holding over of a rented vehicle for two hours after the due date of its return constitutes theft or conversion, as a matter of law. Surely whether or not a theft or conversion occurred within such a short time span after the required due date should be subject to factual determination by a jury or at least based upon substantial record evidence, neither of which has occurred in this case.

There were genuine issues of material fact as to the issue of permission and consent regarding David Flory's holding over the rental vehicle by two hours beyond the due date.

First, there was record evidence at the time of the Summary Judgment hearing which presented a factual dispute as to the issue of permission and consent. Jeffrey Stupak had alleged in his pleadings that David Warren Flory had permission and consent of

Winter Park Leasing, Inc., expressed or implied, at the time of the accident. (R 38-39, of the 5th DCA Record on Appeal). Winter Park Leasing had merely denied this allegation in its Answer and Affirmative Defenses.

The factual evidence that would be admissible under the Florida Evidence Code included the answers to the interrogatories by the corporate vice-president of Winter Park Leasing, Inc., which were filed the day before the Summary Judgment hearing. (R 161 of the 5th DCA Record on Appeal).

In explaining Winter Park Leasing's denial of the issue of permission and consent in its response to Request for Admissions, the answer to the interrogatory merely stated that since Winter Park Leasing had not been able to contact David Warren Flory that corporation was not in a position to admit or deny whether David Warren Flory was operating the vehicle at the time of the accident with permission and consent of Winter Park Leasing.

There was no effort by Winter Park Leasing to establish any violation of its lease terms with Major Rent-A-Car concerning restrictions on use of the vehicle by renters renting the vehicles such as David Flory.

There was no effort by Winter Park Leasing by affidavit or deposition to establish that Winter Park Leasing relied upon any specific provision of the rental agreement between Major Rent-A-Car and individuals renting vehicles owned by Winter Park Leasing and rented by Major Rent-A-Car.

The language of the rental agreement provided;

DATE DUE:

Expiration of Contract

11/1/8 A.M.

(P.M.

What occurred at the Summary Judgment hearing was that counsel for Winter Park Leasing interpreted the rental agreement with the undisputed fact that the accident occurred at approximately 2:00 A.M. on November 2, 1987, and took a position that was actually inconsistent factually with the sworn testimony of the corporate representative of Winter Park Leasing.

In short, having answered sworn interrogatories to the effect that no admission or denial could be made as to the issue of permission and consent by David Warren Flory in the operation of the rental vehicle, Winter Park Leasing was able to get a Summary Judgment from the trial Judge arguing that there was no permission and consent solely through the operation of the language of the rental contract.

As was explained to the Trial Court at the time of the hearing, where none of the pleadings in a civil action are under oath, the allegations of a complaint have as much efficacy as the allegations of an answer for purposes of determining a Motion for Summary Judgment. Feinman vs. City of Jacksonville, 356 So. 2d 50, (Fla. 1st DCA 1978).

At the time of the Summary Judgment hearing, there was simply a pleading dispute as to the issue of permission and consent, and

no record evidence to establish a breach of custody or conversion such that it could be said that there was no genuine issue of any material fact that David Flory was a thief or had converted the Dodge Lancer to his own use on the night of the accident.

As was pointed out previously, Major Rent-A-Car has been deemed by operation of law in this civil action to have admitted that David Warren Flory did have the permission and consent of Major Rent-A-Car to operate the Dodge Lancer at the time of the accident. (R-112 of the 5th DCA Record on Appeal).

Winter Park Leasing provided no evidence that David Flory was charged with theft of the vehicle, that he was charged with excessive rental charges, that he was prosecuted or condemned in any fashion for having this accident two hours after midnight, when the vehicle was due to be returned.

As was pointed out in the Briefs to the Fifth District Court of Appeal, this appeal is similar to Tribbitt vs. Crown Contractors, Inc., 513 So. 2d 1084 (Fla. 1st DCA 1987).

In this case, as in Tribbitt, there is no dispute that Winter Park Leasing had given its consent to the use and operation of the Dodge Lancer beyond its immediate control by the nature of its lease agreement with Major Rent-A-Car. The real issue is whether Winter Park Leasing had in fact been deprived of the incidents of ownership, through a breach of custody amounting to a species of conversion or theft by the renting individual, David Warren Flory.

As in Tribbitt, there is no record evidence to establish that David Warren Flory's operation of the 1987 Dodge Lancer constituted

a species of conversion or theft.

There were factual disputes as to the return of the vehicle. The Trial Court ruled that no other facts about the rental agreement or circumstances of the accident could alter his opinion that once David Flory did not return the vehicle by its due date, it is established as a matter of law that David Flory had stolen the vehicle, or converted to his own use, thus exonerating Winter Park Leasing from liability. Whether David Flory intended to return the vehicle by paying the hourly rate that quoted in the rental agreement for the period of the hold over, or whether David Flory had an understanding with Major Rent-A-Car about when he could return the vehicle; or the custom and practice of Major Rent-A-Car concerning a customer's renting the vehicles owned by Winter Park Leasing by holding over beyond the due date for return;, all of these are facts still in dispute, which the trial Judge ruled unnecessary to a determination as a matter of law that David Flory was a thief. Winter Park Leasing has never explained what could possibly be the purpose of containing an hourly quotation for renting a vehicle if David Flory could only return it within two business days or less as Winter Park Leasing contends without risking being deemed a thief by conversion.

Even if Winter Park Leasing did deem David Flory a thief by conversion of the vehicle by the holding over of the 1987 Dodge Lancer beyond the due date, why is that sole document, the rental agreement and its interpretation by the trial court or its draftsmen, Major Rent-A-Car, the only evidence that a jury could

use in deciding the issue of permission and consent? It does not require any citation of authority that permission and consent for the operation of the motor vehicle under the dangerous instrumentality case is normally a fact question.

The rental agreement itself is only one potential item of evidence to be considered by a finder of fact on the issue of permission and consent.

Where the issue of permission and consent requires record evidence as to operation of the vehicle by an individual renting it two hours beyond the alleged return date on the rental agreement, there are genuine issues of material fact concerning whether or not that individual's continuing operation of the vehicle constituted a species of conversion or theft.

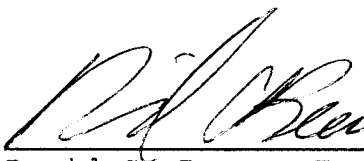
To decline Jeffrey D. Stupak an opportunity to establish the liability of the owner of the vehicle, Winter Park Leasing, for its operation by the renter David Warren Flory, on the basis solely of the language of the rental agreement is a denial of substantial justice in this matter.

CONCLUSION

The Summary Judgment should not have been granted by the Trial Court. The Fifth District Court of Appeal only affirmed the Trial Court's ruling on Summary Judgment because of the Fifth District's adoption of the Kraemer doctrine. The Kraemer doctrine has been over ruled by the Florida Supreme Court. This matter should be remanded to the Fifth District Court of Appeal with instructions to issue its mandate reversing the decision of the Trial Court, and remanding to the Trial Court for further consideration of this matter on the merits.

The purpose and function of the Florida Supreme Court is to provide all citizens equal access to the courts and substantial justice, without regard to technicalities. Jeffrey D. Stupak is entitled to relief in this action.

Respectfully submitted,



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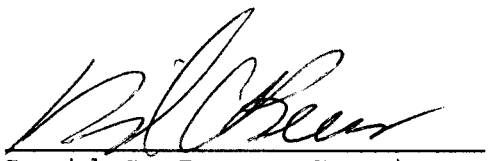
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail to **William E. Lawton, Esquire**, Post Office Box 2928, Orlando, Florida 32802, **David A. Sims, Esquire**, 500 East Altamonte Drive, Suite 200, Altamonte Springs, Florida 32701, this **13th day of May, 1991.**



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