IN THE SUPREME COURT OF FLORIDA

CASE NO. 85,492

2 DCA Case No. 94-01400

Fla. Bar No. 137172

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.
_____/

REPLY BRIEF OF PETITIONER

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and
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Melbourne's corrected 3/25/96 JB

TOPICAL INDEX

LIST OF CITATIONS AND AUTHORITIES

I.

INTRODUCTION

In this reply brief of petitioner the parties litigant will be referred to consistent with the references utilized in the petitioner's main brief, to wit: as the plaintiff and the defendant and, alternatively, by name. The Amici Curiae, American Automobile Manufacturers Association and the Association of International Automobile Manufacturers, will, if necessary, be referred to simply as "Amicus." The symbol "A" will refer to the appendix which accompanied plaintiff's main brief. All emphasis has been supplied by counsel unless indicated to the contrary.

II.

STATEMENT OF THE CASE AND FACTS

At pages 2 and 3 of the defendant's brief the following is stated:

> "Contrary to the mis-statements contained in plaintiff's statement of the case and facts, AHFC never admitted that it was the 'owner' of the vehicle for purposes of the dangerous instrumentality doctrine, but did admit that it was the title owner of the vehicle at the time of the accident (citations omitted). Furthermore, AHFC never contended that Pelley did not have insurance on the day of the accident as required by the statute and the lease. Instead, AHFC at all times has maintained that Pelley had his own policy of insurance, under the policy of insurance issued by American Insurance to AHFC (citations omitted)."

The plaintiff has reviewed his statement of the case and facts and, after review, stands on it as written. The defendant's assertions have no basis in fact. Moreover, there exist no "mis-

statements" at all. What the defendant has "contended," "asserted" and/or "maintained all along" does not change either the facts of this case or the practical effect of what the defendant has admitted. The fact remains: Pelley, the long-term lessee, did not obtain insurance as he was required to do. This fact is undisputed and remains so irrespective of the contentions of the litigants regarding "how" the statute can or should be viewed.

Likewise, it is also undisputed that the defendant leased the vehicle to Pelley even though Pelley did not himself obtain insurance. While the defendant has uniformly disputed the significance of this fact and contends it was/is not sufficient to vitiate its "limited" liability (given that "it" provided the insurance for Pelley) still, the matters remain undisputed. Whether the defendant could unilaterally supply insurance and still keep its limited liability presents an issue to be resolved. The facts are undisputed, the defendant questions their effect.

At page 3 of its brief the defendant states:

> "...AHFC has never argued before either the trial court, or the District Court of Appeal, that the policy was a 'contingent liability' policy. A review of the transcript of the hearing before the trial court...and the briefs filed with the Second District more accurately reflect the argument of AHFC on this point. In fact, the trial court judge specifically determined that the policy of insurance issued by American Insurance was not a 'contingent liability' policy...Rather, the judge found that the policy was Pelley's policy, and, therefore, Pelley did have insurance as required by the lease agreement..."

Endorsement "G" to the subject policy 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 insurance obtained by the defendant "for Pelley" provides that if the insurance required does not exist, the policy so obtained will "substitute for...." The plaintiff suggests this is about as "contingent" as "contingent" gets!

The plaintiff reserves the right to argue the significance of the above facts and other relevant record facts in the argument portion of this brief.

III.

REPLY 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 there exists very little substance to the defendant's argument. Perforce, there exists very little for this plaintiff to reply to. The thrust of the defendant's argument is quite clear. The defendant argues, essentially, that irrespective of the Legislature's concerns, the defendant can provide the insurance required where the lessee does not. In this vein the defendant suggests that the plaintiff has not presented any evidence that:

> "...the purchase of insurance for Pelley by AHFC resulted in a charge of any kind to him, let alone the imposition of double premium (because Pelley did not himself ever purchase any insurance)." See: brief of defendant at pages 15 and 16.

The defendant argues:

> "Surely, the statute cannot be read to prohibit a long-term lessor from appropriately safeguarding its own interests while making sure the heightened financial responsibility requirements under Florida Statute Section 324.021(9)(b) have been met. There is simply nothing in the legislative history to indicate that this is contrary to the policy behind the statute." See: brief of defendant at page 16.

The defendant also argues:

> "Plaintiff makes numerous claims in his brief that the decision of the Second District in the instant case ignores legislative intent and the legislative history behind the statute. However, plaintiff makes absolutely no citation to how such intent or history has been ignored, <u>except to continually repeat that lessees would be required to pay double insurance premiums or increase costs--without a shred of evidence or support for this contention</u>. Here, AHFC has simply absorbed the two cents a day which it costs to maintain coverage on each of their leased vehicles and there is no double premium charged." See: brief of defendant at page 18.

The plaintiff would simply remind this Court of what the District Court of Appeal, Fourth District, observed in FOLMAR v. YOUNG, 591 So. 2d 220 (Fla. App. 4th 1991). In that case the Court noted that the subject statute was enacted in the form selected as:

> "...<u>The legislators specifically addressed their concern over the imposition of double premiums upon the lessee</u>. Under the previous statutory scheme, <u>both</u> the lessee and the lessor were obtaining liability coverage." 591 So. 2d at page 223.

The plaintiff would suggest to this Court that the defendant has the sequence and analysis "in reverse." The statute was passed because of legislative concern, not because of "plaintiff's facts." The Legislature, concerned in part over the imposition of double premiums, caused it to impose upon the <u>lessee</u> the burden to obtain the requisite insurance. The

Legislature envisioned that absent that occurring, the vehicle would not be leased! The defendant, however, suggests this Court ignore the concerns of the Legislature and allow long-term leases to exist by allowing long-term lessors to bypass stated legislative concerns by routinely providing insurance. The plaintiff would urge that this result not be allowed.

First, and foremost, such a result would be against the clear language of the statute. See, for example: McDONALD v. ROLAND, 65 So. 2d 12 (Fla. 1953).

Second, such a result would remove all incentives from a long-term lessor to require the lessee to obtain insurance. "Contingent" insurance would be common and such premiums routine.

At page 18 of its brief the defendant suggests:

> "Further, the way the insurance policy at issue is written, it actually has the effect of decreasing the costs passed along to the lessee..."

Whether the costs passed on to the consumer are "decreased" or not, there still exist premium costs being passed on to the consumer, something the Legislature hoped to eliminate. In truth what the defendant is proposing is that this Court "ignore" legislative concerns because the concerns are, in the opinion of the defendant, "ill-founded." The defendant buttresses its argument with a smoke screen that the plaintiff has not produced any evidence establishing "double premiums." The plaintiff suggests to this Court no such precedent exists for the argument

advanced by the defendant. See: McDONALD v. ROLAND, supra, 65 So. 2d 12:

> "Where the Legislature's intention is clearly discernible, the court's duty is to declare it as it finds it, and it may not modify it or shade it, out of any consideration of policy or regard for untoward consequences..." 65 So. 2d at page 14.

Here, the defendant argues that irrespective of what the Legislature was concerned with, irrespective of what the policy provides or the statute requires, long-term leases should be allowed irrespective of whether the long-term lessee effectuates what he (or she) is contractually obligated to do. The defendant is attempting to end run legislative concern. This the defendant should not be allowed to do.

At page 17 of its brief the defendant states:

> "It is an unfortunate reality that some lessees, through trick, fraud or scheme, represent that they have insurance coverage and produce proof of the required insurance when in fact they have none. Other lessees allow applicable coverage to lapse during the term of the lease and are involved in accidents before a lessor receives notice of that fact and can regain possession of the vehicle. There is no public policy in Florida which prohibits a long-term lessor from providing the required insurance to the lessee in such cases."

Whatever <u>other</u> arguments are available to the defendant or may otherwise become available under different circumstances or at other times are of no moment. <u>In this case</u> the defendant leased the subject vehicle even though the lessee did not obtain the requisite insurance. Absent the obtaining of insurance by the lessee the long-term lease should not have been allowed.

On the date of the subject accident the defendant was the leased vehicle's owner and was not possessed of statutory immunity. The dangerous instrumentality doctrine is a part of the Florida common law. See: 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. In this case the Second District ignored the clear and unambiguous language of the subject statute and ignored the legislative intent as found and discussed in FOLMAR v. YOUNG, 591 So. 2d 220, supra. The plaintiff would again argue to this Court that there existed no justification for the Second District to ignore what the Legislature intended that a court focus on, to wit: that the long-term lessee obtain the requisite insurance and that the long-term lessor not lease until the lessee has complied with his (or her) obligations under both the statute and the contract. In the instant cause the Second District disagreed with the opinion rendered by the Fourth District in GEDERT v. SOUTHEAST BANK LEASING CO., 637 So. 2d 253 (Fla. App. 4th 1994) in that in this case the Second District 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 Fourth District's "focus" was correct. The court focused on insurance of the lessee rather than on insurance covering the vehicle because both the legislative history and the enactment itself directed it to so do. Where, as here, the Legislature's

intention was clearly discernible, it became the duty of the Second District to construe the Legislature's enactment consistent with that intention. Because it did not, the opinion herein sought to be reviewed should be quashed.

The plaintiff respectfully urges this Honorable Court to quash the decision of the Second District, to approve the decision rendered by the Fourth District in GEDERT, and to reverse the summary final judgment appealed.

IV.

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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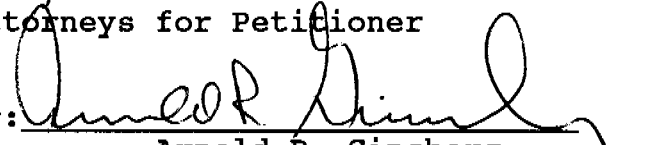
By: 
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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true copy of the foregoing Reply Brief of Petitioner was mailed to the following counsel this 26th day of September, 1995.

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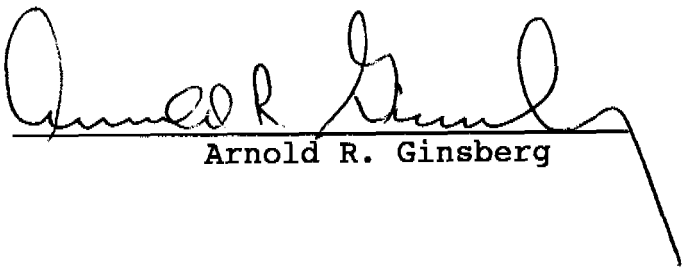

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