IN THE SUPREME COURT OF FLORIDA

CASE NO. 75,870

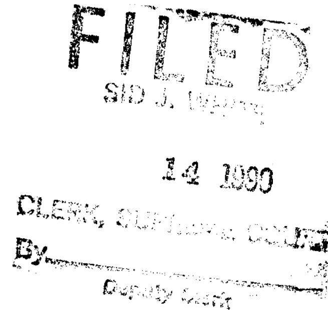
ALONZO T. RAYNOR, as Guardian
of the person and property of
SCOTT THOMAS RAYNOR, Incompetent,

Petitioner,

vs.

EQUILEASE CORPORATION, a foreign
corporation authorized to do business
in the State of Florida; ALEXIS DE LA
NUEZ; and GILBERT0 GARAY,

Appellees.



ON CERTIFICATION FROM THE DISTRICT COURT OF
APPEAL OF FLORIDA, THIRD DISTRICT

PETITIONER'S BRIEF ON THE MERITS

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I.
STATEMENT OF THE CASE AND FACTS

On November **23, 1985,** Scott Thomas Raynor suffered severe injuries, including brain damage rendering him incompetent, when his automobile was struck in Dade County, Florida, by a tractor-trailer driven by a socially and financially irresponsible driver, Alexis de la Nuez, a resident of New Jersey (R. 1). Thereafter, Scott's father, Alonzo T. Raynor, in his capacity as guardian of the person and property of his son, brought suit against Mr. de la Nuez and his alleged employer, Checkmate Truck Brokerage, Inc. (R. **1).** Both defendants appeared and filed answers to the complaint (R. **11, 13).** Mr. de la Nuez then refused to cooperate with his counsel in any way and simply disappeared, resulting in the withdrawal of his counsel (R. **29,** 36).

The plaintiff thereafter filed an amended complaint which joined two additional defendants: (1) Equilease Corporation, which was alleged to be the owner/lessor of the tractor-trailer, which had allegedly been leased to Mr. de la Nuez; and (2) Gilberto Garay, who was also alleged to be a possible owner of the vehicle (R. **54).** Equilease appeared and filed an answer (R. 66). Mr. Garay's whereabouts could not be ascertained and the plaintiff was therefore unable to obtain his appearance in the lawsuit (R. **73).** Checkmate subsequently obtained a summary final judgment in its favor upon a demonstration that Mr. de la Nuez was not its employee at the time of the accident (R. **37,** 80).

As a practical matter, therefore, the only defendant remaining in the lawsuit at that point was Equilease, the alleged owner/lessor of the vehicle which caused Scott's injuries, whose liability rested upon its vicarious liability for the negligence of Mr. de la Nuez under Florida's "dangerous instrumentality **doctrine".**[1/] Neither Mr. Raynor nor

---

[1/] Although the lease agreement between Equilease and Mr. de la Nuez was executed in New York, and therefore governed by New York law, we conceded below that, because of Florida's conflict of law rules, Florida law governs the issue of Equilease's vicarious liability for negligent operation of the vehicle in Florida.

Equilease were ever able to determine if Mr. de la Nuez had liability insurance, and all the evidence points to a conclusion that he did not (R. **206-11, 227-28, 287-90, 310-12).** And, although the lease agreement between Equilease and Mr. de la Nuez required that he maintain liability insurance on the tractor-trailer, Equilease conceded on the record that it did not bother to enforce this provision (R. **216-17, 253-54, 276-77).** Instead, Equilease simply maintained its own policy of insurance on the vehicle (R. **290-91).**

At the time Equilease was joined in the suit, it appeared to be thoroughly settled in Florida that an owner/lessor was subject to vicarious liability under the "dangerous instrumentality doctrine" as a matter of public policy, and Equilease did not contend otherwise. Instead, it moved for summary judgment in its favor on the sole ground that it had sold the tractor-trailer to Mr. de la Nuez and Mr. Garay in **1983,** and was therefore not its owner at the time of the accident (R. **91).** The plaintiff also moved for summary judgment on the issue of ownership (and defended against Equilease's motion), on the ground that the contract by which Equilease delivered possession of the vehicle to Mr. de la Nuez and Mr. Garay was in fact and law a lease agreement, and that Equilease was therefore the owner/lessor of the vehicle at the time of the accident (R. **106).** The lease agreement itself, which was for a period of **49** months, is in the record as PX. **13-23** to the deposition of Mr. Polizzi at R. 320 *et seq.*

The trial court granted Equilease's motion and entered a summary final judgment in its favor -- holding that the transaction was, as a matter of law, a sale rather than a lease, and that Equilease was therefore not the owner of the tractor-trailer at the time of the accident (R. **943).** The judgment was appealed to the District Court of Appeal, Third District (R. **941).** Our initial brief addressed the only question decided by the trial court. It was our position that there was abundant competent evidence in the record which would at least support a finding of fact that the vehicle was owned by Equilease and leased (not sold) to Mr. de la Nuez (not the least of which was the lease agreement itself, which declared Equilease to be the owner); that Equilease therefore did not

shoulder its burden of demonstrating conclusively, and as a matter of law, that it was not the owner of the vehicle at the time of the accident; and that the trial court erred in entering summary final judgment in Equilease's favor as a result.

After our initial brief was filed, but before Equilease filed its answer brief, the Second District decided ***Peny v.*** G.M.A.C. ***Leasing Cop.***, 549 So.2d 680 (Fla. 2nd DCA 1989), ***review denied,*** 558 So.2d 18 (Fla. 1990). Although the issue in that case was the constitutionality of the legislature's 1986 modification of the "dangerous instrumentality doctrine" where long-term leases are concerned, the ***Peny*** Court had to determine whether long-term lessors were liable under the doctrine prior to 1986 in order to resolve that question -- and it announced (for the first time ever in the history of the law of Florida) that they were not.[2]

The bulk of Equilease's answer brief was devoted to the issue of "sale vs. lease". However, the briefs two concluding paragraphs advanced the following "right for the wrong reason" argument:

> The Second District recently indicated in ***Peny v. G.M.A.C. Leasing Cop.***, 549 So.2d 680 (Fla. 2d DCA 1989) that at the time the cause of action accrued in this case, a long-term lessor, like a conditional vendor, did not have "a sufficient ownership interest [in the leased vehicle] for the purpose of the dangerous instrumentality doctrine." Id at 682. Thus, under ***Peny,*** the order appealed from should be affirmed, even if this Court were to accept all of Plaintiffs contentions.

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[2] The statute at issue in Peny was §324.021(9)(b), Fla. Stat. (1986 Supp.), effective July 1, 1986, which appears to modify Florida's "dangerous instrumentality doctrine" in circumstances where an owner/lessor has leased a vehicle for a term of one year or longer, and the lessee has complied with the minimum liability insurance requirements of the statute. This statute is inapplicable to the instant case for several reasons. First, Equilease did not contend that the statute could permissibly be applied retroactively to the instant suit, which arose out of an accident occurring in 1985. Second, such a contention would run afoul of the Constitution in any event. ***Frothingham v. Jabe Tile*** *Corp.*, 14 FLW 5 (Cir. Ct. Dec. 6, 1988). ***See Kaisner v. Kolb,*** 543 So.2d 732 (Fla. 1989). Third, even if the statute could permissibly be applied retroactively, Equilease did not provide any proof below that Mr. de la Nuez had complied with the minimum liability insurance requirements of the statute (and the evidence points to a conclusion that he did not).

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> Equilease acknowledges that the *Peny* decision may conflict with decisions from this and other of the district courts of appeal. In the event that this Court should decide to follow *Perry,* or in the event that decision is upheld by the Florida Supreme Court, Equilease would rely on *Peny* as an additional basis for affirmance of the summary final judgment.

(Answer brief of appellee, pp. 25-26).

Before our reply brief was filed, the Second District also decided Kiaemer *v. General Motors Acceptance Cop.,* 556 So.2d 431 (Fla. 2nd DCA 1989), which squarely holds that, prior to 1986, owner/lessors leasing their vehicles under long-term leases were not liable under Florida's "dangerous instrumentality doctrine". The bulk of our reply brief was therefore devoted to a demonstration that both *Peny* and *Kiaemer* were wrongly decided. Unfortunately, nine days before oral argument of the case, another panel of the Third District filed a (presently unpublished) decision in *Roca v. Volkswagen Credit, Inc.,* case no. 89-1184 -- a simple "PER CURIAM. Affirmed.", citing *Palmer v.* R *S. Evans, Jacksonville, Inc.,* 81 So.2d 635 (Fla. 1955), and *Kiaemer,* supra.

Given the settled rule that one panel of a district court is bound by the decision of another panel of the same court, *Roca* foreordained the outcome in the instant case. We therefore concentrated our oral argument upon a demonstration that *Perry, Kiaemer,* and *Roca* were simply wrong; and we urged the panel to certify the issue to this Court if it agreed with us, but felt bound to follow *Roca.* The panel's decision, filed shortly thereafter, reads in its entirety as follows:

> The summary judgment in favor of the lessor is affirmed on authority and reasoning of *Perry v. G.M.A.C. Leasing Cop.,* 549 So.2d 680 (Fla. 2d DCA 1989) and *Kiaemer v. G.M.A.C. Leasing Corp.,* ____ So.2d ____ (Fla. 2d DCA Dec. 27, 1989), 15 F.L.W. D81. Because the question affects the rights of the motoring public, we certify our decision to the Supreme Court of Florida as one of great public importance pursuant to article V, sections 3(b) and (4) of the Florida Constitution.

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A copy of the decision is included in the appendix to this brief, as required.[3/]

From the face of the district court's decision, it would appear that Equilease's summary final judgment was affirmed on the sole ground advanced in its "right for the wrong reason" argument (that even if it were an owner/lessor, it was not liable under Florida's "dangerous instrumentality doctrine"), and that the district court did not reach the additional "sale vs. lease" issue. We will therefore assume that the "sale vs. lease" issue has not been resolved, and we will limit our argument here to the only issue decided below and certified to this Court. If that issue is resolved in our favor, the case should be remanded to the district court for disposition of the "sale vs. lease" issue.[4/]

[3/] The "snowball" effect of ***Perry*** and ***Kraemer*** has continued. They were followed again in the Third District in ***Tsiknakis v. Volvo Finance North America, Inc.***, 15 FLW D992 (Fla. 3rd DCA Apr. 17, 1990). Unlike the instant case, ***Tsiknakis*** involved a post-1986 incident governed by §324.021(9)(b), Fla. Stat. (1986 Supp.). Like the instant case, the ***Tsiknakis*** decision was certified to this Court.

The Fourth District has also addressed the issue in a post-1986 case governed by §324.021(9)(b), and has announced a result which is consistent with ***Perry,*** but inconsistent with Kiaemer. ***See Folmar v. Young,*** 15 FLW D366 (Fla. 4th DCA Feb. 6, 1990) (recognizing, contrary to ***Kraemer***, that long-term lessors were liable under Florida's "dangerous instrumentality doctrine" prior to 1986, but upholding constitutionality of §324.021(9)(b), consistent with ***Perry***, on the ground that it did not deprive the plaintiff of any remedy).

[4/] Unfortunately, our reading of the district court's decision is by no means certain. By describing Equilease as the "lessor" in its opinion, it is perhaps arguable that the district court decided the "sale vs. lease" issue in our favor as a preliminary matter. If that is what the district court meant, however, there would still be no reason for us to raise the issue here because we prevailed on it below -- so we must limit ourselves to the single issue certified to the Court on either reading of the district court's decision. To allay any concern which Equilease might have -- and to discourage it from dragging the complicated, fact-sensitive, UCC-governed "sale vs. lease" issue into this proceeding as a precautionary matter -- we hereby stipulate that, if there is to be a remand, the "sale vs. lease" issue is open for determination on remand.

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11.
ISSUE PRESENTED ON REVIEW

WHETHER, PRIOR TO THE ENACTMENT OF §324.021(9)(b), FLA. STAT. (1986 SUPP.), A VEHICLE OWNER LEASING A VEHICLE UNDER A LONG-TERM LEASE WAS VICARIOUSLY LIABLE FOR THE NEGLIGENT OPERATION OF THAT VEHICLE UNDER FLORIDAS "DANGEROUS INSTRUMENTALITY DOCTRINE.

111.
SUMMARY OF THE ARGUMENT

The question of whether an owner/lessor is vicariously liable under Florida's "dangerous instrumentality doctrine" has been answered several times by this Court -- in the affirmative, and without drawing any distinction whatsoever between long-term leases and short-term leases. To the contention that there should be no vicarious liability where "possession and control" have been relinquished to another, this Court has responded that "possession and control" is ultimately an irrelevant question -- that the "dangerous instrumentality doctrine" is simply a rule of public policy creating an additional layer of financial responsibility for the protection of the travelling public. Statutory developments have paralleled these developments in the decisional law. Section 627.7263 has long provided, without drawing any distinction whatsoever between long-term leases and short-term leases, that a lessor's liability insurance coverage is primary unless shifted to the lessee "in bold type on the face of the rental or lease agreement" -- and there are numerous decisions of this Court applying and enforcing that statute. Neither the statute nor this Court's decisions on the subject would make any sense at all unless the "dangerous instrumentality doctrine" applied to owner/lessors.

The first time that any distinction was ever drawn in Florida between long-term and short-term leases was after the accident at issue in the instant suit, when the legislature enacted §324.021(9)(b), **Fla.** Stat. (1986 Supp.), which excepts long-term lessors from liability *if* their lessees maintain substantial amounts of liability insurance. But that

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statute amounts to a legislative recognition that the "dangerous instrumentality doctrine" theretofore *did* apply to long-term leases, since all that the amendment does is create a narrow exception to that vicarious liability -- and actually leaves that liability fully in place where the lessee fails to purchase the insurance required to relieve the long-term lessor of liability under the doctrine. In sum, all of the sign posts on the pre-1986 legal landscape pointed in one well-established direction: motor vehicle owner/lessors *were* liable under Florida's "dangerous instrumentality doctrine", as a matter of public policy and to ensure financial responsibility for negligently caused injuries -- irrespective of the fact that they had relinquished "possession and control" of their vehicles to their lessees, and without regard to the length of their contractual arrangements to that end.

The Second District badly misread these sign posts in *Perry* and *Kraemer.* In fact, it appears that these sign posts were overlooked altogether. Instead, the Court inappropriately relied upon a decision of this Court involving a conditional *sale*; it erroneously concluded that the phrase "beneficial ownership" appearing in that decision meant the same thing as "possession and control"; and, thus confused, it decided that, unlike short-term leases, long-term leases transferred "beneficial ownership" to the lessee in the same way that conditional sale contracts do, and that long-term lessors should therefore escape liability under the doctrine for the same reasons that conditional vendors do.

As we shall explain in some detail in the argument which follows, this conclusion is bottomed upon a mistaken understanding of property law. A lease transfers only "possession and control"; it does not transfer "beneficial ownership". "Beneficial ownership" is a synonym for "equitable title" -- a claim to title which a law court will not enforce, but which will be enforced in a court of equity if a conditional vendor fails to deliver legal title upon the purchaser's compliance with the conditional sale contract. The distinction drawn by this Court's decisions has been between ownership and a "sale" of ownership, not between short-term relinquishment of "possession and control" and

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long-term relinquishment of "possession and control". Given the long line of authority represented by this Court's prior decisions and the parallel statutory developments, it ought to be clear that the analogy drawn in Perry and *Kraemer* between conditional sale contracts and long-term leases is an impermissible analogy which has no relevance to application of Florida's "dangerous instrumentality doctrine". Prior to the enactment of §324.021(9)(b), the "dangerous instrumentality doctrine" clearly applied to all owner/lessors, whether long-term or short-term.

We will also note in conclusion that, if Equilease's lessee had negligently caused Scott Raynor's devastating brain damage after July 1, 1986, Equilease *would* be vicariously liable under §324.021(9)(b) by virtue of the public policy codified in that statute -- because Mr. de la Nuez did not maintain any insurance coverage on the leased vehicle. The decision below therefore reaches the entirely anomalous conclusion that, because of an exception to the general rule enacted *after* the accident in suit -- an exception not even implicated by the facts in this case -- the general rule which now exists as a matter of statute did not exist for an accident which occurred within months prior to enactment of the exception. In our judgment, something has gone terribly wrong here.

If, as a matter of public policy, Equilease would have been Vicariously liable on the facts in this case if the accident in suit had occurred after July 1, 1986, and it clearly would have been, it makes no sense at all to relieve it of liability as a matter of public policy merely because the accident occurred in November, 1985 -- but that is exactly what the district court did below when it blindly followed the wrong turn taken in Perry and *Kraemer*. We respectfully submit that the district court's decision should be quashed.

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IV.
ARGUMENT

PRIOR TO THE ENACTMENT OF §324.021(9)(b), FLA. STAT, (1986 SUPP.), A VEHICLE OWNER LEASING A VEHICLE UNDER A LONG-TERM LEASE WAS VICARIOUSLY LIABLE FOR THE NEGLIGENT OPERATION OF THAT VEHICLE UNDER FLORIDA'S "DANGEROUS INSTRUMENTALITY DOCTRINE".

Our obvious burden here is to demonstrate that ***Perry*** and ***Kraemer*** were wrongly decided. We intend to do that. In our judgment, the Second District misread the road signs; took a wrong turn at a sign labelled "beneficial ownership" (the meaning of which it simply misunderstood); and ended up miles from the destination to which a correct reading of the decisional and statutory law should have directed it. That demonstration will make more sense if we first sketch out the map which the Second District misread.

1. The historical legal background.

We begin with ***Southern Cotton Oil Co. v. Anderson,*** 80 Fla. 441, 86 So. 629 (1920). In that case, 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. In that paradigm case at least, that has undeniably been the law in this State for the last 70 years. ***See Michalek v. Shumate,*** 524 So.2d 426 (Fla. **1988).**[5]

The question of whether an owner who has ***leased*** a vehicle to another is liable

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[5] We can find only one solid exception to this general rule in this Court's decsions. In ***Castillo v. Bickley,*** 363 So.2d 792 (Fla. 1978), the Court held that an owner was not liable under the "dangerous instrumentality doctrine" for the negligent operation of a vehicle by a repairman, where the service agency with which it had been left for repairs entrusted it to the repairman. The narrowness of this exception was emphasized in ***Michalk v. Shumate, supra,*** where the Court refused to extend it to negligent operation by a serviceman to whom the owner had directly entrusted it: "An owner who authorizes another to transport his car to a service agency remains in control thereof and ultimately liable for its negligent operation until it is delivered to an agency for service". 524 So.2d at 427. In a leasing arrangement, like the arrangement in issue in the instant case, the vehicle is entrusted directly to the lessee, so the rationale of *Michalek* would seem to apply, rather than the limited exception created in ***Castillo.***

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under the "dangerous instrumentality doctrine" was answered by this Court 43 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 travelling 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

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> 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; footnotes omitted).

The issue arose again in ***Roth v. Old Republic Insurance Co.***, 269 So.2d 3 (Ha. 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 (Ha. 1984). The Court held as follows:

> . . . In the instant case, the country club had rented the golf cart 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 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 March 29, 1990, in deciding an issue not implicated by the facts in the instant case, 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, 15 FLW S170 (Fla. Mar. 29, 1990) (emphasis supplied). Once again, the Court drew no distinction whatsoever between long-term leases and short-term leases. In addition, ***see Leaseco, Inc. v. Bartlett***, 257 So.2d 629 (Fla. 4th DCA

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1971), *cert. denied,* 262 So.2d 447 (Fla. 1972); *Avis Rent-A-Car System v. Garmas,* 440 So.2d 1311 (Fla. 3rd DCA 1983), *review denied,* 451 So.2d 848 (Fla 1984); P & H *Vehicle Rental & Leasing Corp. v. Gamer,* 416 So.2d *503* (Fla. 5th DCA 1982). *Cf. Folmar v. Young,* 15 **FLW** D366 (Fla. 4th DCA Feb. 6, 1990).

Statutory developments have paralleled the developments in the decisional law. For example, Chapter 319 of the Florida Statutes, which deals with Title Certificates, expressly lumps both short-term and long-term rentals under a ***single*** category, which it calls "for-hire vehicles". ***See*** §319.14(1)(b)(2), **Fla.** Stat. (1985). More to the point, 5627.7263, Fla. Stat., which was first enacted in 1976, declares (without drawing any distinction whatsoever between long-term and short-term leases) that a ***lessor's*** liability insurance coverage "shall be primary" unless shifted to the lessee "in bold type on the face of the rental or lease agreement". Of course, this statute would make no sense whatsoever if owner/lessors had no liability under the "dangerous instrumentality doctrine", because their insurers would have no liability to begin with -- primary, secondary, or otherwise.

Section 627.7263, Fla. Stat., has generated numerous decisions dealing with the question of whether a lessor's or a lessee's liability insurance coverage is primary -- each of which assumes as an essential predicate that the owner/lessor of an automobile *is* vicariously liable for its negligent operation, else there would have been no need even to consider the question. ***See, e. g., Allstate Insurance Co. v. Executive Car & Truck Leasing, Inc.,*** 494 So.2d 487 (Fla. 1986); ***Southeastern Fidelity Insurance Co. v. Cole,*** 493 So.2d 445 (Fla. 1986); ***Allstate Insurance*** Co. ***v. Fowler,*** 480 So.2d 1287 (Fla. 1985); ***Maryland Casualty Co. v. Reliance Insurance Co.,*** 478 So.2d 1068 (Fla. 1985); ***Insurance*** Co. of ***North America v. Avis Rent-A-Car System, Inc.,*** 348 So.2d 1149 (Fla. 1977); ***Canal Insurance Co. v. Continental Casualty Co.,*** 489 So.2d 136 (Fla. 2nd DCA 1986); *Patton v. Lindo's Rent-A-Car, Inc.,* 415 So.2d 43 (Fla. 2nd DCA 1982); P & H ***Vehicle Rental & Leasing Cop. v. Gamer,*** 416 So.2d *503* (Fla. 5th DCA 1982); ***Racecon, Inc. v. Mead,***

388 So.2d 266 (Fla. 5th DCA 1980). These cases also draw no distinction whatsoever between long-term leases and short-term leases.[6/]

The first time that any distinction was ever drawn in Florida between long-term and short-term leases was when the legislature enacted §324.021(9)(b), Fla. Stat. (1986 Supp.) (effective July 1, 1986) -- which appears to relieve long-term lessors of vicarious liability under the "dangerous instrumentality doctrine" *if* they ensure that their lessees carry insurance in amounts far exceeding the minimum coverages required of others (at least $100,000/$300,000 in liability insurance coverage and $50,000 in property damage coverage).[7/] In our judgment, the very enactment of this statute amounts to a legislative recognition that Florida's "dangerous instrumentality doctrine" theretofore ***did*** apply to long-term leases, since all that the amendment does is create a narrow exception to that vicarious liability -- and actually leaves that vicarious liability fully in place where the lessee fails to purchase the insurance required to relieve the long-term lessor of liability under the doctrine.

This Court's observation in ***Crenshaw Brothers Produce Co., Inc. v. Harper,*** 142 Fla. 27, 194 So. 353, 365 (1940), would therefore appear to be directly relevant here:

> But more than 20 years have passed since this Court announced the dangerous instrumentality doctrine as applied to motor vehicles and as yet no serious attempt has been made by the legislature to abolish that doctrine. None of the many amendments to the motor vehicle law of this State has impugned or questioned it. Indeed, it might be said that this

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[6/] In fact, it is clear from the facts in the Second District's 1986 decision in ***Canal Insurance Co. v. Continental Casualty Co., supra*** -- where the vehicle was leased in 1977 and the accident occurred in 1979 -- that even long-term lessors were liable for the negligent operation of their vehicles under Florida's "dangerous instrumentality doctrine" in the Second District (at least until ***Perry*** and ***Kraemer***).

[7/] We say "appears to relieve" because it is arguable that the statute simply provided for an additional layer of financial responsibility, and did not abrogate vicarious liability under the "dangerous instrumentality doctrine" with respect to long-term lessors. ***See Folmar v. Young,*** 15 FLW D366 (Fla. 4th DCA Feb. 6, 1990) (rejecting this reading of the statute). Because the statute does not apply to the instant case, that issue need not be resolved here, and we therefore take no position on it.

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> doctrine received express legislative approval when the legislature of 1937 granted exemption from the doctrine in the case of injuries to gratuitous guests or hitch hikers. See Chapter 18033, Acts of 1937.

Indeed, one might legitimately ask why the legislature bothered to create an exception at all in §324.021(9)(b), if the doctrine to which the exception was tailored did not previously exist.

In short and in sum, all of the sign posts on the pre-1986 legal landscape pointed in one well-established direction: motor vehicle owner/lessors *were* liable under Florida's "dangerous instrumentality doctrine", as a matter of public policy and to ensure financial responsibility for negligently caused injuries -- irrespective of the fact that they had relinquished "possession and control" of their vehicles to their lessees, and without regard to the length of their contractual arrangements to that end. And notwithstanding that the district court followed *Peny* and *Kraemer* below (as it was obliged to do in view of its earlier decision in *Roca*), it should be obvious from its certification to this Court that it concluded that those sign posts may have been badly misread.

2. The error of *Peny* and *Kraemer*.

It remains for us to explain where the Second District took its wrong turn in Peny and *Kraemer.* The primary question in *Peny* was whether §324.021(9)(b), Fla. Stat. (1986 Supp.) -- which appears to abrogate Florida's "dangerous instrumentality doctrine" in circumstances where an owner/lessor has leased a vehicle for a term of one year or longer, and the lessee has complied with the minimum liability insurance requirements of the statute -- violated Article I, 821 of the Florida Constitution by abolishing a theretofore existing cause of action against the owner/lessor. The Court held that it did not. In the process of resolving that question, the Court stated that it could find no authority for applying Florida's "dangerous instrumentality doctrine" to long-term leases prior to July 1, 1986, so it held that §324.021(9)(b) did not abolish a theretofore existing cause of action. Taking its cue from *Peny,* the *Kraemer* Court held in an action arising

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prior to July 1, 1986, that Florida's "dangerous instrumentality doctrine" was never applicable to long-term leases. The two decisions are sufficiently similar in reasoning that they can profitably be discussed together here.

It is noteworthy, we think, that the Second District was unable to find any Florida decision which had ever drawn a distinction between long-term leases and short-term leases.[8] Instead, it relied exclusively upon ***Palmer v.*** R ***S. Evans, Jacksonville, Inc.,*** 81 So.2d 635 (Fla. 1955), in which this Court held that ***conditional vendors*** transferring "beneficial ownership" to their conditional vendees and retaining only "naked legal title" as security are not liable under Florida's "dangerous instrumentality doctrine".[9] Reduced to their essentials, both ***Perry*** and ***Kraemer*** hold that, unlike short-term leases, long-term leases transfer "beneficial ownership" to the lessee in the same way that conditional sale contracts do, and that long-term lessors should therefore escape liability under Florida's "dangerous instrumentality doctrine" for the same reason that conditional vendors do.

With all due respect to the Second District, it overlooked this Court's emphasis in ***Palmer*** upon the fact that a ***sale*** was involved, and "that the sale had been completed before the accident in suit. 81 So.2d at 637. The Second District also overlooked a substantial amount of legal history and confused the principle of property law known as "beneficial ownership" with the quite separate concept of "possession and control". In

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[8] The only case drawing such a distinction which the Court cited was a trial-level decision of a federal district court sitting in the District of Columbia, in which the issue appears to have been resolved by statute: ***Lee v. Ford Motor Co.,*** 595 F. Supp. 1114 (D.D.C. 1984). However, the ***Lee*** decision represents a distinctly minority view. ***See generally,*** Annotation, ***Car Rental Regulation,*** 60 A.L.R.4th 784 (1988) (and later case service).

[9] ***Palmer*** is not alone in this conclusion. There are numerous additional decisions (which have long existed side by side with the owner/lessor cases upon which we have relied above) which relieve conditional ***sellers*** of vehicles from liability under the "dangerous instrumentality doctrine". ***See, e. g., McAfee v. Killingsworth,*** 98 So.2d 738 (Fla. 1957); ***Fletcher Motor Sales, Inc. v. Cooney,*** 158 Fla. 223, 27 So.2d 289 (1946); ***Cooney v. Jacksonville Transportation Authority,*** 530 So.2d 421 (Fla. 1st DCA 1988); ***Cox Motor Co. v. Faber,*** 113 So.2d 771 (Fla. 1st DCA 1959). ***Compare Escobar v. Bill Currie Ford, Inc.,*** 247 So.2d 311 (Fla. 1971); ***Metzel v. Robinson,*** 102 So.2d 385 (Fla. 1958).

fact, it erroneously equated the two quite different concepts, and reached an erroneous conclusion as a result.

A lease transfers *only* "possession and control". *See* Restatement (Second) of Property, **$1.2;** 3 ***Thompson on Real Property,*** **$1032,** p. **116 (1980** Ed.). **A** lease does ***not*** transfer "beneficial ownership". The phrase "beneficial ownership" is a term of art, a shorthand phrase for a far more complicated concept than mere "possession and control", and a phrase whose meaning depends upon centuries of legal history. "Beneficial ownership" is a synonym for "equitable ownership". Black's ***Law Dictionary,*** p. **142** (5th Ed. **1979).** "Beneficial ownership" is a claim to title which a law court will not enforce, but which will be enforced in a court of equity. The simplest example is a conditional sale contract -- like the conditional sale contract involved in ***Palmer,*** upon which ***Perry*** and ***Kraemer*** are anomalously bottomed -- in which the seller has promised to convey legal title to the purchaser at some future date. The purchaser obtains "beneficial ownership" of the property by virtue of that agreement, and if the seller fails to convey legal title as agreed, a court of equity will order specific performance in the purchaser's favor. That is, in essence, "beneficial ownership".

The point is explained in Cribbet, ***Principles of the Law of Property,*** pp. 18-19 (**1962** Ed.), as follows:

> . . . What is important here, is that certain parts of property law came to be administered in equity rather than in the common-law courts and another difficulty to ready understanding of property terminology arose. The rights and interests recognized by chancery were called equitable and so we have legal title and equitable title, legal rights and equitable rights.
>
> If either party to a written contract for the sale of an interest in land fails to carry out his bargain, equity will grant a decree for specific performance, i. e., force the vendor to deed the land to the purchaser and the latter to pay the purchase price. The only remedy at law is money damages for breach of contract and, since that is felt to be inadequate for a ***res*** so unique as land, equity asserts its extraordinary jurisdiction. The result is that the vendor has legal title until

> the deed conveying the interest in land is delivered to the purchaser but the purchaser is said to have equitable title just as soon as an enforceable contract for the sale of land is executed. This result arises from a maxim of the Court of Chancery, "Equity regards as done that which ought to be done." Since the vendor ought to convey the interest in land on performance by the purchaser, equity will treat the matter as if he had done so and give the buyer equitable title to the land.. . .

The point is also nicely explained in ***Cox Motor Co. v. Faber,*** 113 So.2d 771 (Fla. 1st DCA 1959), in which the Court explained the concept of "beneficial ownership" as we have explained it here; followed ***Palmer*** on similar facts; and observed that a conditional sale contract transferring "beneficial ownership" is not synonymous with a lease. In addition, ***see generally, Arko Enterprises, Inc. v. Wood,*** 185 So.2d 734 (Fla. 1st DCA 1966) (and decisions cited therein); ***Cain & Bultman, Inc. v. Miss Sam, Inc.,*** 409 So.2d 114 (Fla. 5th DCA 1982); ***Contella v. Contella,*** 15 FLW D776 (Fla. 5th DCA Mar. 22, 1990); 8A ***Thompson*** on ***Real Property,*** 54447 (1965 Ed.).

In contrast, a lease agreement transfers only "possession and control"; it creates no claim to ownership in the lessee which can be enforced in a court of equity, and it therefore does not create any "beneficial ownership" in the lessee. This point is nicely explained in In ***Re Ludlum Enterprises, Inc.,*** 510 F.2d 996, 999-1000 (5th Cir. 1975) (construing Florida law), as follows:

> . . . It is . . . clear to us that a lease does not involve [the type of condition on title to the property represented by a conditional sale contract], nor does it involve a reversion, remainder or any other similar future interest, legal or equitable. [Citations omitted]. The lessor owns the *only* legal and equitable title in the property, subject only to the lessee's right to possession for the lease term. This right to possession does not give the lessee any legal or equitable title in the property subject to the lease, and under no circumstances can the lessee himself cut off the lessor's interest in the property. A lease simply is not an interest of the same character as conditional title. . . .

For the sake of emphasis, we repeat: a lease "does not give the lessee any legal or

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equitable [i. e., beneficial] title in the property subject to the lease . . ."; it gives the lessee only a "right of possession".

This explanation of the legal effect of a lease under Florida law is clearly accurate. ***See, e. g., W. E. Johnson Equipment Co., Inc. v. United Airlines, Inc.***, *238* So.2d 98, 100 (Fla. 1970) (" . . . a sale transfers ownership and a lease or bailment merely transfers possession and anticipates future return of the chattel to the owner"); ***Burnette v. Thomas,*** 349 So.2d 1208 (Fla. 2nd DCA 1977) (lease transfers only possessory interest to lessee; lessor retains all ownership interests); 5 Fla. Jur.2d, ***Bailments,*** 92 ("In a bailment, possession of the property bailed is severed from the ownership, the bailor retaining general ownership and the bailee receiving lawful possession or custody for the specific purpose of the bailment."). ***See generally,*** 8 C.J.S., ***Bailments***, §§28-29 (and numerous decisions cited therein). In short, a lease, by ***definition,*** does ***not*** transfer any beneficial ownership to the lessee; it transfers ***only*** possession, and leaves both legal and beneficial ownership squarely in the owner/lessor. And in that respect, of course, there is no difference whatsoever between a long-term lease and a short-term lease.[10/]

It therefore ought to be clear that the analogy drawn in ***Perry*** and ***Kraemer*** between conditional sale contracts and long-term leases is an impermissible analogy, and that the Second District's conclusion that long-term leases transfer "beneficial ownership" is simply wrong. The conclusion is also dangerous -- because, if ***Perry*** and ***Kiuemer*** are correct that a long-term lease transfers "beneficial ownership" (i. e., equitable title) to a lessee, then long-term lessors no longer own the entire "bundle of sticks" which constitute

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[10/] Since the lease involved here is governed by New York law, we should mention that New York law is the same as Florida law on this point; a lease transfers only possession and control, not beneficial ownership. ***See Feder v. Caliguira,*** 8 N.Y.2d 400, 208 N.Y.S.2d 970, 171 N.E.2d 316 (1960); ***DuBay v. Trans-America Insurance Co.,*** 75 App. Div.2d 312, 429 N.Y.S.2d 449, ***appeal denied,*** 51 N.Y.2d 709, 435 N.Y.S.2d 1025, 417 N.E.2d 96 (1980). It is probably also worth mentioning that owner/lessors are Vicariously liable under the "dangerous instrumentality doctrine" as a matter of New York law. ***See*** *Rutherford v. Gray Line, Inc., 615* F.2d 944 (2nd Cir. 1980).

title, and they no longer have a complete enough ownership interest in their property to be able to sell it to another (subject to the lease, of course) during the term of the lease. (The availability of that option is, of course, one of the reasons for choosing to lease rather than sell in the first place.) We do not believe that the Peny and *Kraemer* Court meant to give long-term lessees an ownership interest in their leased vehicles, but that is exactly what it did -- and we respectfully submit that, once this fundamental flaw in the cornerstone of *Perry* and *Kraemer* is recognized, then the rest of the edifice created in those two decisions should fall of its own unsupported weight.

Neither is it appropriate to declare long-term leases to be nothing more than mere "alternative financing arrangements", and thereby treat them as synonymous with secured sales and conditional sales. Although long-term leases are financing arrangements in one sense, they are clearly not straightforward "alternatives" to a financed sale because they are different in kind in several respects. For example, there are tax advantages to leasing which are unavailable in a secured sale or conditional sale. Leasing also cleanly avoids creditors' claims against the vehicle if the lessee ends up in a bankruptcy court. Leasing also enables the lessor to sell the used vehicle at the end of the term for additional profit. Most importantly, by inserting contractual limitations and requirements in its lease, a lessor *can* control the operation of its lessee's vehicle in a number of ways which a seller cannot. For example, to ensure financial responsibility, a lessor can require a lessee to maintain liability insurance on the vehicle as a condition of the lease (a condition which Equilease did impose in the instant case, but then failed to enforce).

Since the commercial world recognizes separate utilities in the two types of transactions, there is no good reason for the courts to declare them equal -- and the analogy which the *Peny* and *Kraemer* Court inferred between conditional sales and long-terms leases (by misunderstanding the meaning of the phrase "beneficial ownership") ought to be recognized as an impermissible analogy. *See Levitz Furniture Co. v.*

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Continental Equities, Inc., 411 So.2d 221, 225 (Ha. 3rd DCA), *review denied,* 419 So.2d 1196 (Ha. 1982) (notwithstanding that, in the words of the dissent, a "net lease" is "essentially a sophisticated financing technique intended to make the tenant the owner of the property", where the parties structured the transaction as a lease rather than a sale, lessor was bound by landlord-tenant law).

3. A concluding argument.

We are left then with the long line of Florida decisions which squarely holds that the owner of a vehicle leased to another *is* vicariously liable for negligent operation of the vehicle under Florida's "dangerous instrumentality doctrine". None of those cases draw any distinction whatsoever between short-term rentals and long-term rentals, because neither type of rental transfers "beneficial ownership" to the lessee. Neither do any of those decisions support the Second District's conclusion that the transfer of total "possession and control" (a phrase which the Court erroneously understood to be synonymous with "beneficial ownership") is reason to relieve a lessor of liability under the doctrine. The line which has been drawn by the cases is between ownership and the "sale" of ownership, not between short-term relinquishment of "possession and control" and long-term reliquishment of "possession and control". A lease is not a sale, and it therefore falls on the liability side of the line.

In fact, as we have previously noted, when the argument was made in ***Susco Car Rental System of Florida v. Leonard,*** 112 So.2d 832 (Fla. 1959), that liability should cease with relinquishment of "possession and control", this Court squarely rejected it. 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" does not rest on such distinctions; instead, it is simply a rule of public policy creating an additional layer of financial responsibility for the protection of the travelling public. That simply has to be the case, because no owner who entrusts a vehicle to another has any "possession or control" of that vehicle once the keys are handed over.

For example, an owner/parent who turns the car keys over to a teenager for a Saturday night date has neither possession nor control of the vehicle at that point, yet he or she remains liable for its negligent operation. A corporation which entrusts a vehicle to an employee has neither possession nor control of the vehicle (and cannot possess or control it in any event, because it is a fictional entity which exists only on paper), yet it remains liable for its negligent operation. A short-term lessor who rents a vehicle for a day or a week has neither possession nor control of that vehicle for that period, yet (according to ***Peny*** and ***Gamer)*** it remains liable for its negligent operation. And when a long-term lessor turns over the keys, it has relinquished possession and control no differently than the owner/parent, the corporation, or the short-term lessor -- yet (according to ***Peny*** and ***Gamer*** at least) it is immune from liability for negligent operation of the vehicle. Clearly, there is no ***principled*** difference between these four cases where "possession and control" is concerned.

Moreover, even if there were a difference, where does a short-term lease end and a long-term lease begin? Does liability under the "dangerous instrumentality doctrine" cease if the lease is for a week, or does it cease if the lease is for a month? Six months, perhaps -- or maybe a year? Neither ***Perry*** nor ***Gamer*** answer that question, and it ought to be clear that no logical answer to the question exists. Most respectfully, there is no principled dividing line between short-term leases and long-term leases where "possession and control" are concerned, so "possession and control" simply cannot be the touchstone for liability under the "dangerous instrumentality doctrine". And that, in essence, is what this Court announced in ***Susco Car Rental,*** when it declared that "possession and control" was an ultimately irrelevant question, and that the "dangerous instrumentality doctrine" is simply a rule of public policy creating an additional layer of financial responsibility for the protection of the travelling public -- a public policy which

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is nullified by the contrary conclusion in Perry and ***Kraemer***.[11/]

There are several additional areas of the law with which Perry and Kiaemer simply cannot be squared. For example, as noted previously, there are numerous decisions dealing with the question of whether a lessor's or a lessee's liability insurance coverage is primary or secondary, each of which was necessitated by the existence of 5627.7263, Fla. Stat. -- which declares (without drawing any distinction whatsoever between long-term and short-term leases) that a lessor's liability insurance coverage "shall be primary" unless shifted to the lessee "in bold type on the face of the rental or lease agreement". Of course, if Perry and *Kraemer* are correct that long-term lessors have never been vicariously liable for the negligence of their lessees, then this statute amounts to a nullity, and the numerous decisions construing it were mere academic exercises. We respectfully submit that it is Perry and ***Kraemer*** which are the flies in the soup.

Perry and Kiaemer also make no sense when read against §324.021(9)(b), Fla. Stat. (1986 Supp.), in which the legislature appears to have created an exception to Vicarious liability under the "dangerous instrumentality doctrine" for long-term lessors, but left that vicarious liability fully in place where the lessee fails to purchase the insurance required to relieve the long-term lessor of liability under the doctrine. If Perry and ***Kiaemer*** are correct, there was absolutely no need for this statute, since long-term essors were never liable under the doctrine in the first place. In addition, if Perry and ***Kiaemer*** are correct, then enactment of this statute in 1986 had the peculiar effect of ***creating*** vicarious liability under the "dangerous instrumentality doctrine" for long-term lessors

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[11/] Of course, just because no logical or principled line can be drawn between short-term leases and long-term leases does not mean that no arbitrary line can be drawn between them. The legislature drew such a line in §324.021(9)(b), when it exempted leases of one year or longer from the "dangerous instrumentality doctrine" (but with appropriate provision for financial responsibility). The issue before the Court is what the law was before that arbitrary line was drawn, however, and we respectfully submit that the Court should be guided by logic and principle when deciding that issue, rather than arbitrariness.

(whose lessees do not carry the required insurance), for the first time ever in Florida law, notwithstanding that, on its face, the statute purports to create only an exception to that doctrine. In our judgment, because it makes no sense to read the amended statute that way, ***Peny*** and ***Kraemer*** remain the flies in the soup.

We will not belabor the point. We ask simply that the conclusions announced in *Perry* and *Kraemer* be considered carefully in light of the well-settled principles of the law of property which we have now brought to this Court's attention. We urge the Court to recognize that, unlike a conditional *sale* contract, a long-term lease does not transfer "beneficial ownership" to the lessee; that the Second District's reliance upon ***Palmer v.*** R ***S. Evans, Jacksonville, Inc.,*** 81 So.2d 635 (Fla. 1955), for a contrary conclusion was misplaced; and that, prior to the enactment of §324.021(9)(b), Fla. Stat. (1986 Supp.), the public policy of the State of Florida was to provide an additional layer of financial responsibility for the protection of the travelling public by imposing **vicarious** liability under the "dangerous instrumentality doctrine" upon ***all*** owner/lessors, whether short-term or long-term.

We should also note in conclusion that, if Equilease's lessee had negligently caused Scott Raynor's devastating brain damage after July 1, 1986, Equilease would be vicariously liable under §324.021(9)(b) by virtue of the public policy codified in that statute -- because Mr. de la Nuez did not maintain any insurance coverage on the leased vehicle. The decision below therefore reaches the entirely anomalous conclusion that, because of an ***exception*** to the general rule enacted *after* the accident in suit -- an exception not even implicated by the facts in the case -- the general rule which now exists as a matter of statute did not exist for an accident which occurred within months prior to enactment of the exception. In our judgment, something has gone terribly wrong here. If, as a matter of public policy, Equilease would have been vicariously liable on the facts in this case if the accident in suit had occurred after July 1, 1986, and it clearly would have been, it makes no sense at all to relieve it of liability as a

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matter of public policy merely because the accident occurred in November, 1985 -- but that is exactly what the district court did below when it blindly followed the wrong turn taken in *Perry* and *Kraemer.*

There is also the matter of Equilease's insurer to consider. As it stands now, Equilease's insurer accepted substantial premiums for liability coverage which was entirely unnecessary (according to Peny and *Kraemer* at least), and it has therefore reaped a considerable windfall at the expense of Scott Raynor, who was intended to be a beneficiary of that liability coverage. In effect, the wrong turn taken in Peny and *Kraemer* amounts to a "Windfall Profits Act" for insurance companies, and the Second District's decisions therefore ought not be considered the last word on the subject. In our judgment, and if the doctrine of stare *decisis* has any vitality at all, the numerous sign posts erected by this Court in the last 70 years point to only one conclusion here. As this Court has held over and over again, without drawing any distinction whatsoever between long-term leases and short-term leases, motor vehicle owner/lessors *are* liable under Florida's "dangerous instrumentality doctrine" -- as a matter of public policy and to ensure financial responsibility in the operation of commercial leasing enterprises, to the end that brain-damaged victims of socially and financially irresponsible lessees do not go uncompensated for the destruction of their lives by negligently operated, commercially leased vehicles. We respectfully submit that the district court's decision should be quashed.

V.
CONCLUSION

It is respectfully submitted that the district court erred in concluding that Florida's "dangerous instrumentality doctrine" is inapplicable to owner/lessors leasing vehicles under long-term leases; that the district court's decision should be quashed; and that the case should be remanded to the district court for disposition of the presently unresolved "sale vs. lease" issue.

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VI.
CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 10th day of May, 1990, to: George C. Bender, Esq., Bender, Bender & Chandler, 5915 Ponce de Leon Blvd., #62, Coral Gables, Fla. 33146; and to Ralph O. Anderson, Esq., Daniels & Hicks, P.A., 100 North Biscayne Blvd, Suite 2400, Miami, Florida 33132, Attorneys for Appellees.

Respectfully submitted,

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