A-57305-7

IN THE SUPREME COURT
STATE OF FLORIDA

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., a corporation,

Respondent.
_____/

CASE NO. SC10-694
L.C. CASE NO. 2D08-248

RESPONDENT, AEROLEASE OF AMERICA, INC.'S RESPONSE TO PETITIONER'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

Vreeland's decedent was a passenger in an aircraft leased by Ferrer from Aerolease.[1] "Vreeland does not dispute that the airplane was not in Aerolease's possession or control at the time of the pilot's alleged negligence." (opinion p. 3) Vreeland seeks discretionary review of a decision confirming that 49 U.S.C. §44112 preempts state law and precludes vicarious liability for owners or lessors of civil aircraft who are not in possession or control of the airplane at the time of a plaintiff's injury. The appellate decision leaves intact other aspects of Vreeland's claim against Aerolease. (opinion p. 11-12)

Vreeland argues that the instant decision conflicts with the case of *Orefice v. Albert*, 237 So.2d 142 (Fla. 1970), despite the fact that the *Orefice* case is distinguishable because it (1) neither references nor addresses the issue of federal preemption, and (2) is based, in part, on a Florida statute that has long since been repealed.

[1] Ferrer leased the aircraft in question from Aerolease "as is" with an option to purchase it.

ISSUE ON APPEAL

WHETHER THE INSTANT DECISION HARMONIZES WITH THE CASE OF *OREFICE V. ALBERT*, 237 So.2d 142 (Fla. 1970) AND THEREFORE PRECLUDES DISCRETIONARY REVIEW

ARGUMENT SUMMARY

The instant decision does not conflict with the case of *Orefice v. Albert*, 237 So.2d 142 (Fla. 1970). The district court's opinion clearly and concisely explains why no confusion in the law is created as a result of its opinion and the earlier *Orefice* case: (1) federal preemption of the issue of any claim of vicarious liability against an aircraft owner or lessor was not discussed by either the district court or Florida Supreme Court in *Orefice*, and (2) the *Orefice* Court relied, in part on an early version of a Florida statute addressing aircraft safety that has since been repealed.

There is no uncertainty or confusion in this state's law on the point Vreeland raises. Because of the obvious distinctions between the *Orefice* and the instant case, there is no conflict between the two decisions and no need for this Court to review this case.

ARGUMENT

THE INSTANT DECISION HARMONIZES WITH THE CASE OF *OREFICE V. ALBERT*, 237 So.2d 142 (Fla. 1970) AND THEREFORE PRECLUDES DISCRETIONARY REVIEW

For over half a century, federal law has clearly and unequivocally preempted state law claims for vicarious liability of an owner or lessor of an aircraft:

> **(a) Definitions** – In this section –
>
> (1) "Lessor" means a person leasing for at least 30 days a civil aircraft, aircraft engine, or propeller.
>
> (2) "Owner" means a person that owns a civil aircraft, aircraft engine, or propeller.
>
> (3) "Secured Party" means a person having a security interest in, or a security title to, a civil aircraft, aircraft engine, or propeller under a conditional sales contract, equipment trust contract, chattel or corporate mortgage, or similar instrument.
>
> (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 damage or loss occurs because of*
>
> (1) *the aircraft*, engine, or propeller, or
>
> (2) *the flight* of, or an object falling from, the aircraft, engine or propeller.

49 U.S.C. §44112.[2] Because of this federal preemption of the right to regulate and control any claims against an aircraft owner or lessor based on assertions of vicarious liability (and the prohibition of any such theory of liability), both the trial and appellate courts correctly recognized that Vreeland has no such cause of action against Aerolease under Florida law.

Multiple courts have agreed that section 44112 establishes federal preemption that bars any claim of vicarious liability against the lessor of an aircraft. *See, e.g.: Ellis v. Flying Boat, Inc.* Case #06-2006-Civ-Seitz/McAliley (S.D. Fla.); *Esheva v. Siberia Airlines*, 499 F.Supp.2d 493 (S.D.N.Y.); *In re Lawrence W. Inlow Accident Litigation*, 2001 WL 331625 (S.D. Ind. 2001); *Mangini v. Cessna Aircraft Co.*, 2005 WL 3624483 (40 Conn. L. Rptr. 470) (Conn. Super. Ct. 12-7-05); *Rogers v. Ray Gardner Flying Service*, 435 F.2d 1389, 1394 (5th Cir. 1970); *McCord v. Dixie Aviation Corp.*, 450 So.2d 1129 (10th Cir. 1971). While there are courts that have held differently, the district court's opinion outlines the flaws in their reasoning.

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[2] This statute is a recodification of 49 U.S.C. §1404 that was enacted in 1948, approximately ten years before the enactment of the Federal Aviation Act of 1958 that established the Federal Aviation Administration. There were very minor clarifications to the original statutory language that are not dispositive to the issue presented.

This Court's 1970 decision in *Orefice v. Albert*, 237 So.2d 142 (Fla. 1970) (finding that an airplane is a dangerous instrumentality and therefore a co-owner could be vicariously liable for its negligent operation) does not conflict with the instant decision determining that there is a federal preemption of this issue of aviation safety. The district court's opinion itself provides two reasons why no express and direct conflict exists between the *Orefice* case and the instant matter: (1) the *Orefice* case neither discusses nor mentions the existence or applicability of the federally preemptive statute that governs the issue of a vicarious liability claim under a dangerous instrumentality theory. Because the *Orefice* opinion is wholly silent on the issue of federal preemption and that topic was plainly never considered in that case, there is clearly no conflict presented by the instant decision. (2) the *Orefice* ruling that the concept of a dangerous instrumentality could serve as a vehicle for seeking vicarious liability from owners/lessors of aircraft was partly based on reference to a specific Florida statute that the Florida legislature subsequently repealed. *Compare* Ch. 330 Fla. Stat. (1970) *with* Ch. 330, Fla. Stat. (2004).

Conflict certiorari is not appropriate here because there is no direct, express conflict between and among appellate decisions of this state. *Ford Motor Co. v. Kikis*, 401 So.2d 1341 (Fla. 1981). Review is inappropriate

and unnecessary to maintain uniformity in decisions as precedent. *Mystan Marine, Inc. v. Harington*, 339 So.2d 200 (Fla. 1976). The instant decision is readily distinguishable from the *Orefice* case. Allowing the instant decision to stand does not create disharmony within the case law of this state. This Honorable Court should decline to accept jurisdiction.

CONCLUSION

For the reasons set forth herein, it is respectfully requested that this Honorable Court decline review of this matter. The Second District correctly decided the instant case and properly applied the law. There is neither conflict nor confusion in Florida law on the point Vreeland raises.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 29th day of April, 2010, to all parties on the attached service list.

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CERTIFICATE OF COMPLIANCE PURSUANT TO Fla. R. App. P. 9.210(a)(2); 9.100(1)

Counsel for the Respondent, AEROLEASE OF AMERICA, INC., certifies the following:

Pursuant to Fla. R. App. Pro. 9.210(a)(2); 9.100(1), the attached brief for respondent is printed using a proportionally spaced 14 point Times New Roman typeface.

Dated: 4/29/2010

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