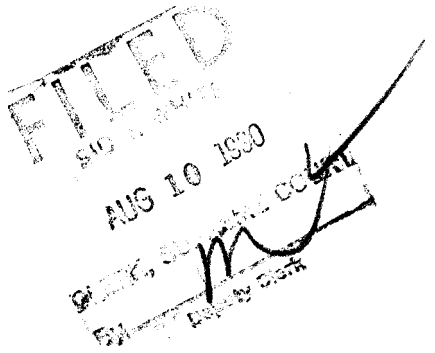
IN THE SUPREME COURT OF FLORIDA

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 REPLY BRIEF ON THE MERITS

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I.
STATEMENT OF THE CASE AND FACTS

Our initial statement of the case and facts was limited to the procedural and factual background underlying the single issue certified to this Court. Equilease has not challenged the accuracy of that statement in any way, but has simply repeated it. There is therefore no need for us to reply to that aspect of Equilease's restatement of the case and facts.

The remainder of Equilease's statement of the case and facts is addressed to an issue which we could not initially raise here, and which we therefore did not raise here -- the "sale versus lease" issue.[1/] Curiously, after dragging that issue into this proceeding, Equilease concedes that the issue "was not decided by the Third District" (respondent's brief, p. 12). In our judgment, that concession subsumes and includes the necessary additional concession that the issue is not properly before this Court -- because this Court's discretionary *review* jurisdiction necessarily contemplates that a ruling exist which is capable of being reviewed. We therefore remain convinced that the "sale versus lease" issue should be left to the District Court on remand.

We will respond to the issue nevertheless, of course. And, in due course, we will demonstrate that the facts in the record will fully support a finding of fact that the transaction in issue was a lease, not a sale. In the interest of clarity and ease of comprehension, however, we will defer our restatement of the facts underlying that issue to the appropriate argument section of the brief, and limit ourselves here to several miscellaneous items which deserve to be noted before turning to the merits of the issues

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1/ Since we could not properly raise the issue here (for reasons explained in our initial brief at page 5, footnote 4), there was obviously no reason for us to set out the facts underlying the issue. It was therefore entirely unfair (and a little silly) for Equilease to accuse us of being "careful to avoid most if not all of the relevant facts", and of "improperly driving at night with sunglasses on and no lights" (respondent's brief, p. 2). Most respectfully, until Equilease injected the "sale versus lease" issue into the proceeding in its answer brief, the facts underlying the issue were irrelevant -- and we stand by our decision to spare the Court those initially irrelevant details.

before the Court.

We first address Equilease's suggestion that this Court's denial of review in ***Peny v. G.M.A.C. Leasing Corp.***, 549 So.2d 680 (Fla. 2nd DCA 1989), ***review denied,*** 558 So.2d 18 (Fla. 1990), effectively amounts to a "pre-rejection" of our arguments on the merits here. If this Court had mandatory conflict review jurisdiction, there might be some arguable merit in the suggestion. This Court's conflict review jurisdiction is absolutely ***discretionary,*** however, so its denial of review in ***Peny*** obviously does not speak to the merits of the issue presented here in any way. In any event, this Court recently granted conflict review of ***fiaemer v. General Motors Acceptance Corp.***, 556 So.2d 431 (Fla. 2nd DCA 1989), ***review granted*** (June 22, 1990; case no. 75,580) -- and ***that*** development clearly renders Equilease's suggestion of "pre-rejection" superfluous here.

One of Equilease's amici, The Florida Motor Vehicle Leasing Group, has taken Equilease's suggestion a step further. It submits that the denial of review in ***Peny*** (and the absence of a grant of review in ***Kiaemer)*** makes it "inappropriate" for this Court even to consider reviewing the instant case (FMVLG's brief, p. 7, n. 4). Of course, the grant of review in ***fiaemer*** renders that suggestion superfluous as well. More importantly, the suggestion is apparently bottomed on the mistaken assumption that this proceeding arises under this Court's "express and direct conflict" jurisdiction. It does not. The case is here because the District Court certified that its decision passed upon a question of great public importance. The Court therefore has jurisdiction to review the District Court's decision quite independently of the question of "conflict" inherent in amici's mistaken suggestion.

We should also alert the Court that, after declining to certify either ***Peny*** or ***Kiaemer*** to this Court, the Second District has had a change of heart, and on June 15, 1990, it certified the issue presented in ***Kiaemer*** and the instant case to this Court as a question of great public importance. ***See Kottmeier v. General Motors Acceptance Cop.,*** 15 FLW D1611 (Fla. 2nd DCA June 15, 1990). In addition, the Fourth District has

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recently withdrawn its decision in *Folmar v. Young*, 560 So.2d 798 (Fla. 4th DCA 1990), and granted an en banc rehearing in that case. Neither of these recent developments controls the decision of this Court in the instant case, of course, but the developments do demonstrate (as do the numerous additional certifications of the identical issue to this Court) that Peny and *Kraemer* came as a complete surprise to numerous litigants who filed actions in reliance upon this Court's long line of authority to the contrary, and that Peny and *Kraemer* have been drawn into considerable doubt all across the State since they were announced. And with those miscellaneous observations behind us, we turn to the merits of the issues before the Court.

11.
ISSUES PRESENTED ON REVIEW

A. 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 FLORIDA'S "DANGEROUS INSTRUMENTALITY DOCTRINE.

B. WHETHER THE TRIAL COURT ERRED IN ENTERING SUMMARY FINAL JUDGMENT IN EQUILEASES FAVOR ON THE GROUND THAT IT HAD CONCLUSIVELY DEMONSTRATED AS A MATTER OF LAW THAT IT HAD SOLD, RATHER THAN LEASED, THE VEHICLE INVOLVED IN THE ACCIDENT IN SUIT.

111.
ARGUMENT

A. 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".

In our judgment, the most notable things about Equilease's responsive argument are the things which it chose not to say, and those things deserve to be briefly

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highlighted here before turning to the two narrow contentions which it does advance in defense of ***Perry*** and ***Kraemer.*** First, Equilease does not quarrel with our observation that *all* of this Court's decisions addressing the issue presented here have held that owner/lessors ***are*** liable under the "dangerous instrumentality doctrine". It also does not quarrel with our additional observation, that in none of those numerous decisions did this Court ever draw any distinction between long-term leases and short-term leases. Equilease also does not quarrel with our observation that **5627.7263,** Fla. Stat. (which declares, without drawing **any** distinction between long-term leases 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"), would make no sense if owner/lessors had no liability under the "dangerous instrumentality doctrine". **And** it simply ignores the 10 decisions we cited which were decided under this statute, and which would have amounted to entirely academic exercises if owner/lessors were not liable under the "dangerous instrumentality **doctrine".**[2/]

Equilease also does not quarrel with our observation that the cornerstone of both ***Perry*** and ***Kraemer*** -- this Court's decision in ***Palmer v.*** R ***S. Evans, Jacksonville, Inc.,*** 81 So.2d 635 (Ha. 1955) -- involved a ***conditional sale*** rather than a lease. It also does not quarrel with our insistence that (unlike a conditional sale, which does transfer "beneficial ownership") a lease transfers only "possession and control" -- and it therefore does not quarrel with our observation that the critical conclusion of ***Perry*** and ***Kraemer,*** that long-term leases transfer "beneficial ownership", is simply wrong. Equilease also does not quarrel with our contention that, at least where "possession and control" are concerned, there is neither a practical nor a principled difference between relinquishing "possession and control" to a teenager for a Saturday night date, to a lessee for a week, or to a

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[2/] To those decisions we add the Fifth District's recent decision in Gray ***v.*** Major ***Rent-A-Car, Inc.,*** 15 **FLW** D1600 (Ha. 5th DCA June 14, 1990).

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lessee for a year or more. And Equilease also does not quarrel with our observation that it would have been liable for its lessee's negligence if Scott Raynor's devastating brain damage had occurred after July 1, 1986, and that it is therefore entirely anomalous that, because of an ***exception*** to the general rule enacted ***after*** the accident in suit, 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 short, Equilease has quarreled with hardly anything which we argued in our initial brief. Instead, it has narrowed the debate here, and rested its position on two quite narrow grounds, neither of which has any merit.

1. Application of the doctrine turns upon ownership and the "authority to entrust", not upon "possession and control".

Equilease (and its amici) first take issue with our contention that application of the "dangerous instrumentality doctrine" turns upon ownership of a vehicle rather than upon who has "possession and control" of it. It argues that application of the doctrine has always turned upon who has "authority and control" of the vehicle. If that were true, then Equilease should have been able to find at least one decision of this Court which declines to apply the doctrine to an owner/lessor -- but it has not. Instead, as we demonstrated in our initial brief, ***all*** of this Court's owner/lessor decisions apply the doctrine to the owner. Moreover, as we also noted in our initial brief, Equilease's argument has been expressly rejected by this Court: ". . . 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". ***Susco Car Rental System of Florida v. Leonard,*** 112 So.2d 832, 835-36 (Fla. 1959).

Equilease purports to find support for its contrary "authority and control" argument in three of this Court's decisions. The decisions do not support the argument, however; they demonstrate simply that Equilease is playing word games with the Court. First, Equilease quotes a single sentence from Anderson ***v.*** Southern ***Cotton Oil Co., 73***

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Fla. 432, 74 So. 975 (1917). To demonstrate the word game, we will requote Equilease's sentence in context with the sentence which precedes it:

> The principles of the common law do not permit the owner of an instrumentality that is not dangerous per se, but is peculiarly dangerous in its operation, to authorize another to use such instrumentality on the public highways without imposing upon such owner liability for negligent use. The liability grows out of the obligation of the owner to have the vehicle, that is not inherently dangerous per se, but peculiarly dangerous in its use, properly operated when it is by his *authority* on the public highway.

74 So.2d at 978 (emphasis supplied).

We ask the Court to note that the phrase "authority and control" does not appear in the quoted material. The only word which appears there is the word "authority" -- and it is abundantly clear that the word "authority" is used, not in the sense of "control", but in the sense of "authoriz[ing] another to use". There is therefore no support whatsoever in ***Anderson*** for Equilease's insistence that the doctrine depends upon "authority and control". And if that were not clear enough from ***Anderson*** itself, it is made crystal clear by this Court's ***subsequent*** decision in the same case, in which it declined to retreat from its earlier holding, notwithstanding that the servant to whom the master/owner had "authorized the vehicle's use had total "control" of it: "In intrusting [sic] the servant with this highly dangerous agency, the master put it in the servant's power to mismanage it, and as long as it was in his [the servant's] *custody* or control, the master was liable for any injury which might be committed through his negligence." Southern ***Cotton Oil Co. v. Anderson, 80*** Fla. 441, 86 So. 629, 636 (1920). In short, the primary authority relied upon by Equilease here demonstrates that the law is exactly what we said it is in our initial brief: whenever an owner "authorizes" the use of his vehicle by another, he is liable for the other's negligent operation of it, notwithstanding that the other is in "possession and control" of the vehicle.

The second decision upon which Equilease relies is ***Palmer v.*** R ***S. Evans,***

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Jacksonville, Inc., 81 So.2d 635 (Fla. 1955). As we have already explained at persistent length, however, ***Palmer*** involved a ***conditional sale*** in which "beneficial *ownership*" had been transferred to the buyer, so it is simply inapposite to the owner/lessor situation involved in this case. In addition, the sentence in ***Palmer*** upon which Equilease relies for its "authority and control" argument also does not contain the word "control"; only the word "authority" appears. And, of course, when a vehicle is sold, the seller has no "authority" to decide to whom to entrust the vehicle's operation -- so it is the loss of this "authority", and not the loss of "control", which requires different treatment for conditional sales.

The third decision upon which Equilease relies is ***Castillo v. Bickley***, 363 So.2d 792 (Fla. 1978). The holding of that case is very narrow, however. The Court recognized in ***Castillo*** that "[a]n 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". 363 So.2d at 793. Accordingly, it held that an owner who turns an automobile over to an automotive service agency is not liable for the negligent operation of the vehicle by someone to whom the service agency has thereafter further entrusted the vehicle.[3/]

The narrowness of the ***Castillo*** exception was emphasized in a subsequent decision of this Court (which was cited in our initial brief, but then ignored by Equilease). In that decision, the Court refused to extend the narrow exception created in ***Castillo*** 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

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[3/] Equilease contends that, in ***Castillo,*** this Court "expressly receded from" ***Susco Car Rental System of Florida v. Leonard,*** 112 So.2d 832 (Fla. 1959). This is inaccurate. ***Castillo*** created a narrow exception to the rationale of ***Susco,*** to be sure, but it did not overrule ***Susco.***

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for service". *Michalek v. Shumate*, *524* So.2d 426, 427 (Fla. 1988). Although the word "control" appears in this language, it is clear from the context in which it is used and the ground upon which *Castillo* was distinguished, that the critical fact requiring application of the "dangerous instrumentality doctrine" is the "authority to entrust" (or the ability to control to whom the vehicle is entrusted), and that its application does not depend upon who has "possession" of the vehicle, or who is directly "controlling" operation of the vehicle, at the time a negligent injury is caused.

In short, none of the three decisions of this Court upon which Equilease relies even arguably contradicts our position that application of the doctrine does not turn upon who has "possession and control" of the vehicle at the time of the accident, and each of the three decisions demonstrates that the doctrine turns exclusively upon who has the "authority" to entrust the owned vehicle. In a leasing arrangement, like the arrangement in issue in the instant case, the owned vehicle is entrusted directly to the lessee, so the rationale of *Michalek* applies, rather than the limited exception created in *Castillo* for further entrustment by the initial entrustee. And, of course, Equilease *did* have the necessary "authority to entrust" in the instant case. As we shall demonstrate *infra*, Equilease did not *sell* its vehicle to Mr. de la Nuez and Mr. Garay; instead, it entrusted the vehicle to them under a written lease full of conditions and stipulations governing financial responsibility for its use and care in its operation. The record also reflects that the lease was breached in several respects, and that Equilease knew long before the accident in suit that its lessees were socially and financially irresponsible, yet it took no action to "disentrust" the dangerous instrumentality from them by repossession or otherwise.[4/]

[4/] As we noted in our initial brief, Mr. de la Nuez and Mr. Garay did not maintain the liability insurance coverage required by the lease, and Equilease simply ignored this default (PX. 62 to depo of Pollizi at R. 320 *et seq.)*. The record also reflects that payments on the lease were rarely made; that Mr. de la Nuez's checks sometimes bounced; that Equilease threatened repossession several times, but never followed through; and that Equilease hired a collection agent, who visited Mr. de la Nuez's home

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In our judgment, these facts do not militate ***against*** retention of the "dangerous instrumentality doctrine" to the leasing arrangement in issue here; they militate ***in favor of*** retention of the doctrine. If the doctrine does not apply, then there is no incentive for the owner to "disentrust" the vehicle from one to whom it should not have been entrusted. If the doctrine exists, however, there will be a strong incentive for owner/lessors to screen their lessees' driving records and credit histories initially, and to remove their vehicles from the hands of demonstrably irresponsible lessees thereafter -- which is probably why this Court has held in ***every*** prior decision in which the issue has been raised that owner/lessors ***are*** liable under the "dangerous instrumentality doctrine". We respectfully submit that the public policy of the State of Florida is no different today than it has always been, and that the result in the instant case should be consistent with all of this Court's prior decisions on the subject.[5/]

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on numerous occasions and who was only infrequently successful in obtaining partial payments (PX. 48, 50 to depo of Pollizi at R. 320 *et seq.*).

[5/] A passing word is in order concerning a related and rather curious argument made by one of Equilease's amici here, the Florida Motor Vehicle Leasing Group. At pages 26-32 of its brief, the FMVLG argues that the *Perry* Court was correct in concluding that long-term owner/lessors were not vicariously liable for the negligent operation of their vehicles "at common law" -- because, it asserts, "the dangerous instrumentality doctrine . . . is a creature of Florida caselaw [sic], ***not Florida common law***", and because "[l]essor liability did not exist prior to July 4, 1776" (FMVLG's brief, pp. 30, 26). Even if these assertions were correct, they are totally irrelevant to the issue presented here. Unlike *Perry*, the instant case does not involve the constitutionality of §324.021(9)(b), Fla. Stat. (1986 Supp.), so there is no reason for any discussion concerning the availability of the doctrine "at common law". In addition, our position here depends upon the law embodied in the case law of this Court at the time of the accident in suit -- not upon English law governing the 13 colonies more than a century before the automobile was invented.

The contentions are also simply wrong. As this Court is well aware, the phrase "common law" includes the decisional law of the judiciary from the beginning to the present, as distinguished from legislative law. ***See Overland Construction Co., Inc. v. Sirmons,*** 369 So.2d 572 (Fla. 1979); ***State v. Egan,*** 287 So.2d 1 (Fla. 1973). In addition, the relevant date for determining the status of the "common law" for purposes of application of Article I, 921 of the Florida Constitution is not July 4, 1776; it is the date of the last adoption of the Florida Constitution incorporating Article I, §21 -- or 1968. ***See, e. g., Smith v. Department of Insurance,*** 507 So.2d 1080 (Fla. 1987); ***Overland Construction Co., Inc. v. Sirmons, supra; Kluger v. white,*** 281 So.2d 1 (Fla. 1973).

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2. The definition of "owner" in §324.021(9), Fla. Stat. (1985), is for purposes of the minimum insurance requirements of Chapter 324 only, not application of the "dangerous instrumentality doctrine".

The remaining position advanced by Equilease (and its amici) is this: the definition of the word "owner" contained in §324.021(9), Fla. Stat. (1985), relieves all owner/lessors whose lessees have executed an option to purchase from ***both*** **(1)** the financial responsibility requirements of Chapter 324, ***and*** (2) the "dangerous instrumentality doctrine". We disagree.[6/] The definition certainly relieves such an owner/lessor from the minimum insurance requirements of Chapter 324, but that is all that it does; it does not even arguably purport to relieve such an owner/lessor from the "dangerous instrumentality doctrine" separately imposed upon it by the long line of authority upon which we have relied here. Once again, just as Equilease impermissibly expanded the word "authority" into the phrase "authority and control", it has impermissibly expanded the implications of this statutory definition well beyond its actual reach.

We requote the definition, with emphasis in the appropriate places:

> **324.021 Definitions; Minimum Insurance Required. --** The following words and phrases ***when used in this chapter*** shall, ***for the*** purpose ***of this chapter,*** have the meanings respectively ascribed to them in this section, except in those instances where the context clearly indicates a different meaning:
>
> . . . .

[6/] We also take issue with the thinly-veiled accusation of Equilease (and its amici) that we purposefully withheld mention of this statutory definition from our brief in the hope of hiding it from the Court. Equilease's entire argument on the "dangerous instrumentality doctrine" in the District Court consisted of the two short paragraphs quoted at pages 3-4 of our initial brief; the statute was not mentioned in that argument, so we had no obligation to anticipate Equilease's reliance upon it here. More importantly, we did not initially mention the statutory definition here for a very good reason -- it simply has no relevance to application of the "dangerous instrumentality doctrine", as we now intend to demonstrate in reply.

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> **(9)** 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 the owner ***for the purpose of this chapter.***

Section **324.021(9),** Fla. Stat. **(1985)** (emphasis **supplied).**[1/]

The remaining provisions of Chapter **324** relate *solely* to the obligations of such statutorily-defined "owners" to obtain and maintain specified levels of liability insurance in order to demonstrate "financial responsibility", and to the consequences which attach to the failure to do so. There are no words in Chapter **324** (with a single, inapplicable provision enacted ***after*** the accident in suit, which we will address in a moment) which even arguably address liability under the "dangerous instrumentality doctrine". Equilease's lessees may therefore have been an "owner" for purposes of Chapter **324,** and may therefore have been required to comply with its minimum insurance requirements, but the fact that this obligation was theirs rather than Equilease's hardly means that Equilease was not the owner of the vehicle for purposes outside the reach of Chapter **324,** such **as** application of the "dangerous instrumentality doctrine". That simply has to be the case, of course, because no reasonable person could read this definition of "owner" to mean that a lessee with an option to purchase (or a "mortgagor") was an

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[1/] Throughout its brief, Equilease has referred to this provision **as §324.021(9)(a).** Subparagraph (a) did not appear in the statute until subparagraph (b) was added in **1986,** however. The correct identification of the statute which controls the accident in the instant case is **§324.021(9),** Fla. Stat. **(1985).** In its reading of this provision, Equilease has also apparently concluded that the adjective "conditional" in the phrase "conditional vendee or lessee" was intended to modify both nouns, and its brief therefore refers repeatedly to "conditional vendees", "conditional leases", and "conditional lessees". In the law of property, however, there is no such thing **as** a "conditional lease" or a "conditional lessee". The statute means what it says; it addresses conditional sales and leases with options to purchase -- and nothing more. The point is semantic rather than substantive, of course, but we could not leave Equilease's confusing terminology unaddressed.

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"owner" for purposes of legal ownership or title -- because then the definition would automatically convert the mere option to purchase (or mortgage) into a completed sale, and any owner/lessor who attempted to lease a vehicle with an option to purchase (or an owner/mortgagee) would automatically have effected a *sale* of the vehicle.

Although we *think* those conclusions flow from the plain language of the careful limitation imposed by the phrase "for the purpose of this chapter", and that resort to the decisional law should therefore be unnecessary, we should note that this Court has itself stated that the provisions of Chapter 324 relate ***solely*** to minimum insurance requirements, and that Chapter 324 has nothing to do with other obligations attaching to ownership of a motor vehicle, such as application of the "dangerous instrumentality doctrine":

> In our view, the financial responsibility law is only relevant to situations such as this insofar as it is necessary to protect the public from uncompensated losses arising from the use of motor vehicles. To this end, the law requires motor vehicle owners to provide liability insurance coverage for the operation of their motor vehicles on the highways of this state. ***Independent of this insurance requirement is the common law obligation of vehicle owners under the dangerous instrumentality doctrine. . . .***

Insurance Company of North America v. Avis Rent-A-Car System, Inc., 348 So.2d 1149, 1153 (Fla. 1977). ***Accord Racecon, Inc. v. Mead,*** 388 So.2d 266, 268 (Fla. 5th DCA 1980) ("Independent of any insurance requirement, and by virtue of the dangerous instrumentality doctrine, there is a common law obligation of owners of motor vehicles which makes them responsible for injuries caused by such vehicle in the course of its intended use").

Absent some authority to the contrary, the pronouncement quoted above ought to establish to a certainty that application of the "dangerous instrumentality doctrine" is ***independent*** of, and does not turn in any way upon, the definition of "owner" "for the purpose of" Chapter 324. Curiously, although Equilease has insisted that the two things

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must be conflated into one, it has cited no authority contrary to the pronouncement quoted above. Instead, it has invented several makeweight arguments which fall far short of supporting its reading of Chapter 324. First, for example, it refers to §324.011, Fla. Stat. (1985), which declares that "[i]t is the intent of this Chapter . . . to promote safety and provide financial security for such owners or operators whose responsibility it is to recompense others for injury . . .". However, this "intent" is perfectly consistent with this Court's conclusion in *Insurance* Co. of *North America, supra* at 1153, that the purpose of Chapter 324 was to provide for financial responsibility on the part of those "owners" to whom it applied, "*[i]ndependent* of . . . the common law obligation of vehicle owners under the dangerous instrumentality doctrine". This argument is therefore clearly a makeweight.

Second, Equilease notes that Chapter 324 was initially enacted in 1955, the same year that this Court decided ***Palmer v. R S. Evans, Jacksonville, Inc.*, 81 So.2d 635** (Fla. 1955) -- and upon this coincidence alone it asserts that §324.021(9) was obviously a legislative response to *Palmer*, and was therefore intended to exempt all statutorily-defined "owners" from the obligations of ***both*** Chapter 324 ***and*** the "dangerous instrumentality doctrine". In our judgment, that is an awful lot to read into the mere coincidence of a decision and a legislative act in the space of one year. The two things were merely coincidental, of course. *Palmer* did not represent anything new in the common law which the legislature might have thought it a good idea to codify, because *Palmer* simply followed *Fletcher* Motor *Sales, Inc. v. Cooney*, 158 Fla. 223, 27 So.2d 289 (1946).

In addition, of course, Chapter 324 deals exclusively with the minimum insurance requirements to demonstrate financial responsibility, and the consequences of the failure to comply, and there is nothing in *Palmer* which even arguably addresses ***that*** subject. And finally, the meaning of a statutory enactment depends upon the words in the statute, not upon the words in all the judicial decisions in the year of its enactment --

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and because (prior to 1986 at least) Chapter 324 does not address application of the "dangerous instrumentality doctrine" in any manner, shape, or form, there is no justification whatsoever for this Court to read into Chapter 324 any implications concerning that doctrine, simply because it decided a case on that subject in the year of the Chapter's enactment. This argument is therefore also clearly a makeweight.

Equilease also contends that the enactment of §324.021(9)(b), Fla. Stat. (1986 Supp.) -- which does appear to address application of the "dangerous instrumentality doctrine" -- proves its point that, as originally enacted, §324.021(9) was meant to address application of the "dangerous instrumentality doctrine". It devotes only a single sentence to the argument (and relegates the sentence to a footnote), so we could probably safely ignore it. Equilease's amici have made this argument a central feature of their briefs, however, so we should take a moment to explain its error.

Section 324.021(9), Fla. Stat. (1986 Supp.), now reads as follows:

> **(9)** OWNER; OWNER/LESSOR. --
>
> (a) 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 the owner for the purpose of this chapter.
>
> (b) *Owner/lessor.* -- Notwithstanding any other provision of the Florida Statutes or ***existing case law***, the lessor, under an agreement to lease a motor vehicle for 1 year or longer which requires the lessee to obtain insurance acceptable to the lessor which contains limits not less than $100,000/$300,000 bodily injury liability and $50,000 property damage liability, shall not be deemed the owner of said motor vehicle for the purpose of [1] determining financial responsibility for the operation of said motor vehicle or [2] ***for the acts of the operator in connection therewith;*** further, this paragraph shall be applicable so long as the insurance required under such lease agreement remains in effect.

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(Emphasis and bracketed numerals supplied).

Paragraph 9(a) is the former paragraph (9) of the statute applicable to the instant case; paragraph 9(b) is the new provision which does not apply to the instant case -- and it is drafted in a considerably different fashion than paragraph 9(a). Paragraph 9(a) defies "owner" only "for the purpose of this chapter" relating to minimum insurance requirements to demonstrate financial responsibility; it contains no language relieving such "owners" from liability "for the acts of the operator in connection" with operation of the vehicle. In contrast, paragraph 9(b) deals with both subjects, as the bracketed numerals which we have inserted reveal. Unlike paragraph 9(a), paragraph 9(b) now excludes long-term owner/lessors not only from the financial responsibility requirements imposed by Chapter 324, but also from liability "for the acts of the operator in connection" with operation of such a vehicle -- which is an apparent exclusion from application of the "dangerous instrumentality doctrine", "[n]otwithstanding . . . existing case law".

In our judgment, this recent amendment to 5324.021 does not support Equilease's (or its amici's) position in any way; it simply destroys it, for several reasons. First, the amendment implicitly recognizes that the "dangerous instrumentality doctrine" theretofore *did* apply to long-term owner/lessors as a matter of "existing case law", which is exactly what we have argued here. Second, by creating an explicit exception to liability "for the acts of the operator", it creates an explicit exception to the "dangerous instrumentality doctrine" for the first time in the history of Chapter 324 -- an exception which does not appear in paragraph 9(a). Third, it announces that this exception from the "dangerous instrumentality doctrine" exists *only* "so long as the insurance required under such lease agreement remains in effect" -- which simply must mean that long-term lessors are *not* otherwise exempted from the "dangerous instrumentality doctrine" by Chapter 324. In short, from whatever angle it is viewed, the 1986 amendment to 5324.021 supports our position on what the law was in 1985 in every respect, and there is clearly no

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justification whatsoever for Equilease's contention that the amendment proves that long-term lessors have been exempted from the "dangerous instrumentality doctrine" by Chapter 324 since 1955.

Finally, we note that Equilease (and its amici) have collected a handful of decisions from other jurisdictions which have interpreted language similar to §324.021(9), Fla. Stat. (1985), as exempting owner/lessors from application of the "dangerous instrumentality doctrine". Some courts have apparently looked to legislative pronouncements on financial responsibility to define the scope of their own "dangerous instrumentality doctrine". In other cases, the language similar to §324.021(9) is found in a liability statute, rather than a financial responsibility statute. And in some states, the issue is far from settled. For example, the reasoning in the Michigan decision upon which Equilease relies -- ***Moore v. Ford Motor Credit Co.,*** 166 Mich. App. 100, 420 N.W.2d 577 (1988) -- was not followed by a different intermediate appellate court in Michigan. ***See Miller v. Massulo,*** 172 Mich. App. 752, 432 N.W.2d 429 (1988).

Because Chapter 324 says what it says, and because this Court has always recognized that the financial responsibility requirements of Chapter 324 are ***independent*** of the common law's "dangerous instrumentality doctrine", it seems to us that no useful purpose would be served by exploring the intricate details of this issue against the specific statutory schemes in other states, or the judicial decisions construing those statutes. Because Florida law clearly governs the issue presented here, and because this Court has a long line of its own authority upon which to base its decision in the instant case, we will limit this reply to Florida law -- and turn to the remaining issue presented for review.

B. THE TRIAL COURT ERRED IN ENTERING SUMMARY FINAL JUDGMENT IN EQUILEASE'S FAVOR ON THE GROUND THAT IT HAD CONCLUSIVELY DEMONSTRATED AS A MATTER OF LAW THAT IT HAD SOLD, RATHER THAN LEASED, THE VEHICLE INVOLVED IN THE ACCIDENT IN SUIT.

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1. The evidence will support a finding of fact that the transaction was a lease, not a sale.

Equilease also contends (in a protective fashion, since the District Court did not rule upon the issue below) that the trial court correctly granted its motion for summary judgment, on the ground that it had conclusively proved as *a matter* of *law* that it had sold, rather than leased, the vehicle involved in the accident in suit. We disagree with this contention as well. Although the record developed below on the issue of whether the vehicle was leased or sold is voluminous, our burden here is not to resolve the issue, but merely to demonstrate that, at minimum, a material issue of fact exists precluding resolution of the issue as a matter of law. Our summary of the evidence can therefore be brief.

We begin with the evidence supporting the plaintiffs contention that Equilease leased the vehicle to Mr. de la Nuez and Mr. Garay. The most important document is the agreement executed by the three parties (see PX. 13-23 to depo of Polizzi at R. 320 *et seq.*) It is entitled "Automotive Lease". The opening recitations of the agreement label it as a "lease"; they describe Equilease as a "lessor"; and they describe Mr. de la Nuez and Mr. Garay as "lessee". Paragraph 1 of the agreement begins with the following language: "Lessor leases to Lessee and Lessee rents from Lessor, the motor vehicle . . .". Paragraph 4 of the agreement (and Schedule A-1) requires the vehicle to be garaged in Union City, New Jersey, and prohibits a change of location without prior consent of Equilease. Paragraph 5 requires the lessee to make all necessary repairs and replacements, but provides that all replacements shall become the property of the lessor at expiration of the lease. Paragraph 7 requires the lessee to stencil the interest of the lessor on the vehicle. Paragraph 10 gives the lessor a right to inspect the vehicle. Paragraph 12 requires the lessee to maintain liability insurance coverage on the vehicle for the benefit of the lessor, with the lessor to be named as a "named insured".

Paragraph 15 of the agreement requires the lessee to surrender the vehicle in

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roadworthy condition to the lessor at the expiration of the lease, with all tires having "a tread depth of not less than 6/32 of an inch (no recaps)"; it further provides that the vehicle "shall become and remain the property of the Lessor at the expiration of this Lease . . ." Paragraph 16 prevents the lessee from assigning the lease or selling the vehicle. Paragraph 19 provides that, in the event of default by the lessee, the lessor is entitled to possession of the vehicle -- indeed, that the lessor can actually *sell* the vehicle to cover the indebtedness of the lessee. Paragraph 21 provides in pertinent part as follows:

> This document together with all Schedules hereto attached, all of which are made a part hereof, shall constitute the full, complete and entire agreement between Lessor and Lessee, superseding any other or prior understandings or agreements between Lessor and Lessee. No agent or employee of Lessor has been or is authorized to make any representation or warranty with respect to any matter or thing contained, referred to in, or in any way related to, this Lease, except as may be contained herein. There are no oral agreements or understandings affecting this instrument, and any future alteration, modification or waiver, to be binding upon the parties hereto, must be reduced to writing signed by the parties and attached hereto. . . . ***The Vehicles are to be at*** *all* ***times during the term hereof the sole property*** of ***Lessor*** *and* ***or its assigns*** *and* ***Lessee shall have no right, title, or interest therein except the right of possession*** *and* ***use thereof pursuant to this*** Lease.

(Emphasis supplied). Paragraph 24 provides that "the interpretation and legal effect of this Lease shall be governed by the substantive law of the State of New York". Schedule A-1 to the lease fixes the term of the lease at 49 months.

In a separate document executed contemporaneously with the lease, the lessees were given an option to purchase the vehicle at the expiration of the lease for 10% of the "purchase price" of $45,000.00, or $4,500.00 (PX. 19 to depo of Polizzi at R. 320 *et seq.*). It is not accurate for Equilease to say that the "option to purchase" amounted to only 7.79% of the so-called "purchase price" of the vehicle. Equilease's own documents reflect that the July, 1983, "cost" of the used 1979 tractor (first purchased in December,

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1978) was $45,000.00, and that the option to purchase (which could be exercised only 49 months later, when the tractor would be nearly nine years old) was *10%* of the purchase price, or $4,500.00 (PX. 4, 23, 27, 58 to depo of Polizzi at R. 320 *et seq.*).

The option also recites that, notwithstanding that the $4,500.00 was prepaid, the option need not be exercised; that the option payment would be returned if the vehicle were returned to Equilease; and that a Bill of Sale would be issued to the lessees if and when they chose to exercise the option to purchase. The record also reflects that no Bill of Sale was issued to Mr. de la Nuez or Mr. Garay before the accident in suit (R. 237, 248-50). UCC Financing Statements were executed by Mr. de la Nuez and Mr. Garay, and filed by Equilease in New Jersey; both statements contain the following typewritten entries: "This filing is intended to represent a true lease. Lessee is not authorized to dispose of leased equipment." (PX. 22 to depo of Polizzi at R. 320 *et seq.*).

There should be no need to belabor the point. We note simply that (with the exception of a few documents which we will discuss in a moment) each and every additional document concerning the transaction which Equilease produced from its files below describes the arrangement as a leasing arrangement, rather than a purchase and sale (see R. 109-837). It is also worth noting that the monthly rental payments required by the lease included a sum for the insurance coverage required by the lease, which was then purchased and paid for by Equilease through its own insurance agency, Underwriters Services, Inc. (PX. 23 and 33-35 to depo of Polizzi at R. 320 *et seq.*; R. 171-72, 203-04). In short, the face of the agreement by which Equilease transferred possession and control of the vehicle to Mr. de la Nuez and Mr. Garay reflects that a leasing arrangement was intended and effected, not a purchase and sale, and that legal and beneficial ownership remained in Equilease. Without more, it would simply be indisputable that Equilease was the owner/lessor of the vehicle at the time of the accident. *See Leaseco, Inc. v. Bartlett,* 257 So.2d 629 (Fla. 4th DCA 1971), *cert. denied,*

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262 So.2d 447 (Fla. 1972).

Unfortunately, there is more. The record reflects that, at the time of the transaction with Mr. de la Nuez and Mr. Garay, Equilease held a Florida title to the vehicle, which it had "repossessed" from a prior lessee (R. 143-44, 153). (The various title documents to be discussed here can be found at R. 838-56.) On the date on which the lease agreement was executed, July 7, 1983, Equilease executed the 'Transfer of Title" portion of the reverse of the title certificate, certifying that the vehicle was "hereby sold and delivered to" Mr. de la Nuez and Mr. Garay. The assignees did not apply for a Florida title, however. They also could not have obtained a Florida title, even if they had applied, because (1) there is no "selling price" stated on the "transfer" portion of the form; and (2) §319.22(4), Fla. Stat. (1983), provided in pertinent part as follows:

> . . . No notary public shall notarize a title transfer until the seller properly indicates the sales price, if a labeled place is provided on the certificate of title. No title shall be accepted for transfer by any county tax collector or other agent of the state unless the sales price is entered in the appropriately labeled place on the certificate of title by the seller, if a labeled place is provided. . . .

Instead, on July 11, 1983, Mr. de la Nuez and Mr. Garay applied for and obtained a certificate of title on the vehicle from the State of Nebraska, utilizing their ineffectively transferred "previous Florida title" as "evidence of ownership". The Court need not concern itself with this particular title, however, because it was subsequently transferred to a different state (and Equilease relied only on the title subsequently obtained in the different state -- see R. 144-45, 239). On October 21, 1983, Mr. de la Nuez and Mr. Garay presented their Nebraska title to the State of New Jersey, and obtained a "certificate of ownership" from that State, which reflected Equilease as a "secured party".

Although it was apparently this "certificate of ownership" upon which the trial court bottomed its ruling that the vehicle had been sold rather than leased, the fact of the matter is that a "certificate of ownership" in New Jersey is not a "legal title" at all.

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Section 39:10-2, N.J.S.A., defines the term "contract" to include both "conditional sale agreement" and "lease"; it defines the term "buyer" to include both "purchaser" and "lessee"; it defines the term "seller" to include both "seller" and "lessor"; it defines the term "sale" to include both "sales" and "leases"; and it provides that a lease is a "security interest" and a lessor is a "secured party". Because of these definitions, the substantive portions of the New Jersey statutes concerning changes in certificates of title upon the "sale" of a vehicle (§§39:10-9, 39:10-11, N.J.S.A.) encompass lease transactions as well as outright sales; as a result, a "certificate of ownership" in New Jersey is simply not evidence of either legal or beneficial ownership.

Since "ownership" of a vehicle in New Jersey can be nothing more than mere possession and control under a leasehold interest, and since the "secured party" reflected on the "certificate of ownership" can be the owner/lessor of the vehicle, the New Jersey "title" upon which Equilease avoided the plain and unambiguous language of its "Lease Agreement" (and nearly every other document in its extensive file) *can* hardly be deemed "conclusive" of who actually owned the vehicle at the time of the accident.[8/] Moreover, even if the chain of documents upon which Equilease relies was sufficient to create a paper "legal title" in Mr. Garay and Mr. de la Nuez, the fact remains that under both New Jersey and New York law, that paper title (and the subsequent "registration" to which it gave rise) raises only a presumption of ownership; it does not prevent anyone from rebutting that presumption with proof that ownership actually lay elsewhere (such as by proof that the lease agreement recited that the lessor was the owner of the vehicle, and that the lessee had "no right, title, or interest therein"). That point is

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[8/] It is also worth noting that §39:10-11(B), N.J.S.A., requires that the original "certificate of ownership" be delivered to the "secured party", and that only a copy of the certificate be provided to the "purchaser"; it is therefore highly probable that Equilease held the original New Jersey "certificate of ownership" at all times relevant to the instant case. That inference is underscored by a memo in Equilease's file, in which it requested the Department of Vehicles in New Jersey to send the "Certificate of ownership" to it when issued (PX. 45 to depo of Pollizi at R. 320 *et seq.*).

settled.[9/]

Equilease also presented additional evidence on the issue through the deposition of Mr. John Pollizi. According to Mr. Pollizi, although Equilease both leased and sold vehicles and had different sets of documents for the two types of transactions, company policy was changed on January 1, 1983 (before the transaction in suit) to require that title be transferred in all transactions; that, as a result, the transaction in issue was intended to be a sale rather than a lease; that old lease forms were apparently used inadvertently; and that the UCC filing (which stated that the transaction was a "true lease") was apparently an "error" (R. 132, 160, 170, 177, 182-83, 221, 277, 315-17). This explanation was contradicted by nearly every document in Equilease's file, of course, including a letter to Mr. de la Nuez in which Equilease indicated that it "would pass title to the truck" when Mr. de la Nuez paid up the lease (PX. 50 to depo of Pollizi at R. 320 ***et seq.;*** R. 299).

The more important point, however, is that the lease itself contains a "merger" clause -- a clause which states that the lease contains the entire agreement of the parties and that there "are no oral agreements or understandings affecting this instrument". Given this clause, and the familiar principle of the parol evidence rule, Mr. Pollizi's self-serving after-the-fact parol "explanation" of his company's "policy" is probably irrelevant. ***See Leaseco, Inc. v. Bartlett,*** 257 So.2d 629 (Fla. 4th DCA 1971), ***cert. denied,*** 262 So.2d 447 (Fla. 1972); ***Valenti v. Coral Reef Shopping Center, Inc.,*** 316 So.2d 589 (Fla. 3rd DCA 1975), ***cert. denied,*** 330 So.2d 727 (Fla. 1976).

In any event, Mr. Pollizi's after-the-fact "opinion", that the transaction was a sale

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[9/] ***See, e.g., American Hardware*** *Mutual* ***Insurance Co. v. Muller,*** 98 NJ. Super. 119, 236 A.2d 182 (Ch. Div. 1967), ***aff'd,*** 103 N.J. Super. 9, 246 k 2 d 493 (App. Div. 1968), ***cert. denied,*** 53 NJ. 85, 248 A.2d 437 (1968); ***Martin v. Nager,*** 192 NJ. Super. 189, 469 k 2 d 519 (1983); ***Switzer v. Aldrich,*** 307 N.Y. 56, 120 N.E.2d 159 (1954); ***Bornhurst v. Massachusetts Bonding & Insurance Co.,*** 21 N.Y.2d 581,289 N.Y.S.2d 937,237 N.E.2d 201 (1968); ***Blackmer v. Travelers Indemnity Co. of Rhode Island,*** 110 Misc.2d 704, 442 N.Y.S.2d 923 (1981).

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rather than a true lease, is hardly conclusive of the legal effect of the rest of the evidence to support a finding of fact to the contrary. An examination of Mr. Pollizi's deposition will demonstrate that he did not participate in the transaction in issue here; that he had no personal knowledge whatsoever of what the agents of Equilease actually "intended" at the time they entered into the lease agreement in July, 1983; and that his "opinion" was formed solely upon his review of the documents which are presently before this Court for review (several of which he simply dismissed as "mistakes"). Mr. Pollizi's opinion upon the ultimate issue in the case was therefore simply a legal conclusion, not a statement of fact -- and it is apodictic that legal conclusions given by fact witnesses must be ignored when ruling upon motions for summary judgment.[10/] Surely, if a finder of fact could conclude on the documents that Equilease intended to enter into a true lease rather than a sale, then Mr. Polizzi's hindsight "opinion" to the contrary is hardly the stuff from which a summary final judgment can properly be fashioned.

2. The law does not require a conclusion contrary to the overwhelming evidence that the transaction was, in fact, a lease.

Turning to the law to be applied to the facts, we agree with only one contention advanced by Equilease -- that the law governing the issue is to be found in §1-201(37) of the Uniform Commercial Code, which was adopted in New York in 1964, and which reads as follows:

> Security interest means an interest in personal property or fixtures which secures payment or performance of an obligation. . . . unless a lease or consignment is intended as security, reservation of title thereunder is not a security interest. . . . 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

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[10/] *See, e.g., Seinfeld v. Commercial Bank & Trust Co.,* 405 So.2d 1039 (Fla. 3rd DCA 1981); *Hurricane* Boats, *Inc. v. Certified Industrial Fabricators, Inc.,* 246 So.2d 174 (Fla. 3rd DCA 1971); *First Mortgage Corp. of Stuart v. DeGive,* 177 So.2d 741 (Fla. 2nd DCA 1965); *Deerfield Beach* Bank *v. Mager,* 140 So.2d 120 (Fla. 2nd DCA 1962); *Martin v.* E.A. *McCabe & Co.,* 113 So.2d 879 (Fla. 2nd DCA 1959).

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> lease one intended for security, and (b) an agreement that upon compliance with the terms of the lease the lessee shall become or has the option to become the owner of the property for no additional consideration or for a nominal consideration does make the lease one intended for security.

62% McKinney's Consolidated Laws of New York Ann. (UCC), §1-201(37).[11/]

The thrust of this provision is that, merely because a transaction is cast in the form of a lease does not necessarily make it a lease; it *can* be, in substance, either a "true lease" or a conditional sale agreement with a security interest, depending on "the facts of each case". The provision also makes it clear that the inclusion of an option to purchase does not of itself turn a "true lease" into a conditional sale agreement with a security interest, and that a lease will be considered a conditional sale agreement as a matter of law only when an option to purchase can be exercised for "no additional consideration or for a nominal consideration". In our judgment, the provision presents one of the thorniest and most difficult aspects of the UCC -- and after reading dozens of decisions applying it to various factual situations, we confess that we find it highly problematical. Rather than attempt to explain its background, it purpose, and its various ramifications here, we simply refer the Court to the experts for orientation. ***See*** White & Summers, Uniform ***Commercial Code,*** Vol. 2, 523-3, pp. 244-254 (3rd Ed. 1988). For the convenience of the Court, we have included Professors' White and Summers discussion of the subject in the appendix to this brief.[12/]

Before we examine the New York decisions on the subject, we think it is worth reminding the Court that one of the express purposes of promulgation of the UCC was to make *uniform* the law among the various jurisdictions adopting it. Section 1-101(2)(c)

11/ Because the UCC was adopted in New York effective September 27, 1964, all decisions prior to that date are irrelevant to the issue presented here.

12/ The Court may also find the following Annotation helpful in coping with the difficulties of the issue; Annotation, ***UCC-Equipment Lease as Security Interest,*** 76 A.L.R.3d 11 (1977) (and 1988 Supplement).

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of the Uniform Commercial Code. Because of this provision, it is settled that decisions from ***all*** jurisdictions adopting the UCC are relevant aids in determining the meaning of any given provision, and in applying any given provision to a set of facts. ***See Dunn v. Stack,*** 418 So.2d 345 (Fla. 1st DCA 1982); ***Mason v. Avdoyan,*** 299 So.2d 603 (Fla. 4th DCA 1974). The Court is therefore not limited to New York law alone in deciding the issue presented here.

There are numerous decisions from various jurisdictions construing §1-201(37), including Florida decisions, which squarely support our position here -- that, on the evidence adduced below, a finder-of-fact could properly conclude that the transaction in issue here was a "true lease", and not a conditional sale agreement with a security interest. ***See, e. g., Transport Rental Systems, Inc. v. Hertz Corp.,*** 129 So.2d 454 (Fla. 3rd DCA 1961) (truck lease agreement with option to purchase for greater of market value or 15% of original value was a lease rather than a conditional sale); ***Sellers v. Frank Griffin AMC Jeep, Inc.,*** 526 So.2d 147 (Fla. 1st DCA 1988) (where language of lease agreement is unambiguous, lease agreement is a lease rather than a sale); ***Leaseco,*** Inc. ***v. Bartlett,*** 257 So.2d 629 (Fla. 4th DCA 1971), ***cert. denied,*** 262 So.2d 447 (Fla. 1972) (similar). In addition, ***see TKO Equipment Co. v. C & G Cole Co., Inc.,*** 863 F.2d 541 (7th Cir. 1988) (to be discussed below); In ***re Celeryvale Transport, Inc.,*** 822 F.2d 16 (6th Cir. 1987) ($4,000 option to purchase 8-year old trailer at end of lease not nominal under §1-201(37)); ***Carlson v. Tandy Computer Leasing,*** 803 F.2d 391 (8th Cir. 1986) (factual finding that agreement was a lease rather than a sale fully supported by unambiguous language of lease agreement itself); ***American Standard Credit, Inc. v. National Cement Co.,*** 643 F.2d 248 (5th Cir. 1981) (recitation in documents that lease was intended to be "a true lease" ***required*** a finding that the lease was a true lease rather than a sale); ***Diede v. Davis,*** 661 P.2d 838 (Mont. 1983); ***Mejia v. Citizens & Southern Bank,*** 175 Ga. App. 80, 332 S.E.2d 170 (1985); ***Triple C Leasing, Inc. v. All-American Mobile Wash,*** 134 Cal. Rptr. 328, 64 Cal. App.3d 244 (1976). Because these decisions

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are from Florida appellate courts and federal appellate courts, we respectfully submit that they ought to prove more persuasive on the application of §1-201(37) than the isolated trial level decisions relied upon by Equilease.

There is another wrinkle to the problem presented here which deserves to be highlighted -- the fact that Equilease is now actively attempting to disavow the plain and unambiguous language of its lease agreement, because it now appears advantageous to it to recharacterize the transaction as a sale. As a general rule, courts will not permit this tactic in the type of dispute in issue here:

> . . . [The lessor], having written and signed documents repudiating sale-and-security status, is in the uncomfortable position of trying to doff its own disguise.
>
> There is at least a presumption in the law, as in economic life, against having and eating one's cake simultaneously. [The lessor] signed two documents spurning a security interest in the tractors. [The lessor] hoped that this would improve its position in the event of [its lessee's] bankruptcy. It recognized that strangers to the transaction might be able to pierce form to get at substance. All of the cases [the lessor] cites in which courts have looked through the form of a lease to conclude that the transaction was a sale (because the option price was so small in relation to the residual value of the item that the "lessee" was certain to exercise it) are suits brought by strangers to the transaction [claiming an interest in the goods]. We asked [the lessor's] lawyer at oral argument whether he knew of any case, in any state, in which the "lessor" had been allowed to attack its own characterization of the transaction. Counsel knew of none. Our own search has not turned up such a case. . . .
>
> . . . .
>
> If [the lessor] and [the lessee] had written: "This document is either a sale or a lease, to remain our secret until we know which will give us the greatest benefit at the expense of strangers", no court would enforce this "meaning". In a famous *gedanken* experiment of quantum mechanics, Schrodinger's cat remains suspended between life and death in a box, neither alive nor dead until the box is opened and uncertainty about the decay of a radioactive particle is resolved. [The lessor] wants us to believe that its agreement with [the lessee] is like Schrodinger's cat, neither a sale nor

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> a lease until uncertainty about [the lessee's] payments and solvency is resolved and [the lessor] knows which characterization is more favorable. We doubt that Indiana would allow contracting parties such latitude. Just as a one-man corporation may not pierce its own corporate veil to endow the shareholder with the firm's rights . . . , so the author of a lease may not pierce its form to get at a "substance" that it suddenly finds more lucrative.
>
> . . . No case in Indiana or any other state permits such a maneuver. [The lessor] signed a lease, and a lease is what it had.

TKO Equipment Co. v. C & G Coal Co., Inc, 863 F.2d 541, 544-46 (7th Cir. 1988). Although this observation would support a conclusion that the transaction in issue here was a lease as a matter of law, at the very least it ought to require a conclusion that the lease agreement cannot be declared a sale as a matter of law, and that factual questions concerning the intention of the parties remain for adjudication by a finder-of-fact in the instant case.

We have been unable to find any New York decisions with exactly the same facts as those presented in the instant case. In addition, most of the cases relied upon by Equilease involve the circumstance declared irrelevant to the circumstance presented here by the Seventh Circuit in TKO *Equipment,* because they are cases in which a stranger is seeking to pierce form for substance in order to claim an interest in the goods. In New York, the general principle appears to be that, with facts like those in the instant case, the issue of whether a transaction is intended to be a "true lease" or a conditional sale agreement with a security interest belongs to a finder-of-fact -- since §1-201(37) expressly states that the issue "is to be determined by the facts of each case". *See* In *Re Leasing Consultants, Inc.,* 486 F.2d 367 (2nd Cir. 1973); *Van Alphen v. Robinson,* 71 App. Div. 1039, 420 N.Y.S.2d 44 (1979); *Mayflower Restaurant Cop. v. Begera Cop.,* 88 App. Div.2d 716, 451 N.Y.S.2d 286, *appeal dismissed,* 57 N.Y.2d 604, 454 N.Y.S.2d 1029, 440 N.E.2d 800 (1982).

There are several additional New York decisions which would appear to require

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a conclusion in the instant case that the arrangement in issue is a "true lease". ***See Rebhun v. Executive Equipment Corp.,*** 90 Misc.2d 576, 394 N.Y.S.2d 792 (S. Ct. 1977) (where option price is not a nominal sum -- such as $2,600.00 -- lease was a "true lease", not a conditional sale contract with a security interest); ***Petrolane Northeast Gas Service, Inc. v. State Tax Commission,*** 79 App. Div. 1043, 435 N.Y.S.2d 187, 189, ***appeal denied,*** 53 N.Y.2d 601, 438 N.Y.S.2d 1027, 420 N.E.2d 981 (1981) (although courts must look to substance rather than form, "substantial sale characteristics cannot change the identity of a transaction which is, in undeniable form, a lease."); In ***Re General Assignment for Benefit of Creditors of Merkel, Inc.,*** 46 Misc.2d 270, 259 N.Y.S.2d 514 (S. Ct. 1965).[13/]

Fortunately, our burden here is not to resolve the issue, but merely to demonstrate that the issue cannot be resolved as a matter of law -- that, at minimum, the evidence presents a factual issue requiring resolution by a finder of fact. Such a demonstration does not require extensive analysis of all the facts; all that it requires is the existence of one item of evidence which prevents determination of the issue in Equilease's favor as a matter of law. We think that item of evidence exists in the UCC Financing Statements filed in New Jersey by Equilease, in which (when it had a clear opportunity to clarify its intent) it stated: "This *filing* is ***intended to represent a true lease.*** Lessee is not authorized to dispose of leased equipment" (emphasis supplied). Given that description of the transaction in issue here by Equilease itself, surely this Court cannot hold as a matter of law (as the trial court did) that the transaction was ***not*** intended to be a "true lease", but was intended as a conditional sale to Mr. de la Nuez and Mr. Garay. ***See In Re Leasing Consultants, Inc.,*** 486 F.2d 367 (2nd Cir. 1973)

[13/] Equilease attempts to distinguish some of the New York decisions upon which we have relied on the ground that they did not involve an option to purchase. As §1-201(37) expressly states, however, the existence of an option does ***not*** convert a lease into a security agreement, unless the option price is "nominal". Because we shall demonstrate *infra* that the option price of $4,500.00 in Equilease's lease cannot be declared "nominal" as ***a matter of law*** here, the New York decisions upon which we rely are not distinguishable on the ground urged by Equilease.

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(concluding that an "information only" filing similar to the UCC Financing Statements filed by Equilease in this case presented a question of fact on the issue of lease versus sale).[14/]

Although all of the foregoing decisions indicate that the issue presented here is obviously fact-sensitive and therefore ordinarily incapable of resolution as a matter of law, Equilease persists in advancing a "bright line" approach to the issue which would render irrelevant *all* of the factual evidence that the transaction in issue was intended to be a lease rather than a sale. It first contends that its lessees' prepayment of the $4,500.00 price of the option to purchase means that the vehicle was purchased as a matter of law. That simply cannot be correct, however, because the option to purchase recites that, notwithstanding that the $4,500.00 was prepaid, the option need not be exercised; that the option payment would be returned if the vehicle were returned to Equilease; and that a Bill of Sale would be issued to the lessees if and when they chose to exercise the option to purchase. Given that express language of the option to purchase, Equilease is clearly in no position to assert that the prepayment of the option constituted a sale as a matter of law.

Second, Equilease contends that the $4,500.00 price of the option to purchase was "nominal" as a matter of law because it represented only 7.79% of the so-called "purchase price" of the vehicle. As we have previously explained, however, this is inaccurate. The "purchase price" of the used vehicle was $45,000.00, and the option price was therefore 10% of the "purchase price" (as Equilease's own documents reflect

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14/ Equilease argues that the "information only" filing which it effected in New Jersey under §9-408 of the UCC is irrelevant to the issue presented here. That provision allows a lessor to file an "information only" UCC-1 form to protect itself against the possibility that a court might declare a transaction to be a sale, and it therefore prevents the "information only" filing from being viewed as evidence of a sale -- but it does not require a court to ignore a statement on the face of a UCC-1 that the transaction was intended to be a "true lease" in determining whether a separate lease agreement was intended to be a true lease or a sale. *See American Standard Credit, Inc. v. National Cement Co., 643* F.2d 248 (5th Cir. 1981).

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on their face). The difference is not really important, however, because the decision upon which Equilease primarily relies for its "less than 10% is nominal as a matter of law" argument simply does not support the argument. In ***National Equipment Rental, Ltd. v. Priority Electronics Corp.***, 435 F. Supp. 236 (E.D.N.Y. 1977), a federal trial court observed that there were several decisions which had concluded (on the specific facts in each case) that percentages of less than 10% were nominal; it observed that other cases had concluded (once again on the specific facts in each case) that percentages approximating the fair market value of the leased chattel at the end of the lease term were not nominal; and it declined to follow either approach, because on the facts in the case before it, the equipment in issue was essentially worthless at the end of the lease term, which was indicative that the lease was intended as a security interest. There is nothing in ***National Equipment Rental*** which even arguably supports Equilease's overly broad contention that an option price of 10%, by itself and without reference to the economic realities of the transaction, is nominal as a matter of law.

There are, to be sure, a minority of cases decided under §1-201(37) of the UCC which look to mere form rather than substance and apply a simple "percentage test" to options to purchase. The majority of cases approach the question more rationally, however, and apply an "economic realities" test (which is what the ***National Equipment Rental*** judge ultimately did). The latter approach is the better approach (and is the approach taken in the pending proposed revision to §1-201(37)), according to the leading commentators on the subject. ***See*** White & Summers, Uniform ***Commercial Code***, Vol. 2, §23-3, pp. 244-54 (3rd Ed. 1988). The subject is complicated, and space is limited, so we simply refer the Court to Professors White and Summers' discussion of it -- a copy of which is included in the appendix to this brief.

In any event, there is a much more specific and a more important point to be made here. As Professors White and Summers (as well as the decisions cited above) make clear, before it *can* be determined whether an option price is "nominal" within the

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meaning of §1-201(37), it is ***necessary*** that the record contain evidence of the approximate value of the leased chattel at the end of the term, because it is simply impossible to determine whether an option price is nominal or actual without that information, and because an option price which approximates the value of the leased chattel at the end of the term is the best indicator that the lease was intended to be a true lease rather than a sale. As a result, courts have held that the absence of such evidence simply precludes determination of the issue pending development of that fact. ***See, e. g., In Re Fashion Optical, Ltd. v. Gebetsberger***, 653 F.2d 1385 (10th Cir. 1981); ***Earman Oil*** Co., ***Inc. v. Burroughs Corp., 625*** F.2d 1291, 1295 n. 12 ***(5th*** Cir. 1980).

In the instant case, there is no evidence whatsoever concerning the approximate value which the leased tractor would have had at the end of the lease's term (when the tractor would have been nearly 9 years old), and it is therefore entirely possible that the value of the tractor at that time would have been approximately $4,500.00. Since it was Equilease's burden to prove its entitlement to *summary* judgment ***conclusively***, and since its failure to offer any evidence from which a determination of the economic realities could be made, we are clearly entitled to the existence of that possibility in the present procedural posture of this case. In short, the silence in the record on this point absolutely precluded the trial court from determining the question of lease versus sale as a matter of law.

Equilease also collects a number of additional factors which "suggest" or which are "indicative" of a sale rather than a lease under §1-201(37). As Professors White and Summers explain (in the excerpted portion of their treatise in our appendix), and as the decisions relied upon by Equilease demonstrate, these additional factors are simply additional "facts" to be considered in determining the ultimate issue -- and not factors which can ever conclusively resolve the issue as a matter of law. That simply has to be the law, since long-term leases are similar to conditional sales in numerous respects; and if it were not the law then all long-term leases would be conditional sales as a matter

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of law, and there would be no purpose whatsoever for the distinction drawn between "true leases" and conditional sales by §1-201(37).

The long and the short of all of this is that 99% of the evidence in the record establishes, in Equilease's own words, that the transaction in issue here was intended to be a "true lease", and the only evidence in the record which even arguably suggests anything to the contrary is the apparently fortuitous circumstance that someone in its organization saw fit to sign the back of the Florida Title Certificate, notwithstanding that Equilease's lease agreement expressly declares that "Lessee shall have no right, title or interest therein except the right of possession and use thereof pursuant to this Lease". In other words, because Equilease now finds it disadvantageous to have leased the vehicle, it is now attempting to disavow nearly every word it ever spoke on the subject -- and to escape liability here solely upon the 1% of the evidence which ***conflicts*** with the 99% of the evidence which declares the transaction in issue here to be a "true lease".

We respectfully submit that the sentiment expressed in TKO ***Equipment Co. v. C & G Cole Co., Inc.,*** 863 F.2d 541, 544-46 (7th Cir. 1988), quoted at pages 26-27, supra, ought to govern the issue presented here -- and that the tiny conflict in the evidence over whether Equilease meant what it plainly said in its lease (and said over and over again in its extensive file) belongs to a finder-of-fact. Most respectfully, the issue of whether Equilease was owner/lessor of the vehicle which caused Scott Raynor's severe injuries, or whether it was merely a conditional vendor/secured party, simply cannot be resolved in Equilease's favor as a matter of law on the record made below -- and we respectfully submit that the trial court erred in doing so.

IV.
CONCLUSION

It is respectfully submitted that the district court erred in holding that Equilease was not vicariously liable for the negligent operation of its vehicle under Florida's

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"dangerous instrumentality doctrine". The district court's decision should be quashed, and the cause should be remanded to the district court for initial determination of the "sale versus lease" issue. If the Court chooses to reach the "sale versus lease" issue, it is respectfully submitted that the issue is not susceptible of resolution as a matter of law, and that the Court should declare that the trial court erred in granting Equilease's motion for summary judgment on that issue.

V.
CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 8th day of August, 1990, to: George C. Bender, Esq., Bender, Bender & Chandler, 5915 Ponce de Leon Blvd., #62, Coral Gables, Fla. 33146; Ralph O. Anderson, Esq., Daniels & Hicks, P.A., 100 North Biscayne Blvd, Suite 2400, Miami, Florida 33132, Attorneys for Respondents; Judy Shapiro, Esq., Herzfeld & Rubin, 801 Brickell Avenue, Suite 1501, Miami, Florida 33131; and to William C. Owen, Esq., Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A., 410 First Florida Bank Building, P.O. Drawer 190, Tallahassee, Florida 32302, Attorneys for Amicus Curiae.

Respectfully submitted,

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