IN THE DISTRICT COURT OF APPEAL
FIFTH DISTRICT, STATE OF FLORIDA

CASE NO. 5D22-147

JARRETT OLSEN,

Appellant,

v. L.T. Case No. 2018-CA-002110

FIRST TEAM FORD, LTD.
d/b/a Autonation Ford Sanford,
a Florida Limited Partnership,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT, EIGHTEENTH JUDICIAL CIRCUIT, IN AND FOR SEMINOLE COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE AND FACTS

The issue on appeal is whether a car dealership is immune under the Graves Amendment when it provides a complimentary loaner vehicle to a customer. This Court resolved that question in *Romero v. Fields Motorcars of Florida, Inc.*, 333 So. 3d 746 (Fla. 5th DCA 2022), concluding that the dealership is not immune. The trial court—which did not have the benefit of this Court's decision in *Romero*—reached the opposite result and granted summary judgment for the dealership.

A. Background facts

1. The dealership provides a complimentary loaner vehicle to Mr. Matthews.

Ryan Matthews is the longtime general manager of First Team Ford, a car dealership. (R. 765:15–766:10.) As general manager, he "oversee[s] sales, service, finance, all operations of the dealership." (R. 766:9–10.) In other words, he "oversee[s] the whole store," including all 75 of its employees. (R. 766:11–767:2.)

On the afternoon of December 21, 2016, Mr. Matthews went to work at the dealership. (R. 768:3–12.) He drove to the dealership in

his wife's Chevrolet Tahoe because, according to him, he was going to get its oil changed. (R. 768:15–769:8.)

Mr. Matthews did not actually get the Tahoe's oil changed or have it serviced. (R. 769:9–10, 791:20–22, 798.) At deposition, he explained: "I didn't get to it, because right before Christmas is kind of a busy time, so I got shuffled to the bottom of the list." (R. 769:10–12.) But other evidence casts doubt on whether the Tahoe was ever submitted for service to begin with.

Notably, it is undisputed that there are no records of the service. (R. 886:21.) Yet the dealership's service manager testified that records are created when a customer leaves a vehicle for service. (R. 834:2–19.) Mr. Matthews's explanation is also skeptical given that he is the general manager of the dealership. Indeed, it is reasonable to infer that the general manager—in charge of every employee—could get an oil change any time. It is also reasonable to infer that Mr. Matthews did not need to leave the Tahoe at the dealership overnight; he could have simply brought it back to work another day if it was not ready to be serviced.

In any event, Mr. Matthews eventually left work in a 2017 Ford Expedition EL (Extended Length) owned by the dealership. (R. 769:2–

4, 783:9–11, 800, 804 ¶ 9, 805 ¶ 12; 833:3–5.) He testified that he drove the Expedition for two reasons: (1) because "they didn't get done with the oil change" on his wife's Tahoe, and (2) because he and his wife were thinking about buying the Expedition to replace the Tahoe, which was nearing the end of its lease. (R. 769:15–21.) Mr. Matthews wanted to make sure the Expedition fit in his home garage "because it was a little bit longer than the Tahoe." (R. 769:24–25.)

Whenever a customer takes home a vehicle on a test drive, the customer is required to sign a loaned vehicle agreement with the dealership. (R. 772:14–17.) Employees are not allowed to sign out vehicles or otherwise use them for personal use. (R. 775:11–13.) So, just like any other customer test driving a car, Mr. Matthews signed a "loaned vehicle agreement" to take home the Expedition. (R. 773:8–774:2, 800–01.) Mr. Matthews testified that his "intention" in signing the agreement was that he wanted to "take the vehicle home overnight and show [his] wife so she could decide whether she wanted to buy the vehicle." (R. 774:4–9.)

The "loaned vehicle agreement" did not say that the Expedition was being "rented" or "leased"—instead, it said that the Expedition was being "loaned." (R. 800–01.) Nor did Mr. Matthews "have to pay

any kind of money or anything" to take the Expedition home. (R. 774:10–12.) The dealership would often loan vehicles on a "complimentary" basis if, for example, "a wife comes in and wants to show the car to the husband at the house." (R. 784:20–785:4.)

2. Mr. Matthews gets into a crash with Mr. Olsen while driving the complimentary loaner vehicle.

Soon after leaving the dealership, Mr. Matthews got into a crash with Jarrett Olsen. (*See* R. 775:18–777:13, 788:21–789:3, 805 ¶ 12.) Mr. Matthews was driving the dealership's Expedition at the time of the crash. (R. 783:9–15, 805 ¶ 12.) Traffic had backed up outside of a gated community, and Mr. Matthews "couldn't get stopped," so he caused a rear-end collision. (*See* R. 776:5–15.)

B. Procedural history

Mr. Olsen sued Mr. Matthews for negligently crashing into him. (R. 18–20.) Mr. Olsen also sued the dealership for vicarious liability under Florida's dangerous-instrumentality doctrine. (R. 20–21.) Mr. Olsen later settled with Mr. Matthews, and the case proceeded against the dealership. (R. 534, 540.)

In September 2019, the dealership moved for summary judgment on the vicarious-liability claim, arguing it was immune

under the Graves Amendment. (*See* R. 124–28.) The Graves Amendment provides that, if certain requirements are met, an owner who "rents or leases" a motor vehicle is immune from liability that would otherwise attach under the dangerous-instrumentality doctrine:

> An owner of a motor vehicle that *rents or leases* the vehicle to a person (or an affiliate of the owner) shall not be liable under the law of any State or political subdivision thereof, by reason of being the owner of the vehicle (or an affiliate of the owner), for harm to persons or property that results or arises out of the use, operation, or possession of the vehicle during the period of the rental or lease, if—
>
> (1) the owner (or an affiliate of the owner) is engaged in the trade or business of renting or leasing motor vehicles; and
>
> (2) there is no negligence or criminal wrongdoing on the part of the owner (or an affiliate of the owner).

49 U.S.C. § 30106(a) (emphasis added).

The dealership did not explain how it met the "rents or leases" requirement. (R. 124–28.) Instead, the dealership seemed to assume that it met the requirement merely because Mr. Matthews signed a loaned vehicle agreement. (*See* R. 125.) Further, without citation to any evidence, the dealership asserted in its summary-judgment

motion that Mr. Matthews rented a vehicle "while his motor vehicle"—the Tahoe—"*was being repaired*." (R. 125. (emphasis added).)

On December 3, 2019, Mr. Olsen deposed the dealership's service manager. (R. 808–35.) The service manager was unable to confirm whether Mr. Matthews's Tahoe was serviced on the date of the incident. (R. 825:14–17.) He claimed to "remember seeing service records" for it, but he could not produce any. (*See* R. 820:14–821:7.)

Mr. Olsen then requested the dealership to produce service records for the Tahoe. (R. 351, ¶ 13.) On January 6, 2020, the dealership objected to the request as "irrelevant and not reasonably calculated to lead to the discovery of admissible evidence." (R. 397, ¶ 13.) Only two hours later, however, the dealership's counsel sent Mr. Olsen's counsel an email stating that "Mr. Matthews did not have his vehicle serviced at that time and brought home a vehicle to test drive for his wife." (R. 798.) Still, counsel emphasized that "Mr. Matthews executed a short term rental agreement." (R. 798.)

In March 2020, the dealership filed a supplemental memorandum in support of its summary-judgment motion. (R. 414–19.) Despite counsel's prior email, the motion again asserted—without citation—that Mr. Matthews's "motor vehicle was being

repaired." (R. 415.) What's more, the motion still did not explain how the dealership satisfied the Graves Amendment's "rents or leases" requirement. (R. 414–19.)

The trial court later denied the dealership's motion for summary judgment on the Graves Amendment defense. (*See* R. 529, 614 n.1.)

After the Florida Supreme Court adopted the federal summary-judgment standard, the dealership filed a renewed motion for summary judgment and rehashed its Graves Amendment defense. (R. 614–22.)[1] The dealership conceded that, for the defense to apply, it had to show it "rented" the Expedition to Mr. Matthews. (R. 619); *see also* 49 U.S.C. § 30106(a) (limiting the liability of an owner who "rents or leases" a vehicle). But, once again, the dealership did not explain how it met this requirement. (*See* R. 614–22.) Instead, the dealership seemed to assume that it met the "rents or leases" requirement merely because Mr. Matthews signed the loaned vehicle agreement. (R. 615 ("[Mr. Mathews] executed a short term rental agreement for a 2017 Ford Expedition EL, and, thereby rented that vehicle.").)

[1] The dealership filed three seemingly identical copies of its motion. (R. 561–719.) Mr. Olsen cites to the last-filed copy.

The dealership argued that "[t]he controlling case on this defense is *Collins v. Auto Partners V, LLC*, 276 So. 3d 817 (Fla. 4th DCA 2019)." (R. 619.) The dealership also summarized the federal district court's summary-judgment order in *Thayer v. Randy Marion Chevrolet Buick Cadillac, LLC*, 519 F. Supp. 3d 1062 (M.D. Fla. 2021).[2] (R. 620–21.) The court in *Thayer* ruled that "a transaction qualifies as a 'rental' under the Graves Amendment when, in exchange for use of a vehicle, a party provides some form of consideration." 519 F. Supp. 3d at 1067. The court further ruled that the customer in *Thayer* had provided consideration because she submitted her car for service and, "[i]mportantly, . . . [the defendant] would not allow her to use the loaner vehicle unless she allowed [the defendant] to service her own vehicle." *Id.* at 1068.

In response, Mr. Olsen argued that the dealership was relying on caselaw "solely applicable to situations involving vehicle service" and that it was improperly trying to "expand application of the Graves Amendment to test drive situations." (R. 740–41.) He noted that "Mr.

[2] The Eleventh Circuit has since affirmed the district court's summary judgment. *Thayer v. Randy Marion Chevrolet Buick Cadillac, LLC*, 30 F.4th 1290 (11th Cir. 2022).

Matthews never had his car serviced, and was taking the subject vehicle on an overnight test drive to see whether [it] . . . would fit in his garage." (R. 741.) Accordingly, Mr. Olsen argued that the dealership did not "rent" the Expedition to Mr. Matthews and thus the Graves Amendment did not apply. (R. 742–53.)

Mr. Olsen explained that the Fourth District's decision in *Collins* was not helpful or controlling because the court did not evaluate whether the defendant in *Collins* had "rented" the car by submitting it for service. (R. 748–49.) Mr. Olsen also argued that *Thayer* was distinguishable because, unlike the customer there, Mr. Matthews took the Expedition for a test drive and did not have his car serviced. (R. 750.) As support, Mr. Olsen cited Mr. Matthews's deposition testimony as well as defense counsel's email admitting that Mr. Matthews "did not have his vehicle serviced." (R. 750–51.)

The trial court held a hearing on the dealership's summary-judgment motion. (R. 876–92.) Crediting Mr. Matthews's deposition testimony, the court asked why the Graves Amendment would not apply given that Mr. Matthews said he submitted the Tahoe for an oil change. (R. 880:5–14.) Mr. Olsen responded that "it was unequivocally a test drive" and "the oil change was never done."

(R. 880:17–18, 881:10–11.) Mr. Olsen further noted there were "no records of a service" and that the dealership "indicated there w[ere] no records because [the Tahoe] was never serviced." (R. 883:6–12.)

Mr. Olsen also pointed out that an oil change is "not something that you leave your car there overnight [for]." (R. 883:18–19.) The court asked whether any record evidence supported that assertion, and Mr. Olsen asked for a "continuance" and "additional discovery for that" because he "didn't feel that it was even a question." (*See* R. 883:23–884:12, 885:1–15.) He explained that the dealership originally "had the position that [Mr. Matthews] did get the oil changed," and it was not until Mr. Olsen asked for records that he "learned that didn't actually happen." (R. 885:1–9.)

For its part, the dealership conceded "[t]here is no service order." (R. 886:21.) The trial court then conjured up a new argument for the dealership, which the dealership adopted:

> THE COURT: So but you're indicating because he had his vehicle *intending* to be serviced that essentially as far as the Graves Amendment -- so there's no dispute that it was in the shop and *intending* to be serviced based on what's indicated, and therefore the Graves Amendment applies even if it wasn't actually serviced?
>
> [DEALERSHIP]: Correct, Your Honor.

(R. 887:16–24 (emphasis added).) The dealership had not raised this "intention" argument in its summary-judgment motion. (R. 614–22.) Rather, as previously noted, the dealership merely relied on the fact that Mr. Matthews signed the loaned vehicle agreement. (*See* R. 615.)

Consistent with the argument it crafted for the dealership, the trial court orally ruled that "while the oil change may not have occurred," the Graves Amendment nonetheless applied because Mr. Matthews "intended" for the oil to be changed. (R. 890:9–891:5.) Mr. Olsen asked to make a point on the record, but the court denied his request. (R. 891:6–18.) The court then entered a written order granting the dealership's motion and entering final judgment in its favor. (R. 902–06.)

Mr. Olsen moved for rehearing, noting that the dealership "never argued in its [m]otion that Mr. Matthews' intent to receive an oil change transformed an ordinary test drive into a . . . rental vehicle." (R. 908.) Mr. Olsen therefore argued that the trial court erred in "enter[ing] summary judgment on a ground not raised with particularity in the motion." (R. 920 (citation omitted).)

Mr. Olsen further argued that "Mr. Matthews' intent and whether the Tahoe was ever 'submitted' for service" were disputed

issues of fact that involved credibility determinations for the jury. (*See* R. 911, 917.) Notably, he explained that "[a] jury is entitled to hear about the absence of [service records] and draw conclusions as to the factual issues of 'intent' and 'submitted' for service." (R. 916.)

Finally, Mr. Olsen argued that he needed further discovery to address the newly raised issue of intent. (R. 918–20.) In support, Mr. Olsen attached a CARFAX report showing that Mr. Matthews's Tahoe was serviced on November 18, 2016—just one month before he purportedly intended to submit it for an oil change at the dealership. (R. 928.) The report further showed that the Tahoe had never been serviced at the dealership but instead was always serviced at other locations. (R. 927–28.)

Mr. Olsen also attached an affidavit made by his counsel under Florida Rule of Civil Procedure 1.510(d). (R. 937, ¶ 3.) Counsel identified a list of discovery that Mr. Olsen needed so he could defend against the dealership's summary-judgment motion. (R. 939, ¶ 11.) As counsel explained, this discovery was not sought before because the dealership had never raised the issue of Mr. Matthews's intent. (*See* R. 940, ¶¶ 12–14.)

On December 13, 2021, the trial court entered an amended order granting the dealership's motion and entering final judgment. (R. 941–47.) The court recognized that "Mr. Matthews' personal vehicle did not undergo service on December 21, 2016." (R. 945.) Nevertheless, the court again ruled that "it was Mr. Matthews' intent to have the vehicle serviced that day which determines he rented the 2017 Ford Expedition under the Graves Amendment." (R. 945.) The court then summarily denied Mr. Olsen's motion for rehearing. (R. 948.)

Mr. Olsen moved for rehearing of the amended order and judgment, incorporating the arguments he made in his prior motion. (R. 950–62.) He again argued that Mr. Matthews's purported intent to have his car serviced was "a question of fact for the jury" that "was not raised in [the dealership's] motion." (R. 951, ¶ 2.) Critically, Mr. Olsen explained that the evidence contradicted Mr. Matthews's account, so a jury could reject his testimony by making a credibility determination. (*See* R. 953–55, ¶¶ 8–13.) Mr. Olsen argued that the trial court erred in making this credibility determination at summary judgment. (R. 958–60, ¶¶ 22–24.)

Nonetheless, Mr. Olsen also argued that the trial court "misapplied the law" by "us[ing] Mr. Matthews' subjective intent as a substitute for valid consideration." (R. 951, ¶ 3.) As Mr. Olsen explained, "[n]o case indicates that a witness['s] subjective intent to have a quick oil change without actually having the oil changed[] equates to consideration to rent a vehicle." (R. 957, ¶ 17.)

On January 5, 2022, the trial court summarily denied Mr. Olsen's motion for rehearing of the amended order and judgment. (R. 963.) Mr. Olsen timely appealed. (R. 965.)

Two days after the trial court denied the motion for rehearing, this Court issued its decision in *Romero*. 333 So. 3d at 747. The dealership and Mr. Olsen later filed a joint motion asking this Court to stay this appeal pending the Florida Supreme Court's potential review of *Romero*. Joint Motion to Stay, filed 03/21/2022. Significantly, the parties agreed that *Romero* "is factually similar to the present matter and would likely control the outcome of the present appeal." *Id.* at 1. This Court summarily denied the motion.

SUMMARY OF ARGUMENT

This Court's decision in *Romero* controls. The dealership already conceded that *Romero* is factually similar to this case, and a comparison of the two cases confirms the same.

Neither *Collins* nor *Thayer*—which the dealership cited below—warrants a different result. This Court already distinguished *Collins* because it makes no mention of consideration, which is required to establish a rental under the Graves Amendment. And *Thayer* is factually distinguishable for several reasons. What's more, the dealership did not raise the argument addressed in *Thayer* (that submitting a car for service constitutes consideration), so it would be improper to grant summary judgment on that basis.

Finally, it was error to grant summary judgment based on Mr. Matthews's purported intent. The Graves Amendment does not refer to intent, and no authority has interpreted the Graves Amendment's "rents or leases" requirement to depend on intent. Even if intent were relevant, the dealership never raised that issue, Mr. Matthews's intent is genuinely disputed, and Mr. Olsen should be entitled to additional discovery on the issue.

ARGUMENT

I. Standards of review and decision

"This Court conducts a de novo review of an order granting summary judgment." *Dennison v. Halifax Staffing, Inc.*, 336 So. 3d 345, 347 (Fla. 5th DCA 2022). Summary judgment is proper only "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fla. R. Civ. P. 1.510(a).

As this Court has long held, on summary judgment "'all evidence before the court plus favorable inferences reasonably justified thereby are to be liberally construed' in favor of the non-moving party"—here, Mr. Olsen. *Martins v. PNC Bank, Nat'l Ass'n*, 170 So. 3d 932, 935 (Fla. 5th DCA 2015) (citation omitted)). The same is true under the new federal standard. *E.g.*, *Brosseau v. Haugen*, 543 U.S. 194, 195 n.2 (2004) ("Because this case arises in the posture of a motion for summary judgment, we are required to view all facts and draw all reasonable inferences in favor of the nonmoving party . . . .").

II. This Court's decision in *Romero* controls.

The dealership already conceded that this Court's decision in *Romero* "is factually similar to the present matter and would likely control the outcome of the present appeal." Joint Motion to Stay, filed 03/21/2022, at 1. This is no surprise—the dealership's appellate counsel also represented the losing party in *Romero*.

Romero and this case are materially indistinguishable. Just like this case, *Romero* involved a claim under the dangerous-instrumentality doctrine concerning a complimentary loaner vehicle. 333 So. 3d at 747. And, just like this case, the customer who obtained the vehicle "did not believe he paid anything for the use of the complimentary loaner vehicle." *Id.* at 750. The trial court granted summary judgment for the defendant under the Graves Amendment, and the plaintiff appealed, arguing that "the Graves Amendment does not apply where a dealership has provided a complimentary loaner vehicle to its customer because the Graves Amendment expressly applies only in a rental or lease situation." *Id.* at 747.

This Court agreed with the plaintiff and reversed the trial court's summary judgment. *Id.* As this Court explained, "the plain meaning of the phrase 'rents or leases' used in the Graves Amendment does

not encompass a dealership's gratuitous provision of a loaner vehicle." *Id.* This is because the plain meanings of the words "rents" and "leases" both involve an exchange of consideration. *Id.* at 749 (citing various dictionaries). Accordingly, because (i) no consideration was identified at the time of the transaction, (ii) the customer was not made aware he was entering into a lease, and (iii) there were no indicia of a lease, this Court held that the transaction did not qualify as a rental or lease:

> In sum, a transaction involving the provision of a complimentary loaner vehicle is not a rental or lease transaction where no money or other consideration is identified by the parties at the time of the transaction; where the purported lessee was not made aware he was entering into a lease; and where there is no indicia of a lease agreement, oral or written. It defies logic to conclude [the customer] was a party to a lease when he himself never agreed to a lease or the terms thereof. All he agreed to, via the Loaner Agreement, was a bailment, as expressly identified in that Agreement, and a gratuitous bailment at that. He did not believe he paid anything for the use of the complimentary loaner vehicle and certainly could not be said to have agreed to the essential terms of any rental or lease.

Id. at 750.

Romero compels the same outcome in this case. Just like the plaintiff in *Romero*, Mr. Matthews testified that he did not "have to pay any kind of money or anything" to take the Expedition home.

(R. 774:10–12.) Indeed, he explained that the dealership would often provide loaner vehicles on a "complimentary" basis when, like him, a customer wanted to take a vehicle home to show their spouse. (R. 784:20–785:4.)

Also like in *Romero*, the "loaned vehicle agreement" that Mr. Matthews signed did not say the Expedition was being rented or leased. (R. 800–01.) Instead, it said the dealership was "loaning" the vehicle. (R. 800.) The verb "loan" does not require an exchange of consideration. *Peters v. Thompson*, 42 So. 2d 91, 92 (Fla. 1949) ("We do not find that the word[] . . . 'loan' connote[s], or indicate[s] there should be, payment for the use of the chattel which is the subject matter of the loan."); *Fireman's Fund Ins. v. Dollar Sys., Inc.*, 699 So. 2d 1028, 1029–30 (Fla. 4th DCA 1997) (concluding that a "courtesy car"—which the recipient made "no payments" for—was "loaned"); *Row Equip. Sales & Rental v. Grange Mut. Cas. Co.*, No. CV 511–099, 2012 WL 4339335, at *5 (S.D. Ga. Sept. 20, 2012) ("The verb 'loan' . . . does not connote the payment of a fee for using the loaned property."); *see also Loan, Black's Law Dictionary* (11th ed. 2019) (defining "loan" as "[t]o lend"); *id.* at *Lend* (defining "lend" as "[t]o allow the temporary use of (something), *sometimes* in exchange for

compensation, on condition that the thing or its equivalent be returned" (emphasis added)).

To be sure, the "loaned vehicle agreement" said the dealership was loaning the Expedition "[i]n consideration" of Mr. Matthews's accepting full responsibility for its operation and agreeing to other conditions. (R. 800.) But so did the agreement in *Romero*. 333 So. 3d at 748 ("In consideration for use of the Vehicle, I agree to the following terms and conditions . . . ."). And this Court did not deem that to be consideration. *See id.* at 751 (holding that "the evidence instead established a gratuitous bailment").

At any rate, the dealership never argued that Mr. Matthews's acceptance of responsibility and agreement to other conditions constitutes consideration. Accordingly, summary judgment on that basis would be improper. *E.g.*, *Transp. Eng'g, Inc. v. Cruz*, 152 So. 3d 37, 47 n.5 (Fla. 5th DCA 2014) (Lawson, J.) (explaining that "it would have been error for the trial judge to have granted summary judgment on any . . . basis" other than what was raised in the motion). To hold otherwise would deprive Mr. Olsen of an opportunity to oppose summary judgment on that unargued basis.

The same is true under the new summary-judgment rule. Although the new rule allows a trial court to "grant the motion on grounds not raised by a party," it may do so only "[a]fter giving notice and a reasonable time to respond." Fla. R. Civ. P. 1.510(f)(2); *see also, e.g.*, *Amy v. Carnival Corp.*, 961 F.3d 1303, 1310–11 (11th Cir. 2020) (holding that, under the identical federal rule, the trial court erred in granting summary judgment on an unraised ground without giving notice and a reasonable time to respond). Here, the trial court did not even consider the argument, so notice and opportunity to respond were necessarily not given.

In sum, *Romero* controls the outcome of this appeal. The dealership already conceded that the facts of this case are materially similar to the facts of *Romero*, and a comparison of the two cases confirms the same. As prior precedent of this Court, *Romero* is "binding on all judges of this district until revisited by this [C]ourt in an en banc proceeding, or overturned by the Florida Supreme Court." *See Progressive Am. Ins. v. Belcher*, 496 So. 2d 841, 843 (Fla. 5th DCA 1986).

III. The dealership's caselaw and the trial court's reasoning are unavailing.

The dealership relied below on *Collins* and *Thayer*. (R. 619–21.) Neither case warrants a different result than the one this Court reached in *Romero.*

The trial court also ruled that the Graves Amendment applied because of Mr. Matthews purported "intent" to have his car serviced. (R. 945.) This argument likewise fails for several reasons.

A. *Collins* does not apply because it did not address the issue of consideration.

The dealership argued below that the "controlling case" on its Graves Amendment defense is *Collins v. Auto Partners V, LLC*, 276 So. 3d 817 (Fla. 4th DCA 2019). (R. 619.) But this Court already concluded that "*Collins* is distinguishable." *Romero*, 333 So. 3d at 750. Specifically, *Collins* "makes no mention of consideration, presumably because the plaintiff's arguments did not address it and instead challenged the status of the loaner car solely on the basis that it bore no indicia of being a complimentary courtesy car." *Id.* Because the issue of consideration was not raised and addressed, *Collins* is not precedent on that issue. *Fla. Highway Patrol v. Jackson*, 288 So. 3d 1179, 1183 (Fla. 2020) ("Questions which merely lurk in

the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." (citation omitted)).

This Court is not alone in distinguishing *Collins*. The district court in *Thayer* likewise noted that "*Collins* has little analysis about why the car . . . qualified under the Graves Amendment." 519 F. Supp. 3d at 1067. Accordingly, *Collins* does not offer any reason to reach a different result than the one this Court reached in *Romero*.

B. *Thayer* is factually distinguishable, and the dealership did not raise the argument addressed in *Thayer*.

The other case the dealership cited below was *Thayer v. Randy Marion Chevrolet Buick Cadillac, LLC*, 519 F. Supp. 3d 1062 (M.D. Fla. 2021). (R. 620–21.) The court in *Thayer* ruled that the Graves Amendment applied because the defendant provided a rental vehicle in exchange for consideration. 519 F. Supp. 3d at 1068. Namely, the court ruled that the following facts demonstrated sufficient consideration:

> When [the customer's husband] took [the customer's] car in for servicing, [the defendant] accepted the car for servicing and allowed [the customer] to use a car owned by [the defendant] while the car was being serviced. *Importantly, [the defendant] testified that it would not allow her to use the loaner vehicle unless she allowed*

> *[the defendant] to service her own vehicle. And [the plaintiff] has offered no evidence that [the defendant] would have allowed [the customer] to use that loaner vehicle if her car were not being serviced.* [The customer] surrendered her car to [the defendant] and agreed to pay the cost of repairs. In exchange, she received the use of a loaner vehicle.

Id. (emphasis added) (citation omitted).

The italicized sentences above show that *Thayer* is factually distinguishable from this case. Critically, the court deemed it "[i]mportant[]" that the defendant "would not allow [the customer] to use the loaner vehicle unless she allowed [the defendant] to service her own vehicle."[3] *Id.* Here, by contrast, the evidence shows that the dealership allowed customers to use loaner vehicles for test drives. (R. 769:22–770:2, 771:11–16, 772:14–773:3, 784:20–785:4, 798.) So, contrary to the plaintiff in *Thayer*, Mr. Olsen did offer evidence "that [the defendant] would have allowed [the customer] to use that loaner vehicle if her car were not being serviced." 519 F. Supp. 3d at 1068.

[3] The Eleventh Circuit deemed that same fact important on appeal. *See Thayer*, 30 F. 4th at 1293–94 (emphasizing that the customer and her husband "only received the vehicle because they brought their own car in for service" and that the defendant "only provides vehicles if a customer leaves their own vehicle for service").

Another significant distinction is that in *Thayer* there was "no dispute that . . . the vehicle involved in the accident was provided as a temporary replacement vehicle *while [the customer's] vehicle was being serviced*." 519. F. Supp. 3d at 1067 (emphasis added). Here, on the other hand, Mr. Matthews testified that he did not actually get his Tahoe's oil changed or have it serviced. (R. 769:9–10, 791:20–22; *see also* R. 798.)

Although Mr. Matthews testified that he submitted the Tahoe for an oil change (*see* R. 792:2–5), that issue is genuinely disputed because other evidence casts doubt on Mr. Matthews's testimony. Again, even though the service manager testified that records are created when a customer leaves a vehicle for service (R. 834:2–19), it is undisputed that there is no service record for the Tahoe (R. 886:21).

Mr. Matthews's explanation for why the oil change did not happen is also doubtful. He claimed he "didn't get to it, because right before Christmas is kind of a busy time, so [he] got shuffled to the bottom of the list." (R. 769:10–12.) As the longtime general manager, however, it is reasonable to infer that he could get an oil change any time. It is also reasonable to infer that Mr. Matthews did not need to

leave the Tahoe at the dealership overnight; he could have simply brought it back to work another day if it was not ready to be serviced. These inferences are "evidence" because they are "logically and naturally drawn from admitted or known facts." *Johnson v. Dicks*, 76 So. 2d 657, 661 (Fla. 1954).

A jury could further reject Mr. Matthews's testimony because of his relationship with the dealership. By claiming that he submitted the Tahoe for service, Mr. Matthews was able to protect the dealership—his employer—from liability for damages under Florida's dangerous-instrumentality doctrine. "A party may attack the credibility of a witness by exposing a potential bias." *Vazquez v. Martinez*, 175 So. 3d 372, 373 (Fla. 5th DCA 2015); *see also Allstate Ins. v. Boecher*, 733 So. 2d 993, 997 (Fla. 1999) ("The more extensive the financial relationship between a party and a witness, the more it is likely that the witness has a vested interest in that financially beneficial relationship continuing.").

In short, the evidence would permit a reasonable jury to reject Mr. Matthews's testimony for lack of credibility. *E.g.*, *Rice v. Everett*, 630 So. 2d 1184, 1186 (Fla. 5th DCA 1994) ("The jury was free to . . . reject the testimony of plaintiff's witnesses. It is the jury's function in

any trial to evaluate the credibility of the witnesses."). Of course, at trial a jury would not be *required* to draw any of the above inferences or reject Mr. Matthews's credibility. But because this case is on appeal from a summary judgment, the evidence and all "favorable inferences" must be "liberally construed" in favor Mr. Olsen. *Martins*, 170 So. 3d at 935 (citation omitted); *see also supra* § I, at 16. It is therefore irrelevant that the evidence might also permit contrary inferences. *E.g.*, *Castillo v. E.I. Du Pont De Nemours & Co.*, 854 So. 2d 1264, 1279 (Fla. 2003) ("A jury question is presented when the evidence is susceptible to inference that would allow recovery even though there are opposing inferences that are equally reasonable.").

Finally, even if *Thayer* were not factually distinguishable, the dealership did not raise the argument addressed in *Thayer*: that submitting a car for service constitutes consideration. Although the dealership cited *Thayer* in its summary-judgment motion and summarized the court's ruling, the dealership never *argued*—let alone stated—that submitting a car for service constitutes consideration. (R. 620–22.) Thus, summary judgment on that basis would be improper. *Supra* § II, at 20–21; *see also Rossman v. Wallick*, 301 So. 3d 493, 494 (Fla. 5th DCA 2020) ("[I]t is reversible error to

enter summary judgment on a ground not raised with particularity in the motion. And, for purposes of that rule, the trial court should take a strict reading of the papers filed by the moving party." (citations omitted).)

This Court reached the same conclusion in *Romero*. There, too, the defendant did not argue in the trial court that submitting a car for service constitutes consideration. *Romero*, 333 So. 3d at 748 n.2. When the defendant (albeit the appellee) tried to raise the argument for the "first time on appeal," this Court "decline[d] to consider" the argument because it had not been raised below. *Id.* It would likewise be improper for this Court to consider the argument in this appeal because the dealership did not raise it below.

C. It was error to grant summary judgment based on Mr. Matthews's purported "intent."

The trial court recognized that "Mr. Matthews' personal vehicle did not undergo service on December 21, 2016." (R. 945.) Nevertheless, the court ruled that "it was Mr. Matthews' *intent* to have the vehicle serviced that day which determines he rented the 2017 Ford Expedition under the Graves Amendment." (R. 945 (emphasis

added).) For multiple reasons, the trial court erred in granting summary judgment based on Mr. Matthews's purported intent.

1. The Graves Amendment's application does not depend on intent.

The Graves Amendment does not refer to "intent." 49 U.S.C. § 30106(a). Nor does there appear to be any published decision that interprets the Graves Amendment's "rents or leases" requirement to depend on intent. Indeed, the trial court—which based its ruling on Mr. Matthews's purported "intent"—did so without citing any authority. (R. 945.)

The trial court erred in ruling that Mr. Matthews's intent to have his car serviced determines that he "rented" the Expedition for purposes of the Graves Amendment's "rents or leases" requirement. As the district court held in *Thayer*, the requirement "focus[es] on the actual relationship." 519 F. Supp. 3d at 1067, *aff'd* 30 F.4th at 1294 ("The substance of the transaction . . . controls."). A customer cannot convert a test drive into a rental by merely intending that his car be submitted for service. After all, contractual relationships are governed by the substance of the agreement—not one party's intent. *See Romero*, 333 So. 3d at 751 (emphasizing that there was "no

meeting of the minds" between the defendant and the customer as to a rental agreement); *King v. Bray*, 867 So. 2d 1224, 1228 (Fla. 5th DCA 2004) ("The making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs—not on the parties having meant the same thing but on their having said the same thing." (citation omitted)).

To hold otherwise would mean that a customer could unilaterally form a rental relationship with a dealership simply by leaving his car with the "intent" for it to be serviced. In other words, a customer could leave his car in the parking lot, not tell anyone about it, take one of the dealership's cars home for a test drive, and then claim that the test drive was actually a rental because he "intended" for his car to be serviced. To say the least, that is not how contracts work. *E.g.*, *Bowen v. Taylor-Christensen*, 98 So. 3d 136, 140–41 (Fla. 5th DCA 2012) (en banc) ("[C]ontracts are formed by objective acts, not subjective beliefs.").

2. The dealership did not raise the issue of intent.

The dealership never raised the issue of Mr. Matthews's intent. (R. 614–22.) Rather, it was the trial court that first raised the issue at the summary-judgment hearing. (R. 887:16–24.) So even if intent

were relevant, it was error for the trial court to grant summary judgment on that basis. *Deluxe Motel, Inc. v. Patel*, 727 So. 2d 299, 301 (Fla. 5th DCA 1999) ("[T]he trial court erred to the extent that, in entering judgment for the sellers, it relied on the arguments made at the hearing but not in the motion."); *see also supra* § II, at 20–21.

3. Mr. Matthews's intent is genuinely disputed.

Even if intent were relevant, and even if the dealership had properly raised the issue, the trial court still erred by concluding that "it was Mr. Matthews' intent to have [his wife's Tahoe] serviced" on the day of the incident. (R. 945.) The trial court's conclusion directly conflicts with Mr. Matthews's testimony that his "intention" in signing the loaned vehicle agreement was that he wanted to take it for a test drive. (R. 774:4–9.) Specifically, he wanted to "take the vehicle home overnight and show [his] wife so she could decide whether she wanted to buy the vehicle." (*Id.*)

Granted, Mr. Matthews also said he took the Expedition because "they didn't get done with the oil change" on his wife's Tahoe. (*See* R. 769:13–16.) But—as noted *supra* § III.B, at 25–27—a jury could rely on contrary evidence and inferences to reject Mr. Matthews's testimony for lack of credibility. "[Q]uestions regarding

relative credibility or weight of . . . evidence compared to other evidence cannot be resolved on summary judgment but must be left for the trier of fact." *Shanks v. Bergerman*, 334 So. 3d 681, 686 (Fla. 2d DCA 2022) (citation omitted); *see also, e.g.*, *TypeRight Keyboard Corp. v. Microsoft Corp.*, 374 F.3d 1151, 1158 (Fed Cir. 2004) ("[S]ummary judgment is not appropriate where the opposing party offers specific facts that call into question the credibility of the movants witnesses.").

Accordingly, there is a genuine dispute of fact as to whether Mr. Matthews intended to have his wife's Tahoe serviced. So even if intent were relevant, and even if the dealership raised the issue, the trial court erred in granting summary judgment.

4. Mr. Olsen was entitled to additional discovery.

Even if intent were relevant, the dealership raised the issue, and the evidence did not present a genuine dispute as to Mr. Matthews's intent, the trial court still erred in granting summary judgment without giving Mr. Olsen leave to conduct additional discovery.

The rule states that where a nonmovant shows "it cannot present facts essential to justify its opposition, the court may: (1) defer considering the motion or deny it; (2) allow time to obtain

affidavits or declarations or to take discovery; or (3) issue any other appropriate order." Fla. R. Civ. P. 1.510(d). Motions under the federal equivalent to this rule—which is identically worded—are "'broadly favored and should be liberally granted' because the rule is designed to 'safeguard non-moving parties from summary judgment motions that they cannot adequately oppose.'" *Raby v. Livingston*, 600 F.3d 552, 561 (5th Cir. 2010); *see also In re Amends. to Fla. Rule of Civ. Proc. 1.510*, 317 So. 3d 72, 76 (Fla. 2021) ("[O]ur act of transplanting federal rule 56 brings with it the 'old soil' of case law interpreting that rule." (citation omitted)).

Here, Mr. Olsen's trial counsel prepared an affidavit under rule 1.510(d) that identified a list of discovery Mr. Olsen needed to defend against the dealership's summary-judgment motion. (R. 939, ¶ 11.) The list included items such as a "[d]eposition of Mr. Matthews' wife to inquire whether the . . . Tahoe . . . was indeed due for an oil change," "subpoenas to those departments listed on the Carfax Report" for the Tahoe, and "information regarding when the Chevy Tahoe was in fact coming off lease . . . and if the terms of that lease required an oil change before it was returned." (R. 939, ¶ 11.) All of this evidence bore directly on whether Mr. Matthews's testimony—

that he submitted the Tahoe for an oil change and intended to do so—was credible. And, as counsel explained, none of it was previously sought because the dealership never raised the issue of Mr. Matthews's intent. (R. 939–40, ¶¶ 12–14.)

Accordingly, to the extent this Court concludes that the Graves Amendment's application depends on intent (which it does not), that the dealership raised the issue (which it did not), and that Mr. Matthews's intent was not genuinely disputed (which it was), the trial court erred in denying Mr. Olsen leave to conduct discovery before ruling on the dealership's summary-judgment motion.

CONCLUSION

This Court should reverse the final summary judgment for the dealership and remand for further proceedings.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing document complies with the word count limitation of Rule 9.210, Florida Rules of Appellate Procedure, in that it contains 6,998 words (including words in headings, footnotes, and quotations), according to the word-processing system used to prepare this document. This document also complies with the line spacing, type size, and typeface requirements of Rule 9.045, Florida Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been electronically filed via the Florida Courts E-Filing Portal on July 21, 2022, and an electronic copy has been furnished to the following counsel of record:

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