IN THE SUPREME COURT OF FLORIDA

CASE NO. _____

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 JURISDICTION

WAGNER, VAUGHAN & McLAUGHLIN P.A.
601 Bayshore Blvd., Suite 910
Tampa, FL 33606
-and-
PODHURST ORSECK, P.A.
25 West Flagler Street, Suite 800
Miami, Florida 33130
(305) 358-2800 / Fax (305) 358-2382

By: JOEL D. EATON
Fla. Bar No. 203513

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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 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. On the authority of this Court's decision in *Orefice v. Albert*, 237 So.2d 142 (Fla. 1970), Aerolease was sued for (among other things) vicarious liability -- under Florida's "dangerous instrumentality doctrine" -- for the negligence of the pilot.

The trial court concluded that, notwithstanding *Orefice v. Albert*, Aerolease was immune from suit as a matter of federal law and granted Aerolease's motion for summary judgment. The District Court of Appeal, Second District, affirmed -- also concluding that a provision of the Federal Aviation Act enacted in 1948, more than 60 years ago, preempts the remedy provided to the plaintiff by this Court's 1970 decision in *Orefice v. Albert*. Because the district court's decision directly conflicts with *Orefice v. Albert*, the petitioner respectfully seeks discretionary review.

II. SUMMARY OF THE ARGUMENT

In *Orefice v. Albert*, 237 So.2d 142 (Fla. 1970), this Court held that the owner of an aircraft is vicariously liable for its negligent operation under Florida's "dangerous instrumentality doctrine." In the decision sought to be reviewed, the district court held

that the owner of an aircraft cannot be held liable for negligence in its operation under Florida's "dangerous instrumentality doctrine." Conflict is both direct and undeniable, and the existence of both decisions is bound to cause enormous confusion in the trial courts of this state until this Court addresses the continuing vitality of *Orefice v. Albert* and resolves the conflict.

III. ARGUMENT

THE DISTRICT COURT'S DECISION IS IN EXPRESS AND DIRECT CONFLICT WITH THIS COURT'S DECISION IN *OREFICE V. ALBERT*, 237 SO.2D 142 (FLA. 1970).

As the face of the district court's decision reflects, there is considerable disarray among the nation's courts on the preemption issue decided adversely to the plaintiff below. Respected appellate courts, like the Michigan Supreme Court and an Illinois Court of Appeals, have ruled the other way. A brief review of the history of the issue will demonstrate that its resolution is far from straightforward -- and because the district court has resolved it in a manner that conflicts with a decision of this Court that has been on the books for 40 years, the issue deserves to be resolved definitively by this Court.

When Congress enacted the Civil Aeronautics Act in 1938, it 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. Because Congress had not intended to *create* vicarious liability in those states that did not afford this remedy to aircraft accident victims, it added a version of the provision in issue in this case to the Act in 1948. 49 U.S.C. §1404. Federal courts thereafter rejected plaintiffs' contentions that 49 U.S.C. §1301(26) *created* vicarious liability upon aircraft owners in states that did *not* impose vicarious liability upon aircraft owners, on the ground that the 1948 enactment of 49 U.S.C. §1404 made it clear that Congress did *not* intend to preempt state laws in this area -- and that 49 U.S.C. §1301(26) therefore did not impose vicarious liability on owners in states which did not do so under their own state law.

Until recently, the 1948 amendment was not thought to prevent a state from imposing vicarious liability upon the owner of an aircraft as a matter of state law. Indeed, three years after enactment of the 1948 amendment, the United States Court of Appeals for the Fifth Circuit held that an aircraft owner is vicariously liable for the negligent operation of its aircraft under Florida's "dangerous instrumentality doctrine." *Grain Dealers Nat. Mut. Fire Ins. Co. v. Harrison*, 190 F.2d 726 (5th Cir. 1951). This Court followed suit in 1970 in *Orefice v. Albert*, 237 So.2d 142 (Fla. 1970). And until the district court's decision in this case, that has been the law in Florida ever since.

In an apparent effort to remove any lingering doubt about the lack of preemptive effect of the Federal Aviation Act, Congress added 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. In 1994, Congress engaged in an extensive "recodification" of the Federal Aviation Act, and the "General Remedies Savings Clause" now reads, a "remedy under this part is in addition to any other remedies provided by law." 49 U.S.C. §40120(c). But as the district court recognized, the "recodification" was not intended to effect any substantive change of the predecessor statutes. It is therefore clear (or should be clear) that the statute relied upon by the district court below was not intended in any way to preempt the remedy provided to aviation accident victims by Florida's "dangerous instrumentality doctrine."

In any event, that is merely a sketch of the argument we will make in this Court if the Court should exercise its discretion to grant review. The more important point for present purposes is that the decisional law now provides conflicting rules that can only create enormous confusion in the courts of this state. United States District Courts in Florida have been bound by *Grain Dealers Nat. Mut. Fire Ins. Co. v. Harrison*, 190 F.2d 726 (5th Cir. 1951), for nearly 60 years, and they remain bound by it today. *See Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc; adopting decisions of the Fifth Circuit prior to 1981 as binding precedent in the Eleventh Circuit). And notwithstanding the existence of the 1948 statute, in 1970, this Court held that an owner of an aircraft *is* liable for the negligence of the aircraft's pilot

under Florida's "dangerous instrumentality doctrine." *Orefice v. Albert*, 237 So.2d 142 (Fla. 1970). Florida's courts have been bound by that decision ever since.

Now, however, the bottom line of the decision sought to be reviewed squarely conflicts with the bottom line of *Orefice v. Albert*. Trial courts in the state are bound to be confused by this development. Should they follow this Court's decision in *Orefice v. Albert*, as it would appear they are required to do? Or should they follow the district court's decision whenever federal preemption is raised? And what now are Florida's federal district courts to do? Frankly, we don't know the answer to these questions. The only logical solution to this confusing state of events, we respectfully submit, is for this Court to determine whether its decision in *Orefice v. Albert* survives the district court's analysis of the federal preemption issue, or whether *Orefice v. Albert* should now be overruled. We respectfully urge the Court to grant review to that end.

IV. CONCLUSION

This Court has jurisdiction, and review should be granted to resolve the conflict created by the district court's decision.

Respectfully submitted,

WAGNER, VAUGHAN & McLAUGHLIN P.A.
601 Bayshore Blvd., Suite 910
Tampa, FL 33606

-and-
PODHURST ORSECK, P.A.
25 West Flagler Street, Suite 800
Miami, Florida 33130
(305) 358-2800 / Fax (305) 358-2382

By:_____
JOEL D. EATON

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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JOEL D. EATON

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 13th day of April, 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.

By:_____
JOEL D. EATON