12-24

SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

Case No. 76,850

JAMES ROBERT ROOKS,

Petitioner,

vs.

SAMUEL JAMES THORPE, et al.,

Respondent.

PETITIONER'S BRIEF ON THE MERITS ON CERTIFICATION

FROM THE DISTRICT COURT OF APPEAL, THIRD DISTRICT

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PREFACE

The Third District Court of Appeal affirmed an order granting a partial final summary judgment for the defendant, General Motors Acceptance Corporation (GMAC), a long-term lessor, in an auto accident case and certified the question to this court as one of great public importance. Petitioner, James Robert Rooks, was the plaintiff in the trial court and appellant in the Third District and respondents, Samuel James Thorpe, GMAC, Jose Brown, Graciela Brown, and Unistrut Corporation were defendants/appellees. The parties are referred to as plaintiff and defendant or by their proper names. GMAC is the only defendant involved in this appeal.

The following symbols are used:

(R) - Record
(A) - Appendix.

STATEMENT OF THE CASE AND FACTS

In January, 1985, Samuel James Thorpe entered into a motor vehicle lease agreement with GMAC for a 1985 Jimmy (R 33-36, 117-202, Exhibit B). The lease was for 48 months and required that Mr. Thorpe, as lessee, obtain liability insurance with limits not less than $100/300,000 (R 112-202, Exhibit B). Pursuant to paragraph 10 of the lease the lessee had the option to purchase the vehicle for the fair market value (R 117-202, Exhibit B). The lease further provided:

> 25. OWNERSHIP. This is a lease only and Lessor remains the owner of the vehicle. You will not transfer, sub-lease, rent, or do

> anything to interfere with Lessor's ownership of the vehicle. You and Lessor agree that this lease will be treated as a true lease for Federal Income Tax purposes and elect to have Lessor receive the benefits of ownership... . (Emphasis added) (R 112-202, Exhibit B)

In March of 1986, plaintiff was injured when his motorcycle was struck by the Jimmy driven by Samuel James Thorpe and another vehicle driven by Jose Brown and owned by Graciela Brown (R 1-3, 33-36). Plaintiff sued the Browns, Samuel James Thorpe, Unistrut Corporation (Mr. Thorpe's employer), and GMAC (R 1-3, 33-36). GMAC moved for summary judgment on the basis that it was not the owner as defined by Section 324.021(9)(b), Florida Statutes (R 14-15). The trial court denied the motion because the statute as amended, effective July 1, 1986, does not apply retroactively (R 65).

GMAC subsequently filed a renewed motion for final partial summary judgment pursuant to Section 324.021(9)(a), Florida Statutes, claiming that this statute exempts long-term lessors from vicarious liability under the dangerous instrumentality doctrine and because GMAC, under the terms of the lease, was not the beneficial owner of the vehicle (R 203-217). The court granted GMAC's motion and entered a final partial summary judgment for GMAC, finding no liability as a matter of law under Section 324.021(9)(a), that the dangerous instrumentality doctrine does not apply to long-term lessors, and that GMAC did not have beneficial

ownership of the leased vehicle on the day of the accident (R 339-340).

Plaintiffs appealed to the Third District Court of Appeal which affirmed based on Kraemer v. General Motors Acceptance Corporation, 556 So.2d 431 (Fla. 2d DCA 1989), jurisdiction accepted, 564 So.2d 487 (Fla. 1990) and Raynor v. De La Nuez, 558 So.2d 141 (Fla. 3d DCA 1990), pending Florida Supreme Court Case No. 75,870, and certified the decision to this court as a question of great public importance. The Third District did not set out a precise question, but the question, based on the cases cited and the issue before the court, is whether a long-term lessor of a motor vehicle is vicariously liable for the negligent operation of that vehicle under the dangerous instrumentality doctrine.

ISSUE

WHETHER, PRIOR TO THE ENACTMENT OF SECTION 324.021(9)(b), FLORIDA STATUTES (1986 SUPP.), A VEHICLE OWNER LEASING A VEHICLE UNDER A LONG-TERM LEASE WAS VICARIOUSLY LIABLE FOR THE NEGLIGENT OPERATION OF THAT VEHICLE UNDER FLORIDA'S DANGEROUS INSTRUMENTALITY DOCTRINE.

SUMMARY OF ARGUMENT

Florida courts have long held that the dangerous instrumentality doctrine renders lessors liable for the negligent operation of a vehicle and have drawn no distinction between long-term and short-term leases. In Susco Car Rental System of Florida v. Leonard, 112 So.2d 832 (Fla. 1959), this court reiterated that

relinquishment of possession and control is not the touchstone in determining liability under the dangerous instrumentality doctrine and decided as a matter of public policy that this extension of liability where the owner does not have custody and control is necessary to protect the motoring public.

The Second District Court of Appeal's opinions in Perry and Kraemer were the first to distinguish between long-term and short-term leases. These cases and their progeny ignore the purpose of the dangerous instrumentality doctrine and inappropriately rely upon a decision of this court, Palmer v. R.S. Evans, Jacksonville, Inc., 81 So.2d 635 (Fla. 1955), involving a conditional sale. Perry and Kraemer incorrectly analogized long-term leases to conditional sales and reasoned that, like conditional sales contracts, long-term leases transfer beneficial ownership to the lessee so that the long-term lessor should escape liability under the dangerous instrumentality doctrine for the same reasons that conditional vendors do. A lease, however, does not transfer beneficial ownership to the lessee, only possession. The lessor is not akin to a naked legal title holder; therefore, the analogy to conditional sale is inappropriate.

This court should answer the certified question and hold the long-term lessor liable under the dangerous instrumentality doctrine, particularly in cases predating the amendment to Section

324.021(9)(b). The Third District's decision should be quashed and the case remanded to the trial court for further proceedings.

ARGUMENT

ISSUE

WHETHER, PRIOR TO THE ENACTMENT OF SECTION 324.021(9)(b), FLORIDA STATUTES (1986 SUPP.), A VEHICLE OWNER LEASING A VEHICLE UNDER A LONG-TERM LEASE WAS VICARIOUSLY LIABLE FOR THE NEGLIGENT OPERATION OF THAT VEHICLE UNDER FLORIDA'S DANGEROUS INSTRUMENTALITY DOCTRINE.

The Third District relied on Kraemer v. General Motors Acceptance Corporation, 556 So.2d 431 (Fla. 2d DCA 1989), jurisdiction accepted, 564 So.2d 487 (Fla. 1990) and Raynor v. De La Nuez, 558 So.2d 141 (Fla. 3d DCA 1990), pending Supreme Court Case No. 75,870, in affirming the trial court's finding the long-term lessor immune from liability under Section 324.021(9), Florida Statutes (1985). The issue here is identical to the issue addressed in Raynor v. De La Nuez, supra. Petitioner respectfully adopts and incorporates the arguments presented by petitioner in Raynor v. De La Nuez [Equilease], supra.

Kraemer and its immediate predecessor, Perry v. G.M.A.C. Leasing Corporation, 549 So.2d 680 (Fla. 2d DCA 1989), rev. denied, 558 So.2d 18 (Fla. 1990), held that, unlike short-term leases, long-term leases transfer "beneficial ownership" to the lessee in the same way conditional sales contracts do; therefore, the long-term lessor should escape liability under the dangerous

instrumentality doctrine for the same reason that conditional vendors do.[1] Kraemer further held that Florida's dangerous instrumentality doctrine never applied to long-term leases, including actions arising prior to July 1, 1986 (the effective date of the statutory amendment to Section 324.021). In so holding, the Second District relied heavily upon Palmer v. R.S. Evans, Jacksonville, Inc., 81 So.2d 635 (Fla. 1955), in which this court held that conditional vendors transferring "beneficial ownership" to their conditional vendee and retaining only "naked legal title" as security are not liable under Florida's dangerous instrumentality doctrine.

It is respectfully submitted that the Second District misapplied Palmer which is distinguishable from long-term leases and ignored the very purpose of the dangerous instrumentality doctrine as articulated in Susco Car Rental System of Florida v. Leonard, 112 So.2d 832 (Fla. 1959), namely, to cover situations where the owner does not have custody and control. The rationale of Kraemer, that there never existed a common law right of action

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[1] In Perry, the primary question was whether subsection (b), the amendment to Section 324.021, abrogated the dangerous instrumentality doctrine in circumstances where an owner/lessor leased the vehicle for one year or more and the lessor had complied with the minimum liability insurance requirements. The Second District held that the statute exempted the long-term lessor from liability under those circumstances and did not violate Article I, Section 21 of the Florida Constitution by abolishing a previously existing cause of action against the owner/lessor. Perry is inapplicable here since the lease was executed and the accident occurred before the effective date of the amendment.

under the dangerous instrumentality doctrine against a long-term lessor, is fundamentally incorrect. A lease, by definition, does not transfer beneficial ownership to the lessee. The lease transfers only possession, leaving both legal and beneficial ownership in the owner/lessor. In re Ludlam Enterprises, Inc., 510 F.2d 996 (5th Cir. Fla. 1975).

The lease here provided that,

> This is a lease only and lessor remains the owner of the vehicle. You will not transfer, sub-lease, rent, or do anything to interfere with lessor's ownership of the vehicle. You and lessor agree that this lease will be treated as a true lease for Federal Income Tax purposes and elect to have lessor receive the benefits of ownerships... . (Emphasis added)

In spite of this provision, GMAC claimed it only had beneficial ownership of the car. This provision in the GMAC/Thorpe lease, that the transaction was a true lease, was a concession that both legal and beneficial ownership of the vehicle belonged to GMAC.

This lease agreement was also not equivalent to a conditional sale since this lease is a "true lease". The lease itself so states and prohibits any act inconsistent with the lessor's legal and beneficial ownership. In a lease agreement the owner retains legal and beneficial title and transfers only a possessory interest to the lessee. In a conditional sales contract the owner retains only naked legal title and transfers beneficial ownership and possession to the conditional vendee. Further, the option to

purchase contained in paragraph 10 of the lease did not give Mr. Thorpe "the option to become the owner of the property for no additional consideration or for a nominal consideration", a crucial element in determining a lease versus a conditional sale under Section 671.201(37), Florida Statutes (1985). Instead, the option to purchase required Mr. Thorpe to pay the "fair market value" defined as "the average of the retail and wholesale value stated in a then current vehicle guide book selected by the lessor". There is no way this lease agreement can be construed as a conditional sales contract. See Sellers v. Frank Griffin AMC Jeep, Inc., 526 So.2d 147 (Fla. 1st DCA 1988); Transport Rental Systems, Inc. v. Hertz Corporation, 129 So.2d 454 (Fla. 3d DCA 1961).

The point then becomes whether GMAC, as owner/lessor of the vehicle driven by Mr. Thorpe, can be liable for his negligence under the dangerous instrumentality doctrine. With the exception of the Second District's holdings in Kraemer and Perry and the Third District's adoption of these cases, numerous Florida cases hold that the owner of a vehicle leased to another is vicariously liable for the negligent operation of the vehicle under the dangerous instrumentality doctrine. Hernandez v. Hertz Corporation, 680 F.Supp. 378 (S.D. Fla. 1988), app. dismissed, 867 F.2d 1330 (11th Cir. 1989); Roth v. Old Republic Insurance Company, 269 So.2d 3 (Fla. 1972); Susco Car Rental System of Florida v. Leonard, supra; Fleming v. Alter, 69 So.2d 185 (Fla. 1953); Lynch v. Walker, 159 Fla. 188, 31 So.2d 268 (1947); Avis Rent-A-Car

Systems, Inc. v. Garmas, 440 So.2d 1311 (Fla. 3d DCA 1983), rev. denied, 451 So.2d 848 (Fla. 1984); Allstate Insurance Company of Canada v. Value Rent-A-Car of Florida, Inc., 463 So.2d 320 (Fla. 5th DCA), rev. denied, 476 So.2d 672 (Fla. 1985). Similarly, the facts in Canal Insurance Company v. Continental Casualty Company, 489 So.2d 136 (Fla. 2d DCA 1986), where the vehicle was leased in 1977 and the accident occurred in 1979, indicate that courts have imposed liability against long-term lessors for the negligent operation of their vehicles under the dangerous instrumentality doctrine.

In Insurance Company of North America v. Avis Rent-A-Car Systems, Inc., 348 So.2d 1149 (Fla. 1977), this court squarely held on page 1153 of the opinion that a lessor as a vehicle owner has a common law obligation under the dangerous instrumentality doctrine, distinct from its responsibilities under the financial responsibility law:

> ... the financial responsibility law is only relevant to situations such as this insofar as it is necessary to protect the public from uncompensated losses arising from the use of motor vehicles. To this end the law requires motor vehicle owners to provide liability insurance coverage for the operation of their motor vehicles on the highways of this state Independent of this insurance requirement is the common law obligation of vehicle owners under the dangerous instrumentality doctrine. (Emphasis added).

The Fifth District reiterated this in Racecon, Inc. v. Mead, 388 So.2d 266 (Fla. 5th DCA 1980), holding as follows on page 268 of the opinion:

> Independent of any insurance requirement, and by virtue of the dangerous instrumentality doctrine, there is a common law obligation of owners of motor vehicles which makes them responsible for injuries caused by such vehicle in the course of its intended use.

None of the cases distinguish between long-term and short-term rentals. In fact, Chapter 319, dealing with title certificates, lumps long-term and short-term rentals together. § 319.14(1)(b)(2), Fla. Stat. (1985). If the legislature had intended to exempt long-term lessors from liability in Chapter 324, it would have used language similar to Section 319.22(2), Florida Statutes, dealing with conditional sales or included long-term leases in that definition. The conditional sales statute does not include long-term lessors and does not exempt them from liability.

Numerous cases deal with whether a lessor's liability insurance coverage is primary, each case assuming as an essential predicate that the owner/lessor of the vehicle is vicariously liable for its negligent operation. Roth v. Old Republic Insurance Company, supra; Tribbitt v. Crown Contractors, Inc., 513 So.2d 1084 (Fla. 1st DCA 1987); Sunshine Dodge, Inc. v. Ketchem, 445 So.2d 395 (Fla. 5th DCA 1984). In Enterprise Leasing Company v. Almon, 559 So.2d 214 (Fla. 1990), the Supreme Court continued to recognize the

lessor/owner's liability for injuries to third persons as a result of the negligent operation of the vehicle under Florida's dangerous instrumentality doctrine.

Further, if the statute as it existed prior to the 1986 amendment exempted long-term lessors from liability under the dangerous instrumentality doctrine, no basis existed for the statutory amendment. This contradicts all precepts of statutory construction and renders the amendment meaningless. See Escambia County Council on Aging v. Goldsmith, 465 So.2d 655 (Fla. 1st DCA 1985). The Fourth District's opinion in Folmar v. Young, 560 So.2d 798 (Fla. 4th DCA 1990), pending on rehearing and certification, supports this view.

The owner of a vehicle leased to another is vicariously liable for the negligent operation of the vehicle under the dangerous instrumentality doctrine regardless of whether the lease is short-term or long-term. The Second District's opinions in Perry and Kraemer were the first to distinguish between long-term and short-term leases. There is no sensible dividing line between short-term and long-term leases where "possession and control" are concerned; therefore, "possession and control" cannot be the touchstone for liability under the dangerous instrumentality doctrine. This comports with this court's holding in Susco which declared "possession and control" an ultimately irrelevant question and described the dangerous instrumentality doctrine as a rule of

public policy which creates an additional layer of financial responsibility to protect the travelling public. Perry, Kraemer and their progeny ignore and nullify this public policy. The Third District decision should be quashed.

CONCLUSION

The Third District erred in concluding that the dangerous instrumentality doctrine is inapplicable to owners/lessors leasing vehicles under long-term leases. The district court's decision should be quashed and the case remanded to the trial court for further proceedings, including determination of the "sale versus lease" issue.

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CERTIFICATE OF SERVICE

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