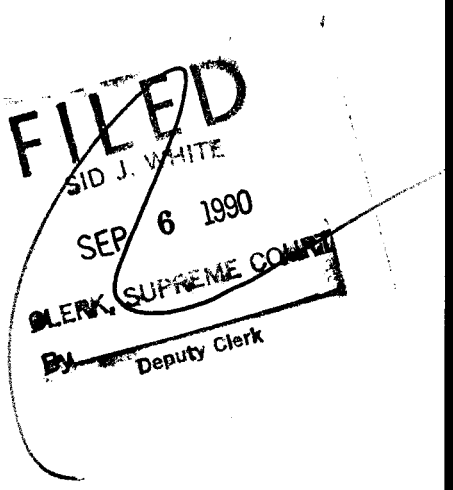
IN THE SUPREME COURT OF FLORIDA

CASE NO. 76,336



JUNE H. KOTTMEIER, individually and in her capacity as personal representative of the Estate of CARL KOTTMEIER,

Petitioner,

vs.

GENERAL MOTORS ACCEPTANCE CORPORATION, a corporation,

Respondent.

_____/

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

PETITIONER'S BRIEF ON THE MERITS

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I.
STATEMENT OF THE CASE AND FACTS

On February 18, 1986, Karl Kottmeier suffered severe injuries when his automobile was struck by an automobile driven by Scott Raybuck (R. 1). He (and his wife, for her derivative claim) brought a negligence action against three defendants: Mr. Raybuck; General Motors Acceptance Corporation (hereinafter GMAC), the owner/lessor of the automobile; and Richard Hersh, the lessee of the automobile (R. 1). GMAC's amended answer admitted that it was the owner/lessor of the automobile driven by Mr. Raybuck, but denied that it was the "beneficial owner" of the vehicle, and contended that it therefore could not be held liable for Mr. Raybuck's negligence (R. 22).

Shortly thereafter, GMAC filed a motion for summary judgment bottomed upon a single ground:

> . . . The basis for this motion, and the substantial matters of law to be argued, are that this Defendant was not the beneficial owner of the automobile involved in the accident which is the subject of this lawsuit, and therefore cannot be liable to Plaintiffs under the Dangerous Instrumentality Doctrine.

(R. 33). GMAC also filed the affidavit of its "leasing manager" (R. 31). The affidavit admitted that GMAC was the legal owner of the vehicle driven by Mr. Raybuck, but denied that GMAC was the "beneficial owner" of the vehicle or exercised any "control" over it (*id.*). A copy of the "lease agreement" was also filed (R. 25, 91). In addition, GMAC filed Mr. Hersh's response to its requests for admissions, in which he admitted the leasing arrangement; admitted that GMAC did not control the day-to-day use of the vehicle; admitted that he had exclusive possession of the vehicle; but denied that he was the "beneficial owner" of the vehicle (R. 19, 20).

While the motion for summary judgment was pending, the court was advised of Mr. Kottmeier's death on November 17, 1988, and Mrs. Kottmeier, individually and in her capacity as personal representative of her husband's estate, was substituted as plaintiff (R. 38, 134). An amended complaint was then filed, which alleged in the

alternative both a survival action and a wrongful death action against the defendants (R. 146). GMAC's motion for summary judgment was heard thereafter, and granted -- and a final judgment was entered in GMAC's favor (R. 298). A timely appeal was taken to the District Court of Appeal, Second District.

Before the appeal was argued, the Second District decided *Perry v. G.M.A.C. Leasing Corp.*, 549 So.2d 680 (Fla. 2nd DCA 1989), *review denied*, 558 So.2d 18 (Fla. 1990). Although the issue in that case was the constitutionality of the legislature's 1986 modification of the "dangerous instrumentality doctrine" where long-term leases are concerned, the *Perry* Court had to determine whether long-term lessors were liable under the doctrine prior to 1986 in order to resolve that question -- and it announced (for the first time ever in the history of the law of Florida) that they were not.[1/] *Perry* was followed shortly thereafter by *Kraemer v. General Motors Acceptance Corp.*, 556 So.2d 431 (Fla. 2nd DCA 1989), which squarely holds that, prior to 1986, owner/lessors leasing their vehicles under long-term leases were not liable under Florida's "dangerous instrumentality doctrine". Given the settled rule that one panel of a district court is bound by the decision of another panel of the same court, *Perry* and *Kraemer* foreordained the outcome in the instant case.

Prior to oral argument of the case, the Third District also decided *Raynor v. de la Nuez*, 558 So.2d 141 (Fla. 3rd DCA 1990), which followed *Kraemer*, but which was certified to this Court as passing upon a question of great public importance. When

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

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the case finally came on for decision, the Second District affirmed the summary judgment entered in GMAC's favor, and certified the issue to this Court. The panel's decision reads in its entirety as follows:

> Affirmed. *See Raynor v. de la Nuez*, 558 So.2d 141 (Fla. 3d DCA 1990); *Kraemer v. General Motors Acceptance Corp.*, 556 So.2d 431 (Fla. 2d DCA 1990).
>
> As did the Third District Court of Appeal in *Raynor*, we certify this case to the Florida Supreme Court as of great public importance. It involves whether under circumstances like those recited in *Kraemer* a long-term lessor of an automobile may be held liable under the dangerous instrumentality doctrine to a plaintiff injured by the operation of the automobile.

Kottmeier v. General Motors Acceptance Corp., 561 So.2d 1369 (Fla. 2nd DCA 1990). A copy of the decision is included in the appendix to this brief, as required. Although this Court denied review in *Perry*, it granted review in *Kraemer*. It also granted review in *Raynor* -- and several other cases involving the issue presented here are presently before the Court.

II.
ISSUE PRESENTED ON REVIEW

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

III.
SUMMARY OF THE ARGUMENT

The question of whether an owner/lessor is vicariously liable under Florida's "dangerous instrumentality doctrine" has been answered several times by this Court -- in the affirmative, and without drawing any distinction whatsoever between long-term leases and short-term leases. To the contention that there should be no vicarious liability

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where "possession and control" have been relinquished to another, this Court has responded that "possession and control" is ultimately an irrelevant question -- that the "dangerous instrumentality doctrine" is simply a rule of public policy creating an additional layer of financial responsibility for the protection of the travelling public. Statutory developments have paralleled these developments in the decisional law. Section 627.7263 has long provided, without drawing any distinction whatsoever between long-term leases and short-term leases, that a lessor's liability insurance coverage is primary unless shifted to the lessee "in bold type on the face of the rental or lease agreement" -- and there are numerous decisions of this Court applying and enforcing that statute. Neither the statute nor this Court's decisions on the subject would make any sense at all unless the "dangerous instrumentality doctrine" applied to owner/lessors.

The first time that any distinction was ever drawn in Florida between long-term and short-term leases was after the accident at issue in the instant suit, when the legislature enacted §324.021(9)(b), Fla. Stat. (1986 Supp.), which excepts long-term lessors from liability *if* their lessees maintain substantial amounts of liability insurance. But that statute amounts to a legislative recognition that the "dangerous instrumentality doctrine" theretofore *did* apply to long-term leases, since all that the amendment does is create a narrow exception to that vicarious liability -- and actually leaves that liability fully in place where the lessee fails to purchase the insurance required to relieve the long-term lessor of liability under the doctrine. In sum, all of the sign posts on the pre-1986 legal landscape pointed in one well-established direction: motor vehicle owner/lessors *were* liable under Florida's "dangerous instrumentality doctrine", as a matter of public policy and to ensure financial responsibility for negligently caused injuries -- irrespective of the fact that they had relinquished "possession and control" of their vehicles to their lessees, and without regard to the length of their contractual arrangements to that end.

The Second District badly misread these sign posts in *Perry* and *Kraemer*. In fact, it appears that these sign posts were overlooked altogether. Instead, the Court

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inappropriately relied upon a decision of this Court involving a conditional *sale*; it erroneously concluded that the phrase "beneficial ownership" appearing in that decision meant the same thing as "possession and control"; and, thus confused, it decided that, unlike short-term leases, long-term leases transferred "beneficial ownership" to the lessee in the same way that conditional sale contracts do, and that long-term lessors should therefore escape liability under the doctrine for the same reasons that conditional vendors do.

As we shall explain in some detail in the argument which follows, this conclusion is bottomed upon a mistaken understanding of property law. A lease transfers *only* "possession and control"; it does *not* transfer "beneficial ownership". "Beneficial ownership" is a synonym for "equitable title" -- a claim to title which a law court will not enforce, but which will be enforced in a court of equity if a conditional vendor fails to deliver legal title upon the purchaser's compliance with the conditional sale contract. The distinction drawn by this Court's decisions has been between ownership and a "sale" of ownership, not between short-term relinquishment of "possession and control" and long-term relinquishment of "possession and control". Given the long line of authority represented by this Court's prior decisions and the parallel statutory developments, it ought to be clear that the analogy drawn in *Perry* and *Kraemer* between conditional sale contracts and long-term leases is an impermissible analogy which has no relevance to application of Florida's "dangerous instrumentality doctrine". Prior to the enactment of §324.021(9)(b), the "dangerous instrumentality doctrine" clearly applied to all owner/lessors, whether long-term or short-term.

GMAC's contention below -- that the definition of the word "owner" 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" -- is simply wrong. The definition certainly relieves such an owner/lessor from the minimum insurance requirements of

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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. That is clear from both the plain language of §324.021, which defines the word only "for the purpose of this chapter". That is also clear from the decisional law, which has long held that the "dangerous instrumentality doctrine" exists independently of, and is broader than, the minimum insurance requirements imposed by Chapter 324. The *only* portion of Chapter 324 which even arguably purports to address the "dangerous instrumentality doctrine" is the recent amendment to §324.021, which is *not* applicable to the instant case -- and which, fairly read, fully supports the conclusion that the "dangerous instrumentality doctrine" applied to long-term leases prior to enactment of the limited exception contained in the amendment.

IV.
ARGUMENT

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

We alert the Court at the outset that the argument which follows is essentially the same argument which we presented to the Court in our briefs on the merits in the *Raynor* case (case no. 75,870), with some minor embellishments. If the briefs in the *Raynor* case have been digested, the Court does not need to read the remainder of this brief (unless it is interested in the minor embellishments). We will set out our position in detail nevertheless, to enable the respondent to prepare a responsive brief.

Our obvious burden here is to demonstrate that *Perry* and *Kraemer* were wrongly decided. We intend to do that. In our judgment, the Second District misread the road signs; took a wrong turn at a sign labelled "beneficial ownership" (the meaning of which

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it simply misunderstood); and ended up miles from the destination to which a correct reading of the decisional and statutory law should have directed it. That demonstration will make more sense if we first sketch out the map which the Second District misread.

1. The historical legal background.

We begin with *Southern Cotton Oil Co. v. Anderson*, 80 Fla. 441, 86 So. 629 (1920). In that case, this Court announced that a motor vehicle is a dangerous instrumentality, and that the public policy of Florida required that an owner be financially responsible for damages caused by one to whom the vehicle has been entrusted. In that paradigm case at least, that has undeniably been the law in this State for the last 70 years. *See Michalek v. Shumate*, 524 So.2d 426 (Fla. 1988).[2/]

The question of whether an owner who has *leased* a vehicle to another is liable under the "dangerous instrumentality doctrine" was answered by this Court 43 years ago in *Lynch v. Walker*, 159 Fla. 188, 31 So.2d 268 (1947). The Court squarely held that commercial owner/lessors *are* subject to the doctrine, and it drew no distinction whatsoever between long-term leases and short-term leases. The question recurred in *Fleming v. Alter*, 69 So.2d 185 (Fla. 1954). The Court stuck to its guns: "To hold that liability would be limited to damage caused by the bailee alone where a dangerous instrumentality is put in circulation in such fashion would be entirely beyond our conception of the responsibility one should assume where he is in the business of

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

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entrusting vehicles of such character to another for a price." 69 So.2d at 186. Once again, the Court drew no distinction whatsoever between long-term leases and short-term leases.

The question was decided again in *Susco Car Rental System of Florida v. Leonard*, 112 So.2d 832 (Fla. 1959). Once again, the Court refused to budge. In response to the owner/lessor's contention that the "dangerous instrumentality doctrine" should not apply because an owner/lessor relinquishes "possession and control" of the vehicle under a commercial lease, the Court responded, " . . . when control of such a vehicle is voluntarily relinquished to another, only a breach of custody amounting to a species of conversion or theft will relieve an owner of responsibility for its use or misuse". 112 So.2d at 835-36. Once again, the Court drew no distinction whatsoever between long-term leases and short-term leases.

This Court also made it clear in *Susco* that the question of who has "possession and control" of a vehicle is ultimately an irrelevant question, because the "dangerous instrumentality doctrine" is simply a rule of public policy creating an additional layer of financial responsibility for the protection of the travelling public:

> There can be no doubt from current statistics that the dangerous character of motor vehicles has become more obvious than when originally so denominated by this Court, and the number and complexity of police regulations has vastly increased. But just as was noted at the outset in this jurisdiction, it has been the legislative view that the public interest requires more than regulation of operation, and that safety regulations can never, in fact, eliminate the enormous risks involved. Responsibility under the law was accordingly attached to *ownership* of these instrumentalities, evinced first by registration laws and now by numerous provisions to assure financial responsibility of owners. It is plain that these provisions are based on the assumption that an owner cannot deliver a vehicle into the hands of another without assuming, or continuing, his full responsibility to the public. . . .

112 So.2d at 837 (emphasis in original; footnotes omitted).

The issue arose again in *Roth v. Old Republic Insurance Co.*, 269 So.2d 3 (Fla.

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1972). The Court reaffirmed *Susco*, and drew no distinction whatsoever between long-term leases and short-term leases. The issue arose again in *Meister v. Fisher*, 462 So.2d 1071, 1073 (Fla. 1984). The Court held as follows:

> . . . In the instant case, the country club had rented the golf cart to Fisher. However, this factor does not call for a different result, since in Florida the [dangerous instrumentality] doctrine clearly extends to and encompasses the bailment relationship. *See Lynch v. Walker*, 139 [sic] Fla. 188, 31 So.2d 268 (1947).

Although the bailment in question was obviously a short-term bailment, the Court mentioned no distinction between short-term leases and long-term leases.

And, as recently as March 29, 1990, in deciding an issue not implicated by the facts in the instant case, this Court reaffirmed the long line of authority cited above, as follows:

> Enterprise Leasing *correctly* notes that it remained liable, as owner of the vehicle, for injuries to third parties as a result of the negligent operation of the vehicle under Florida's dangerous instrumentality doctrine despite a contractual provision in the lease prohibiting [the lessee] from allowing others to use the car. . . .

Enterprise Leasing Co. v. Almon, 559 So.2d 214, 215 (Fla. 1990) (emphasis supplied). Once again, the Court drew no distinction whatsoever between long-term leases and short-term leases. In addition, *see Leaseco, Inc. v. Bartlett*, 257 So.2d 629 (Fla. 4th DCA 1971), *cert. denied*, 262 So.2d 447 (Fla. 1972); *Avis Rent-A-Car System v. Garmas*, 440 So.2d 1311 (Fla. 3rd DCA 1983), *review denied*, 451 So.2d 848 (Fla. 1984); *P & H Vehicle Rental & Leasing Corp. v. Garner*, 416 So.2d 503 (Fla. 5th DCA 1982).

Statutory developments have paralleled the developments in the decisional law. For example, Chapter 319 of the Florida Statutes, which deals with Title Certificates, expressly lumps both short-term and long-term rentals under a *single* category, which it calls "for-hire vehicles". *See* §319.14(1)(b)(2), Fla. Stat. (1985). More to the point, §627.7263, Fla. Stat., which was first enacted in 1976, declares (without drawing any

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distinction whatsoever between long-term and short-term leases) that a *lessor's* liability insurance coverage "shall be primary" unless shifted to the lessee "in bold type on the face of the rental or lease agreement". Of course, this statute would make no sense whatsoever if owner/lessors had no liability under the "dangerous instrumentality doctrine", because their insurers would have no liability to begin with -- primary, secondary, or otherwise.

Section 627.7263, Fla. Stat., has generated numerous decisions dealing with the question of whether a lessor's or a lessee's liability insurance coverage is primary -- each of which assumes as an essential predicate that the owner/lessor of an automobile *is* vicariously liable for its negligent operation, else there would have been no need even to consider the question. *See, e. g., Allstate Insurance Co. v. Executive Car & Truck Leasing, Inc.*, 494 So.2d 487 (Fla. 1986); *Southeastern Fidelity Insurance Co. v. Cole*, 493 So.2d 445 (Fla. 1986); *Allstate Insurance Co. v. Fowler*, 480 So.2d 1287 (Fla. 1985); *Maryland Casualty Co. v. Reliance Insurance Co.*, 478 So.2d 1068 (Fla. 1985); *Insurance Co. of North America v. Avis Rent-A-Car System, Inc.*, 348 So.2d 1149 (Fla. 1977); *Canal Insurance Co. v. Continental Casualty Co.*, 489 So.2d 136 (Fla. 2nd DCA 1986); *Patton v. Lindo's Rent-A-Car, Inc.*, 415 So.2d 43 (Fla. 2nd DCA 1982); *P & H Vehicle Rental & Leasing Corp. v. Garner*, 416 So.2d 503 (Fla. 5th DCA 1982); *Racecon, Inc. v. Mead*, 388 So.2d 266 (Fla. 5th DCA 1980). These cases also draw no distinction whatsoever between long-term leases and short-term leases.[3/]

The first time that any distinction was ever drawn in Florida between long-term and short-term leases was when the legislature enacted §324.021(9)(b), Fla. Stat. (1986 Supp.) (effective July 1, 1986) -- which appears to relieve long-term lessors of vicarious

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

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liability under the "dangerous instrumentality doctrine" *if* they ensure that their lessees carry insurance in amounts far exceeding the minimum coverages required of others (at least $100,000/$300,000 in liability insurance coverage and $50,000 in property damage coverage). In our judgment, the very enactment of this statute amounts to a legislative recognition that Florida's "dangerous instrumentality doctrine" theretofore *did* apply to long-term leases, since all that the amendment does is create a narrow exception to that vicarious liability -- and actually leaves that vicarious liability fully in place where the lessee fails to purchase the insurance required to relieve the long-term lessor of liability under the doctrine.

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

> But more than 20 years have passed since this Court announced the dangerous instrumentality doctrine as applied to motor vehicles and as yet no serious attempt has been made by the legislature to abolish that doctrine. None of the many amendments to the motor vehicle law of this State has impugned or questioned it. Indeed, it might be said that this doctrine received express legislative approval when the legislature of 1937 granted exemption from the doctrine in the case of injuries to gratuitous guests or hitch hikers. See Chapter 18033, Acts of 1937.

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

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

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be obvious from its certification to this Court that it concluded that those sign posts may have been badly misread.

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

It remains for us to explain where the Second District took its wrong turn in *Perry* and *Kraemer*. The primary question in *Perry* was whether §324.021(9)(b), Fla. Stat. (1986 Supp.) -- which appears to abrogate Florida's "dangerous instrumentality doctrine" in circumstances where an owner/lessor has leased a vehicle for a term of one year or longer, and the lessee has complied with the minimum liability insurance requirements of the statute -- violated Article I, §21 of the Florida Constitution by abolishing a theretofore existing cause of action against the owner/lessor. The Court held that it did not. In the process of resolving that question, the Court stated that it could find no authority for applying Florida's "dangerous instrumentality doctrine" to long-term leases prior to July 1, 1986, so it held that §324.021(9)(b) did not abolish a theretofore existing cause of action. Taking its cue from *Perry*, the *Kraemer* Court held in an action arising prior to July 1, 1986, that Florida's "dangerous instrumentality doctrine" was never applicable to long-term leases. The two decisions are sufficiently similar in reasoning that they can profitably be discussed together here.

It is noteworthy, we think, that the Second District was unable to find any Florida decision which had ever drawn a distinction between long-term leases and short-term leases.[4/] Instead, it relied exclusively upon *Palmer v. R. S. Evans, Jacksonville, Inc.*, 81 So.2d 635 (Fla. 1955), in which this Court held that *conditional vendors* transferring "beneficial ownership" to their conditional vendees and retaining only "naked legal title"

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

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as security are not liable under Florida's "dangerous instrumentality doctrine".[5/] Reduced to their essentials, both *Perry* and *Kraemer* hold that, unlike short-term leases, long-term leases transfer "beneficial ownership" to the lessee in the same way that conditional sale contracts do, and that long-term lessors should therefore escape liability under Florida's "dangerous instrumentality doctrine" for the same reason that conditional vendors do.

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

A lease transfers *only* "possession and control". *See* Restatement (Second) of Property, §1.2; 3 *Thompson on Real Property*, §1032, p. 116 (1980 Ed.). A lease does *not* transfer "beneficial ownership". The phrase "beneficial ownership" is a term of art, a shorthand phrase for a far more complicated concept than mere "possession and control", and a phrase whose meaning depends upon centuries of legal history. "Beneficial ownership" is a synonym for "equitable ownership". *Black's Law Dictionary*, p. 142 (5th Ed. 1979). "Beneficial ownership" is a claim to title which a law court will not enforce, but which will be enforced in a court of equity. The simplest example is a conditional sale contract -- like the conditional sale contract involved in *Palmer*, upon

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

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which *Perry* and *Kraemer* are anomalously bottomed -- in which the seller has promised to convey legal title to the purchaser at some future date. The purchaser obtains "beneficial ownership" of the property by virtue of that agreement, and if the seller fails to convey legal title as agreed, a court of equity will order specific performance in the purchaser's favor. That is, in essence, "beneficial ownership".

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

> . . . What is important here, is that certain parts of property law came to be administered in equity rather than in the common-law courts and another difficulty to ready understanding of property terminology arose. The rights and interests recognized by chancery were called equitable and so we have legal title and equitable title, legal rights and equitable rights.
>
> If either party to a written contract for the sale of an interest in land fails to carry out his bargain, equity will grant a decree for specific performance, i. e., force the vendor to deed the land to the purchaser and the latter to pay the purchase price. The only remedy at law is money damages for breach of contract and, since that is felt to be inadequate for a *res* so unique as land, equity asserts its extraordinary jurisdiction. The result is that the vendor has legal title until the deed conveying the interest in land is delivered to the purchaser but the purchaser is said to have equitable title just as soon as an enforceable contract for the sale of land is executed. This result arises from a maxim of the Court of Chancery, "Equity regards as done that which ought to be done." Since the vendor ought to convey the interest in land on performance by the purchaser, equity will treat the matter as if he had done so and give the buyer equitable title to the land. . . .

The point is also nicely explained in *Cox Motor Co. v. Faber*, 113 So.2d 771 (Fla. 1st DCA 1959), in which the Court explained the concept of "beneficial ownership" as we have explained it here; followed *Palmer* on similar facts; and observed that a conditional sale contract transferring "beneficial ownership" is not synonymous with a lease. In addition, *see generally, Arko Enterprises, Inc. v. Wood*, 185 So.2d 734 (Fla. 1st

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DCA 1966) (and decisions cited therein); *Cain & Bultman, Inc. v. Miss Sam, Inc.*, 409 So.2d 114 (Fla. 5th DCA 1982); *Contella v. Contella*, 559 So.2d 1217 (Fla. 5th DCA 1990); 8A *Thompson on Real Property*, §4447 (1965 Ed.).

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

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

For the sake of emphasis, we repeat: a lease "does not give the lessee any legal or equitable [i. e., beneficial] title in the property subject to the lease . . ."; it gives the lessee only a "right of possession".

This explanation of the legal effect of a lease under Florida law is clearly accurate. *See, e. g., W. E. Johnson Equipment Co., Inc. v. United Airlines, Inc.*, 238 So.2d 98, 100 (Fla. 1970) (" . . . a sale transfers ownership and a lease or bailment merely transfers possession and anticipates future return of the chattel to the owner"); *Burnette v. Thomas*, 349 So.2d 1208 (Fla. 2nd DCA 1977) (lease transfers only possessory interest to lessee; lessor retains all ownership interests); 5 Fla. Jur.2d, *Bailments*, §2 ("In a bailment, possession of the property bailed is severed from the ownership, the bailor retaining general ownership and the bailee receiving lawful possession or custody for the specific purpose of the bailment."). *See generally*, 8 C.J.S., *Bailments*, §§28-29 (and

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numerous decisions cited therein). In short, a lease, *by definition*, does *not* transfer any beneficial ownership to the lessee; it transfers *only* possession, and leaves both legal and beneficial ownership squarely in the owner/lessor. And in that respect, of course, there is no difference whatsoever between a long-term lease and a short-term lease.

It therefore ought to be clear that the analogy drawn in *Perry* and *Kraemer* between conditional sale contracts and long-term leases is an impermissible analogy, and that the Second District's conclusion that long-term leases transfer "beneficial ownership" is simply wrong. The conclusion is also dangerous -- because, if *Perry* and *Kraemer* are correct that a long-term lease transfers "beneficial ownership" (i. e., equitable title) to a lessee, then long-term lessors no longer own the entire "bundle of sticks" which constitute title, and they no longer have a complete enough ownership interest in their property to be able to sell it to another (subject to the lease, of course) during the term of the lease. (The availability of that option is, of course, one of the reasons for choosing to lease rather than sell in the first place.) We do not believe that the *Perry* and *Kraemer* Court meant to give long-term lessees an *ownership* interest in their leased vehicles, but that is exactly what it did -- and we respectfully submit that, once this fundamental flaw in the cornerstone of *Perry* and *Kraemer* is recognized, then the rest of the edifice created in those two decisions should fall of its own unsupported weight.

Neither is it appropriate to declare long-term leases to be nothing more than mere "alternative financing arrangements", and thereby treat them as synonymous with secured sales and conditional sales. Although long-term leases are financing arrangements in one sense, they are clearly not straightforward "alternatives" to a financed sale because they are different in kind in several respects. For example, there are tax advantages to leasing which are unavailable in a secured sale or conditional sale. Leasing also cleanly avoids creditors' claims against the vehicle if the lessee ends up in a bankruptcy court. Leasing also enables the lessor to sell the used vehicle at the end of the term for additional profit. Most importantly, by inserting contractual limitations

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and requirements in its lease, a lessor *can* control the operation of its lessee's vehicle in a number of ways which a seller cannot. For example, to ensure financial responsibility, a lessor can require a lessee to maintain liability insurance on the vehicle as a condition of the lease (a condition which GMAC did impose in the instant case).

Since the commercial world recognizes separate utilities in the two types of transactions, there is no good reason for the courts to declare them equal -- and the analogy which the *Perry* and *Kraemer* Court inferred between conditional sales and long-terms leases (by misunderstanding the meaning of the phrase "beneficial ownership") ought to be recognized as an impermissible analogy. *See Levitz Furniture Co. v. Continental Equities, Inc.*, 411 So.2d 221, 225 (Fla. 3rd DCA), *review denied*, 419 So.2d 1196 (Fla. 1982) (notwithstanding that, in the words of the dissent, a "net lease" is "essentially a sophisticated financing technique intended to make the tenant the owner of the property", where the parties structured the transaction as a lease rather than a sale, lessor was bound by landlord-tenant law). Most respectfully, GMAC was undeniably both the legal owner and the beneficial owner of the vehicle in issue here.[6/]

[6/] This conclusion is not affected in any way by the affidavit of GMAC's "leasing manager", in which he asserted that GMAC was not the "beneficial owner" of the vehicle. The assertion is simply a legal conclusion, not a statement of fact -- and it is apodictic that legal conclusions have no place in factual affidavits, and that they must be ignored when ruling upon motions for summary judgment. *See, e. g., 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); *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).

And, in any event, the legal conclusion contained in the layman's affidavit is simply wrong. Once GMAC conceded that the transaction in issue was a lease, rather than a conditional sale, it necessarily conceded that both legal and beneficial ownership of the vehicle belonged to it, as a matter of well-settled principles of the law of property. Alternatively, even if the legal conclusion in the affidavit were considered competent evidence of a *fact*, the fact remains that Mr. Hersh denied on the record that he was the "beneficial owner" of the vehicle. At the very least, therefore, there is a conflict in the evidence which simply precluded the granting of a motion for summary judgment on this issue.

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3. The inapplicability of Chapter 324.

GMAC also contended below that 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. 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.

We quote 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:
>
> . . . .
>
> (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).

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". GMAC's

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lessee 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 his rather than GMAC's hardly means that GMAC 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 "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).

Other decisions are in accord. *See American States Insurance Co. v. Baroletti*, 15

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FLW D2055 (Fla. 2nd DCA Aug. 10, 1990) ("dangerous instrumentality doctrine" exists independently of, and is broader than, minimum insurance requirements of Chapter 324); *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 of this Court quoted in the preceding paragraph 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.

GMAC also contended below 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". Amici in the other cases pending here have also made this argument a central feature of their briefs, 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

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> 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.

(Emphasis and bracketed numerals supplied).

Paragraph 9(a) is the former paragraph (9) of the statute; 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) defines "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 §324.021 does not support GMAC'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

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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 July 1986 amendment to §324.021 supports our position on what the law was in February, 1986, in every respect.

4. A concluding argument.

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

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

For example, an owner/parent who turns the car keys over to a teenager for a

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

Moreover, even if there were a difference, where does a short-term lease end and a long-term lease begin? Does liability under the "dangerous instrumentality doctrine" cease if the lease is for a week, or does it cease if the lease is for a month? Six months, perhaps -- or maybe a year? Neither *Perry* nor *Kraemer* answer that question, and it ought to be clear that no logical answer to the question exists. Most respectfully, there is no principled dividing line between short-term leases and long-term leases where "possession and control" are concerned, so "possession and control" simply cannot be the touchstone for liability under the "dangerous instrumentality doctrine". And that, in essence, is what this Court announced in *Susco Car Rental*, when it declared that "possession and control" was an ultimately irrelevant question, and that the "dangerous instrumentality doctrine" is simply a rule of public policy creating an additional layer of financial responsibility for the protection of the travelling public -- a public policy which is nullified by the contrary conclusion in *Perry* and *Kraemer*.[7/]

[7/] Of course, just because no logical or principled line can be drawn between short-term leases and long-term leases does not mean that no *arbitrary* line can be drawn between them. The legislature drew such a line in §324.021(9)(b), when it exempted leases of one year or longer from the "dangerous instrumentality doctrine" (but with

There are several additional areas of the law with which *Perry* and *Kraemer* simply cannot be squared. For example, as noted previously, there are numerous decisions dealing with the question of whether a lessor's or a lessee's liability insurance coverage is primary or secondary, each of which was necessitated by the existence of §627.7263, Fla. Stat. -- which declares (without drawing any distinction whatsoever between long-term and short-term leases) that a *lessor's* liability insurance coverage "shall be primary" unless shifted to the lessee "in bold type on the face of the rental or lease agreement". Of course, if *Perry* and *Kraemer* are correct that long-term lessors have never been vicariously liable for the negligence of their lessees, then this statute amounts to a nullity, and the numerous decisions construing it were mere academic exercises. We respectfully submit that it is *Perry* and *Kraemer* which are the flies in the soup.

Perry and *Kraemer* also make no sense when read against §324.021(9)(b), Fla. Stat. (1986 Supp.), in which the legislature appears to have created an exception to vicarious liability under the "dangerous instrumentality doctrine" for long-term lessors, but left that vicarious liability fully in place where the lessee fails to purchase the insurance required to relieve the long-term lessor of liability under the doctrine. If *Perry* and *Kraemer* are correct, there was absolutely no need for this statute, since long-term lessors were never liable under the doctrine in the first place. In addition, if *Perry* and *Kraemer* are correct, then enactment of this statute in 1986 had the peculiar effect of *creating* vicarious liability under the "dangerous instrumentality doctrine" for long-term lessors (whose lessees do not carry the required insurance), for the first time ever in Florida

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appropriate provision for financial responsibility). The issue before the Court is what the law was *before* that arbitrary line was drawn, however, and we respectfully submit that the Court should be guided by logic and principle when deciding that issue, rather than arbitrariness. In addition, of course, the arbitrary line recently drawn by the legislature was *conditioned* upon the lessee's procurement of insurance in the amounts of $100,000/$300,000/$50,000 -- a condition which this Court could *not* impose (given the *different* statutory requirements in existence in 1985) -- so any line which this Court might draw without such a condition would be doubly arbitrary.

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law, notwithstanding that, on its face, the statute purports to create only an *exception* to that doctrine. In our judgment, because it makes no sense to read the amended statute that way, *Perry* and *Kraemer* remain the flies in the soup.

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

V. CONCLUSION

It is respectfully submitted that the District Court erred in concluding that Florida's "dangerous instrumentality doctrine" is inapplicable to owner/lessors leasing vehicles under long-term leases; that the district court's decision should be quashed; and that the case should be remanded to the district court with directions to reverse the summary judgment entered in GMAC's favor by the trial court.

VI. CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 4th day of September, 1990, to: Larry I. Gramovot, Esq., Mallory & Zimmerman, P.O. Box 479, Wausau, Wisconsin 54401; and to Roland J. Lamb, Esq., Williams, Brasfield, Wertz, Fuller & Lamb, P.A. 2553 First Avenue North, Post Office Box 12349, St. Petersburg, Fla. 33733-2349.

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