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 GILBERTO GARAY,

Respondents.

RESPONDENT EQUILEASE CORPORATION'S BRIEF ON THE MERITS

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I.

INTRODUCTION

Petitioner, Alonzo T. Raynor, as Guardian of the person and property of Scott Thomas Raynor, brought this action to recover for personal injuries Scott allegedly sustained when his automobile collided with a tractor-trailer rig operated by Alexis de la Nuez. (R. 1).[1/] Petitioner alleged in his amended complaint that Respondent Equilease Corporation was the owner/lessor of the tractor and therefore was vicariously liable for the operator's alleged negligence under the "dangerous instrumentality doctrine." (R. 55).

The trial court entered summary final judgment in favor of Equilease on the ground that the transaction in which de la Nuez acquired possession of the tractor was in fact and in law a sale and not a true lease. (R. 943). The Court of Appeal, Third District, affirmed the trial court's summary judgment ruling on the authority of Perry v. G.M.A.C. Leasing Corp., 549 So.2d 680 (Fla. 2d DCA 1989), rev. denied, 558 So.2d 18 (Fla. 1990) and Kraemer v. G.M.A.C. Leasing Corp., 556 So.2d 431 (Fla. 2d DCA 1989). The Third District certified its decision to this Court as one of great public importance because the question involved

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1/ "R." refers to the record on appeal; "R.A." refers to Respondent's Appendix; "Amicus FADA" refers to Amicus Curiae Florida Automobile Dealers Association; "Amicus FMVLG" refers to Amicus Curiae Florida Motor Vehicle Leasing Group; and "A.A." refers to the appendix to Amicus FMVLG's brief on the merits. All emphasis has been supplied by counsel unless otherwise noted.

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affects the rights of the motoring public. (R.A. 1-2).

Petitioner contends here that the Third District's decision should be quashed because, in his view, Perry and Kraemer are nothing more than unsupported "flies in the soup" which conflict with every decision from this Court involving owner/lessor liability under a long-term lease. Throughout his brief, Petitioner condemns the Second District for having "misread" or totally "overlooked" the applicable law, and for having "confused" even the most elementary principles of property law. After paying his respects to the Second District, Petitioner next chastises Florida's legislature for the "arbitrary" classification set forth in Fla. Stat. §324.021(9) (b), enacted in 1986. (Petitioner's Brief, at 7, 9, 23).

Equilease submits that it is Petitioner, not the Second District who is confused, and were he operating a motor vehicle instead of submitting a brief he surely would be pulled over and cited for improperly driving at night with sunglasses on and no lights. First of all, although the correctness of the Third District's decision must be measured against the record in this case, Petitioner is careful to avoid most if not all of the relevant facts. For example, Petitioner neglects to point out that title documents from no less than three states show that Equilease transferred title to the subject vehicle before Scott Raynor was injured. Petitioner also fails to note that Equilease's transferees were given and in fact exercised an option to buy the vehicle before the accident occurred. This probably explains why

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Petitioner does not even mention, let alone discuss, Section 324.021(9)(a), which was enacted in 1955 and provides that a conditional lessor is not the owner of a motor vehicle where the conditional lessee is given the right to immediate possession and an option to purchase.

In short, the case which Petitioner has chosen to present here is not the case which was decided by the Third District or the trial court. Equilease accordingly submits the following statement of the case and facts.

II.

STATEMENT OF THE CASE AND FACTS

1. Facts showing that Equilease relinquished legal and beneficial ownership of the tractor before the accident giving rise to this suit.

a. Legal title

Equilease was engaged in the business of selling and leasing various types of commercial equipment, including semi-tractor rigs, prior to 1983. (R. 128, 132). In January of that year, Equilease management decided to confine its new business to providing financing for the purchase of vehicles. At about the same time freight haulers Alex de la Nuez and Gilberto Garay expressed interest in acquiring a Kenworth tractor which was owned by Equilease and located at its Eagle, Pennsylvania, facility. (R. 142-143).[2/]

2/ Equilease had purchased the tractor new from Kenworth of Tampa, Inc., in December, 1978, as shown by the State of

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On July 8, **1983,** Garay and de la Nuez entered into an agreement with Equilease which is styled "Automotive Lease." (R.A. 5-10). At the same time, Garay and de la Nuez also executed a number of other documents, including a power of attorney authorizing an Equilease employee to act on their behalf in connection with applying for a certificate of title or registration for the tractor. (R.A. 11).

On July 11, **1983** -- three days after Garay and de la Nuez signed the agreement -- Equilease endorsed the Transfer of Title section of the Florida Certificate of Title over to them. Garay and de la Nuez are listed as the purchaser of the tractor and Equilease is listed as holding a lien on the vehicle. (R.A. 4).

Garay and de la Nuez subsequently applied in the State of Nebraska for a certificate of title to the tractor. (R.A. 12).[3/] The application names Equilease as the tractor's previous owner, shows Equilease as holding a lien on the vehicle under a security agreement, and identifies a "previous Florida title" as evidence of Garay and de la Nuez's ownership. (R.A. 12).

On July **29, 1983,** the State of Nebraska issued Garay and de la Nuez a Certificate of Title to the tractor. The certificate states the pair owned the tractor, and that Equilease held

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Florida title documents. (R.A. 3).

3/ The Nebraska address shown on the application for Garay and de la Nuez is the same as the address shown on the Florida Transfer of Title previously endorsed by Equilease. (R.A. 4, 12).

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the first and only lien against it. The certificate also indicates that Garay and de la Nuez acquired title from Equilease on July 11, 1983, when Equilease endorsed the Transfer of Title section of the Florida Certificate of Title. In addition, the Nebraska Certificate of Title refers by number to the Florida certificate. (R.A. 13-15).

Garay and de la Nuez, on October 21, 1983, submitted an application for Certificate of Ownership in the State of New Jersey for the tractor. (R.A. 16). This application again shows the tractor as belongng to Garay and de la Nuez with Equilease listed as the lienholder. (R.A. 16). That same day, the State of New Jersey registered the tractor in the names of Garay and de la Nuez and also issued a Certificate of Ownership of Motor Vehicle. (R.A. 17-18).

The New Jersey Vehicle Registration and Certificate Of Ownership lists Equilease as a secured party. (R.A. 17-18).

This was the state of the legal title to the Kenworth tractor on November 23, 1985, when the accident in which Scott Raynor was injured occurred. About three years later, Garay and de la Nuez sold the vehicle to a third party and transferred ownership to him under a New Jersey Assignment of Certificate of Ownership. (R.A. 19).

b. The transaction between Equilease and the transferees

As noted above, Garay and de la Nuez entered into the agreement to acquire the tractor from Equilease on July 11, 1983.

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The agreement is styled "Automotive Lease," and the document (as well as other Equilease interna records) describes the transaction as a "lease" and frequently refers to Garay and de la Nuez as "lessees" and Equilease as "lessor." (R.A. 5-10).

Equilease executive John Pollizi testified on deposition that company policy was changed on January 1, 1983 (before the subject transaction) to no longer lease equipment, and that the transaction involving Garay and de la Nuez was a sale of the tractor. (R. 171, 183, 221, 236, 252, 277). The tractor accordingly was titled in their names and the purchase option, which will be discussed below, was prepaid. (R. 277). Mr. Pollizi further testified that the business forms which Equilease used after company policy was changed simply were never revised. (R. 277). Mr. Pollizi's testimony is the only testimony on the issue of whether the transaction was intended to be a sale rather than a lease.

The term of the agreement between Garay, de la Nuez, and Equilease was for a period of 49 months. (R.A. 8). Garay and de la Nuez were required under the agreement to make a down payment of $4,500, followed by 16 monthly payments of $1,504.50, 16 monthly payments of $1,296.40, and 16 monthly payments of $844. (R.A. 8).

The evidence shows that the tractor was valued at $45,917 when the agreement was entered into, and that a part of the monthly payments were used to pay for insurance against physical damage to the vehicle. (R.A. 9, 20). The evidence further

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establishes that the ''gross rental" to be paid by Garay and de la Nuez during the term of the agreement (the total of "rental" payments less sums used for property damage coverage) was $57,764. **(R.A.** 20).

Contemporaneous with their execution of the agreement, Garay and de la Nuez paid Equilease $4,500 to exercise the option to purchase the vehicle for that amount. (R.A. 10). Although the option payment could be refunded in the event Garay and de la Nuez later decided to return the tractor to Equilease, the evidence shows that they never elected to rescind the prepaid option. In fact, they ultimately paid the amounts due under the agreement and sold the tractor to a third party in 1988. **(R.A.** 19).

The agreement also contained many other provisions which the courts have consistently held as establishing a sale, rather than a lease, regardless of the labels used by the parties to the disputed transaction.

For example, paragraph 5 of the agreement required Garay and de la Nuez to repair and maintain the tractor at their own expense; paragraph 6 required them to pay for all fuel, oil, lubrication, and other materials necessary to operate the tractor; paragraph 8 required them to procure and maintain at their own expense all licenses, license plates, permits, or registrations necessary for the operation of the tractor; paragraph 9 required them to pay any and all taxes or charges imposed with respect to the tractor; under paragraph 12, Garay and de la Nuez

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agreed to maintain liability insurance coverage on the tractor, to hold Equilease harmless from all claims arising out of the operation of the tractor, to bear all risks of loss, theft, destruction, or damage to the tractor, and they also assumed all risks and liability for personal injury or death and damage to property arising out of the operation of the tractor: paragraph 14 required Garay and de la Nuez to make the monthly payments under the agreement even if the tractor was damaged or being repaired. (R.A. 5-7). In addition, Schedule A-1 to the agreement provided for the acceleration of all payments and authorized Equilease to repossess and sell the tractor with the net proceeds of the sale to be applied to the balance due in the event Garay and de la Nuez defaulted in making payments. (R.A. 8).

The evidence also is undisputed that Garay and de la Nuez had complete possession and control over the subject tractor from 1983, when they first acquired the vehicle and it was titled in their names, until they sold it three years after the accident in which Scott Raynor was injured. (R. 317).

2. Proceedings below

Petitioner's original complaint named only two defendants: de la Nuez, the driver of the tractor, and Checkmate Truck Brokerage, Inc., his alleged employer. (R. 1).

Petitioner later added Equilease and Garay as defendants. (R. 54). Petitioner alleged in the amended complaint that de la Nuez and/or Garay and/or Equilease were legal and/or beneficial owners of the subject tractor. (R. 55). Petitioner

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sought recovery from Garay and Equilease under Florida's dangerous instrumentality doctrine. (R. 56). 4/

Equilease thereafter moved for summary judgment, contending that the undisputed facts demonstrated that the transaction was in fact a "sale" of the tractor and not a true lease, regardless of the terms used in the transactional documents. Equilease accordingly was entitled to judgment as a matter of law because it was neither the legal nor beneficial owner of the tractor at the time of the accident. (R. 91-105, 927-937).

The trial court agreed with Equilease and entered a summary final judgment in its favor. (R. 943). Petitioner appealed this ruling to the Third District Court of Appeal. (R. 941).

Petitioner contended in the Third District that judgment was improperly entered in favor of Equilease because fact questions remained on the sale vs. lease issue. According to Petitioner, Equilease failed to conclusively prove that the transaction, when measured against New York law (which the parties agreed was controlling on this aspect of the case), was not a true lease. Specifically, Petitioner urged that the references

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4/ Checkmate ultimately was granted summary judgment on the ground that de la Nuez was not its employee at the time of the accident. (R. 37, 80). Although de la Nuez, who resided in New Jersey when suit was filed, obtained counsel and filed an answer, his lawyer was granted leave to withdraw because of de la Nuez's refusal to cooperate in his defense. (R. 29, 36). Garay, who also resided in New Jersey, was never served with the amended complaint and never appeared in this cause. (R. 73-74).

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in the agreement and other documents to "lease," "lessor," "lessees," etc., and various provisions of the agreement, raised a genuine issue of material fact concerning the proper characterization of the transaction.

Equilease defended the judgment in its favor on three grounds. First, Equilease contended that the record conclusively established that the transaction transferred both legal and beneficial ownership to de la Nuez and Garay.[5/] Second, Equilease urged that the transaction, notwithstanding the labels which were used, unquestionably was a sale under New York law. And third, Equilease argued that even if Petitioner were right all along, and Equilease was merely a long-term owner/lessor, the summary judgment ruling nevertheless was proper and should be affirmed on the authority of Perry v. G.M.A.C. Leasing Corp., 549 So.2d 680 (Fla. 2d DCA 1989), rev. denied, 558 So.2d 18 (Fla. 1990) and Kraemer v. General Motors Acceptance Corp., 556 So.2d 431 (Fla. 2d DCA 1989).

The Third District affirmed the summary judgment in a per curiam opinion citing Perry and Kraemer as authority. The court also certified its decision to this Court as a case of great public importance on the ground that the question affects

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5/ In this connection, Equilease pointed out that section 324.021(9)(a), which was enacted thirty years before the accident in which Scott Raynor was injured, provided that the conditional lessee, and not the conditional lessor, was the "Owner" of a motor vehicle where the lessee is entitled to immediate possession of the vehicle and has the right to purchase it upon performance of the terms stated in the agreement.

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the rights of the motoring public. (R.A. 1-2).

III.

ISSUE PRESENTED FOR REVIEW

Respondent would restate the issue presented for review as follows:

WHETHER THE THIRD DISTRICT COURT OF *AP*-PEAL PROPERLY AFFIRMED THE SUMMARY FINAL JUDGMENT IN FAVOR OF EQUILEASE.

IV.

SUMMARY OF ARGUMENT

There are two separate grounds which call for affirmance of the summary final judgment in favor of Equilease. The first is that the undisputed facts of this case show that under New York law (which the parties agree is controlling) the transaction between Equilease and Garay and de la Nuez was in fact a sale, notwithstanding its denomination as a "lease." These facts are as follows: an option to purchase the tractor was prepaid, the purchase option amount was nominal, the payments exceeded the value of the equipment, Garay and de la Nuez acquired an equity interest in the equipment, they were saddled with all the incidents and headaches of ownership, and they bore the risk of damage and loss. Additionally, title to the tractor was transferred from Equilease and issued to Garay and de la Nuez. Therefore, Garay and de la Nuez were the owners of the vehicle -- not Equilease. Accordingly, Equilease is not vicariously liable for its operation.

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Even assuming that Equilease was merely a long-term lessor, the summary judgment in its favor should still be affirmed because Equilease did not retain an ownership interest in the tractor sufficient to sustain vicarious liability under the dangerous instrumentality doctrine. This Court has long required that a party have authority and control over a vehicle before vicarious liability for its improper operation would be imposed. This requirement has also been part of the statutory law of Florida since 1955. Section 324.021(9)(a) expressly exempts lessors from the operation of the dangerous instrumentality doctrine when a lessee acquires immediate possession of the vehicle and has the right to purchase it. Since it is without dispute that these conditions were met here, the summary judgment in favor of Equilease should be affirmed.

V.

ARGUMENT

Petitioner limits his challenge to the decision on review to an attack on Perry and Kraemer, cited by the Third District, because the Third District did not reach the sale vs. lease issue. Having thus limited his argument, Petitioner assumes throughout his brief that Equilease is a garden-variety long-term lessor for purposes of vicarious liability under the dangerous instrumentality doctrine. Although Equilease agrees that the sale vs. lease issue was not decided by the Third District, Equilease does not agree that this Court's review should be limited to only those issues which Petitioner now chooses to

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raise.

In the event jurisdiction over this cause is accepted, this Court is authorized to hear all issues which have been preserved for review. Freund v. State, 520 So.2d 556, 557 n.2 (Fla. 1988). Equilease submits that the Third District's decision was manifestly proper, assuming Petitioner's contention that Equilease is merely a long-term lessor is correct. Equilease also submits, however, that the Court need not reach this issue here because the Third District's decision can be approved on the basis of the alternative arguments which Equilease has previously advanced in support of the summary final judgment in its favor. It is to these arguments that we now turn.

I. THE "AUTOMOTIVE LEASE" AND THE OTHER DOCUMENTS CONCLUSIVELY ESTABLISH A "SALE" AND NOT A "LEASE" OF THE TRACTOR.

Petitioner and Equilease agree that Florida law controls on the issue of Equilease's potential liability under Florida's dangerous instrumentality doctrine. The parties further agree that New York law, pursuant to the choice of law clause found in the agreement under which de la Nuez and Garay acquired the tractor, controls on the issue of whether the transactional documents establish a conditional sale of the tractor rather than a true lease. Furthermore, Petitioner has conceded that Equilease is entitled to summary judgment if the transaction was really a conditional sale.

The courts applying New York law have consistently held on similar facts that the disputed transaction was not a "lease"

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at all but rather a "sale" with the agreement creating a security interest in the so-called "lessor." The Third District's decision affirming the summary judgment therefore should not be disturbed, putting aside the title documents from three states which show that Equilease sold the tractor and retained only a lien or security interest.

A. New York law applied to the undisputed facts

Section 1-201(37) of New York's Uniform Commercial Code provides in part:

> Whether a lease is intended as security is to be determined by the facts of each case: however, (a) the inclusion of an option to purchase does not of itself make the lease one intended for security, and (b) an agreement that upon compliance with the terms of the lease the lessee shall become the owner of the property for no additional consideration or for a nominal consideration does make the lease one intended for security.

62f McKinney's Consolidated Laws of New York Ann. (UCC), §1-201(37).[6/] The New York courts, in keeping with the plain language of this provision, have indicated that a transaction automatically qualifies as a conditional sale where the agreement provides that the "lessee" has the option to become the owner of the property for nominal additional consideration. See Guardsman Lease Plan, Inc. v. Gibraltar Transmission Corp., 494 N.Y.S.2d 59, 63 (Sup. Ct. 1985). A fortiori, where, as in the present

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6/ Petitioner conceded below that New York's Section 1-201(37) applied to the sale vs. lease issue.

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case, the purchase option is prepaid by the "lessees", and thus no additional consideration has to be paid upon expiration of the agreement's term, the transaction must also qualify as a matter of law as a conditional sale agreement and not a true lease. See Brandes v. Pettibone Corp., 360 N.Y.S.2d 814 (Sup. Ct. 1974).

In any case, the purchase option amount clearly is "nominal consideration" within the meaning of §1-201(37), regardless of when it was to be paid.

The courts applying New York law compare the purchase option price with the total sum to be paid as "rental" to determine whether the "nominal consideration" test has been met. E.g., Credit Car Leasing Corp. v. DeCresenzo, 525 N.Y.S.2d 492 (N.Y. City Civ. Ct. 1988); In the Matter of the General Assignment for the Benefit of Creditors of Merkel, Inc., 258 N.Y.S.2d 118 (Sup. Ct. 1965); Matthews v. CTI Container Transport International, Inc., 871 F.2d 270, 275 (2d Cir. 1989) (applying New York law); G.A. Giancaterin & Assoc. v. Cottrone Development Co. (In re Giancaterin & Assocs.), 9 B.R. 26 (Bkrtcy. W.D. N.Y. 1981) (same); National Equipment Rental v. Priority Electronics Corp., 435 F. Supp. 236, 238 (E.D. N.Y. 1977) (same); In re Oak Manufacturing, Inc., 6 U.C.C. Rep. Service, 1273 (Bkrtcy. S.D. N.Y. 1969) (same). See also In the Matter of Herold Radio & Electronics Corp., 218 F. Supp. 284 (S.D. N.Y. 1963), aff'd, 327 F.2d 564 (2d Cir. 1964) (same).

The purchase option amount ($4,500) which was paid by Garay and de la Nuez represents only 7.79% of the total amount

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($57,764) which they were obligated to pay to Equilease under the agreement. The courts have consistently held that so-called "lease" agreements with similar purchase option percentages constituted conditional sale contracts and not leases as a matter of law under New York law. See In the Matter of the General Assignment for the Benefit of Creditors of Merkel, Inc., supra, 258 N.Y.S.2d 118, 119 ("lease" held to be conditional sale as a matter of law where purchase option price of $800 represented "somewhat less than 10% of the total monthly rental"); In re Oak Manufacturing, Inc., supra, 6 U.C.C. Rep. Service 1273 ("lease" held to be conditional sale where purchase option price was 9% of total rentals due under the contract); National Equipment Rental, supra, 435 F.Supp. at 238-239 (court cites decisions holding that purchase option amounts of 7.7%, 8.5%, and 9% were held to be nominal).

Garay and de la Nuez were given, and in fact exercised, the option to purchase the tractor for nominal consideration under New York law. That fact alone establishes that the transaction was a sale of the vehicle as a matter of law with the "Automotive Lease" serving as security for the payments which Garay and de la Nuez agreed to make to Equilease.7/

7/ Petitioner will no doubt argue in reply that the absence of evidence of the fair market value of the tractor upon expiration of the agreement's term precludes a determination that the option price was "nominal" as a matter of law. The short answer to this contention is that under New York law, which is controlling, the option price is compared to the total rentals for purposes of the "nominal consideration" test. See citations in the text.

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Quite apart from having met the nominal consideration test of Section 1-201(37), various other provisions of the agreement also confirm that the transaction at issue was a sale and not a true lease as a matter of law.

The New York courts have repeatedly held that it is necessary to look beyond the language used to describe a transaction and its participants to determine whether a transaction is in fact a sale and not a true lease. DeCresenzo, 525 N.Y.S.2d at 495 (quoting Matter of Tillery, 571 F.2d 1361, 1364-1365 (5th Cir. 1978)). "The form of the transaction may not be exalted over the substance of the transaction." DeCresenzo, 525 N.Y.S.2d at 495. Thus, where "the lessor retains title [unlike the present case] and a security interest, the fact that the lessee is saddled with both the risks and headaches of ownership suggests that the arrangement is in fact a sale and not a true lease." Barco Auto Leasing Corp. v. PSI Cosmetics, Inc., 478 N.Y.S.2d 505, 511 (N.Y. City Civ. Ct. 1984) (holding as a matter of law in summary judgment proceeding that agreement denominated "an agreement of lease only" was really intended for security under §1-201(37)).

The "Automotive Lease" agreement between Garay, de la Nuez, and Equilease contains numerous provisions which the courts applying New York law have found controlling on the issue of whether a transaction -- regardless of its style, the labels used by the parties, and other indicia of a lease arrangement -- was really a sale. For example, Garay and de la Nuez were required

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to maintain liability and property insurance coverage on the tractor. The cases are legion holding that: "The fact that the lessee is required to maintain insurance coverage upon leased equipment indicates that the transaction is a secured transaction and not a lease." Guardsman Lease, 494 N.Y.S.2d at 63 (quoting International Paper Credit Corp. v. Columbia Wax Products Co., 102 Misc.2d 738, 424 N.Y.S.2d 827 (Sup. Ct.), rev'd on other grounds, 79 A.D.2d 1039, 434 N.Y.S.2d 270 (N.Y.A.D. 1980)); Barco, 478 N.Y.S.2d at 510; Matter of Tillery, 571 F.2d 1361; DeCresenzo, 525 N.Y.S.2d at 496 (granting motion to dismiss); Matthews, 871 F.2d at 275 (applying New York law); In Re G.A. Giancaterin & Associates, Inc., 9 B.R. 26 (Bkrtcy. W.D. N.Y. (1981) (applying New York law and granting motion for summary judgment).

The total rentals ($57,764) which Garay and de la Nuez paid to Equilease exceeded the value of the tractor ($45,719). The courts have also held that "the fact that the rentals required to be paid by the lessee exceed the purchase price is an indication that the transaction is a sale and that the lease creates a secur ty interest." International Paper Credit Corp., 424 N.Y.S.2d at 830; De Cresenzo, 525 N.Y.S.2d at 64 (see pg # above, one of these is wrong) (granting motion to dismiss); Matthews, 871 F.2d at 276 (applying New York law); National Equipment Rental, 435 F.Supp. at 239 (same).

Garay and de la Nuez also were responsible for all repairs to the tractor and for the replacement of parts; they bore

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the risk of damage or loss to the vehicle; and they agreed to indemnify Equilease for all claims arising out of the operation of the vehicle. These provisions too have been held to show "an ownership interest in the vehicle." DeCresenzo, 525 N.Y.S.2d at 496 (granting motion to dismiss); Barco, 478 N.Y.S.2d at 510; Matthews, 871 F.2d at 276 (applying New York law).

Garay and de la Nuez also were obligated under the "Automotive Lease" to pay all license, permit, and registration costs, as well as any and all taxes or charges imposed with respect to the tractor. Again, "such expenses are usually borne by owners of motor vehicles." DeCresenzo, 525 N.Y.S.2d at 496 (granting motion to dismiss).

Schedule A-1 to the "Automotive Lease" further provides:

> Upon default under any provision of this lease, the Lessee shall be liable for all arrears of rent, if any, the expense of retaking possession and the removal of the Vehicle(s), court costs, attorneys fees ... in addition to the balance of the rentals provided for herein ... less the net proceeds of the sale of said Vehicle(s) .... The said sums shall immediately become due and payable ... as liquidated damages and not a penalty. (R.A. 8).

The courts have consistently held that similar provisions in so-called "leases" clearly establish that the transaction was in reality a form of secured financing to facilitate the "lessee's" ownership of the equipment. See Guardsman Lease, 494 N.Y.S.2d at 64; International Paper Credit Corp., 424 N.Y.S.2d at 830; Matthews, 871 F.2d at 276 (applying New York law). As the court stated in International Paper Credit Corp., 424 N.Y.S.2d at 830:

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> The conclusion is inescapable that the lease created a security interest when the entire balance would be accelerated upon default and the lessee would be liable for any deficiency on the sale of the property.

Accord, Equilease Corp. v. AAA Machine Co. (In re AAA Machine Co.), 30 B.R. 323 (Bkrtcy. S.D. Fla. 1983) (where the "lease" provides that in the event of default the lessor may sell equipment and recover any deficiency from lessee "the parties are deemed as a matter of law to have intended the lease as security").

Equilease submits that the foregoing provisions of the "Automotive Lease," when measured against New York law, required the trial court to find that the subject transaction was in fact a conditional sale of the vehicle and not a true lease, as urged by Petitioner in the lower courts.

B. Petitioner's cases distinguishable

Throughout these proceedings, Petitioner has cited a few New York cases which supposedly support his position that the transaction was really a true lease. These cases clearly are distinguishable and, if anything, help, rather than harm, Equilease's position.

The lease agreements in In the Matter of the General Assignment for the Benefit of Creditors, 46 Misc.2d 270, 259 N.Y.S.2d 514 (Sup. Ct. 1965) did not give the lessees an option to purchase the equipment. The court thus held:

> An analysis of the provisions of the documents before us reveals that none of

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> them possesses the vital characteristics that would transmute them from a lease into a conditional sale.
>
> There is no right or obligation on the part of the lessee to acquire title. These instruments are therefore distinguishable from other forms of so-called leases involving purchase options which use the term lease to hide what is in fact a conditional sales agreement.

Id. at 516. In the present case, Garay and de la Nuez were given, and had actually exercised, an option to purchase the tractor.

Rebhun v. Executive Equipment Corp., 394 N.Y.S.2d 792 (Sup. Ct. 1977) also is off point. The court there held that the purchase option amount of $2,600 was not nominal when compared to the $13,000 capital cost of the vehicle or the $14,256 in rentals due under the agreement. The purchase option amount in that case was 18.24% of the gross rentals. Here, the prepaid purchase option is only 7.79% of the gross rentals which, as was established above, is clearly a nominal sum under New York law. Furthermore, there is no indication whatever in Rebhun that the lease agreement contained any of the other provisions which are present here, and which the court's have held establish a sale, not a true lease, even where no purchase option at all is involved.

Nor is Petrolane Northeast Gas Service v. State Tax Commission, 435 N.Y.S.2d 187 (App. Div. 1981), appeal denied, 420 N.E.2d 981 (N.Y. 1981) support for Petitioner's position. The court in Petrolane affirmed the state tax commission's determina-

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tion that a transaction was a lease, not a sale, where (1) title at all times remained in the lessor's name; (2) the rental payments were not equal to or even related to the purchase price or fair market value of the leased goods; (3) upon termination of the lease, possession was unconditionally to revert to the lessor; and (4) the lessees were not given an option to purchase the goods. Significantly, the court noted that the absence of a purchase option was "a most persuasive factor." Id. at 189. In contrast to Petrolane, here title was in the names of Garay and de la Nuez, the rental payments exceeded the value of the tractor, and Garay and de la Nuez exercised the option to purchase the vehicle and never returned the tractor to Equilease.8/

Equilease submits that there is no case from any jurisdiction, let alone New York, which has held a transaction to be a "lease" where title was transferred into the "lessee's" name: an option to purchase the equipment was prepaid by the "lessee"; the purchase option amount was nominal: the "rental" payments ex-

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8/ Petitioner will presumably again rely on the financing statements which were filed in New Jersey and stated that the filing was intended to represent a true lease. Petitioner's reliance on these statements also is totally misplaced. First, as was shown above, the substance of a transaction, not the descriptions which the parties place on it, is controlling on the issue of whether the transaction is properly characterized as a sale. Second, N.J.S.A. 12A:9-409 (Supp. 1988), which is identical to UCC §9-408, expressly provides that the filing of a financing statement which uses terms such as "lessor," "lessee", etc. is not to be considered by the court in determining whether a transaction is a sale rather than the lease it purports to be. See Western Enterprises, Inc. v. Arctic Office Machines, Inc., 667 P.2d 1232 (Alaska 1983).

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ceeded the value of the equipment; the "lessee" acquired an equity interest in the equipment; the "lessee" was saddled with all the incidents and headaches of ownership; the "lessee" bore the risk of damage and loss, etc. Summary final judgment for Equilease accordingly was properly entered, and the Third District correctly affirmed the trial court's ruling.

11. EQUILEASE DID NOT HAVE *AN* OWNERSHIP INTEREST IN THE TRACTOR SUFFICIENT TO IMPOSE LIABILITY FOR ITS ALLEGED NEGLIGENT OPERATION UNDER THE DANGEROUS INSTRUMENTALITY DOCTRINE.

Equilease submits that the transaction with Garay and de la Nuez unquestionably was in fact and in law a sale of the tractor. If this Court disagrees, or declines to decide the sale vs. lease issue, the Third District's decision nevertheless was correct and should be approved. For the reasons which follow,[9/] the record conclusively establishes that Equilease did not have an ownership interest in the tractor sufficient to sustain vicarious liability under the dangerous instrumentality doctrine.

Petitioner's attack on the Third District's decision rests on two basic arguments. First, Petitioner contends that the Third District in the present case, and the Second District in Perry and Kraemer, erroneously concluded that "possession and control" of a motor vehicle was relevant to a determination of vicarious liability under the dangerous instrumentality doctrine.

9/ Equilease also adopts and incorporates by reference herein the additional arguments made by Amicus FMVLG and Amicus FADA.

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According to Petitioner, this reasoning results from a misunderstanding of Palmer v. R. s. Evans, Jacksonville, Inc., 81 So.2d 635 (Fla. 1955), and flies in the face of numerous other decisions from this Court, most notably Southern Cotton Oil Co. v. Anderson, 80 Fla. 441, 86 So. 629 (Fla. 1920) and Susco Car Rental System of Florida v. Leonard, 112 So.2d 832 (Fla. 1959). Second, Petitioner contends that prior to the enactment of subparagraph (b) of Section 324.021(9), Fla. Stat., in 1986, no exemption from vicarious liability existed for lessors of motor vehicles under any circumstances. As will be shown, Petitioner is simply wrong on both scores.

A. "Authority and control" over the motor vehicle are relevant to liability under the dangerous instrumentality doctrine.

It is worth noting at the outset that the same assault on Perry (and therefore Kraemer, according to Petitioner's own analysis) which Petitioner presses here has already been presented to this Court. The petitioner in Perry sought discretionary review from the Second District's decision on the ground, among others, that it conflicted with this Court's decisions in Anderson and Susco, and the Fifth District's decision in Racecon, Inc. v. Meade, 388 So.2d 266 (Fla. 5th DCA 1980) (also relied upon by Petitioner here). (A.A. 20-30). This Court denied discretionary review on January 24, 1990. Thus, Petitioner's contention that Perry, Kraerner, and the Third District's decision are the proverbial "flies in the soup" and conflict with a legion of prior decisions from this Court is but a rehash of the argu-

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ment which obviously did not impress this Court. (Petitioner's Brief, at 23).

In any event, Petitioner badly misreads precedent in urging that "authority and control" has nothing whatsoever to do with "beneficial ownership" and the imposition of vicarious liability under the dangerous instrumentality doctrine. For example, in Anderson v. Southern Cotton Oil Co., 73 Fla. 432, 74 So. 975 (Fla. 1917), the case in which this Court first imposed liability upon a motor vehicle owner on the basis of the dangerous instrumentality doctrine, the Court pointed out:

> The liability grows out of the obligation of the owner to have the vehicle ... properly operated when it is by his authority on the public highways.

Id. at 978. Clearly, an owner must have a certain degree of control over the instrumentality before he can be held responsible for not ensuring that it was "properly operated."

This Court again recognized in Palmer, 81 So.2d 637, that control over the motor vehicle must be present for liability to attach under the dangerous instrumentality doctrine. In that case, the Court held that a conditional vendor of a motor vehicle was not liable for the negligence of the conditional vendee, even though the sales contract was not completed until after the accident and the conditional vendor was to retain title until all payments were made. The Court reasoned as follows:

> But the rationale of our cases which impose tort liability upon the owner of an automobile operated by another ... would not be served by extending the doctrine to one who holds mere naked

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> legal title as security for payment of the purchase price. In such a title-holder, the authority over the use of the vehicle which reposes in the beneficial owner is absent.

Id. at 637. See also Cox Motor Co. v. Faber, 113 So.2d 771, 773 (Fla. 1st DCA **1959)** ("beneficial ownership" for dangerous instrumentality purposes is determined by the party having control and authority over the use of the automobile).

More recently, this Court plainly indicated that "authority" and "control" over a motor vehicle's operation served to limit application of the dangerous instrumentality doctrine. In Castillo **v.** Bickley, **363** So.2d **792** (Fla. 1978), the Court approved the decision of the Third District which held that an owner of an automobile who entrusts it to a repair shop "and has no knowledge of or control over the operation of the vehicle during that time" was not liable to a third party who was injured as a result of the negligent operation of the vehicle by the repairman. Id. at **792.** In reaching this conclusion, the Court expressly receded from Susco Car Rental System of Florida, Inc., 112 So.2d **832,** Petitioner's premier case, reasoning:

> An automobile owner is generally able to select the persons to whom a vehicle may be entrusted for general use, but he rarely has authority and control over the operation or use of the vehicle when it is turned over to a firm in the business of service and repair.

Id. at **793.** This Court accordingly held:

> The owner of a motor vehicle is not liable for injuries caused by the negligence of the repairman or serviceman with whom the vehicle has been left, so long

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> as the owner does not exercise control over the injury - causing operation of the vehicle ... and is not otherwise negligent.

Id.

From the foregoing, Petitioner's contention that authority and control over a vehicle are, in the final analysis, irrelevant concerns under the dangerous instrumentality doctrine is entirely untenable.

B. Section 324.021(9)(a) enacted in 1955, exempts certain lessors from vicarious liability.

Petitioner's analysis also is based on the faulty premise that no legislative exemption from vicarious liability is applicable in the present case.

As noted above, the Court in Palmer held that a conditional vendor is not liable under the dangerous instrumentality doctrine where he retains title as security for payment of the purchase price. Under such circumstances, the vendor has relinquished beneficial ownership of the vehicle and accordingly is exempt from tort liability. Section 324.021(9) (a) was enacted the same year that Palmer was decided, and provides as follows:

> OWNER; OWNER/LESSOR. --
> Owner. -- A person who holds the legal title of a motor vehicle; or, in the event a motor vehicle is the subject of an agreement for the conditional sale or lease thereof with the right of purchase upon performance of the conditions stated in the agreement and with an immediate right of possession vested in the conditional vendee or lessee, or in the event a mortgagor of a vehicle is entitled to possession, then such conditional vendee or lessee or mortgagor shall be deemed

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> the owner for the purpose of this chapter.

Clearly, this statute is the legislative embodiment of the rationale behind the Palmer decision. Thus, for the last thirty-five years, a lessor was not considered the owner of a motor vehicle for purposes of financial responsibility and the dangerous instrumentality doctrine where, as in this case, the lessee (1) acquires immediate possession of the vehicle, and (2) also has the right to purchase it.

Petitioner does not even mention Section 324.021(9)(a) in his brief. It is anticipated, however, that he will take the position that this provision does nothing more than require a lessee with a purchase option to comply with the financial responsibility law: and has no effect on the conditional lessor's liability under the dangerous instrumentality doctrine. This position is totally without merit.

First of all, the legislature has expressly stated that the definition of "owner" found in the financial responsibility law limits the class of owner/lessors who are potentially liable under the dangerous instrumentality doctrine. Section 324.011 declares the legislature's intent in enacting Chapter 324:

> Purpose of Chapter -- It is the intent of this Chapter to recognize the existing privilege to own or operate a motor vehicle on the public streets and highways of this state when such vehicles are used with due consideration for others and their property, and to promote safety and provide financial security requirements for such owners or operators whose responsibility it is to recompense others for injury to person or property caused

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by the operator of a motor vehicle.

Section 324.011, Fla. Stat. (1985). The underscored portion of this statute clearly establishes that by excluding conditional lessors from the definition of "owner" where the conditional lessee acquires immediate possession of the vehicle and an option to buy it, the conditional lessee alone is the "owner" of the vehicle for purposes of financial responsibility and tort liability.

Although unnecessary in light of the legislature's unmistakeable intent, decisions from this Court point to the same conclusion. In Anderson, as noted above, this Court held for the first time that an owner of an automobile was vicariously liable under the dangerous instrumentality doctrine for the alleged negligence of the operator. The following passage from that decision clearly shows that the Court was influenced by the statutory treatment of automobile "owners":

> The lawmaking power of the state, in recognition of the many and great dangers incident to their use, has enacted special regulations for the running of automobiles ....
>
> These regulations relate primarily to duties that are imposed upon the owners of such vehicles. While these regulations do not expressly enlarge the common law liabilities of employers for the negligence of the employees, the statute does impose upon the owners of automobiles and motor vehicles duties and obligations not put upon the owners of other vehicles ... and specifically requires licenses, numbering, etc. for purposes of identifying the owner, and enacts that automobiles shall not be so operated on a public highway "as to endanger the life

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> or limb of any person.''
>
> It is also enacted that in case of accident the name and address of the owner shall be given on request.
>
> The owners of automobiles in this state are bound to observe statutory regulations of their use and assume liability commensurate with the dangers to which the owners or their agents subject others in using the automobiles on the public highways.
>
> * * *
>
> The liability grows out of the obligation of the owner to have the vehicle ... properly operated when it is by his authority on the public highway.
>
> In view of the dangers incident to the operation of automobiles and of the duties and obligations of the owners of motor vehicles under the statutes of the state, it could not be said that on the facts of this case no question was made for the jury to decide.

Id. at 978. This Court, therefore, imposed vicarious liability on the owner of the motor vehicle in large measure because of the legislature's decision (and the intent behind that decision) to saddle "owners" of motor vehicles with sundry duties and obligations.

This Court also looked to the statutes when it decided Palmer, 81 So.2d 635. The Court noted there that the rationale of the cases imposing liability under the dangerous instrumentality doctrine would not be served by extending the doctrine to a party who holds title only as security for payment for the purchase price. The Court further stated:

> In such a titleholder, the authority over

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> the use of the vehicle which reposes in the beneficial owner is absent. Probably because of this fact, the term "owner" is defined in F.S. §317.74(20), F.S.A., to mean only the conditional vendee, in the case of a vehicle which is the subject of an ordinary agreement for conditional sale.

Id. at 637.

The controlling factor in Palmer was that the operator of the vehicle had acquired beneficial ownership before the accident occurred. Significantly, the Court, once again, made specific reference to the traffic statutes in reaching its conclusion. The statute referred to in Palmer, section 317.74(20), is now found at section 316.003(27), and is identical to section 324.021(9)(a).

Susco Car Rental System of Florida, 112 So.2d 832, perhaps the case on which Petitioner relies most heavily, also is instructive. In that case, this Court held that an automobile rental company was liable under the dangerous instrumentality doctrine for the negligence of the renter's permittee, even though the rental contract prohibited anyone other than the renter from driving the vehicle. In holding the company liable,[10/] the Court stated:

> It has been the legislative view that the public interest requires more than regulation of operation, and that safety

---

10/ Pursuant to the contract, the renter was obligated to return the vehicle "within 1-2 days" Leonard v. Susco Car Rental System of Florida, 103 So.2d 243, 246 n.9 (1958), aff'd, 112 So.2d 832 (Fla. 1959), and there is no indication that a purchase option was involved.

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> 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.[17/]
>
> [17/] Chanter 324, Florida Statutes, F.S.A.

Id. at 837. This Court's determination in Susco to impose liability under the dangerous instrumentality doctrine manifestly was guided by the financial responsibility law set forth in Chapter 324 and its definition of "owner." In the words of Petitioner, the Court "stuck to its guns," and once more looked to the statutes to craft the contours of the dangerous instrumentality doctrine

From the foregoing, it should be abundantly clear that Florida's legislature elected in 1955 to exempt from vicarious liability under the dangerous instrumentality doctrine conditional lessors whose lessees are given immediate possession of a motor vehicle and the option to purchase it.[11/] Further, this Court has traditionally looked to the legislature's public policy pronouncements when addressing the scope of the dangerous instrumentality doctrine which, of course, is a rule founded on public policy.

[11/] With the enactment of subparagraph (b) of section 324.021(9) in 1986, the legislature simply extended the immunity from vicarious liability to another class of lessors -- i.e., certain long-term lessors whose lessees meet insurance requirements.

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In the present case, the legislature has decided that where a lessee is given immediate possession of a motor vehicle and the option to purchase it then he, and he alone, is the vehicle's "owner." Equilease submits, respectfully, that it is not the office of the courts to disturb that judgment.

C. The Third District properly concluded that Equilease was not liable under the dangerous instrumentality doctrine.

As we have shown, this Court has looked to the degree of authority and control an "owner" has over a motor vehicle when determining whether to impose liability under the dangerous instrumentality doctrine, and the legislature long ago codified this principle when it enacted section 324.021(9)(a). The Third District's decision accordingly should be approved given the nature of the transaction between Equilease and the "lessees," de la Nuez and Garay.

Garay and de la Nuez were required by the agreement to repair and maintain the tractor at their own expense; to pay for all fuel and material necessary to operate the tractor; to acquire and pay for all licenses, license plates, permits or registrations necessary to operate the tractor; to pay for all taxes and charges imposed with respect to the tractor; to maintain insurance coverage on the tractor and to hold Equilease harmless from all claims arising out of its use; to bear all risks of loss, theft, destruction, or damage to the tractor; to comply with all state inspection requirements; to assume all risks and liabilities for injuries or death arising out of the operation of

the tractor; etc. (R.A. 5-10). In the event of default in making payments, Equilease was authorized to accelerate the payments due under the agreement, sell the tractor, and apply the proceeds to the balance due. (R.A. 8). Further, the "lessees" exercised complete control over the tractor and the uses to which it was put during the 49-month term of the agreement.

Equilease submits that there is no practical difference between the conditional vendor in Palmer, who was held not vicariously liable, and Equilease. In addition, Garay and de la Nuez acquired immediate possession of the tractor and had the option (which they in fact exercised) to purchase it. Accordingly, Garay and de la Nuez, and not Equilease, were the "owners" of the vehicle under section 324.021(9)(a). In short, the transaction here unquestionably transferred authority, control and sufficient other incidents of ownership so as to relieve Equilease from vicarious liability under the dangerous instrumentality doctrine. The Third District, accordingly, properly affirmed the summary final judgment in favor of Equilease.

For similar reasons, the Second District correctly ruled in favor of the long-term lessors in Perry and Kraerner. The issue in Perry was the constitutionality of section 324.021(9)(b), which was enacted in 1986. The court held that the statute passed constitutional muster, discussed Palmer, and also observed that the parameters of a common law right to sue a long-term lessor under the facts of that case had not been fully established. Perry thus is consistent with the holding in Palmer and

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section 324.021(9)(a).

In Kraemer, the Second District held that the lessor was not liable under the dangerous instrumentality doctrine where the lease was for four years, the lessees were given an option to purchase the vehicle, and the lessees were obligated to maintain the vehicle, obtain the tag and registration, pay all taxes, and obtain liability insurance. The court's holding was eminently correct under Palmer, and entirely in accord with section 324.021(9)(a).

Courts from other jurisdictions have directly considered statutory provisions virtually identical to section 324.021(9)(a), and have concluded, consistent with Palmer, Kraemer, and the Third District here, that conditional lessors were exempted from vicarious liability for the lessee's negligent operation of the leased vehicle. For example, the court in Moore v. Ford Motor Credit Co., 420 N.W.2d 577 (Mich. App. 1988), recently held that the lessor was not vicariously liable as the "owner" of the vehicle where the lease agreement gave the lessee immediate possession and the right to purchase. The statute at issue in that case defined "owner" as follows:

> "'Owner' means: (a) Any person, firm, association or corporation renting a motor vehicle or having the exclusive use thereof, under a lease or otherwise, for a period of greater than 30 days.
>
> "(b) A person who holds the legal title of a vehicle or in the event a vehicle is the subject of an agreement for the conditional sale or lease thereof with the right of purchase upon performance of the conditions stated in the agreement and

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> with an immediate right of possession vested in the conditional vendee or lessee or in the event a mortqaqor of a vehicle is entitled to possession, then such conditional vendee or lessee or mortgagor shall be deemed the owner."

Id. at 578. The court squarely rejected the contention that both the conditional lessor and lessee were "owners" for purposes of liability under the statute:

> We believe that the second part of subsection (b) [which begins "or in the event"] qualifies the first part, so that the legal title holder of a vehicle subject to a conditional lease is not an owner for purposes of the civil liability statute. In other words, [the section] excepts from its definition of "owner" a lessor such as defendant, and deems the lessee ... the owner. (emphasis in original).

Id. at 579. The court also aptly observed:

> If the Legislature had not intended to except lessors such as defendant from the definition of "owner" then the second part of subsection (b) would not have been necessary. Every word of a statute should be given meaning and no word should be treated as surplusage or rendered negatory if at all possible.

Id.

Lee v. Ford Motor Co., 595 F. Supp. 1114 (D.D.C. 1984) also is on point. There, the district court concluded that where a long-term lease was involved in which the lessor retained only minimal control over the vehicle's use and operation, the lessor was not liable as an "owner" under the District of Columbia's Motor Vehicle Safety Responsibility Act. The Court reasoned:

> It is undisputed that Ford lacked "dominion and control" over the vehicle in

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> question. The car had been provided to [the lessee] by Ford while one of the vehicles under a long-term lease between the parties was being repaired ...
>
> Under the lease, title remained in Ford but authority to control and operate the vehicle was given to the lessee ... Ford had no immediate right to control the use of the vehicle at the time of the accident.

Id. at 1116. The court further noted that the purposes of the statute which imposed vicarious liability on the "owner" of a vehicle would not be advanced by holding the lessor liable because the focus of the act was to impose liability only on the person in a "position ... to allow or prevent the use of the vehicle." Id.

It is respectfully submitted that these decisions, like Kraemer, and in essence, Palmer before that, correctly recognize that a commercial lease transaction, under certain circumstances, is simply a means of financing "ownership" of the motor vehicle. It is further submitted that Equilease, like the conditional vendor in Palmer, and the lessors in Kraemer, Moore and Lee, did not maintain the indicia of beneficial ownership of the motor vehicle sufficient to be vicariously liable for de la Nuez's alleged negligence. The Third District's decision on review here is proper under prior decisions from this Court and section 324.021(9)(a), and should be approved.

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CONCLUSION

Based on the reasons and authorities set forth herein and in the briefs filed by Amicus FMVLG and Amicus FADA, Respondent respectfully requests that the decision of the Third District Court of Appeal affirming the summary final judgment entered in favor of Respondent be approved.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent Equilease Corporation's Brief on the Merits was mailed this 22nd day of June, 1990 to:

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