IN THE
SUPREME COURT OF FLORIDA

CASE NO. 76,850

JAMES ROBERT ROOKS,

Petitioner,

v.

SAMUEL JAMES THORPE; GENERAL MOTORS ACCEPTANCE CORPORATION; JOSE A. BROWN, GRACIELA BROWN, and UNISTRUT CORP., a foreign corporation,

Respondent(s).
_____/

ON CERTIFICATION FROM
THE THIRD DISTRICT COURT OF APPEAL

RESPONDENT GENERAL MOTORS ACCEPTANCE CORPORATION'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

The discretionary jurisdiction of this Court has been invoked to review the decision of the Third District Court of Appeal, affirming a Final Partial Summary Judgment entered in favor of GENERAL MOTORS ACCEPTANCE CORPORATION and against JAMES ROBERT ROOKS.

GENERAL MOTORS ACCEPTANCE CORPORATION, a Defendant in the trial Court below, will be referred to herein as "GMAC" and/or "LESSOR".

JAMES ROBERT ROOKS, the Plaintiff in the trial court below, will be referred to herein as "PETITIONER".

SAMUEL JAMES THORPE, a Defendant in the trial court below, will be referred to herein as the "LESSEE" or "THORPE".

The record on appeal will be referred to by the symbol "R".

GMAC presents the following Statement of the Case and Facts to clarify that presented by PETITIONER.

In January of 1985, GMAC and LESSEE/THORPE, entered into a lease agreement for a period of forty-eight months. (R. 40-44). Pursuant to the lease agreement, the LESSEE was given immediate possession of the motor vehicle, as well as a right of purchase at the termination of the lease. (R. 40-44).

Also, pursuant to the terms of the lease agreement, the LESSEE was soley responsible for: 1) maintenance of the leased vehicle; 2) repairs to keep the leased vehicle in good working order; 3) any other expenses associated with operating the leased vehicle; 4) servicing the leased vehicle according to the manufacturer's recommendations as set forth in the owner's manual; 5) payment of

title expenses; 6) payment of all registration fees; 7) payment of all licensing fees; 8) payment of all inspections of the leased vehicle required by any governmental authority; 9) payment of all excise, use, personal property, gross receipts and other taxes incurred with respect to the leased vehicle; 10) obtaining insurance on the leased vehicle; and 11) indemnification to GMAC as a result of all losses, damages, injuries, claims, demands and expenses arising out of the operation of the vehicle. (R. 40-44).

In March of 1986, the LESSEE, while driving the subject vehicle, was allegedly involved in an accident with PETITIONER. (R. 1-3). Thereafter, in November of 1986, PETITIONER filed a Complaint against GMAC, the LESSEE, and others. (R. 1-3). The sole basis presented by PETITIONER for recovery against GMAC was that GMAC "owned" the motor vehicle being operated by and leased to THORPE, the LESSEE. (R. 35-36).

On April 12, 1990, Final Partial Summary Judgment was entered in favor of GMAC and against PETITIONER on the ground that GMAC was neither the owner of the leased vehicle pursuant to § 324.021(9)(a), Fla. Stat., nor the beneficial owner of the vehicle. (R. 339-340).

It is from that Final Partial Summary Judgment that PETITIONER filed an appeal. (R. 334-335). The District Court of Appeal affirmed the Final Partial Summary Judgment on October 16, 1990, certifying the decision as one involving great public importance.

ISSUE ON APPEAL

I.

WHETHER FINAL PARTIAL SUMMARY JUDGMENT IN FAVOR OF GMAC IS PROPER WHERE: 1) PURSUANT TO SECTION 324.021(9)(a), LESSOR/GMAC IS NOT LIABLE AS THE "OWNER" OF THE LEASED VEHICLE, AND 2) GMAC DID NOT HAVE BENEFICIAL OWNERSHIP OF THE LEASED VEHICLE?

A. § 324.021(9)(a)

B. CASES FROM OTHER JURISDICTIONS

C. BENEFICIAL OWNERSHIP

D. KRAEMER WAS CORRECTLY DECIDED

E. PERRY WAS CORRECTLY DECIDED

F. THE DANGEROUS INSTRUMENTALITY DOCTRINE IS NOT ABSOLUTE

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SUMMARY OF ARGUMENT

The Final Partial Summary Judgment entered in favor of GMAC and against PETITIONER is correct. No genuine issues of material fact exist. As a matter of law, and pursuant to Section 324.021(9)(a), Fla. Stat. (1985), GMAC is not to be considered the owner of, and therefore not vicariously liable for, the vehicle leased to THORPE, where THORPE was given immediate possession and the right to purchase the leased vehicle.

Additionally, GMAC was not the beneficial owner of the leased vehicle on the date of the accident, and therefore not vicariously liable for the negligence, if any, of the LESSEE/THORPE. Tort liability is imposed upon the beneficial owner, not the mere titleholder, of a vehicle.

ARGUMENT[1]

I.

FINAL PARTIAL SUMMARY JUDGMENT IN FAVOR OF GMAC IS PROPER WHERE: 1) PURSUANT TO SECTION 324.021(9)(a), LESSOR/GMAC IS NOT LIABLE AS THE "OWNER" OF THE LEASED VEHICLE, AND 2) GMAC DID NOT HAVE BENEFICIAL OWNERSHIP OF THE LEASED VEHICLE.

A. § 324.021(9)(a).

Section 324.021(9)(a), Florida Statutes (1985),[2] originally enacted thirty-one years prior to the passage of subsection (b), states as follows:

> (a) Owner - A person who holds the legal title of a motor vehicle; or, in the event a motor 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 a 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 the purpose of this chapter. (Emphasis added).

The agreement entered into between GMAC and THORPE, gave THORPE the right of purchase, as well as immediate possession of

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[1]PETITIONER herein "adopts and incorporates" the argument presented by the petitioner in Raynor v. de la Nuez, Case No. 75,870 pending before this Court. While GMAC questions the propriety of incorporating the arguments contained in a brief in another matter, not even attached to PETITIONER's Brief, in an over-abundance of caution, GMAC will adopt the arguments set forth in the Amicus Curiae Brief filed in Raynor by the Florida Motor Vehicle Leasing Group.

[2]As early as 1955, a lessor who afforded a lessee a right of purchase and an immediate right of possession was entitled not to be sued as the owner of the vehicle. Thus, it would seem that effective with the adoption of the Florida Constitution in 1968, incorporating existing statutes, such lessors had a **constitutional right not to be sued**.

the leased vehicle. Therefore, pursuant to § 324.021(9)(a), GMAC is not deemed to be the "owner" of the leased vehicle on the date of the accident, for purposes of imposing vicarious liability. Raynor v. De la Nuez, 15 F.L.W. D694 (Fla. 3d DCA 1990).

Clearly, subsection (a) is a statutory codification of the law set forth in Palmer v. Evans, 81 So.2d 635 (Fla. 1955), decided the same year that subsection (a) was enacted. Palmer held that the mere titleholder, who had transferred beneficial ownership, was not liable under the dangerous instrumentality doctrine for an automobile's negligent operation by another. Section 324.021(9)(a) expanded the law set forth in Palmer, so as to also exclude lessors, who have given their lessees the rights enunciated in subsection (a), from liability. Thus, in 1955, § 324.021(9)(a) established an exception to a lessor's liability first imposed by Lynch v. Walker, 31 So.2d 268 (Fla. 1947).

It is noteworthy that the Legislature chose the disjunctive "or" in its definition of "owner" in subsection (a). For purposes of imposing tort liability, the "owner" is the legal titleholder unless there is a lessee who has been given immediate possession and the right of purchase. In that event, only the lessee is deemed the owner. The use of "or" cannot be ignored, as every word in a statute must be given meaning and effect. Vocelle v. Knight Bros. Paper Co., 118 So.2d 664 (Fla. 1st DCA 1960).

The question of whether the lease between GMAC and THORPE complies with § 324.021(9)(a), is one of law, not one of fact. Since no ambiguities appear in the contract entered into between GMAC and THORPE, the contract's interpretation is an issue of law,

and the summary judgment procedure becomes the appropriate vehicle upon which to decide this cause. Cox Motor Co. v. Faber, 113 So.2d 771 (Fla. 1st DCA 1959).

B. CASES FROM OTHER JURISDICTIONS.

There are cases from other jurisdictions with identical or analogous statutory provisions to § 324.021(9)(a) excluding certain lessors from the definition of "owner." In each instance, no insurance requirements were placed upon the lessor prior to being excepted from the definition of "owner." In Lee v. Ford Motor Co., 595 F. Supp. 1114 (D.D.C. 1984), involving a statute identical to subsection (a), the owner/lessor of a vehicle involved in an accident, was held not to be the owner as defined by the Motor Vehicle Safety Responsibility Act. (It should be noted that the vicarious liability imposed in Florida is "closely allied" with that of the District of Columbia. Hertz Corp. v. Dixon, 193 So.2d 176 (Fla. 1st DCA 1966)). The lessor was therefore held not to be vicariously liable for the vehicle's negligent operation.

> In 1956, Congress enacted the present Motor Vehicle Safety Responsibility Act, . . . adding a definition of the term owner;
>
> > [a] person who holds a 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 a condition 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 the purpose of this chapter. Id. at 1115.

Ford Motor Company was held not to be the "owner" under this statutory provision, for purposes of imposing tort liability for the negligence of the lessee.

> 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 vehicles was given to the lessee, FCA. Ford had no immediate right to control the use of the vehicles at the time of the accident. Id. at 1116.

The court imposed "the liability upon the person in a position . . . to allow or prevent the use of the vehicle . . . ." Id. This analysis closely comports with the early Florida decisions dealing with liability under the dangerous instrumentality doctrine, reiterated and adopted in Perry v. G.M.A.C. Leasing Corp., 549 So.2d 680 (Fla. 2d DCA 1989).

Moore v. Ford Motor Credit Co., 420 N.W.2d 577 (Mich. App. 1988), is also instructive. The Michigan statute provides as follows:

> "Owner" means: (a) any person, firm, association or corporation renting a motor vehicle or having exclusive use thereof, under a lease or otherwise, for a period of greater than thirty days.
>
> (b) 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 a 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.

The court held that although the lessor was the legal titleholder of the vehicle, the lessor was not to be deemed the "owner," as defined by statute, for purposes of imposing tort liability.

> We believe that the second part of subsection (b) qualifies the first part, so that the legal title holder of a vehicle subject to a conditional lease is not an owner for purposes of the civil liability statute. In other words, Section 37 excepts from its definition of "owner" a lessor such as defendant, and deems a lessee, here Darlene Moore, "the owner."
>
> * * *
>
> If the Legislature had not intended to except lessors such as defendant from the definition of "owner" then the second part of subsection (b) would not have been necessary. Every word of a statute should be given meaning and no word should be treated as surplusage or rendered nugatory if at all possible. Id.

Thus, Ford Motor Credit was not vicariously liable for the negligence of the lessee.

> [L]egal titleholder of a vehicle subject to a conditional lease is not an owner for purposes of the civil liability statute. In other words, Section 37 excepts from its definition of "owner" a lessor such as defendant, and deems a lessee, here Darlene Moore, "the owner." Id.

Siverson v. Martori, 581 P.2d 285 (Ariz. App. 1978), involves a statute identical to § 324.021(9)(a). The court there held the statute defined the "owner" for both purposes of tort liability and criminal liability for the operation of a motor vehicle.

> We do not read the definition of "owner" in A.R.S. § 28-101(30) [Florida's subsection (a)] to apply to a holder of bare legal title in the context of imposing criminal liability under A.R.S. § 28-921(A). It is inconceivable to us that the Legislature, in enacting A.R.S. § 28-101(30), intended the imposition of

> either civil or criminal liability on the holder of bare legal title. Id. at 289.

Witkofski v. Daniels, 198 A. 19 (Pa. 1938), deals with a statute identical to § 324.021(9)(a).

> The title to this car was in Adair Motor Company. The latter rented the car to Henry Daniels for $161.00 on or before delivery, leaving a deferred rental of $576.00, which lessee promised to pay at the office of Universal Credit Company in installments of $32.00 each month. After all payments had been made as agreed, the lessee, Henry Daniels, had the right to purchase the car for $1.00. . . . Id. at 20.
>
> The Adair Motor Company, the owner of a 1934 Ford 8 Coupe, leased that car to Henry, with the right in the latter of purchase upon performance of the conditions stated in the agreement and with an immediate right of possession vested in [Henry Daniels] the conditional vendee or lessee. That situation made Henry Daniels the "owner" of that car, under the provisions of Section 102 of the Act . . . . Id. at 21. (Emphasis added).

The Washington State case of Beatty v. Western Pacific Insurance Co., 445 P.2d 325 (Wash. 1968), involves a Washington state statute which provides as follows:

> RCW 46.04.380 Owner. "Owner" means a person who holds a title of ownership of a vehicle, or in the event the vehicle is subject to 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 the immediate right of purchase vested in the conditional vendee or lessee, or in the event a mortgagor of a vehicle is entitled to possession, then any such conditional vendee or lessee, or mortgagor having a lawful right of possession or use and control for a period of ten or more successive days.

The court held that the conditional vendee fell squarely within the statute's definition of "owner" for purposes of the financial

responsibility act. The conditional vendor was held not to be the "owner" for the imposition of tort liability. The court, in so holding, reasoned that this result was just since:

> The rationale most frequently advanced for this view is that where possession of the automobile has been transferred pursuant to the conditional sales agreement, the conditional vendor no longer owns the vehicle in such a sense as will enable him to give or withhold his consent to the use of the vehicle by the vendee, and that the vendor retains title for security purposes rather than for purposes of dominion over the vendee's possession and use of the car. Id. at 331.
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> * * *
>
> Under the conditional sales transaction herein involved the conditional vendee, Scott, had the lawful right of possession or use and control of the automobile involved for a period in excess of ten (10) days. He, therefore, fell squarely within the foregoing definition and was both the "operator" and the "owner" within the contemplation of the financial responsibility act. The conditional vendor, Sutliff, holding only a security interest, does not come within the thrust of the act. Id. at 333-34.

Cowles v. Rogers, 762 S.W.2d 414 (Ky. App. 1989), involves a statute similar to subsection (a), the only difference being that Kentucky's statute requires a lease of one year or longer. In holding the lessee to be the "owner" of the leased motor vehicle, the court stated:

> The rationale for the rule is that possession of the vehicle is transferred under circumstances which prevent the seller from controlling the use of the vehicle by giving or withholding consent. We believe our jurisdiction's apparent adoption of this general rule by statute is both logical and sound. Id. at 417.

Likewise, the Nevada Supreme Court in Bly v. Mid-Century Ins. Co., 698 P.2d 877 (Nev. 1985), held that a statute identical to Florida's subsection (a) imposes liability only on the conditional vendee.

Arter v. Jacobs, 234 N.Y.S. 357 (App. Div. 1929), involves a statute virtually identical to § 324.021(9)(a). The case held that the lessee of an automobile would be deemed the "owner" of the vehicle, so as to be liable for its negligent operation, where a lessor retained title, until payment was made in full, and even though the lessor was empowered to repossess the automobile in the event of the lessee's breach.

Riggs v. Gardikas, 427 P.2d 890 (N.M. 1967), involves a New Mexico statute identical to § 324.021(9)(a). That case held that where trucks were subject to conditional sales or lease contracts, the vendee/lessee, who had the immediate right of possession, would be deemed the "owner" under that state's motor vehicle act. In fact, the court held that the lessee's judgment creditors were entitled to replevy the leased trucks to satisfy the lessee's debts.

High Point Savings and Trust Co. v. King, 117 S.E.2d 421 (N.C. 1960), also involves a statute identical to § 324.021(9)(a). The court held that the conditional vendee, lessee or mortgagor of a motor vehicle is deemed to be the owner for the purposes of the Motor Vehicle Safety and Financial Responsibility Act, even though legal title is reposed in a third party. Liability on the part of the legal titleholder, i.e., the conditional vendor or lessor, could arise:

> Only by application of the doctrine of respondeat superior, that is, by showing the relationship of master and servant, or employer and employee, or principal and agent. The complaint does not allege facts showing any such relationship. Id. at 422 (emphasis added).

Patently, the Florida Legislature, in excepting lessors such as GMAC from the definition of "owner" in § 324.021(9)(a), intended that those lessors not be considered "owners" for purposes of imposing tort liability. Thus, under subsection (a), GMAC is not deemed the "owner" and, therefore, not liable for the negligence of THORPE under the dangerous instrumentality doctrine. No question of fact exists. As a matter of law, pursuant to § 324.021(9)(a), GMAC is not liable for PETITIONER's injuries.

C. **BENEFICIAL OWNERSHIP**.

Absent § 324.021(9)(a), GMAC would still not be liable for Petitioner's alleged injuries in that GMAC lacked beneficial ownership of the leased vehicle at the time of the accident. Contrary to PETITIONER's theory, naked legal title is not tantamount to automobile ownership for purposes of imposing tort liability. Morgan v. Collier County Motors, Inc., 193 So.2d 35 (Fla. 2d DCA 1966). "Ownership is determined by the party having the beneficial interest with control and authority of the automobile's use." Id. at 37.

> To permit a party by contract to have possession of and a contractual vested interest in the ownership of a vehicle yet to vest the legal and beneficial title in another and thereby avoid tort liability would be an anomaly in the law. It would be completely illogical to interpret this clause to mean that even though the purchaser has a binding contract, has a vested right therein, accepts

> delivery, control and authority of use of the vehicle, and has made a substantial down payment thereon, that nevertheless he is not the owner in determining his tort liability to third parties.
>
> We therefore hold that the purchaser held a binding contract to purchase pursuant to which he had accepted delivery, made a payment thereon and had control and authority of use thereof; that he was the beneficial owner of the automobile at the time of the accident and was the party liable for any damages resulting therefrom. Cox Motor Co. at 774-75. (Emphasis added).

The concept of imposing tort liability on the beneficial owner of a vehicle is not a novel concept.[3] Imposing liability on one other than the beneficial owner would be a departure from well-established law.

Although GMAC may have held naked legal title on the date of the accident, THORPE had the beneficial ownership, with possession, control and authority of the vehicle's use at the time of the accident. Therefore, as a matter of law, GMAC is not liable for THORPE's allegedly negligent operation of the vehicle.

The LESSEE/THORPE was solely responsible for: 1) maintenance of the leased vehicle; 2) repairs to keep the leased vehicle in good working order; 3) any other expenses associated with operating the leased vehicle; 4) servicing the leased vehicle according to the manufacturer's recommendations set forth in the owner's manual;

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[3]While much ado is being made of the recent decisions in Perry, Kraemer, and their progeny, in fact, no new law has been espoused. Tort liability has always followed beneficial ownership. It simply appears that prior to these cases, the issue of beneficial ownership vis a vis a lease had never been raised. It also appears that previously the exemption provided by § 324.021(9)(a) had not been raised.

5) payment of title expenses; 6) payment of all registration fees; 7) payment of all licensing fees; 8) payment of all inspections required by governmental authority; 9) payment of all excise, use, personal property, gross receipts and other taxes incurred with respect to the leased vehicle; and 10) indemnification to GMAC as a result of all losses, damages, injuries, claims, demands and expenses arising out of the operation of the vehicle.

The same indicia of beneficial ownership found lacking in GMAC, was also found to be lacking in the Palmer vendor. Palmer and its progeny set forth the principle, codified by § 324.021(9)(a), that the beneficial ownership of a motor vehicle carries with it the liability for negligent operation. The mere naked legal titleholder is not so encumbered. Recognizing the beneficial ownership doctrine via the conditional vendee, Palmer, supra, states:

> It appears without contradiction that on August 16, 1952, two days before the accident, Hughes selected the car for purchase from R. S. Evans at an agreed price of $1030, paid $50 as a partial down payment, signed an order for the car, and signed a purchaser's statement for the purpose of obtaining credit. Hughes returned to the Evans lot on August 18, 1952, the date of the accident, and paid an Evans salesman $300, the remainder of the down payment. Hughes also signed a conditional sales contract and a power of attorney in blank, whereupon possession of the automobile was delivered to him and he drove it away and was thereafter involved in the accident. . . . although the Evans bookkeeper did not date the conditional sales contract until August 19th and did not fill out the Certificate of Title application until August 21st. Id. at 636. (Emphasis added).

Just as the legal titleholder in Palmer was held not liable for the vehicle's negligent operation, GMAC should be held not liable under the Palmer statutory codification, § 324.021(9)(a).

> In the case at bar, the parties intended to enter, did enter, and ultimately memorialized in writing, a conditional sales contract, in which title was retained by the seller until the completion of payment. 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 impose tort liability on 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 the 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 F.S. § 317.74(20), F.S.A. [now 316.003] 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 legal title. Id. at 637. (Emphasis added).

It is respectfully submitted that the undisputed facts in the case sub judice, clearly show, without any doubt, that GMAC was not the "owner" of the vehicle for purposes of imposing tort liability. As a result thereof, Final Partial Summary Judgment in favor of GMAC is correct.

PETITIONER contends that since the instant lease agreement states it is a lease only and prohibited the lessee from transferring his interest in the leased vehicle, there was no

transfer of beneficial ownership.[4] "Beneficial Ownership" is not determined by language stating "this is a lease only." GMAC is not contending that the lease agreement was anything other than a lease.[5] However, inasmuch as LESSEE/THORPE had a contractually vested, beneficial interest in the leased vehicle, as well as possession, control and authority of the vehicle's use for four years, LESSEE/THORPE was the beneficial owner thereof and the only party liable for the vehicle's negligent operation. Morgan, supra.

PETITIONER has difficulty discerning the difference between a lessor's liability under a long-term lease and that of a lessor under a short-term rental. However, the realities of the situations presented by the long-term lease versus short-term rental are sufficient in themselves to exempt the long-term lessor from liability, while keeping intact the liability of the short-term lessor.

It is clear that the responsibilities and obligations of the long-term lessee are quite different from those of the short-term lessee. The long-term lessee normally has the obligations of vehicle maintenance and servicing, payment for tags, registration, and repairs, as well as obtaining insurance for the leased vehicle. LESSEE/THORPE had these obligations, not GMAC.

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[4]This prohibition is not dissimilar to those set forth by lenders and others holding title merely as security for payment of a purchase price. Restrictions on transfer of interest do not prevent the transfer of beneficial ownership.

[5]GMAC has never asserted that the lease agreement was a conditional sale. GMAC has simply stated that the rights given to, and obligations imposed upon, the LESSEE herein, are the same as those given to, and imposed upon, a conditional vendee.

On the other hand, the short-term lessee has no such obligations. The short-term lessor, not the lessee, is responsible for maintenance, repairs, license tags, inspections, and registration. The short-term lessor also obtains insurance for the vehicle.

Additionally, in the vast majority of instances, the long-term lessee selects a vehicle, including make, model and color, as the subject of the lease. The short-term lessee normally has no say in the type of vehicle to be rented, with the exception of requesting a compact, deluxe and/or luxury model.

The long-term lessee is "stuck" with the vehicle of his choice for the duration of the lease, but may pursue an action against the manufacturer thereof, as if he were the purchaser. The short-term lessee, subject to vehicle availability, can always obtain a replacement vehicle should the rental vehicle not meet with his approval. The short-term lessee is not given the right to pursue an action against the manufacturer as if he were a purchaser. In most instances, the long-term lessor never even has possession of the leased vehicle, as the lease is arranged through a dealership.

It is respectfully submitted that it is not for this Court, at this time, to determine where a short-term rental ends and a long-term lease begins. The legislature has, in § 324.021(9)(a), as have the courts through the doctrine of beneficial ownership, simply analogized the lessor of a vehicle, under certain leases, to that of a seller who retains title but relinquishes all control and dominion over the motor vehicle.

This is similar to the other limitations imposed upon the dangerous instrumentality doctrine. Just as the owner who delivers

his vehicle to a service station, or an owner who delivers his vehicle to a valet parking service, is held not responsible for the vehicle that is out of his control, now too, the lessor who relinquishes control over its vehicle, in the fashion set forth by subsection (a) and/or the doctrine of beneficial ownership, is relieved of responsibility for injuries caused by the operation of the leased vehicle.

PETITIONER's notions of beneficial ownership are not supported by real property law. A tenant's interest in a leasehold estate during the term of the lease is for all practical purposes the equivalent of absolute ownership and ownership of fee simple title, as the tenant has the exclusive right of possession. Gray v. Callahan, 197 So. 396 (Fla. 1940); West's Drug Stores, Inc. v. Allen Inv. Co., 170 So. 447 (Fla. 1936); Baker v. Clifford-Mathew Inv. Co., 128 So. 827 (Fla. 1930); Rogers v. Martin, 99 So. 551 (Fla. 1924).

Through the doctrine of beneficial ownership and subsection (a), the Florida courts and legislature recognize similarities between a lessee and a normal run-of-the-mill owner of a motor vehicle. After all, subsection (a) is nothing more than a statutory codification of the law set forth in Palmer, cast in a more modern, commercial setting, recognizing today's economic realities and the similarities between today's purchasers and lessees. Indeed, § 324.021(9)(a) does away with any fictional distinction between yesterday's installment sales contract and its modern day equivalent, the long-term lease.

D. **KRAEMER WAS CORRECTLY DECIDED.**

In Kraemer v. General Motors Acceptance Corp., 556 So.2d 431 (Fla. 2d DCA 1990), the Second District Court of Appeal, once again, held that the long-term lessor was not liable as the owner for the negligent acts of the lessee. Kraemer merely continued the long-established rule that liability follows beneficial ownership, not mere, naked legal title.

The Court expressed its opinion that, even without reference to § 324.021(9), Fla. Stat., the lessor in Kraemer was not liable because the lessor maintained none of the indicia of beneficial ownership of the vehicle.

> The Anderson I case imposed liability upon the owner based largely upon the fact that the traffic statutes placed various duties on "owners." Similarly Florida Statutes now define the term "owner" to include conditional vendees and lessees. See §§ 316.003(26) and 324.021(9), Fla. Stat. (1985).
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> While this issue has not been squarely addressed in Florida, the United States District Court for the District of Columbia in Lee v. Ford Motor Co., 595 F. Supp. 1114 (U.S.D.C. 1984), decided this very issue. There, when dealing with precisely the same issue as is involved here, the federal district court ruled that liability attached to the beneficial owner, the long-term lessee, rather than to the long-term lessor who held title to the vehicle in question. See also Moore v. Ford Motor Credit Co., 420 N.W.2d 577 (Mich. App. 1988). We do not deem it necessary to rely upon Florida's traffic regulation statutes and financial responsibility laws to conclude that the record titleholder as lessor under a long-term lease is not liable for the negligence of the lessee under the dangerous instrumentality doctrine.

* * *

> In a short-term rental situation, the rental car company agrees to allow its car to be utilized by the renter for a short period of time, with the rental car company purchasing the tag, obtaining the registration, doing all applicable maintenance and providing insurance. The rental car company also generally determines where the car must be dropped off and whether it may be removed from the state. The only similarity between a long-term lease and a short-term rental is the fact that in both situations title is held by someone other than the driver. Title alone is not sufficient to impose liability under the dangerous instrumentality doctrine. Id. at D.82 (emphasis added).

The same indicia of beneficial ownership that the Second District Court of Appeal found to be lacking in the lessor therein, is likewise not to be found in GMAC. Section 324.021(9)(a) is nothing more than a codification of this concept. Florida's legislature, as have so many others, found the beneficial ownership analogy appropriate for certain lessors.

It is respectfully submitted that the cases cited by PETITIONER are inapplicable. While PETITIONER may wish to overlook the fact that, in the cases he cites, the issue of the difference between a long-term lease and a short-term rental is not even raised, this Court should not do likewise. None of the cases relied upon by PETITIONER address the issues of either § 324.021(9)(a) or the doctrine of beneficial ownership as exempting the lessor from liability.

Although PETITIONER seems to forget, the lessor is not at fault and is not the negligent cause of injury to PETITIONER. PETITIONER's interpretations and view of the law only serve to

punish the lessor, who played no role in causing PETITIONER's injuries.

E. PERRY WAS CORRECTLY DECIDED.

Perry's primary concern was whether subsection (b) of § 324.021(9) exempted a lessor from vicarious liability for the negligence of the lessee, regardless of how, when or if that liability ever arose. PETITIONER attacks Perry as incorrect. His misconception of the decision results in a misstatement that Perry stands for the proposition that lessors were previously not held liable under the dangerous instrumentality doctrine. The Perry court simply stated that it could find no authority to support the proposition that at common law, a lessor was held vicariously liable for the acts of a lessee. Interestingly enough, neither PETITIONER nor any other litigant who has disputed the Perry Court's statement, has been able to present any authority supporting the proposition that a lessor was vicariously liable at common law for a lessee's negligence.

PETITIONER's over-simplistic, incorrect approach to demean the holding of Perry, cannot withstand judicial scrutiny. The survival of Perry does not depend upon whether or not a lessor had ever previously been held liable for the negligence of a lessee. Parading citations before this Court to cases where a lessor was held liable, are of no avail where subsections (a) and (b) and the doctrine of beneficial ownership were not in issue. Stated simply, PETITIONER has completely "missed the mark."

Perry merely holds that § 324.021(9)(b) renders a complying lessor immune for the negligence of a lessee regardless of how or

in what manner that liability originally arose. Perry does not hold that henceforth a lessor can never be held vicariously liable for negligence arising out of the operation of the leased vehicle.

The Second District Court of Appeal observed the lack of authority for the proposition that a lessor was vicariously liable at common law.[6] Section 2.01, Florida Statutes, defines "common law" as follows:

> The common and statute laws of England which are of a general and not a local nature, with the exception hereinafter mentioned, down to the Fourth day of July, 1776, are declared to be in force in this state; provided, the said statutes and common law be not inconsistent with the constitution and laws of the United States and the acts of the legislature of this state.

Lessor liability did not exist prior to July 4, 1776. White v. Holmes, 103 So. 623 (Fla. 1925).

> There was no relation of master and servant or of principal and agent between the bailor and the bailee, but a mere bailment for hire by one engaged in the particular business of hiring automobiles without drivers to others for their own purposes.
>
> The facts of this case do not support a rule of liability on the part of the owner of the automobile. . . .
>
> The rules of liability stated in Anderson v. Southern Cotton Oil Co., 73 Fla. 432, 74 So. 975, . . ., and Southern Cotton Oil Co. v. Anderson, 80 Fla. 441, 86 So. 629, . . . have reference to the facts of those cases showing a relation of employer and employee or principal and agent.

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[6]While the dangerous instrumentality doctrine may have existed, under certain circumstances, at common law, a lessor's liability thereunder did not.

> The present statutes of the state, regulating the operation of motor vehicles on the highways in the state, do not require an extension of the rule of liability applicable to owners of motor vehicles as stated in the above-cited cases. Id. at 624. (Emphasis added).

Thus, as of 1925, the date White, supra, was decided, there did not exist, on the part of the lessor, any liability under the dangerous instrumentality doctrine. Therefore, the "notion" that a lessor was liable at common law, under the dangerous instrumentality doctrine, cannot pass muster when this liability had not even been established until almost halfway through the twentieth century.

In summary, "common law" liabilities were those liabilities existing as of July 4, 1776. § 2.01, Fla. Stat. However, until 1947, no liability on the part of a lessor of a motor vehicle existed under the dangerous instrumentality doctrine.

In fact, as of 1931, mere ownership of an automobile did not definitively establish the owner's liability for the negligent operation of the automobile. Engleman v. Traeger, 136 So. 527 (Fla. 1931).

> It may be conceded that the law is to the effect that the mere fact of ownership of a vehicle will not establish a liability of the owner for injuries resulting from the misuse or negligent operation by one to whom the owner has loaned it, and that something more than ownership is ordinarily required to establish agency or the relation of master and servant between the owner and borrower. . . . nor has it been held in Florida that the mere fact that the instrumentality in question is an automobile had per se set up a new rule with regard to how the relationship of principal and agent or master and servant, and the rule of liability controlling these relationships is to be applied. We think it may still safely be affirmed that where it is

> sought to hold one person responsible and civilly liable for the torts committed by another, it must be made to appear by competent evidence that the relationship of principal and agent or that of master and servant existed between the two at the time the tort was committed, and, in addition to that, that the tortious act complained of was committed in the course of the employment of the servant, or was within the scope of the agency. Id. at 529. (Emphasis added).

Therefore, in 1931, the debate went on as to whether mere ownership of an automobile, without more, imposed liability upon the owner for the vehicle's negligent operation by another.

> The rule of the common law which was originally applicable to ox carts, horse-drawn vehicles, and bicycles may still be required by our legal doctrine of "stare decisis" to be applied at this late date to the automobile and aeroplane of modern civilization; but it by no means follows that such common law must be applied to new situations with the same degree of strict construction and narrow limitations. Such rules as this cannot just be applied to such a dangerous instrumentality in operation as an automobile or an aeroplane in exactly the same way as it would be applied to an innocuous thing such as an ox cart, horse and buggy, bicycle, or a wheel barrow.
>
> In this connection it is of interest to demonstrate that the weight of authority in the United States has favored many different, though varying, applications of these ancient rules of the common law when required to be considered in connection with claims of liability asserted with regard to the negligent operation of motor vehicles. In many decided cases the courts have often made a more liberal application of these rules to automobiles than they have applied to less dangerous instrumentalities. Id. at 530. (Emphasis added).

Even when liability for mere ownership of an automobile was imposed, the courts still recognized an exception in the case of a lessor/bailor.

> The only effect our holdings have is to recognize that insofar as the operation of an automobile on the highways is concerned, that the owner stands always, as a matter of law, in the relation of "superior" to those whom he voluntarily permits to use his license and to operate his automobile on the highways under it, or those whom he allows to do so with his knowledge and consent. Like all cases of this kind, there is an exception, as we have pointed out. Such exception has been recognized in the particular case where the statute[7] expressly permitted a bailment for hire, under which the bailee was allowed to procure and operate a hired car as if he were the owner. Under this exception, all liability was transferred to him which would thus have attended his actual ownership if it had existed. Id. at 531. (Emphasis added).

Later, "another era began and the bailor-owner of an automobile for hire lost his immunity . . ." Lynch v. Walker, supra, at 271. The enactment of subsection (a) in 1955 and subsection (b) in 1986 merely completed the circle; i.e., liability of the lessor became, under certain conditions, exactly what it was in 1946, non-existent.

The imposition of vicarious liability was originally based on possession, dominion and control. Perry, supra.

> The rationale of each of the foregoing decisions adopts as a criteria for determining liability whether or not the person charged had possession of and dominion and control over the vehicle at the time its negligent operation caused the damages forming the subject matter of the suit. If so, liability is imposed even though the negligent operation of the vehicle was by some third person to whom it was temporarily entrusted. Martin v.

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[7]This statute is now embodied in § 320.01(3) defining "owner" to be any person controlling any motor vehicle by right of lease, and § 320.02, which requires the lessee to obtain the vehicle registration, as does the lease in the case at bar.

Lloyd Motor Co., 119 So.2d 413, 415-16 (Fla. 1st DCA 1960). (Emphasis added).

The unifying thread running through all of these cases required something other than mere ownership prior to the imposition of liability. Proving actual title was unimportant; it was only necessary "to establish who exerted such dominion" over the vehicle. Wilson v. Burke, 53 So.2d 319, 321 (Fla. 1951); Frank v. Fleming, 69 So.2d 887 (Fla. 1954).

F. THE DANGEROUS INSTRUMENTALITY DOCTRINE IS NOT ABSOLUTE.

Contrary to what PETITIONER would have this Court accept as true, the halls of justice will not crumble by judicial approval of § 324.021(9)(a)'s exception to the dangerous instrumentality doctrine. Nor will those halls even "tremble" at this Court's continued acceptance of the law imposing liability on the beneficial owner, as opposed to mere legal titleholder. The dangerous instrumentality doctrine is not, and has never been, absolute in its application.

The doctrine does not apply, and an owner is not liable, for injuries caused by a vehicle's negligent operation by: 1) a repairman, Castillo v. Bickley, 363 So.2d 792 (Fla. 1978); 2) a valet, Fahey v. Raftery, 353 So.2d 903 (Fla. 4th DCA 1977); or 3) a bailee passenger who had entrusted its operation to a negligent driver, Devlin v. Florida Rent-A-Car, Inc., 454 So.2d 787 (Fla. 5th DCA 1984).

As the Court noted in Robelo v. United Consumer's Club, Inc., 555 So.2d 395 (Fla. 3d DCA 1989), an employer is not necessarily liable for injuries an employee causes when using an automobile

titled in the name of the employer. Likewise, an employer is not liable as the titleholder of a vehicle, for an employee's intentional torts committed while operating the employer's vehicle. Nye v. Seymour, 392 So.2d 326 (Fla. 4th DCA 1980). Similarly, an owner is not liable where there has been a conversion or theft. Owen v. Wagner, 426 So.2d 1262 (Fla. 2d DCA 1983).

None of these exceptions require a relinquishment of control for a certain time period. Notwithstanding PETITIONER's protestations, there is nothing repugnant about exempting a lessor from liability under the doctrine of beneficial ownership and/or § 324.021(9)(a) regardless of lease length, where the law clearly recognizes that an owner is relieved from liability merely by turning over his vehicle to a valet service for five minutes. Interestingly, the same exception recognized by the Second District Court of Appeal and the trial court in the instant case, was accepted in 1931 by this Court in Engleman v. Traeger, 136 So. 527 (Fla. 1931).

G. **LESSOR EXEMPTION UNDER § 324.021(9)(b).**

Section 324.021(9)(a) relieves the lessor from liability where, regardless of the term of the lease: 1) the lessee is given immediate possession; and 2) the lessee is given a right of purchase. Subsection (b) relieves the lessor from liability where: 1) the requisite insurance is in effect; and 2) the lease is for one year or longer. Both subsections must be read so as to achieve a consistent goal, i.e., exemption from liability to complying lessors. State v. Sullivan, 43 So.2d 438 (Fla. 1949); State v. Fussell, 24 So.2d 804 (Fla. 1946). Judicial contortions to yield

a different conclusion would serve no purpose except to salvage PETITIONER's access to a potential deep-pocket defendant, which is not a constitutionally protected right.

Contrary to PETITIONER's assertions on page 11 of his Brief, subsection (a)'s exemption of a lessor from the definition of "owner," does not render meaningless the subsequent enactment of subsection (b). Not every lease gives the lessee either immediate possession or a right of purchase.

Subsection (b) now states:

> **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; further, this subsection shall be applicable so long as the insurance required under such lease agreement remains in effect, **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**. (Emphasis added.)

Section 324.021(9)(b) has been uniformly interpreted to relieve the lessor from liability for the negligence of the lessee by Florida's appellate courts. Abdala v. World Omni Leasing, Inc., 15 F.L.W. D992 (Fla. 3d DCA 1990). Perry, supra,[8] holds that

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[8]The Florida Supreme Court denied discretionary review in Perry on January 24, 1990. Discretionary review was sought on the grounds that: 1) Perry directly conflicts with Anderson v. Southern Cotton Oil Co., 74 So. 975 (Fla. 1917), Susco Car Rental System of Fla. v. Leonard, 112 So.2d 832 (Fla. 1959) and Racecon, Inc. v. Meade, 388 So.2d 266 (Fla. 5th DCA 1980); and 2) § 324.021(9)(b) is unconstitutional as violating the petitioners' access to the courts.

§ 324.021(9)(b) does exempt a lessor from liability for the negligent operation of the leased motor vehicle by the lessee, where the requisite insurance coverage is in place, and the lease agreement is for a period in excess of one year.

> 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.
>
> "[T]here is overwhelming precedent for the proposition that the person that holds legal title to a vehicle will not always be deemed to be the 'owner' under the Motor Vehicle Safety Responsibility Act. Instead, looking to the purpose of the Act, the courts 'place the liability upon the person in a position . . . to allow or prevent the use of the vehicle. . . .'". Indeed, section 324.021(9)(b) may be viewed as enhancing the recoverability of damages from lessees by calling for minimum insurance requirements to be imposed upon lessees. Id. at 682.

Contrary to PETITIONER's contention, the legislative intent and purpose for the enactment of § 324.021(9)(b), would not be defeated by judicial approval of the lessor exemption set forth in subsection (a) of that very same statute. Subsections (a) and (b) merely provide two different alternatives for lessor exemption, neither of which is mutually exclusive of and/or dependent upon compliance with the other subsection. Subsection (b) provided a second statutory exemption to lessor liability, thirty-one years after subsection (a)'s statutory enactment.

Interestingly, it has taken the courts of this state forty-two years to establish, via case law exemption and statutory exemption, the same exception for the lessor under the dangerous instrumentality doctrine that was in existence in 1947. In view of the lessor's long-standing immunity until 1947, PETITIONER's argument carries no weight. PETITIONER has not advanced a single, acceptable theory to impose liability against the long-term lessor. The impetus of PETITIONER's reasoning, i.e., to reach the deep-pocket defendant, provides no basis for ignoring the explicit provisions of § 324.021(9)(a) and the well established legal doctrine that liability follows, and cannot precede, beneficial ownership.

CONCLUSION

Based on the foregoing reasoning and authorities, the decision of the Third District Court of Appeal is eminently correct. It is respectfully submitted that the decision of the Third District Court of Appeal must be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Brief on the Merits of Respondent, GENERAL MOTORS ACCEPTANCE CORPORATION, was mailed this 11th day of December, 1990 to: MILES A. McGRANE, III, ESQ., Kubicki, Bradley Draper, Gallagher & McGrane, P.A., Attorneys for Samuel James Thorpe, Penthouse Suite, City National Bank Building, 25 West Flagler Street, Miami, Florida 33130; MICHAEL J. SCHOFIELD, ESQ., Lanza, O'Connor, Armstrong, Sinclair, Tunstall, Attorneys for Unistrut Corporation, 3300 Ponce de Leon Boulevard, Coral Gables, Florida 33134; DIANA SANTA MARIA, ESQ., Sheldon J. Schlesinger, P.A., Attorneys for Plaintiff, 1212 Southeast Third Avenue, Fort Lauderdale, Florida 33316; JOSE BROWN and GRACIELA BROWN, Defendants, Pro Se, 2850 N.W. 151st Terrace, Opa Locka, Florida 33054; JAMES CLARK, ESQ., Barnett, Clark & Barnard, Co-Counsel for General Motors Acceptance Corporation, 19 West Flagler Street, Suite 1003, Miami, Florida 33130; and Jane Kreusler-Walsh and Larry Klein of Klein & Walsh, P.A., 501 South Flagler Drive, Suite 503, Flagler Center, West Palm Beach, FL 33401.

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