IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-25

SIDNEY J. MASS, as legal guardian
for MICHELLE LORI MASS,

Petitioner,

vs.

DARRIN HELMS and BANK OF AMERICA,

Respondents.

APPEAL FROM THE DISTRICT COURT OF APPEAL
OF FLORIDA, THIRD DISTRICT, CASE NO. 3D02-523

ANSWER BRIEF ON JURISDICTION OF RESPONDENT BANC OF AMERICA

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STATEMENT OF THE CASE AND FACTS

The facts stated in the district court opinion are as follows:

> Darrin Helms entered into an agreement with Bank of America [BOA] to lease a 1998 Ford Explorer for a term of 36 months. While driving that vehicle on June 15, 1999, he struck and injured Michelle Mass. At the time of the accident, the lease had been in effect for fifteen months.
>
> Sidney Mass, as legal guardian of Michelle Mass, sued Helms and BOA alleging liability under the dangerous instrumentality doctrine. BOA defended on the ground that it was exempt from liability under section 324.021 (9) (b) (1), Florida Statutes (1999),[1] as it had leased the vehicle for one year or longer and had complied with all statutory requirements.
>
> Plaintiff moved for summary judgment on the basis that because the lease was terminable at any time upon 30 days' notice with no substantial penalty for early termination, the lease was not a long-term lease protected by section 324.021. The trial court denied plaintiff's motion for summary judgment and granted BOA's cross-motion. (Op. p. 2).

The issue on appeal is not "whether § 324.021(9)(b)(1), Fla. Stat. 1999, which exempts from the dangerous-instrumentality doctrine the lessor of a vehicle for one-

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[1] Section 324.021(9)(b)(1) provides in part:

> [t]he lessor, under an agreement to lease a motor vehicle for 1 year or longer . . . 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. . . .

year or longer, applies even though an ostensible one-year lease in fact is terminable at will." (Petitioner's Br. p. 1). No court has ruled that this lease was terminable at will without substantial financial penalty. The trial court rejected this argument. Rather, the issue here is whether a lease which on its face is a three-year lease, and had been in effect for over one year before the accident, satisfied the statute's requirements for exemption of the lessor. The Third District held that it did based on the following reasoning:

> Entry of summary judgment was proper, as the BOA lease was clearly for thirty-six months - a term of more than one year - and in fact had been in effect for fifteen months when the accident happened. Section 324.021 (9) (b) (1) simply requires that there be "an agreement to lease a motor vehicle for 1 year or longer . . ." There is no statutory requirement for a penalty for early termination of the lease, and we decline to amend the statute judicially. (Op. pp. 2-3).

Mass argues that this Court has jurisdiction because the Third District's holding directly and expressly conflicts with Dearing v. General Motors Acceptance Corp., 758 So. 2d 1236 (Fla. 5th DCA 2000).

SUMMARY OF ARGUMENT

While Dearing may have been the centerpiece of Mass' argument below, BOA argued that Dearing was distinguishable, inapplicable authority. BOA never argued on appeal that Dearing was wrong. Mass has miscast BOA's argument and the Third District's holding. The Third District did not find Dearing instructive or even worthy of citation in this case. In order for there to be express direct conflict jurisdiction, opposite principles of law must be applied to the same set of facts. See Nielsen v. City of Sarasota, 117 So. 2d 731 (Fla. 1960)(jurisdiction may be asserted only when a district court has applied a rule of law to reach a conflicting conclusion in a case involving substantially similar controlling facts). Dearing is an entirely different case. The Third District's holding is moreover consistent with law of this Court construing the statute.

ARGUMENT

NO EXPRESS DIRECT CONFLICT EXISTS BETWEEN THIS CASE AND DEARING

There is no bona fide issue whether the lease in this case was for "one year or shorter," as there was in Dearing. Dearing's holding does not apply in this case. Dearing involves a unique set of facts, not present in this case.

In Dearing, the lessee was an employee of GMAC, the lessor and received a special deal for the lease/purchase of a vehicle for personal use, memorialized by both a SMART lease agreement and a certificate. The lease agreement was for a 12 month term and provided that the lease could be terminated at any time. The certificate, however, required the employee to retain the leased vehicle for only six months from the date of delivery. If the employee returned the leased vehicle after six months, the lease "was carefully structured to permit termination at zero cost to the lessee except for excess mileage and excess wear." 758 So. 2d at 1237. The lessee/employee was involved in an accident four weeks after he leased the vehicle. Thus, the issue of whether this was a lease for one year or shorter was squarely before the court:

> . . . Dearing contends that GMAC's lease does not fall within the exemption of section 324.021(9)(b)1. because it is terminable at will after six months without any realistic monetary liability for the remaining payments. She analogizes it to a discretionary or indefinite term of employment which is terminable at will and for which a breach of contract action may not be maintained. . . . She maintains that the lease is, in essence, an agreement to lease a motor vehicle for six months because, in reality, its term is thereafter within the lessee's discretion.

758 So. 2d at 1236 (emphasis supplied, citations omitted).

Under the circumstances and controlling lease and certificate documents, the court found the lessee's lack of monetary responsibility after six months dispositive:

> We agree with Dearing that the language of the Smart Lease and the formula which sets forth Redditt's liability for early termination after six months, construed in pari materia, do not strictly comply with section 324.021(9)(b)1.[2]

Dearing v. General Motors Acceptance Corp., 758 So. 2d 1238-39 (Fla. 5th DCA 2000)(citations omitted).

Where, as here, there is a 36 month lease agreement in effect for over one year, there is no need for the court to speculate or determine whether the lease could have been terminated before the year was up or calculate whether early termination requires payment of the balance of unpaid lease payments or a penalty substantial enough for a court to conclude that the lease is a one year lease. The point is irrelevant.

There is no express direct conflict or similarity between this case and Dearing. For this reason, the Third District declined to cite Dearing in its opinion or certify conflict.

The Third District's holding that Helms' lease is for "one year or longer" as required by section 324.021(9)(b)(1), is consistent with this Court's holding in Aetna

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[2] Dearing recognizes that a lease provision permitting early termination:

> in and of itself does not take the lease out of the statutory exemption provided the lease makes the lessee liable for the remaining payments.

758 So. 2d at 1238.

Casualty & Surety Co. v. Huntington National Bank, 609 So. 2d 1315 (Fla. 1992). The issue before the Court in Aetna was whether the Section 324.021(9)(b) was applicable to long-term leases which were not automobile financing substitutes. Aetna argued that the statute did not apply to the lessor because the legislative debate preceding passage of the bill described long-term leases as an alternative way of financing the vehicle. Under the terms of the lease, title of the vehicle remained with the bank, which was described as the sole owner. The lessee had no option to purchase the vehicle, but was required to obtain the insurance mandated by the statute. This Court held:

> When the language of a statute is clear and unambiguous and conveys a clear meaning, the statute must be given its plain and ordinary meaning. *Streeter v. Sullivan*, 509 So.2d 268 (Fla.1987); *Holly v. Auld*, 450 So.2d 217 (Fla.1984). In this case, the statute clearly states that "the lessor, under an agreement to lease a motor vehicle for 1 year or longer . . . shall not be deemed the owner" of the vehicle for purposes of determining financial responsibility for the operation of the vehicle or for the acts of the operator of the vehicle. § 324.021(9)(b), Fla.Stat. (1987). The statute places two restrictions upon the type of motor vehicle lease that would exempt the owner/lessor from liability: 1) the lease must be "for 1 year or longer"; and 2) the lease must require 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." *Id*. The statute contains no language that would restrict its application to leases which are financing substitutes, as Aetna urges. Moreover,

> section 324.021(9)(b) specifically states that its terms are applicable "[n]otwithstanding any other provision of the Florida Statutes or existing case law.

Id. at 1317 (emphasis supplied).

Consistent with this opinion, the Third District found that the statute similarly does not contain any language which would restrict its application to leases which may be terminated within one year only with substantial financial penalties and found that BOA likewise met the unambiguous and clear terms of this statute and is exempt from liability. The Third District's decision is consistent with controlling authority of this Court.

CONCLUSION

WHEREFORE, based on the foregoing authorities, Respondent respectfully requests that this Court decline to accept jurisdiction over this cause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief on Jurisdiction of Respondent Bank of America was furnished by mail this 6th day of May, 2003 to:

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CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with Florida Rule of Appellate Procedure 9.210(a)(2), undersigned counsel certifies that the foregoing Answer Brief on Jurisdiction of Respondent Banc of America is printed in Times New Roman, 14-point.