O/A 11-8-95 a-8

IN THE SUPREME COURT OF FLORIDA

CASE NO. 85,492

2 DCA Case No. 94-01400

Fla. Bar No. 137172

FILED
SID J. WHITE
AUG 18 1995
CLERK, SUPREME COURT
By
Chief Deputy Clerk

DAVID J. ADY, as personal representative of the estate of JANET A. ADY, deceased,

Petitioner,

vs.

AMERICAN HONDA FINANCE CORPORATION a/k/a AHFC, a California corporation,

Respondent.
_____/

PETITIONER'S BRIEF AND APPENDIX ON THE MERITS

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LIST OF CITATIONS AND AUTHORITIES

I.

INTRODUCTION

The petitioner, David J. Ady, as personal representative of the estate of Janet A. Ady, deceased, for and on behalf of lawful claimants/survivors, the estate of Janet A. Ady, deceased, David J. Ady, husband, and children, Kimberly Weinmeister, Kelly Jo Ady and David Ady, was the plaintiff in the trial court and was the appellant in the District Court. The respondent, American Honda Finance Corporation a/k/a AHFC, a California corporation, was the appellee in the Second District and was one of several defendants in the trial court. In this brief of petitioner on the merits the parties will be referred to as the plaintiff and the defendant and, alternatively, by name. The symbol "A" will refer to the appendix which accompanies this brief. All emphasis has been supplied by counsel unless indicated to the contrary.

II.

STATEMENT OF THE CASE AND FACTS

The facts of this case being neither complex nor lengthy may be stated as follows:

A. Robert J. Pelley ("PELLEY") (long term) leased a vehicle from AHFC. Negotiations began in late December of 1992 and culminated in January of 1993 (R. 194-207; deposition of PELLEY, exhibits 1, 2 and 3 appended thereto).

B. Although not now pertinent to any issue before this Court and more so to explain the early on existence of other

corporate defendants in the lawsuit, it may be noted that PELLEY leased the vehicle from his local Honda dealer [Southgate Motors, Inc., d/b/a Freeland Honda, a Florida corporation]. Through a series of subsequent transactions between dealer and AHFC, at the time of the accident which forms the basis for this lawsuit, AHFC was admittedly the vehicle's owner/lessor (R. 839, 940; R. 504, paragraph 4).

C. On March 8, 1993, Janet A. Ady died in an automobile collision. As a consequence plaintiff instituted this lawsuit and alleged in essence and pertinent part:

* * *

"11. On or about March 8, 1993, the Plaintiff's decedent, JANET A. ADY, was operating a certain 1990 Mazda motor vehicle owned by herself on Boyscout Drive at its intersection with S.R. 45 in Ft. Myers, Lee County, Florida, when the Defendant, ROBERT J. PELLEY, negligently and carelessly operated a certain 1993 Honda motor vehicle owned by the Defendant, SOUTH GATE MOTORS, INC., d/b/a FREELAND HONDA and leased to the Defendant, ROBERT J. PELLEY, and/or owned by the Defendant, AMERICAN HONDA FINANCE CORPORATION a/k/a AHFC, and leased to the Defendant, ROBERT J. PELLEY; and/or the Defendant, ROBERT C. ELDER, negligently and carelessly operated a certain 1979 Lincoln motor vehicle owned by himself and that as a result of the negligence of either or both Defendant drivers, ROBERT J. PELLEY and ROBERT C. ELDER, a collision was caused with their respective vehicles and the 1990 Mazda motor vehicle of the Plaintiff's decedent, JANET A. ADY, directly and proximately causing injuries and damages resulting in the untimely demise of the Plaintiff's decedent, JANET A. ADY, as hereinafter more particularly set forth.

"12. As a direct and proximate result of the aforesaid negligence of the Defendants and the injuries caused at the said time and place, the Plaintiff's decedent, JANET A. ADY, was caused to die."

* * *

D. The defendant answered (R. 14-16) and raised as an affirmative defense the limitations of Section 324.021, Florida Statutes (1993) (R. 15). After extensive discovery was completed the defendant (by motion and amendment thereto, R. 503-507, 549-560) moved for summary final judgment contending, inter alia, that:

1. Although it was the owner of the PELLEY vehicle on the day of the accident; and

2. Although PELLEY (the lessee) did not on the day of the accident (ever) have the insurance required by the (statute and) lease agreement, still, it was not responsible to the plaintiff:

> "7. At the time the closed end vehicle lease agreement was entered in this case, and at all times material hereto, AHFC was covered by a policy of insurance issued by American Automobile Insurance Company ('AMERICAN INSURANCE'), one of the Fireman's Fund insurance companies. . .that policy was in full force and effect at the time of the accident at issue, and contains one endorsement which is particularly relevant, endorsement 'G.'
>
> "8. Endorsement 'G' provides as follows:
>
> "'. . . For lessees and permissive users whose insurance as required by the lease agreement is not in force, or does not meet the required limit of Florida Statutes, Section 324.021(9)(b), this policy shall substitute for the required insurance, up to the minimum limit stated in Florida Statutes, Section 324.021(9)(b) . . .'" (R. 503-507)

The defendant's amended motion argued that as a consequence of a "contingent liability" policy of automobile insurance that it (AHFC) obtained:

> ". . .Where the requirements of Florida Statutes, Section 324.021(9)(b) have been met, AHFC cannot be deemed the 'owner' of the vehicle under the dangerous instrumentality doctrine. Therefore, it cannot be liable for the 'acts of the operator' in connection with his use of the vehicle. . ." (R. 552; amended motion for summary final judgment, at page 4.)

E. After hearing [the transcript of which is found in the record at R. 834] the trial court granted the defendant's motion.

F. The Second District (R. 883, 884, 885) affirmed the summary final judgment appealed and, after disagreeing with the result reached as to the same issue by the Fourth District Court of Appeal in GEDERT v. SOUTHEAST BANK LEASING CO., 637 So. 2d 253 (Fla. App. 4th 1994), stated, in an opinion now reported, see: ADY v. AMERICAN HONDA FINANCE CORPORATION, 652 So. 2d 415 (Fla. App. 2d 1995):

> "In this case the vehicle involved was insured to the limits required by the statute. The lessee, Mr. Pelley, was insured according to those limits and AHFC was, accordingly, exempt from liability. The fact that Mr. Pelley did not purchase or pay for the insurance called for under the lease, does not change our decision.
>
> "To the extent that our sister court's decision in Gedert would require a different result, we disagree with it.
>
> "Affirmed." 652 So. 2d at pages 416 and 417.

G. This proceeding followed.

III.

POINT INVOLVED ON APPEAL

WHETHER THE TRIAL COURT ERRED IN GRANTING THE DEFENDANT'S MOTION FOR SUMMARY FINAL JUDGMENT.

The above identifies the precise judicial act herein complained of. It does not, however, identify the "issue" involved in this proceeding. The plaintiff believes the precise legal issue herein involved asks:

WHETHER THE "CONTINGENT LIABILITY" AUTOMOBILE INSURANCE POLICY OBTAINED BY AHFC (THE VEHICLE'S OWNER) SATISFIES THE STATUTORY REQUIREMENTS OF SECTION 324.021(9)(b), FLORIDA STATUTES, WHICH MANDATE THAT IT IS THE AUTOMOBILE'S LESSEE WHICH MUST OBTAIN AND KEEP IN PLACE THE REQUISITE AUTOMOBILE INSURANCE IN ORDER FOR THE IMMUNITIES OF THE STATUTE TO BE AFFORDED TO THE OWNER/LESSOR.

If the answer to the above question is "Yes," AHFC is not to be deemed the vehicle's "owner" under the dangerous instrumentality doctrine and is statutorily immune above the limits of the insurance obtained. If the answer to the above question is "No," AHFC is the vehicle owner without limitation given that the statute provides:

> "Further, this paragraph shall be applicable so long as the insurance required under such lease agreement remains in effect."

IV.

SUMMARY OF ARGUMENT

The plaintiff would suggest to this Court that the trial court erred in granting the defendant's motion for summary final judgment and in finding that the "contingent liability" insurance policy obtained by AHFC satisfied the requirements of

the applicable Florida statute. For the reasons which follow the opinion herein sought to be reviewed should be quashed, the opinion in GEDERT should be approved and the summary final judgment appealed should be reversed.

Section 324.021(9)(b), Florida Statutes (1993), exempts a vehicle's owner/lessor from liability under the common law dangerous instrumentality doctrine in certain circumstances. Pertinent here is the fact that the owner/lessor will not be deemed to be the owner (for purposes of the dangerous instrumentality doctrine) as long as the lessee carries liability insurance limits not less than $100,000/$300,000 bodily injury and $50,000 property damage. Under Florida law the lessor is exempt if the lessee maintains this required insurance. Conversely, the statute will not exempt a long term lessor where the lessee's liability insurance is not in effect at the time of an accident.

In GEDERT v. SOUTHEAST BANK LEASING CO., 637 So. 2d 253, supra, the Fourth District addressed the subject issue. In that case the Fourth District reversed a summary final judgment entered in favor of the owner/lessor where the lessee did not have the requisite insurance in place at the time of an accident, but the owner/lessor had a "contingent liability" policy of insurance. The District Court agreed with the plaintiff's contention there that the owner/lessor's interpretation of Section 324.021(9)(b) contradicted the plain language of the statute. The court noted that since the statute

clearly required the lessee to have valid insurance on a leased automobile at the time of an accident and further because the statute contains no exception to the requirement, the lessor's contingent liability policy could not fulfill the statutory requirement. Because the opinion in GEDERT is well reasoned and is consistent with legislative history, purpose and enactment, it should be followed and approved by this Court.

The rulings below render meaningless the plain language of the last phrase of Section 324.021(9)(b):

> "...This paragraph shall be applicable so long as the insurance required under such lease agreement remains in effect..."

The legislative history of the subject statute reflects a concern by the Florida legislators over the imposition of double (and perhaps triple) insurance premiums. See: FOLMAR v. YOUNG, 591 So. 2d 220 (Fla. App. 4th 1991). In that case the court noted that the Legislature enacted the statute, at least in part, to eliminate the imposition of double insurance premiums. The rulings <u>in this case</u> set dangerous precedent because they encourage an owner/long term lessor to be totally indifferent to whether or not the less<u>ee</u> complies with the statute. In encouraging such conduct both the trial court and the Second District unwittingly have ruled against legislative concern over double premiums, to wit: contingent liability insurance will be obtained in all cases, <u>hence</u>, double premiums will again be the norm.

Of even more concern is, of course, the obvious fact that the statute allows no room for this sort of "interpretation." The dangerous instrumentality doctrine is a part of the Florida common law. Florida courts must, therefore, strictly construe any statute which is in derogation of same. Where the insurance required by the statute is in place, the lessor is deemed to not be the owner! There exist no other provisions, conditions, alternatives or choices. The statute is clear. The responsibility is on the lessee to obtain the applicable insurance. The burden is on the lessor to not lease until the statute is complied with. Under the statute, the limitations benefiting the vehicle's owner will be applicable so long as the insurance required under the lease agreement remains in effect.

In this case the lessee did not obtain the required insurance. The lessor allowed the lease anyhow. On the date of the subject accident the defendant was the leased vehicle's owner and was not possessed of statutory immunity. The result reached by the Second District in the instant cause is erroneous and the opinion should be quashed. In rejecting the opinion rendered by the Fourth District in GEDERT, the Second District in this case noted that the GEDERT court:

> "...apparently focused on insurance of the lessee rather than on insurance covering the vehicle..." 652 So. 2d at page 416.

The plaintiff would suggest to this Court the Fourth District's "focus" was correct. The Fourth District in GEDERT focused on insurance of the lessee rather than on insurance covering the

vehicle because the legislative enactment directed it to so do. There existed no justification for the Second District to ignore what the Legislature intended that a court focus on and turn to something that the Legislature believed would be detrimental to, and against, the consuming public. Given these factors the plaintiff respectfully urges this Honorable Court to quash the decision of the Second District in the opinion herein sought to be reviewed, to approve the decision rendered by the Fourth District in GEDERT, and to reverse the summary final judgment appealed.

V.

ARGUMENT

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN GRANTING THE DEFENDANT'S MOTION FOR SUMMARY FINAL JUDGMENT.

The plaintiff would suggest to this Court that the trial court erred in granting the defendant's motion for summary final judgment and in finding that the "contingent liability" insurance policy obtained by AHFC satisfied the requirements of the applicable Florida statute. For the reasons which follow the opinion herein sought to be reviewed should be quashed, the opinion in GEDERT be approved and the summary final judgment appealed should be reversed.

A.

The object of the subject issue is Section 324.021(9)(b), Florida Statutes (1993), which exempts a vehicle's owner/lessor from liability under the common law dangerous instrumentality doctrine in certain circumstances. The statute provides:

* * *

"(b) Owner/lessor.--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, 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; further, this paragraph shall be applicable so long as the insurance required under such lease agreement remains in effect."

* * *

It is now too well settled to need any argument at all that the lessor is exempt if the lessee maintains the required insurance. See: ABDALA v. WORLD OMNI LEASING, INC., 583 So. 2d 330 (Fla. 1991). Stated another way, the statute will not exempt a long term lessor where the lessee's liability insurance is not in effect at the time of an accident. KRAEMER v. GENERAL MOTORS ACCEPTANCE CORP., 572 So. 2d 1363 (Fla. 1990).

B.

In the instant cause:

1. The evidence of record shows that the vehicle operated by PELLEY was leased from South Gate which lease was subsequently purchased by, and assigned to, AHFC.

2. The lease is for a term of sixty months with an option to purchase at the expiration of that time.

3. The lease required PELLEY to maintain $100,000/$300,000 in bodily injury coverage and $50,000 in property damage liability coverage.

4. The evidence is undisputed that PELLEY did not have the insurance as required by the lease agreement.

5. There existed, on the day of the subject incident, a policy of insurance issued to AHFC by American Automobile Insurance Company, one of the Fireman's Fund insurance companies. That policy was in full force and effect at the time of the accident. That policy had an endorsement, denominated "G" which in relevant part provided as follows:

> ". . . For lessees and permissive users whose insurance as required by the lease agreement is not in force, or does not meet the required limit of Florida Statutes, Section 324.021(9)(b), this policy shall substitute for the required insurance, up to the minimum limit stated in Florida Statutes, Section 324.021(9)(b). . ."

6. The defendant argued to the trial court, and both the trial court and the Second District obviously agreed, that the existence of that policy of insurance (with the pertinent "contingent liability" endorsement) issued as it was to AHFC (the lessor) would suffice to "substitute for" the policy statutorily required to be obtained and maintained by the lessee.

7. The trial court then found and the Second District agreed that, as a result, the lessor (AHFC) would still obtain the benefits of the statutory limitations.

Because the policy's limits had been tendered to the plaintiff the trial court entered judgment in favor of the defendant. The plaintiff would respectfully disagree with the results reached below.

C.

In GEDERT v. SOUTHEAST BANK LEASING CO., 637 So. 2d 253, supra, the Fourth District addressed the subject issue. In that case the plaintiff appealed a final judgment which found that the contingent liability policy obtained by SOUTHEAST BANK LEASING CO. (Southeast/lessor) satisfied the statutory requirement of Florida Statutes, Section 324.021(9)(b). That court reversed.

There, as here, the case involved a long term automobile lease as contemplated by Section 324.021(9)(b). There, as here, the lease was for five years. The lease required the lessee to obtain insurance in the amount of $100,000 per person, $300,000 per accident and $50,000 for property damage. There, as here, the lessee was involved in a collision with another car. At the time of the accident in GEDERT the lessee's insurance had lapsed due to non-payment. The plaintiff (GEDERT) sued the lessee in negligence and the lessor under a theory of vicarious liability for the lessee's negligence under the dangerous instrumentality doctrine.

The trial court ruled for the lessor. GEDERT maintained on appeal that although the trial court correctly ruled that SOUTHEAST was vicariously liable for any negligence caused by Grannum (the lessee), the trial court erred in finding SOUTHEAST'S contingent liability policy satisfied the statutory requirements of Section 324.021(9)(b), Florida Statutes. It was the plaintiff's position that since the lessee's policy had

lapsed at the time of the accident, the statutory requirement that the lessee have insurance in effect was not satisfied, and that SOUTHEAST was not exempt from liability under Section 324.021(9)(b). The District Court identified the issue as follows:

> "WHETHER A LESSOR'S CONTINGENT LIABILITY POLICY EXEMPTS IT FROM VICARIOUS LIABILITY UNDER SECTION 324.021(9)(b) WHEN AT THE TIME OF THE ACCIDENT, THE INSURANCE POLICY WHICH THE LESSEE IS REQUIRED TO MAINTAIN UNDER THE LEASE AGREEMENT HAS LAPSED." 637 So. 2d at page 253.

The subject statute provides:

> * * *
>
> "(b) Owner/lessor.--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, 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; further, this paragraph shall be applicable so long as the insurance required under such lease agreement remains in effect. (emphasis added)."
>
> * * *

The District Court concluded that the last clause of the section qualified the exemption. The court agreed with the plaintiff's contention that SOUTHEAST'S interpretation of Section 324.021(9)(b) contradicted the plain language of the statute. In rejecting the lessor's arguments the District Court stated:

> "...The statute clearly requires the lessee to have valid insurance on a leased automobile at the time of an accident; otherwise, liability under the dangerous instrumentality doctrine reverts to the lessor. See, Abdala v. World Omni Leasing, Inc., 583 So. 2d 330 (Fla. 1991); Raynor v. De La Nuez, 574 So.

2d 1091 (Fla. 1991). Because the statute contains no exception to the requirement that the lessee have insurance in effect at the time of the accident, we disagree with Southeast's position that the lessor's contingent liability policy can fulfill the statutory requirement. Accordingly, we hold that Southeast's contingent liability policy does not satisfy the statutory requirement that Grannum have valid insurance at the time of the accident." 637 So. 2d at page 254.

The plaintiff suggests to this Court that the Fourth District's opinion is well reasoned, is consistent with the legislative history, purpose and intent of the subject statute and should be followed by this Court.

D.

The rulings in this case to date render meaningless the plain language of the last phrase of Section 324.021(9)(b):

* * *

"...Further, this paragraph shall be applicable so long as the insurance required under such lease agreement remains in effect."

* * *

In FOLMAR v. YOUNG, 591 So. 2d 220 (Fla. App. 4th 1991), the court had occasion to discuss the legislative history of the subject statute. The court noted that the Legislature enacted the statute, at least in part, to eliminate the imposition of double insurance premiums. As noted in the opinion:

* * *

"Additionally, the legislators specifically addressed their concern over the imposition of double premiums upon the lessee. Under the previous statutory scheme, both the lessee and the lessor were obtaining liability coverage. As Representative Upchurch stated:

> "'The leasing company must carry the liability insurance on every one of those cars, the individual who rents the car has to carry liability insurance for every one of those cars, and the bottom line is that the guy who leases the car is paying for all the insurance and he's paying for it double. . . and so this will save you from paying for double insurance if you lease a car, same as you wouldn't have to pay for double insurance if you purchase a car.'
>
> "Mr. Dudley added:
>
> "'As it now exists, there is an additional premium cost to the lessor, what we're trying to do is eliminate that cost which the resulting savings would accrue to the lessee. We believe that the effect of this bill is to make less costs to the consumer or the lessee.'" 591 So. 2d at page 223.

One need look no further than the statute itself to learn the legislative intent, see: Section 324.011, Florida Statutes (1993):

* * *

> "It is the intent of this chapter to recognize the existing privilege to own or operate a motor vehicle on the public streets and highways of this state when such vehicles are used with due consideration for others and their property, and to promote safety and provide financial security requirements for such owners or operators whose responsibility it is to recompense others for injury to person or property caused by the operation of a motor vehicle. Therefore, it is required herein that the operator of a motor vehicle involved in an accident. . . shall respond for such damages and show proof of financial ability to respond for damages in future accidents as a requisite to his future exercise of such privileges."

* * *

With respect to the adoption of the liability insurance requirements and the imposition of that requirement on the

lessee (the operator) the court in FOLMAR v. YOUNG, supra, again turned to the legislative discussions and noted:

> "It requires financial responsibility in a minimum amount of $100,000/$300,000 limits which doesn't exist now, if you went to the bank and borrowed the money and bought the car, you wouldn't have to carry any liability insurance, if you used this alternative financing, you've got to carry $100,000/$300,000 liability, it also provides THAT IF THE INSURANCE IS NOT IN EFFECT THIS SUB-SECTION IS NOT OPERABLE. So we've protected those things. . .This is a good amendment. It's very important--it simply covers what has been wrongly done in the past, and it provides THAT WHEN YOU USE THIS ALTERNATIVE FINANCING ARRANGEMENT, THAT YOU WILL HAVE THE INCIDENCE OF OWNERSHIP WITH THE PERSON THAT HAS IT, THAT IS THE LESSEE. WE ALSO IN DOING THAT REQUIRE THEM TO MAINTAIN MORE FINANCIAL RESPONSIBILITY THAN ANYONE ELSE IN THIS STATE." 591 So. 2d at page 223.

The rulings below ignore legislative mandate and concerns.

E.

The results reached below are erroneous. The dangerous instrumentality doctrine is a part of the Florida common law. See: SOUTHERN COTTON OIL COMPANY v. ANDERSON, 86 So. 629 (Fla. 1920) and KRAEMER v. GENERAL MOTORS ACCEPTANCE CORP., 572 So. 2d 1363 (Fla. 1990). Florida courts must, therefore, strictly construe any statute which is in derogation of same. See: STATE v. EGAN, 287 So. 2d 1 (Fla. 1973). See also: 49 FLA. JUR. 2d, STATUTES, Section 192 and cases cited therein.

Section 324.021(9)(b) as herein pertinent is clearly in derogation of the common law and must be <u>strictly</u> construed. See: KRAEMER v. GENERAL MOTOR ACCEPTANCE CORP., 572 So. 2d 1363, supra. The trial court and the Second District did no such thing. In point of fact the rulings below set dangerous

precedent because they encourage an owner/long term lessor to be totally indifferent to whether or not the lessee complies with the statute. In encouraging such conduct the lower courts unwittingly have ruled against legislative concern over double premiums, to wit: contingent liability insurance will be obtained in all cases, hence, double premiums will again be the norm.

Of even more concern is, of course, the fact that the statute allows no room for this sort of "interpretation." Where the insurance required by the statute is in place, the lessor is deemed to not be the owner! There exist no other provisions, conditions, alternatives, or choices. The statute is clear. In this vein it should be reminded that a statute should be interpreted to give effect to every clause in it and to accord meaning and harmony to all of its parts. STATE EX REL CITY OF CASSELBERRY v. MAGER, 356 So. 2d 267 (Fla. 1978). Recently, in AUTO-OWNERS INSURANCE COMPANY v. BONITA CONQUEST, 20 Fla. L. Weekly S312 (opinion filed July 6, 1995) this Court reminded that it has a long history of giving deference to a statute's clear and unambiguous wording. It would appear from the opinion herein sought to be reviewed that the Second District does not share this Court's philosophy. The Second District has completely ignored the clear and unambiguous language of the statute and has further ignored the legislative intent as found and discussed in FOLMAR v. YOUNG, 591 So. 2d 220, supra. One does not need to hold a doctorate in economics from an Ivy

League school to know, appreciate and understand that if the interpretation given to this statute by the Second District continues, all consumers (as well as long terms lessees) will be absorbing the increased costs for these "contingent" liability policies.

The plaintiff would respectfully remind this Court that the responsibility is on the lessee to obtain the applicable insurance. The burden is on the lessor to not lease until the statute is complied with. The limitations benefiting the vehicle's owner will be applicable so long as:

> "...the insurance required under such lease agreement remains in effect."

In this case the lessee did not obtain the required insurance! The lessor allowed the lease anyhow. On the date of the subject accident the defendant (AHFC) was the leased vehicle's owner and was not possessed of statutory immunity. The result reached by the Second District in the instant cause is erroneous and the opinion should be quashed.

In rejecting the opinion rendered by the Fourth District in GEDERT the Second District in this case noted that the GEDERT court:

> "...apparently focused on insurance of the lessee rather than on insurance covering the vehicle..." 652 So. 2d at paged 416.

The plaintiff would suggest to this Court the Fourth District's "focus" was correct. The Fourth District focused on insurance of the lessee rather than on insurance covering the vehicle because the legislative enactment directed it to so do. There existed no

justification for the Second District in the instant cause to ignore what the Legislature intended that a court focus on and turn to something that the Legislature believed would be detrimental to, and against, the consuming public. Given these factors the plaintiff respectfully urges this Honorable Court to quash the decision of the Second District in the opinion herein sought to be reviewed, to approve the decision rendered by the Fourth District in GEDERT, and to reverse the summary final judgment appealed.

VI.

CONCLUSION

Based upon the foregoing reasons and citations of authority, the plaintiff would respectfully urge this Honorable Court to quash the opinion herein sought to be reviewed, to approve the decision rendered by the Fourth District in GEDERT, supra, and to reverse the summary final judgment appealed.

Respectfully submitted,

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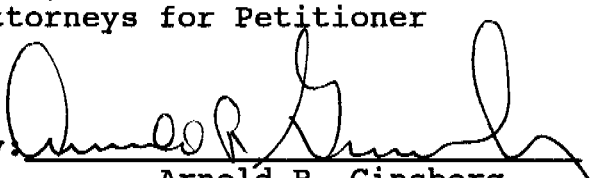
By: 
Arnold R. Ginsberg

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true copy of the foregoing Petitioner's Brief on the Merits and accompanying Appendix was mailed to the following counsel of record this 14th day of August, 1995.

MATTHEW DANAHY, ESQ.
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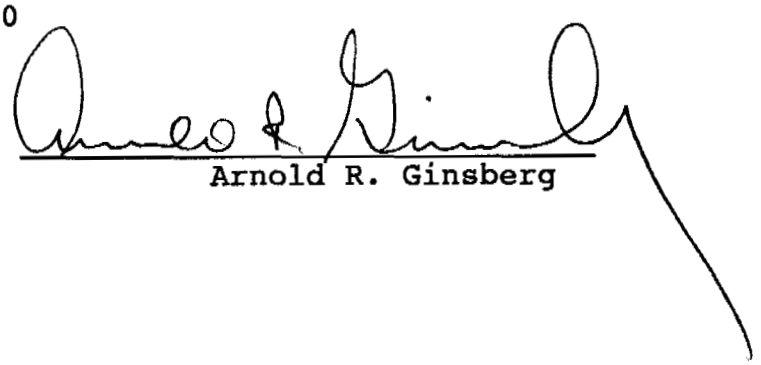

Arnold R. Ginsberg

PETITIONER'S APPENDIX

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gieg v. Prunetti, 610 So.2d 667 (Fla. 4th DCA 1992). *See also Bay City Management, Inc. v. Henderson*, 531 So.2d 1013 (Fla. 1st DCA 1988) (jurisdictional defects waived where defendants by general appearance filed a motion to set aside defaults and merely reserved their right to assert jurisdictional defenses without setting forth the defenses or the grounds upon which they were based); *Cumberland*, 507 So.2d at 795 (a party who takes "some step" submitting to court's jurisdiction is deemed to have waived right to challenge court's jurisdiction regardless of his intent not to concede jurisdiction); *White v. Nicholson*, 386 So.2d 74 (Fla. 2d DCA 1980) (a party who makes a general appearance may not later repudiate it by attacking court's personal jurisdiction over him). Because appellee failed to assert the affirmative defense of lack of jurisdiction in its answer to appellant's initial complaint, the defense was waived. Accordingly, the trial court's dismissal of appellant's amended complaint is reversed.

REVERSED.

COBB and THOMPSON, JJ., concur.

David J. ADY, as Personal Representative of the Estate of Janet A. Ady, deceased, Appellant,

v.

AMERICAN HONDA FINANCE CORPORATION a/k/a AHFC, a California corporation, Appellee.

No. 94-01400.

District Court of Appeal of Florida, Second District.

March 10, 1995.

Personal representative of vehicle lessee's estate brought action against lessor, premising liability on dangerous instrumentality doctrine. The Circuit Court for Lee County, Lynn Gerald, Jr., J., entered summary judgment in favor of lessor, and appeal was taken. The District Court of Appeal, Schoonover, J., held that fact that lessor rather than lessee purchased insurance on vehicle did not prevent lessor from claiming exemption from liability under doctrine based on existence of such coverage. In so holding, the Court disagreed with the holding in *Gedert v. Southeast Bank Leasing Co.*, 637 So.2d 253.

Affirmed.

Automobiles ⇐192(6)

Bailment ⇐21

Fact that vehicle lessor rather than lessee purchased insurance for vehicle did not prevent lessor from claiming exemption from liability under dangerous instrumentality doctrine based on existence of such coverage; vehicle was insured to limits required by statute, and lessee was insured according to those limits. West's F.S.A. § 324.021(9)(b).

Arnold R. Ginsberg of Arnold R. Ginsberg, P.A., and Nance, Cacciatore, Sisserson and Duryea, P.A., Miami, for appellant.

Matthew R. Danahy of Shofi, Smith, Hennen, Jenkins, Stanley & Gramovot, P.A., Tampa, for appellee.

SCHOONOVER, Judge.

The appellant, David J. Ady, as personal representative of the Estate of Janet A. Ady, deceased, challenges a final summary judgment entered in favor of the appellee, American Honda Finance Corporation a/k/a AHFC, a California corporation. We affirm.

The facts material to this appeal indicate that Janet A. Ady was killed as the result of an automobile accident which occurred in Lee County, Florida, on March 8, 1993. One of the three vehicles involved in the accident was a Honda automobile owned by AHFC and leased to, and driven by, Robert J. Pelley.

A.1

David J. Ady, the deceased's husband, after qualifying as personal representative of Mrs. Ady's estate, filed a civil action against AHFC and several others. The complaint alleged that Mrs. Ady was killed as the result of Mr. Pelley's negligence and/or the negligence of the driver of the other vehicle involved in the accident. Mr. Ady contended that AHFC was responsible to the estate because of the dangerous instrumentality doctrine. AHFC, in addition to denying the material allegations of the complaint, affirmatively alleged that it was not liable under the dangerous instrumentality doctrine because of section 324.021(9)(b), Florida Statutes (1991).

After the action was at issue, AHFC filed a motion for summary judgment. It contended that it was exempt from liability under the dangerous instrumentality doctrine because a policy of insurance which met the requirements for coverage set forth in section 324.021(9)(b) was in effect at the time of the accident and that Mr. Pelley was an insured under that policy. The trial court granted AHFC's motion and entered a final summary judgment in its favor. Mrs. Ady's estate filed a timely notice of appeal.

The appellant, relying on our sister court's opinion in *Gedert v. Southeast Bank Leasing Co.*, 637 So.2d 253 (Fla. 4th DCA 1994), contends that AHFC is not exempt from the dangerous instrumentality doctrine because the lessee did not obtain the insurance policy in question. The appellee, on the other hand, contends that Mr. Pelley was an insured under an insurance policy that complied with section 324.021(9)(b) and that the trial court correctly entered a summary judgment in its favor. We agree with appellee.

Section 324.021(9)(b) provides:

> (b) Owner/lessor.—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, 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; further, this paragraph shall be applicable so long as the insurance required under such lease agreement remains in effect.

It is undisputed in this case that the lease was for sixty months and required the lessee to obtain insurance coverage with limits not less than those set forth in section 324.021(9)(b). The lessee did not purchase this insurance, but was an insured under a policy purchased by AHFC. This policy provided the insurance required by the statute to any lessee who did not purchase his own insurance pursuant to the requirements of the lease. The limits of the policy were tendered to the appellant.

In *Gedert*, our sister court held that section 324.021(9)(b) clearly requires the lessee to have valid insurance on a leased automobile at the time of an accident; otherwise, liability under the dangerous instrumentality doctrine reverts to the lessor. The court held further that the statute contained no exception to the requirement that the lessee have insurance in effect at the time of the accident, and therefore, a lessor's contingent liability policy providing the required benefits could not fulfill the statutory requirement. The court apparently focused on insurance of the lessee rather on insurance covering the vehicle. The same court, however, in *Folmar v. Young*, 591 So.2d 220 (Fla. 4th DCA 1991), considered the statute in a situation involving two lessees. The *Folmar* court rejected a contention that the coverage referred to in the statute was per lessee and not per vehicle. The court concluded in an en banc decision that the plain meaning of the statute is that each lease agreement requires insurance in the stated minimum amounts. The court stated that it found no language indicating that each lessee must secure separate insurance coverage. According to that opinion, the owner of the vehicle is exempt from liability even if one of the lessees does not have the insurance required by the lease.

In this case the vehicle involved was insured to the limits required by the statute. The lessee Mr. Pelley was insured according

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to those limits and AHFC was, accordingly, exempt from liability. The fact that Mr. Pelley did not purchase or pay for the insurance called for under the lease, does not change our decision.

To the extent that our sister court's decision in *Gedert* would require a different result, we disagree with it.

Affirmed.

FRANK, C.J., and FULMER, J., concur.

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John OWENS, Appellant,

v.

The STATE of Florida, Appellee.

No. 94-2942.

District Court of Appeal of Florida, Third District.

March 15, 1995.

Rehearing Denied April 19, 1995.

An appeal under Fla.R.App.P. 9.140(g) from the Circuit Court for Dade County; Michael B. Chavies, Judge.

John Owens, in pro. per.

Robert A. Butterworth, Atty. Gen., and Consuelo Maingot, Asst. Atty. Gen., for appellee.

Before HUBBART, COPE and GREEN, JJ.

PER CURIAM.

John Owens appeals an order denying his motion to correct illegal sentence pursuant to Florida Rule of Criminal Procedure 3.800(a). The State concedes that the sentence of 22 years imposed in circuit court case number 88-16241 exceeds the statutory maximum of 15 years. We reverse and remand for resentencing on that count. In so doing, we do not disturb the three-year minimum mandatory portion of the sentence. Appellant need not be present for resentencing.

We find no merit in any of appellant's other claims of illegal sentencing, and thus affirm the remainder of the order denying relief under Rule 3.800(a).

Affirmed in part, reversed in part, and remanded.

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Frank S. NICOLL, Jr., Petitioner,

v.

The Honorable Franklin G. BAKER, Circuit Judge of the Twentieth Judicial Circuit in and for Hendry County, Respondent.

No. 94-02684.

District Court of Appeal of Florida, Second District.

March 15, 1995.

Former husband sought writ of prohibition seeking to prohibit the Circuit Court, Hendry County, Franklin G. Baker, J., from exercising subject matter jurisdiction over wife's action to enforce alimony award under Uniform Reciprocal Enforcement of Support Act (URESA). The District Court of Appeal, Blue, J., held that URESA did not provide jurisdiction for enforcement of alimony order without accompanying child support order.

Petition granted and question certified.

1. Statutes ⇐190

When statute's language is clear and unambiguous, it must be given its plain and obvious meaning.

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