IN THE SUPREME COURT OF FLORIDA

CASE NO. SC10-694

JOHN K. VREELAND, Administrator Ad Litem for the Estate of JOSE MARTINEZ, and the personal representative of the Estate of JOSE MARTINEZ, deceased,

Petitioner,

vs.

AEROLEASE OF AMERICA, INC.,

Respondent.

_____/

On Discretionary Review from the District Court of Appeal of Florida, Second District

PETITIONER'S BRIEF ON THE MERITS

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I. STATEMENT OF THE CASE AND FACTS

The appellant, John K. Vreeland, administrator ad litem for the estate of Jose Martinez and the personal representative of the estate of Jose Martinez, deceased, was the plaintiff below in a wrongful death action against Aerolease of America, Inc. (and others not relevant here), the owner/lessor of an aircraft in which the plaintiff's decedent was killed when the aircraft crashed shortly after takeoff from Lakeland Linder Regional Airport on January 15, 2005 (A. 1).[1/] Aerolease was sued for negligent maintenance and inspection of the aircraft before it was leased, and vicariously -- under Florida's "dangerous instrumentality doctrine" -- for the negligence of the pilot of the aircraft. Although both of these remedies are available to the plaintiff under Florida law, the trial court concluded that Aerolease was absolutely immune from suit as a matter of federal law. The issue on appeal below -- whether the Federal Aviation Act preempts the remedies provided to the plaintiff by Florida tort law -- arose out of the following procedural and factual background.

The plaintiff's Third Amended Complaint (A. 1) alleges in pertinent part that Aerolease negligently maintained and inspected the aircraft before offering it for sale or lease; that the aircraft was thereafter leased to Danny Ferrer in a

[1/] By agreement of the parties, appendices were utilized in lieu of the original record below. A. refers to the appendix filed by the appellant/petitioner, which has been transmitted to this Court by the district court.

defective and unairworthy condition; that the aircraft was being piloted by Donald Palas; that Jose Martinez was a passenger in the aircraft; that because of the aircraft's defective mechanical condition, it became unstable and uncontrollable shortly after takeoff and crashed, killing Mr. Martinez.

The complaint contains three counts against Aerolease. Count I alleges that, pursuant to Florida's "dangerous instrumentality doctrine," Aerolease was liable to the plaintiff for the negligence of Mr. Palas in his operation of the aircraft (A. 5). Count II alleges that Aerolease maintained and inspected the aircraft and then leased it to Mr. Ferrer in a defective and unairworthy condition, and that its negligent maintenance and inspection was a cause of the crash (A. 5-6). Count III alleges that Aerolease intentionally published known false information concerning the condition of the aircraft in order to induce Mr. Ferrer to lease the aircraft (A. 6). The complaint contains additional counts against other defendants, but they are not in issue here.

Aerolease moved for summary judgment, contending that 49 U.S.C. §44112 preempts the plaintiff's state law remedies, and that it was immune from suit because it was not in possession or control of the aircraft it owned at the time of the crash (A. 13 *et seq*.) The motion also contended that the evidence developed to date was insufficient to support the allegations of Count III of the complaint (A. 33 *et seq.*). The plaintiff opposed the motion (A. 44 *et seq.*). The trial court concluded that Aerolease was the owner of the aircraft; that it was not in

possession or control of the aircraft when it crashed; that 49 U.S.C. §44112 preempted the plaintiff's state law remedies altogether; and that Aerolease was therefore entitled to judgment in its favor since the Federal Aviation Act provided the plaintiff with no remedies at all (A. 52-54). Plaintiff moved for reconsideration (A. 55-59). The trial court denied the motion for reconsideration and entered a summary final judgment in Aerolease's favor (A. 60-61). A timely appeal followed.

To the extent that the judgment disposed of Count III of the complaint, we did not challenge it below. However, we did contend that the trial court erred in concluding that federal law preempts the state law remedies alleged in Counts I and II of the complaint. The district court agreed with our contention that federal law did not preempt the claim alleged in Count II for negligent maintenance and inspection, and it reversed the summary judgment with respect to that Count. But it affirmed the summary judgment on Count I for vicarious liability under Florida's "dangerous instrumentality doctrine," concluding that it was preempted by 49 U.S.C. §44112. It acknowledged that the handful of decisions that existed on the point were in considerable disarray and it purported to resolve their differences by referring to the "legislative history" it found in H.R. Rep. 80-2091, 1948 U.S.C.C.A.N. 1836, 1948 WL 1816.

In the process, the district court was required to "distinguish" this Court's decision in *Orefice v. Albert*, 237 So.2d 142 (Fla. 1970), which holds that victims

of aircraft accidents have viable claims against aircraft owners under Florida's "dangerous instrumentality doctrine." This Court accepted jurisdiction to resolve the express and direct conflict between the district court's decision and *Orefice v. Albert*. In the argument that follows, we hope to demonstrate that the language of the statute, its legislative history, and subsequently enacted provisions of the Federal Aviation Act require a conclusion contrary to that reached by the district court.

II. ISSUE ON REVIEW

WHETHER THE DISTRICT COURT ERRED IN CONCLUDING THAT FLORIDA'S "DANGEROUS INSTRUMENTALITY DOCTRINE," WHICH IMPOSES VICARIOUS LIABILITY UPON AIRCRAFT OWNERS FOR NEGLIGENT OPERATION OF AN AIRCRAFT, IS PREEMPTED BY FEDERAL LAW AND THEREFORE UNENFORCEABLE.

III. SUMMARY OF THE ARGUMENT

Our argument will be brief enough that to summarize it here would amount to little more than unnecessary repetition, at the Court's expense. Respectfully requesting the Court's indulgence, we turn directly to the merits.

IV. ARGUMENT

THE DISTRICT COURT ERRED IN CONCLUDING THAT FLORIDA'S "DANGEROUS INSTRUMENTALITY DOCTRINE," WHICH IMPOSES VICARIOUS LIABILITY UPON

AIRCRAFT OWNERS FOR NEGLIGENT OPERATION OF AN AIRCRAFT, IS PREEMPTED BY FEDERAL LAW AND THEREFORE UNENFORCEABLE.

(Standard of review: *de novo*)

A. Florida's "dangerous instrumentality doctrine."

Nearly a century ago, this Court announced that a motor vehicle is a dangerous instrumentality, and that the public policy of Florida required that an owner be financially responsible for damages caused by one to whom the vehicle has been entrusted. *Southern Cotton Oil Co. v. Anderson*, 80 Fla. 441, 86 So. 629 (1920). In that paradigm context at least, that has been the public policy of this state for the last 90 years. *See Michlek v. Shumate*, 524 So.2d 426 (Fla. 1988).

The question of whether an owner who has *leased* a vehicle to another is liable under the "dangerous instrumentality doctrine" was answered by this Court 63 years ago in *Lynch v. Walker*, 159 Fla. 188, 31 So.2d 268 (1947). The Court squarely held that commercial owner/lessors *are* subject to the doctrine, and it drew no distinction whatsoever between long-term leases and short-term leases. The question recurred in *Fleming v. Alter*, 69 So.2d 185 (Fla. 1954). The Court stuck to its guns: "To hold that liability would be limited to damage caused by the bailee alone where a dangerous instrumentality is put in circulation in such fashion would be entirely beyond our conception of the responsibility one should assume where he is in the business of entrusting vehicles of such character to another for a

price." 69 So.2d at 186. Once again, the Court drew no distinction whatsoever between long-term leases and short-term leases.

The question was decided again in *Susco Car Rental System of Florida v. Leonard*, 112 So.2d 832 (Fla. 1959). Once again, the Court refused to budge. In response to the owner/lessor's contention that the "dangerous instrumentality doctrine" should not apply because an owner/lessor relinquishes "possession and control" of the vehicle under a commercial lease, the Court responded, " . . . when control of such a vehicle is voluntarily relinquished to another, only a breach of custody amounting to a species of conversion or theft will relieve an owner of responsibility for its use or misuse." 112 So.2d at 835-36. Once again, the Court drew no distinction whatsoever between long-term leases and short-term leases.

This Court also made it clear in *Susco* that the question of who has "possession and control" of a vehicle is ultimately an irrelevant question, because the "dangerous instrumentality doctrine" is simply a rule of public policy creating an additional layer of financial responsibility for the protection of the traveling public:

> There can be no doubt from current statistics that the dangerous character of motor vehicles has become more obvious than when originally so denominated by this Court, and the number and complexity of police regulations has vastly increased. But just as was noted at the outset in this jurisdiction, it has been the legislative view that the public interest requires more than regulation of operation, and that safety regulations can never, in fact, eliminate the enormous risks involved.

> Responsibility under the law was accordingly attached to *ownership* of these instrumentalities, evinced first by registration laws and now by numerous provisions to assure financial responsibility of owners. It is plain that these provisions are based on the assumption that an owner cannot deliver a vehicle into the hands of another without assuming, or continuing, his full responsibility to the public. . . .

112 So.2d at 837 (emphasis in original).

The issue arose again in *Roth v. Old Republic Insurance Co.*, 269 So.2d 3 (Fla. 1972). The Court reaffirmed *Susco*, and drew no distinction whatsoever between long-term leases and short-term leases. The issue arose again in *Meister v. Fisher*, 462 So.2d 1071, 1073 (Fla. 1984). The Court held as follows:

> . . . In the instant case, the country club had rented the golf car to Fisher. However, this factor does not call for a different result, since in Florida the [dangerous instrumentality] doctrine clearly extends to and encompasses the bailment relationship. *See Lynch v. Walker*, 139 [sic] Fla. 188, 31 So.2d 268 (1947).

Although the bailment in question was obviously a short-term bailment, the Court mentioned no distinction between short-term leases and long-term leases.

And, as recently as 1990, this Court reaffirmed the long line of authority cited above, as follows:

> Enterprise Leasing *correctly* notes that it remained liable, as owner of the vehicle, for injuries to third parties as a result of the negligent operation of the vehicle under Florida's dangerous instrumentality doctrine despite a contractual provision in the lease

> prohibiting [the lessee] from allowing others to use the car. . . .

Enterprise Leasing Co. v. Almon, 559 So.2d 214, 215 (Fla. 1990) (emphasis supplied). Once again, the Court drew no distinction whatsoever between long-term leases and short-term leases.

Not surprisingly, this public policy has been applied to the ownership of aircraft as well, and it has long been the law in Florida that, because an aircraft is a dangerous instrumentality, the owner of an aircraft is liable for its negligent operation, whether it is in possession or control of it at the time or not. The United States Court of Appeals for the Fifth Circuit reached this conclusion under Florida law nearly 60 years ago in *Grain Dealers Nat. Mut. Fire Ins. Co. v. Harrison,* 190 F.2d 726 (5th Cir. 1951). This Court followed suit 40 years ago in *Orefice v. Albert*, 237 So.2d 142 (Fla. 1970). The question presented here is whether a federal statute that was on the books at the time both *Grain Dealers* and *Orefice* were decided prohibits Florida from providing this layer of financial responsibility to victims of negligently caused aircraft accidents under Florida's "dangerous instrumentality doctrine."

B. The federal statute and its legislative history.

Although application of Florida's "dangerous instrumentality doctrine" to aircraft owners went unchallenged for nearly 60 years, the district court concluded, in effect, that *Grain Dealers* and *Orefice v. Albert* were wrongly

decided. It purported to find an absolute prohibition against application of the doctrine in 49 U.S.C. §44112, which reads as follows:

> **(b) Liability** -- A lessor, owner, or secured party is liable for personal injury, death, or property loss or damage *on land or water* only when a civil aircraft, aircraft engine, or propeller is in the actual possession or control of the lessor, owner, or secured party, and the personal injury, death, or property loss or damage occurs because of --
>
> **(1)** the aircraft, engine, or propeller; or
>
> **(2)** the flight of, or an object falling from, the aircraft, engine, or propeller.

(Emphasis supplied; the reason for the emphasis will become clearer as we proceed). Curiously, this provision appears in Chapter 441 of Title 49, entitled "Registration and Recordation of Aircraft." (Its unusual placement there may also become clearer as we proceed.)

If this were the *only* statute in the Federal Aviation Act (and if the critical qualifying words "on land or water" are ignored), the district court's reading of it would at least be understandable, but statutes do not exist in a vacuum. They must be read in the context of the entire Act -- and their history, their purpose, the intent of the legislative body that enacted them, and the decisional law interpreting them must be considered as well. *See Lee v. CSX Transportation Inc.*, 958 So.2d 578 (Fla. 2d DCA 2007). And we are confident that, once we have explored these several things, the Court will be convinced that this particular "Registration and Recordation" statute was not meant to prohibit states from providing financial

responsibility remedies against aircraft owners to passenger victims of negligently caused aircraft accidents.

We begin our survey of the statute's context, its history, its purpose, its intent, and the decisional law construing it when Congress enacted the Civil Aeronautics Act of 1938. The Act contained a provision stating that anyone who authorizes the operation of an aircraft in the capacity of an owner or lessee is deemed to be engaged in the operation of the aircraft. 49 U.S.C. §1301(26). Aviation accident victims then began relying upon this provision to argue that it *created* vicarious liability, as a matter of *federal* law, upon owners for negligent operation by a bailee -- and some of these arguments prevailed. *See* the decisions collected in §4 of Annotation, *Provision of Federal Aviation Act (49 U.S.C.A. § 14302(26)) that any person who causes or authorizes operation of aircraft shall be deemed to engage in operation, as basis for vicarious liability or for imputing pilot's negligence to owner in action arising out of aircraft accident,* 11 A.L.R. Fed. 901 (1972).

Because Congress had not intended to *create* vicarious liability in those states that did not afford this remedy to aircraft accident victims, it added the following provision to the Act in 1948 (as amended in minor respect in 1959):

> **Limitation of Security Owners' Liability:**
>
> No person having a security interest in, or security title to, any civil aircraft, aircraft engine, or propeller under contract of conditional sale, equipment trust, chattel, or

> corporate mortgage, or other instrument of similar nature, and no lessor of any such aircraft, aircraft engine, or propeller under a bona fide lease of thirty days or more, shall be liable by reason of such interest or title, or by reason of his interest as lessor or owner of the aircraft, aircraft engine, or propeller so leased, for any injury to or death of persons, or damage to or loss of property, *on the surface of the earth (whether on land or water*) caused by such aircraft, aircraft engine, or propeller, or by the ascent, descent, or flight of such aircraft, aircraft engine, or propeller or by the dropping or falling of an object therefrom, unless such aircraft, aircraft engine, or propeller is in the actual possession or control of such person at the time of such injury, death, damage, or loss.

49 U.S.C. §1404 (1959), *quoted in Rogers v. Ray Gardner Flying Service, Inc.*, 435 F.2d 1389, 1392, 11 A.L.R. Fed. 891 (5th Cir. 1970) (emphasis supplied).[2/] The legislative history provided for this statute is illuminating. A copy of H.R. Rep. 80-2091, 1948 U.S.C.C.A.N. 1836, 1948 WL 1816, is included in the appendix to this brief for the convenience of the Court. The report makes it clear that the statute was (1) directed at two things, and (2) narrowly drawn (3) for a singular purpose.

According to the House Report, the legislation was directed at two "provisions of present law . . . §1(26) of the Civil Aeronautics Act of 1938 and section 5 of the Uniform Aeronautics Act." And there can be no question that the statute was designed to reject those decisions that had held that 49 U.S.C.

[2/] The 1959 amendment added aircraft propellers and engines to the original 1948 law, which only addressed the aircraft itself. *See* 1959 U.S.C.C.A.N. 1762.

§1301(26) had created vicarious liability upon aircraft owners, as a matter of *federal* law, in those states that did not afford this remedy to aircraft accident victims. That was the conclusion reached in perhaps the leading decision on the subject, by the Fifth Circuit in *Rogers v. Ray Gardner Flying Service, Inc.*, *supra*. And *Rogers* was subsequently followed on the same point -- that 49 U.S.C. §1301(26) does not *create* vicarious liability upon aircraft owners in states which do *not* recognize the remedy -- in *Lockwood v. Astronautics Flying Club, Inc.*, 437 F.2d 437, 439 (5th Cir. 1971) ("in *Rogers* we held that the Federal Aviation Act did not create a federal cause of action against the owner where none existed under state law"); *McCord v. Dixie Aviation Corp.*, 450 F.2d 1129 (10th Cir. 1971) (same); *Sanz v. Renton Aviation, Inc.*, 511 F.2d 1027 (9th Cir. 1975) (same). This aspect of the legislation therefore did not address the different question presented here -- whether Congress intended to prohibit *states* from providing financial responsibility remedies against aircraft owners to passenger victims of negligently caused aircraft accidents.

According to the House Report, the 1948 Act *did* address a state law that had been adopted in at least 10 states, §5 of the Uniform Aeronautics Act, but it was a narrowly drawn statute:

> The owner of every aircraft which is operated over the lands or the waters of this State is absolutely liable for injuries to persons or property *on the land or water beneath*, caused by the ascent, descent, or flight of the aircraft, or the dropping or falling of any object

> therefrom, whether such owner was negligent or not, unless the injury is caused in whole or in part by the negligence of the person injured, or of the owner or bailee of the property injured. If the aircraft is leased at the time of the injury to persons or property, both owner and lessee shall be liable, and they may be sued jointly or either or both of them may be sued separately.

(Emphasis supplied).

Congress' objection to this provision of the Uniform Aeronautics Act was the following:

> This provision thus imposes absolute liability on owners of aircraft *for damage caused on the surface of the earth*. It is susceptible of a construction which would impose liability upon any person registered as owner, even though he holds title only as security under a mortgage or similar security instrument or as lessor under an equipment trust. If such interpretation were adopted, the security title holder could become liable for extensive *damages on the surface* caused by the operation of the aircraft. An owner in possession or control of aircraft, either personally or through an agent, should be liable for damages caused. A security owner not in possession or control of the aircraft, however, should not be liable *for such damages*. This bill would make it clear that this generally accepted rule applies and assures the security owner or lessee [sic], that he would not be liable when he is not in possession or control of the aircraft.

(Emphasis supplied).

In short, the 1948 Act was intended (1) to dispel any notion that §1(26) of the Civil Aeronautics Act created vicarious liability upon aircraft owners as a

matter of federal law, and (2) to displace state laws imposing strict liability upon aircraft owners for injuries and property damage "caused on the surface of the earth." That the Act was narrowly limited in that fashion is proven, we think, by Congress' inclusion of the limiting phrase, "on the surface of the earth (whether on land or water)." There is no indication in this legislative history that Congress intended to preempt state laws providing financial responsibility remedies against aircraft owners for negligently caused injuries and deaths to passengers in the aircraft itself.

Indeed, it is noteworthy -- perhaps even *dispositive* of the issue presented here -- that Congress' *only* quarrel with the Uniform Aeronautics Act was with §5 of the Act, providing for absolute owner liability for damages "caused on the surface of the earth." Congress did *not* quarrel with the very next section in the Uniform Aeronautics Act, §6, which addressed the liability of an owner for injuries and deaths to *passengers* in an aircraft. That provision, which is still in effect in several states, reads as follows:

> The liability of the owner of one aircraft, to the owner of another aircraft, or to airmen or passengers on either aircraft, for damages caused by collision on land or in the air, shall be determined by the rules of law applicable to torts on land.

N.J. Stat. Ann. §6:2-8. *E. g.*, S.C. Code Ann. §55-3-70; Haw. Rev. Stat. Ann. §263-6; Del. Code Ann. tit. 2, §306.

That Congress intended only to displace §5 of the Uniform Aeronautics Act, and *not* §6 of the Act, is a fair indication that it intended 49 U.S.C. §1404 to apply only to injuries, deaths, and property damage "caused on the surface of the earth," and *not* to injuries and deaths to passengers covered by §6 of the Act, with which it expressed no disagreement at all. Congress was apparently quite content with §6, which left it to the states to apply their own land-based tort law and damage remedies to aircraft owners where the death of an aircraft *passenger* was involved. And, of course, the rule of law applicable to torts on land in the instant case is Florida's "dangerous instrumentality doctrine." Most respectfully, in our considered judgment, the legislative history of 49 U.S.C. §1404, proves beyond doubt that the statute was narrowly drawn to apply only to damages "caused on the surface of the earth," not to the deaths of aircraft passengers -- and the statute therefore cannot fairly be read to preempt Florida's "dangerous instrumentality doctrine."

The legislative history also demonstrates that the Act had a singular purpose:

> The relief thus provided from potential unjust and discriminatory liability is necessary to encourage such persons to participate in the *financing of aircraft purchases*.
>
> . . . .
>
> The limitation with respect to leases of 30 days or more, in case of lessors of aircraft, was included for the

> purpose of confining the section to leases executed as a part of some arrangement for *financing purchases of aircraft*. Any lease in connection with any such arrangement would almost certainly be for a period in excess of 30 days.
>
> . . . It is the conviction of the committee that the bill should be passed to remove one of the obstacles to the *financing of purchases of new aircraft*.

(Emphasis supplied). The Act's purpose was therefore to reduce obstacles "to the financing of purchases of new aircraft" -- not to eliminate state financial responsibility laws governing straightforward leases of used aircraft, where no financing is involved and no purchase is contemplated, like the straightforward lease of the used aircraft in which Mr. Martinez met his death.[3/]

Complicating analysis concerning the preemptive effect of the Federal Aviation Act, Congress added a *non-preemption* provision -- a "general remedies savings clause" -- in 1958:

> Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.

49 U.S.C. §1506, Pub. L. No. 85-726 (1958), quoted in *Public Health Trust of Dade County, Fla. v. Lake Aircraft, Inc.*, 992 F.2d 291, 293 (11th Cir. 1993).

All of which brings us to 1994, in which Congress engaged in an extensive

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[3/] A copy of Aerolease's straightforward lease can be found in the appellee/respondent's appendix at tab 1, Exhibit C.

"recodification" of the Federal Aviation Act. But the "recodification" was not intended to effect any substantive change of the predecessor statutes. The purpose of the recodification was to "revise, codify, and enact *without substantive change* certain general and permanent laws, related to transportation, as subtitles II, III, and V-X of title 49, United States Code, 'Transportation,' and to make other technical improvements in the Code." Pub. L. No. 103-272 (1994) (emphasis supplied).

The statement of purpose contained in House Report 103-180 confirms the presumption against substantive change:

> The purpose of H. R. 1758 is to restate in comprehensive form, without substantive change, certain general and permanent laws related to transportation and to enact those laws as subtitles II, III, and V-X of title 49, United States Code, and to make other technical improvements in the Code. In the restatement, simple language has been substituted for awkward and obsolete terms, and superseded, executed, and obsolete laws have been eliminated.
>
> . . . .
>
> *Substantive change not made*. -- As in other codification bills enacting titles of the United States Code into positive law, *this bill makes no substantive change in the law*. It is sometimes feared that mere changes in terminology and style will result in changes in substance or impair the precedent value of earlier judicial decisions and other interpretations. This fear might have some weight if this were the usual kind of amendatory legislation when it can be inferred that a change of

> language is intended to change substance. In a codification law, however, the courts uphold the contrary presumption: *the law is intended to remain substantively unchanged*. . . .

H. Rep. No. 103-180, at 1, 5 (1993), *as reprinted in* 1994 U.S.C.C.A.N. 818, 822 (emphasis supplied).

And as authority for the proposition that "the law is intended to remain substantively unchanged" in a recodification, the House Report cites 15 judicial decisions, including seven decisions of the United States Supreme Court (*id*.). *See, e. g., Finley v. United States*, 490 U.S. 545, 554 (1989); *Tidewater Oil Co. v. United States*, 409 U.S. 151, 162-63 (1972); *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 227 (1957). And if the House Report were not clear enough, both the title to and Section 1 of Public Law 103-272 contained the words "without substantive change." 1994 U.S.C.C.A.N. 818, 108 Stat. 745.

After the 1994 "recodification," the "general remedies savings clause" reads, "A remedy under this part is in addition to any other remedies provided by law." 49 U.S.C. §40120(c). And the former 49 U.S.C. §1404, enacted in 1948, is now 49 U.S.C. §44112 -- the current, highly abbreviated form of the statute quoted at the outset of our argument, and the statute that led the district court to conclude that *Orefice v. Albert*, 237 So.2d 142 (Fla. 1970), was wrongly decided.

The House Report explains the minor editorial changes made to 49 U.S.C. §1404 in recodifying it as 49 U.S.C. §44112 as follows:

> In subsection (b), before clause (1), the words "personal injury, death" are substituted for "any injury to or death of persons", and the words "on land or water" are substituted for "on the surface of the earth (whether on land or water)", to eliminate unnecessary words. In clause (2), the words "ascent, descent, or" and "dropping or" are omitted as surplus.

H. Rep. No. 103-180, at 328 (1993) *as reprinted in* 1994 U.S.C.C.A.N. 1145.

In short, just as 49 U.S.C. §1404 contained a narrow preemption only for injuries caused "on the surface of the earth, whether on land or water," 49 U.S.C. §44112 contains only a narrow preemption for injuries caused on the surface of the earth -- "on land or water." And given this legislative history, we respectfully submit that there is no justification for reading 49 U.S.C. §44112 any broader than the narrow preemption that was expressed in 49 U.S.C. §1404 for injuries and property damage "caused on the surface of the earth" -- especially in the face of 49 U.S.C. §1506, now recodified in abbreviated form as 49 U.S.C. 40120(c): "Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute . . .".

C. The decisional law.

Because of the unusually confusing manner in which Congress has tinkered with the subject over the years, it is not surprising that the several decisions addressing the issue presented here are in considerable disarray. At least three well-respected appellate courts have concluded that 49 U.S.C. §1404 (now

§44112) does *not* preempt state financial responsibility laws imposing vicarious liability upon aircraft owners for the negligence of a pilot causing injury or death to a passenger. In *Storie v. Southfield Leasing, Inc.*, 90 Mich. App. 612, 282 N.W.2d 417 (1979), *aff'd sub nom. Sexton v. Ryder Truck Rental, Inc.*, 413 Mich. 406, 320 N.W.2d 843 (1982), the Michigan Court of Appeals honored the plain language of §1404 and the savings clause of §1506 and concluded that Michigan's owner liability law was preempted only for injuries and deaths occurring "on the surface of the earth" -- *not* for a death to a passenger occurring inside the aircraft. As its citation reflects, the Michigan Supreme Court affirmed the decision: "Like the Court of Appeals in *Storie*, we reject defendant's argument [that Michigan's owner's liability statute is preempted by 49 U.S.C. §1404] and find that plaintiff's action is governed by the applicable Michigan statute." 320 N.W.2d at 847 n.2.

The same conclusion was reached in *Retzler v. Pratt & Whitney Co.*, 309 Ill. App.3d 906, 915, 723 N.E.2d 345, 353, 243 Ill. Dec. 313, 321 (1999) (rejecting the defendant's reliance upon *Matei v. Cessna Aircraft Co.*, 35 F.3d 1142 (7th Cir. 1994), and holding that "section 44112 does not preempt a personal injury action under state law against AMR, the aircraft lessors in the instant case" under Illinois law regarding the liability of bailors). And there is a thoughtful analysis of the issue in which, after a fairly thorough review of the legislative history along the lines of our preceding analysis, the court concluded that 49 U.S.C. §44112 did not preempt state laws providing financial responsibility remedies against aircraft

owners for negligently caused injuries and deaths to passengers in the aircraft itself. *Coleman v. Windham*, 2005 WL 1793907 (R.I. Super. 2005).

In the decision under review here, the district court purported to find two appellate decisions supporting its contrary reading of 49 U.S.C. §1404 (now §44112). Neither of them reached the conclusion attributed to them by the district court, however. In *Matei v. Cessna Aircraft Co.*, 35 F.3d 1142 (7th Cir. 1994), the plaintiff sued an aircraft manufacturer and the owner of an aircraft for the death of the plaintiff's decedent, who had piloted the aircraft, alleging that defects in the aircraft's cockpit lighting system were a cause of his death. The claim against the owner was *not* for vicarious liability for the negligence of the pilot. Rather, the plaintiff alleged that the owner had knowingly leased the aircraft to the pilot's employer in a dangerously defective condition.

The district court granted summary judgment in favor of the owner. Although it bottomed its conclusion partially upon 49 U.S.C. §1404, its principal conclusion was that "the undisputed evidence showed that [the owner] . . . had no knowledge of the alleged defects in the lighting system at the time he transferred possession." 35 F.3d at 1144. The Court of Appeals affirmed on the ground that "[t]here was nothing in the record which would even arguably support the plaintiff's assertion . . . that [the owner] had any knowledge of the defects which she contends were the proximate cause of her husband's death." 35 F.3d at 1146. Presumably, if the plaintiff had been able to prove that the owner had knowledge

of a defective condition of the aircraft at the time it was leased, §1404 would *not* have relieved the owner of liability for its own active negligence.

At least that was the conclusion of the district court below, in the instant case:

> [T]he purpose of the federal statute is to shield an owner or lessor from liability for the negligence of others committed when the aircraft is not in the owner's or lessor's possession or control. We have found no basis for attributing to the statute an intention to shield a party from having to answer for its own active negligence when the party has possession or control of the aircraft. As such, the application of state negligence law in such circumstances would in no way hinder the fulfillment of the federal statute's purpose. For this reason, we conclude that 49 U.S.C. §44112 does not preempt Florida negligence law insofar as Vreeland seeks to recover for Aerolease's active negligence in maintaining and inspecting the airplane while it was in Aerolease's possession or control.

(Slip opinion, pp. 11-12). In short, because there was no claim of vicarious liability for the negligence of the pilot in *Matei*, the Court's discussion of §1404 was entirely unnecessary and clearly beside the point, and the decision therefore provides poor support for the district court's decision in the instant case.

The district court also purported to find support for its conclusion in *Rogers v. Ray Gardner Flying Service, Inc.*, 435 F.2d 1389 (5th Cir. 1970). As noted previously, the issue in *Rogers* was whether 49 U.S.C. §1301(26) created vicarious liability upon aircraft owners, as a matter of *federal* law, in those states

that did not afford that remedy to aircraft accident victims. And in rejecting the plaintiff's contention that §1404 was proof that §1301(26) also preempted contrary state law, the *Rogers* Court wrote the following -- in what is undeniably a dictum:

> We are not unsettled by the 1948 amendment. Title 49 U.S.C. §1404. That section excludes certain persons from liability *for injuries on the surface of the earth*. On its face, *it was enacted to facilitate financing of the purchase of aircraft* by providing that those holding *security interests* would not be liable *for injuries caused by falling planes or the parts thereof*. This provision appears *clearly* and forthrightly to preempt any contrary state law which might subject *holders of security interests* to liability for *injuries so incurred*. If the Congressional intent was as clearly stated with regard to Title 49 U.S.C. §1301(26) our task would be correspondingly simpler. In the absence of similar clear manifestation of Congressional intent we find nothing in Title 49 U.S.C. §1404 which supports construction of Title 49 U.S.C. §1301(26) so as to preempt state law.

435 F.2d 1389, 1394 (emphasis partially supplied).

This dictum does not support the district court's conclusion in the instant case. It does not support the district court's conclusion because the preemption it recognizes is a narrow one, consistent with both the language of §1404 and its legislative history -- excluding owners and lessors "holding security interests" for the purchase of an aircraft from liability "for injuries on the surface of the earth . . . caused by falling planes or the parts thereof." This dictum is therefore consistent

with the Michigan Supreme Court's reading of the statute. It does not support the district court's conclusion in the instant case, that §44112 preempts Florida's "dangerous instrumentality doctrine" where the owner of an aircraft has simply leased the aircraft to another; where no financing of the purchase of the aircraft is involved; and where a death caused by the negligence of a pilot occurs to a passenger inside the aircraft, rather than "on the surface of the earth." In short, neither *Matei* nor *Rogers* supports the district court's reading of the statute.

The remaining decisions mustered by the district court to support its conclusion add little but confusion to the debate. To begin with, they are single-judge decisions, not appellate decisions. In *In Re: Lawrence W. Inlow Accident Litigation*, 2001 WL 331625 (S.D. Ind. 2001), the plaintiff's decedent was killed when he was hit on the head by a helicopter rotor blade after he disembarked from the helicopter. Although the district court judge spent some time quarreling with the decisions supporting our position here, the case actually fits squarely within a very narrow reading of §44112, because the helicopter was being purchased through the financing arrangement of a lease, and the injury occurred, not in the aircraft, but on the ground -- i.e., on the "surface of the earth."

Esheva v. Siberia Airlines, 499 F. Supp.2d 493 (S.D.N.Y. 2007), deals exclusively with a motion to dismiss for *forum non conveniens*. Its only mention of the issue presented here is a highly truncated version of §44112 in a single footnote containing no analysis of the issue at all. 499 F. Supp.2d at 499 n. 4.

Mangini v. Cessna Aircraft Co., 2005 WL 3624483 (Conn. Super. 2005), rejects the plaintiff's principal contention that §44112 was intended to apply only to owners holding a security interest in an aircraft, and not to an owner who owns the aircraft outright. Given the legislative history of §1404, the court's rejection of this contention is far from compelling. And to the plaintiff's additional contention that §44112 fails to preempt state law, the Court relied on truncated snippets of the statute and the cases, filled with ellipses -- and never once acknowledged that the statute was limited to injuries, deaths, and property damage caused "on the surface of the earth" -- to conclude that the statute preempted Connecticut's owner liability law.

Nevertheless, although these three single-judge decisions provide arguable support for the district court's reading of the statute, we think it noteworthy that the reasoning utilized in the two of them that bothered to analyze the issue at all was different in each decision. And, of course, each of them disagrees with the decisions we have relied upon above which reach a contrary conclusion. More importantly, not one of the decisions -- neither those for nor those against our position here -- bothered to examine the Uniform Aeronautics Act to determine if it contained a separate provision addressing owner liability for the death of an aircraft *passenger*.

The Uniform Aeronautics Act *does* contain such a provision, and Congress expressed no disagreement with it when it enacted 49 U.S.C. §1404 to displace the

different provision of the Uniform Aeronautics Act governing damages "caused on the surface of the earth." If the Uniform Aeronautics Act had been consulted, we think it likely that there would be little disagreement about Congress' intent, but because it was not, the most that these multiple conflicting decisions prove is that the statute, which can read in so many different ways, lacks the clarity required for this Court to declare that it preempts Florida's "dangerous instrumentality doctrine" -- a point to which we now turn.

D. Resolution of the issue.

Given the unusually confusing and checkered history of the federal statute and the inability of courts across the nation to agree upon resolution of the issue presented here, we respectfully submit that the general principles governing analysis of preemption claims can lead to only one conclusion -- that 49 U.S.C. §1404 (now §44112) does not impliedly preempt Florida's "dangerous instrumentality doctrine," and that aircraft owners remain financially responsible for negligence in the operation of their aircraft causing the death of a passenger in the aircraft.

Those general principles are well settled, "informed by two presumptions about the nature of preemption":

> The first presumption is "'that the historic police powers of the States [are] not to be superseded by [federal legislation] unless that was the *clear and manifest purpose* of Congress.'" . . . .

> The second presumption that informs the interpretation of an expressly preemptive statutory provision is that "'[t]he purpose of Congress is the ultimate touchstone' in every pre-emption case." . . . .

Lee v. CSX Transportation, Inc., 958 So.2d 578, 581 (Fla. 2d DCA 2007) (emphasis supplied). *See generally Sprietsma v. Mercury Marine,* 537 U.S. 51 (2002); *Wyeth v. Levine,* 129 S. Ct. 1187 (2009).

Clarity of purpose and intent is clearly required before a court can declare a federal statute preemptive of state law -- a point recently reiterated by the United States Supreme Court:

> Our inquiry into the scope of the statute's pre-emptive effect is guided by the rule that "'[t]he purpose of Congress is the ultimate touchstone' in every pre-emption case." . . . Congress may indicate pre-emptive intent through a statute's express language or through its structure and purpose. . . . If a federal law contains an express pre-emption clause, it does not immediately end the inquiry because the question of the substance and scope of Congress' displacement of state law still remains. Pre-emptive intent may also be inferred if the scope of the statute indicates that Congress intended federal law to occupy the legislative field, or if there is an actual conflict between state and federal law. . . .
>
> When addressing questions of express or implied pre-emption, we begin our analysis "with the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the *clear and manifest purpose* of Congress." . . . That assumption applies with particular force when Congress has legislated in a field traditionally occupied by the States. . . . *Thus, when the text of a pre-emption clause is*

> *susceptible of more than one plausible reading, courts ordinarily "accept the reading that disfavors pre-emption."* . . .

Altria Group, Inc. v. Good, 129 S. Ct. 538, 543 (2008) (emphasis supplied).

Surely the statute in issue here arguably has "more than one plausible reading." Proof of that is that some courts have read it narrowly, concluding that its preemptive effect is limited to injuries, deaths, and property damage caused on the "surface of the earth" ("on land or water"), not to injuries and deaths caused to passengers inside an aircraft. Other courts, like the district court below, have read it broadly to preempt owner liability for any injury or death caused by the negligent operation of an aircraft, whether on the surface of the earth or not. At best, because the statute arguably can be read both ways by reasonable people, it is undeniably ambiguous. And because it is ambiguous, this Court should "accept the reading that disfavors pre-emption." That would be the simplest solution to resolving the issue presented here.

More importantly, in resolving the apparent ambiguity, it must be recognized and acknowledged that Congress' stated intent in enacting 49 U.S.C. §1404 was to preempt only §5 of the Uniform Aeronautics Act. It expressed no quarrel with §6 of that Act, governing injuries and deaths to aircraft *passengers*. In that different circumstance, it was content to leave owner liability for passenger deaths to the states, to be governed by "the rules of law applicable to torts on

land." And once that is recognized and acknowledged, resolving the ambiguity in favor of non-preemption in this case should be fairly easy.

And there is more. The legislative history of 49 U.S.C. §1404 (now §44112) simply does not reveal that it was the "clear and manifest purpose" of Congress to preempt state laws imposing financial responsibility upon aircraft owners who have leased their aircraft with a straightforward lease which is not intended as a financing arrangement for the purchase of a new aircraft. As we noted earlier, the legislative history of the statute reveals that it was (1) directed at two things, and (2) narrowly drawn (3) for a singular purpose. It rejected judicial decisions holding that 49 U.S.C. §1301(26) created vicarious liability upon aircraft owners, as a matter of *federal* law, and it preempted §5 of the Uniform Aeronautics Act, which had imposed strict liability upon aircraft owners for injuries and damage "caused on the surface of the earth."

And its stated purpose was to "remove one of the obstacles to the financing of purchases of new aircraft." There is simply no indication in this legislative history that it was the "clear and manifest purpose" of Congress to preempt state laws providing for the financial responsibility of aircraft owners in the circumstances presented here -- a point rather convincingly demonstrated, we think, by the fact that 49 U.S.C. §1404 (now §44112) had been on the books for nearly 60 years before anyone thought that it might amount to federal preemption of this Court's "dangerous instrumentality doctrine," announced 40 years ago.

Finally, if the Court is still in doubt as to how to resolve the issue presented here, the balance simply must be tipped in favor of non-preemption by 49 U.S.C. §1506 (now §40120(c)), which provides that "Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." Indeed, because this provision plainly states that *nothing* in the Federal Aviation Act shall abridge the remedy provided in this case to the plaintiff by Florida's "dangerous instrumentality doctrine," we fail to see how this Court could reasonably conclude that it erred when it decided *Orefice v. Albert*, 237 So.2d 142 (Fla. 1970), 40 years ago.

For all of these reasons, we respectfully submit that *Orefice v. Albert* was correctly decided; that the district court erred in concluding otherwise; and to the extent that the district court affirmed the judgment disposing of Count I of the plaintiff's complaint in Aerolease's favor, its decision should be quashed.

V. CONCLUSION

To the extent that the district court's decision affirmed the judgment disposing of Count I of the plaintiff's complaint in Aerolease's favor, it should be quashed, and the cause remanded for further proceedings on both Counts I and II of the complaint.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 9.210(a)(2)

I hereby certify that the type style utilized in this brief is 14 point Times New Roman proportionally spaced.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 27th day of July, 2010, to: **Shelley H. Leinicke, Esq.**, Wicker, Smith, O'Hara, McCoy, Graham & Ford, P.A., P.O. Box 14460, Ft. Lauderdale, FL 33302, Attorneys for Aerolease of America, Air America & AeroBanc; and **Robert Trohn, Esq.**, P. O. Box 3, Lakeland, FL 33802, Co-Counsel for Plaintiff.

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