IN THE SUPREME COURT OF FLORIDA

AMERICAN HONDA MOTOR COMPANY, INC.,

Petitioner,

v.

JENNIFER CERASANI,

Respondent.

Fla. S. Ct. No. SC05-1907

DCA No. 2D04-2719
Trial Ct. No.03-6470-CI-21

RESPONDENT'S ANSWER BRIEF

On Review from the

Second District Court of Appeal

State of Florida

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I. TABLE OF CONTENTS

Table of Citations …… iii

Statement of the Case & Facts …… 1

Jurisdiction …… 9

The Standard of Review …….. 13

Summary of the Argument …….. 13

Argument on the Merits …….. 16

The Magnuson-Moss Warranty Act, 15 USC 2301 *et seq*., applies to leases as well as purchases of consumer goods, and courts around the country have recognized that fact. All of Florida's District Courts have held that the Warranty Act applies to vehicle leases. Eighteen years ago the First District held that a vehicle lessee may qualify as a category one "buyer" under the Act where the transaction at issue is sufficiently akin to a sale as to fairly be treated as such. The Second and Third Districts recently analyzed the issue in a broader context, and held that a vehicle lessee qualifies as either a category two consumer (a person to whom a consumer good is transferred during the period of the warranty) or as a category three consumer ("any other person" entitled by the warranty or by State law to enforce the warranty). Under either the more limited analysis applied by the First District or the more developed analysis of the Second and Third Districts, the facts and circumstances of this transaction satisfy the criteria for coverage by Magnuson-Moss and the factual allegations contained in the Amended Complaint were fully sufficient to satisfy the Plaintiff's pleading burden on that issue.

1. Florida's district courts recognize that Magnuson-Moss applies to vehicle leases as well as purchases. 16

   A. The Plaintiff is a category one consumer under the Sellers analysis. 18

B. The Plaintiff is both a category two and a category three consumer under the Mesa, O'Connor, Cerasani, and Brophy analysis. 23

2. Other jurisdictions also expressly recognize that lessees qualify as category two and category three consumers under the Warranty Act. 31

A. Federal Courts. …… 31

B. Illinois. …….. 35

C. Ohio. …….. 36

D. Wisconsin. …… 38

E. Arizona. …… 38

F. New Jersey. …… 39

G. Other States. …… 40

3. The express language of the federal Act protects automobile lessees. 41

A. The Plaintiff is a "consumer" under the Act. 42

B. Honda's warranty is a written warranty as defined by the federal Act. 45

4. The principal case Honda relies on has been criticized as fundamentally flawed by every court to rule on these issues since that opinion was issued. 48

Conclusion …… 50

Certificate of Compliance …… CP[1]

Certificate of Service …… CP

[1] Certifications page.

Appendix

1. Cerasani v. Honda, 916 So.2d 843 (Fla. 2nd DCA 2005) **A-1**

2. Mesa v. BMW, 904 So.2d 450 (Fla. 3rd DCA 2005) **A-2**

3. O'Connor v. BMW, 905 So.2d 235 (Fla. 2nd DCA 2005) **A-3**

4. Brophy v. DaimlerChrysler, 2005 WL 2693308 (Fla. 2nd DCA 2005) **A-4**

5. Sellers v. Frank Griffin AMC Jeep, Inc., 526 So.2d 147 (Fla. 1st DCA 1988) **A-5**

6. Lease Agreement **A-6**

7. Amended Complaint (copy w/o attachments) **A-7**

8. Trial court order appealed **A-8**

9. Voelker v. Porsche Cars North America, Inc., 353 F.3d 516 (7th Cir. 2003) **A-9**

10. Cohen v. AM General Corp., 264 F. Supp. 2d 616 (N.D. Ill. 2003) **A-10**

11. Weisberg v. Jaguar Cars, Inc., 2004 U.S. App. LEXIS 5738 (7th Cir. 2004) **A-11**

12. Dekelaita v. Nissan Motor Corporation, 799 N.E.2d 367 (Ill. App. 2003) **A-12**

13. Szubski v. Mercedes-Benz, 796 N.E.2d 81 (Ohio App. 2003) **A-13**

14. Peterson v. Volkswagen, 679 N.W.2d 840 (Wisc. App. 2004) **A-14**

15. Peterson v. Volkswagen, 697 N.W.2d 61 (Wisc. 2005) **A-15**

16. Parrot v. DaimlerChrysler, 108 P.3d 922 (Ariz. App. 2005) **A-16**

17. Ryan v. American Honda Motor Corp., 869 A.2d 945 (N.J. App. 2005) **A-17**

II. TABLE OF CITATIONS

United States Supreme Court

Ford Motor Credit Co. v. Cenance, 452 U.S. 155 (1981) …… 27-28

Landreth Timber Co. v. Landreth, 471 U.S. 681 (1985) …… 41

Russello v. United States, 464 U.S. 16, 20 (1983) ……. 41-42

Florida's District Courts of Appeal

Brophy v. DaimlerChrysler, 2005 WL 2693308 (Fla. 2nd DCA 2005) …….. 1, 8, 11, 17 24, 28, 29

Cerasani v. Honda, 916 So.2d 843 (Fla. 2nd DCA 2005) …….. 1, 6-8, 9,11 17, 23, 24, 25, 27

Chatlos Foundation, Inc. v. D'Arata, 882 So.2d 1021 (Fla. 5th DCA 2004) ……. 13

Elizabeth N. v. Riverside Group, Inc., 585 So.2d 376 (Fla. 1st DCA 1991) ……. 45

Martin v. Principal Mutual Life Ins. Co., 557 So.2d 128 (Fla. 3rd DCA 1990) ……. 13

Mesa v. BMW, 904 So.2d 450 (Fla. 3rd DCA 2005) …… 1, 8, 11, 13 18, 24, 25, 28, 29, 30, 39, 43

Nationwide Mutual Fire Ins. Co. v. Central Fla. Physiatrists, 851 So.2d 762 (Fla. 5th DCA 2003) …… 30

Sellers v. Frank Griffin AMC Jeep, Inc., …….. 6, 10, 18
526 So.2d 147 (Fla. 1st DCA 1988)

O'Connor v. BMW, …… 1, 8, 11, 13
905 So.2d 235 (Fla. 2nd DCA 2005) 24, 28, 29, 30, 40

Federal Appellate Courts

Abraham v. Volkswagen, …….. 49
795 F.2d 238 (2d Cir. 1986)

In re Maxway Corp., ……. 41
27 F.3d 980 (4th Cir.1994)

King v. Internal Revenue Service, ……. 43
688 F.2d 488 (7th Cir. 1982)

Voelker v. Porsche Cars North America, Inc., ……. 31-33
353 F.3d 516 (7th Cir. Dec. 12, 2003)

Weisberg v. Jaguar Cars, Inc., ……. 33
2004 U.S. App. LEXIS 5738 (7th Cir. 2004)

Federal District Courts

Cohen v. AM General Corp., …….. 33-35
264 F. Supp. 2d 616 (N.D. Ill. 2003)

Weisberg v. Jaguar Cars, Inc., …….. 33
2003 WL 1337983 (N.D. Ill. 2003)

Other States

Dekelaita v. Nissan Motor Corporation, ……. 22, 25
799 N.E.2d 367 (Ill. App. 2003), *appeal denied*, 807 N.E.2d 974 (2004) 35-36
43

DiCintio v. DaimlerChrysler, ……. 48-50
768 N.E.2d 1121 (NY 2002)

Heller & Co., Inc. v. Convalescent Home, …….. 41
49 Ill.App.3d 213 (1977)

Henderson v. Benson-Hartman Motors, Inc., 41
41 UCC Rep.Serv. 782, 1983 WL 160532 (Pa. Com. Pl. 1983)

Hertz Commercial Leasing Corp. v. Joseph, …… 41
641 S.W.2d 753 (Kent. App. 1982)

Interstate Ind. Uniform Rental Svc., Inc. v. F.R. Lepege Bakery, Inc., 41
413 A.2d 516 (Maine S.Ct. 1980)

Mangold v. Nissan, …… 25, 43
809 N.E.2d 251 (Ill. App. 2004);

Parrot v. DaimlerChrysler Corp., …… 25,
108 P.3d 922 (Ariz. App. 2005); 38-39
43

Peterson v. Volkswagen of America, Inc., …… 38, 49
697 N.W.2d 61 (Wisc. 2005)

Peterson v. Volkswagen of America, Inc., ……. 38
679 N.W.2d 840 (Wisc. App. 2004)

Ryan v. Honda, …… 25
869 A.2d 945 (N.J. App. 2005); 39-40
43

Szubski v. Mercedes-Benz, U.S.A., LLC, ……. 36-37
796 N.E.2d 81 (Oh. Com. Pl. 2003)

Statutes

Florida Constitution, Article V, § 3(b)(3) …….. 9

The Magnuson-Moss Warranty Act, 15 USC § 2301, et seq. *passim*

Florida Rules of Procedure

Rule 9.030 …… 2

Treatises and Other Publications

Congressional Record ……. 50

Padovano, *Florida Appellate Practice* (West's Florida Practice Series Series, 2006 edition) 9, 13

III. STATEMENT OF THE CASE & FACTS

1. General Issue on Appeal.

The Magnuson-Moss Warranty Act[2] allows "a consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under [the Act], under a written warranty, implied warranty, or service contract, [to] bring suit for damages and other legal and equitable relief."[3] The issue in this case is whether Congress really meant a "consumer" could bring suit under the Act, or whether it meant only a "buyer" could. Honda argues Congress really only meant a buyer could bring suit.[4] The Second and Third District Courts of Appeal held four times last year that by giving the term "consumer" three increasingly broader definitions (only one of which is "buyer"), Congress really did mean a "consumer" could bring suit under the Warranty Act.[5] Honda appeals the District Court's interpretation of the plain language of the federal Act,[6] and in so doing asks the Supreme Court to reverse four virtually identical Florida

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[2] 15 USC §2301, *et seq*.
[3] 15 USC § 2310(d)(1).
[4] See Petitioner's Initial Brief generally.
[5] See Mesa v. BMW, 904 So.2d 450 (Fla. 3rd DCA 2005); O'Connor v. BMW, 905 So.2d 235 (Fla. 2nd DCA 2005); Cerasani v. Honda, 916 So.2d 843 (Fla. 2nd DCA 2005); Brophy v. DaimlerChrysler, 2005 WL 2693308 (Fla. 2nd DCA 2005). (**The decision being appealed by Honda and each of the other four Florida cases dealing with the issue presented here are included in the Respondent's Appendix of materials at "A-1 through A-5."**)
[6] See Notice to Invoke Discretionary Jurisdiction of the Florida Supreme Court.

appellate decisions[7] which are entirely consistent in all ways with the overwhelming majority of courts to have considered the issues presented in this appeal, including the United States Seventh Circuit Court of Appeals.

2. Statement of the Case & Facts.

In early 2002, the Respondent ("Plaintiff")[8] visited Crown Honda ("Dealer"), and selected a brand new 2002 Honda Civic (the "vehicle") for her personal use.[9] The Petitioner ("Honda" or "Defendant") manufactured the vehicle,[10] warranted the vehicle,[11] and distributed the vehicle,[12] and the Plaintiff took possession of the vehicle through an authorized Honda dealership that markets to consumers such as the Plaintiff.[13] Once the Plaintiff selected the vehicle she wanted, the Dealer sold the vehicle to a financial institution (the "Lessor"), and the Lessor in turn immediately and simultaneously leased the vehicle right back to the very consumer who had selected it to begin with (the

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[7] Mesa v. BMW, 904 So.2d 450 (Fla. 3rd DCA 2005); O'Connor v. BMW, 905 So.2d 235 (Fla. 2nd DCA 2005); Cerasani v. Honda, 916 So.2d 843 (Fla. 2nd DCA 2005); Brophy v. DaimlerChrysler, 2005 WL 2693308 (Fla. 2nd DCA 2005).

[8] To avoid confusion from the fact that the designations of the Parties have changed throughout the course of the proceedings, the Parties will be referred to throughout this brief by their original designations of "Plaintiff" and "Defendant."

[9] **See Lease Agreement at "A-6."** (Amended Complaint, Exhibit "A," AR Vol. 1, pp. 86-127; see also Plaintiff's Memorandum of Law (AR Vol. 2, pp. 142 – 232) at Exhibit "A.") (Citations to the appellate record are designated as "AR" and include the volume and page number.)

[10] Amended Complaint, ¶ 3 (AR Vol. 1, pp. 86-127).

[11] Id at ¶ 8.

[12] Id at ¶ 3.

[13] Id at ¶¶ 2 & 3.

Plaintiff, here).[14] The sale would not have occurred but for the Plaintiff's agreement to lease the vehicle, and likewise, there could have been no lease without the simultaneous sale of the vehicle to the Lessor.[15]

The vehicle came with Honda's standard new vehicle written warranty.[16] The Lessor received the warranty with its purchase of the vehicle (just as any purchaser would),[17] and the Lessor in turn immediately assigned its rights in the warranty to the Plaintiff as part of the Lease Agreement.[18] That aspect of the transaction was critical to the deal, and the Plaintiff would not have leased the vehicle absent the ability to enforce the warranty against the Manufacturer.[19] In fact, there'd be precious little interest in leasing new vehicles at all if they didn't come with a new vehicle warranty. Honda's warranty fully applied to the vehicle at all times relevant to this suit, and obligated Honda to satisfactorily and timely correct defects in the vehicle which were brought to Honda's attention.[20]

Not long after the Plaintiff took possession of the vehicle, she began to experience various defects in it.[21] She reported the defects to Honda, and gave

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[14] Id at ¶¶ 5, 6, 7.
[15] Id.
[16] Amended Complaint, ¶¶ 8, 9, 32, 41 (AR Vol. 1, pp. 86-127).
[17] Id.
[18] Id at ¶¶ 11, 28.
[19] Id at ¶¶ 10, 33.
[20] Id at ¶¶ 8, 9, 10, 11, 28, 32, 33.
[21] Id at ¶¶ 12, 44.

Honda a reasonable opportunity to fix the problems.[22] Never once during that time did Honda dispute the fact that the written warranty on the vehicle bound it to the Plaintiff.[23] In fact, Honda allowed the Plaintiff to enforce the written warranty against it over and over again without disputing that the defects at issue were covered by its warranty.[24] Pursuant to the terms of the written warranty, the Plaintiff tendered the vehicle to a Honda authorized dealership time and again – all to no avail.[25] The Plaintiff gave Honda a reasonable opportunity to repair the defects at issue, but Honda either wasn't able to fix the vehicle and conform it to the condition called for by the warranty, or Honda failed or refused to fix it.[26] Either way, the uncorrected defects prevented the Plaintiff from utilizing the vehicle for the personal, family and household use she intended when she took possession of it.[27] Frustrated with the Defendant's inability or unwillingness to fix the vehicle, the Plaintiff revoked her acceptance of it, but the Defendant refused to take the vehicle back.[28] The Amended Complaint alleges all of these facts, and

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[22] Id at ¶¶ 12, 13, 14, 17, 18, 19.
[23] Amended Complaint, ¶¶ 14, 15, 16 (AR Vol. 1, pp. 86-127).
[24] Id at ¶¶ 12-19.
[25] Id at ¶¶ 12-20.
[26] Id.
[27] Id at ¶¶ 12 & 21.
[28] Id at ¶ 20, 26.

further alleges that the result of all of this is that Honda breached its written and implied warranties on the vehicle.[29]

The Plaintiff brought suit under the federal Warranty Act seeking damages arising from the Defendant's breach of its express and implied warranties on the vehicle.[30] After being served with process, the Defendant moved to dismiss Count I (Breach of Express Warranty) based on the two-pronged argument that vehicle lessees are not consumers and that Honda's written warranty is not a written warranty within the context of a lease.[31] Honda also moved to dismiss Count II (Breach of Implied Warranty) based on the argument that there is neither vertical nor horizontal privity between the Plaintiff and Honda.[32]

At the time the trial court considered the Defendant's motion to dismiss, only one of Florida's District Courts had ever considered the question of whether an automobile lessee qualifies as a consumer under the federal Warranty Act.[33] The Plaintiff explained that when the First DCA heard this issue in Sellers v. Frank

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[29] See Plaintiff's Amended Complaint, Count I & Count II generally.

[30] **See copy of Amended Complaint attached as "A-7."** (AR Vol. 1, pp. 86-127) (See also original Complaint at AR Vol. 1, pp. 1-32.)

[31] See Defendant, American Honda Motor Co., Inc.'s Motion to Dismiss Plaintiff's Amended Complaint and to Strike Plaintiff's Demand for Jury Trial. (AR Vol. 1, pp. 135 – 141.)

[32] Id.

[33] See Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Dismiss (AR Vol. 2, pp. 142-232), citing Sellers v. Frank Griffin AMC Jeep, Inc., 526 So.2d 147 (Fla. 1st DCA 1988).

Griffin AMC Jeep[34] more than 16 years ago the court was presented with a narrow issue: whether an automobile lessee qualifies as a category one consumer under the Act (a "buyer") for purposes of enforcing a written warranty.[35] The Plaintiff argued that she is as a category one consumer "buyer" under the Sellers analysis,[36] but also argued that even if she weren't, she is as a category two consumer (a person to whom the product was transferred during the duration of a written warranty) or a category three consumer (a person entitled by the terms of the warranty or by State law to enforce the warranty against the warrantor).[37] Despite the fact that the rules of civil procedure strongly discourage dismissing a cause of action (with prejudice or otherwise), the trial court decided the Plaintiff wasn't entitled under any of those categories to seek relief against the very party that both supplied and warranted the vehicle at issue in this action.[38] The trial court dismissed the Plaintiff's action, and the Plaintiff timely appealed.[39]

The District Court considered argument (written and oral) on the Plaintiff's claims for breach of express and implied warranty.[40] The District Court affirmed

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[34] 526 So.2d 147 (Fla. 1st DCA 1988).
[35] Id.
[36] See Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Dismiss (AR Vol. 2, pp. 142-232).
[37] Id.
[38] See Final Order Granting Defendant's Motion to Dismiss Plaintiff's Amended Complaint. (AR Vol. 2, pp. 234-239).
[39] See Notice of Appeal (AR Vol. 2, pp. 240-247) **(a copy of which is at "A-8")**.
[40] See Cerasani v. Honda, 2005 WL 1875490 (Fla. 2nd DCA 2005) generally.

the trial court as to Count II (implied warranty) based on arguments inapplicable to Count I (express warranty),[41] and neither party has sought review of that ruling.[42] The District Court reversed as to Count I, and held that the plain language of the Warranty Act allows a consumer to bring suit, not just a buyer.[43]

In her briefs as well as at oral argument, the Plaintiff argued that she qualifies as a category one consumer, category two consumer, and category three consumer under the federal Act.[44] Relying on the First DCA's ruling in Sellers, the Plaintiff explained that the requisite incidents of a sale are present in this transaction such that the Plaintiff properly qualifies as a category one consumer (a "buyer") under the Sellers analysis.[45] The Plaintiff also explained that even if that weren't true, however, she fits within one of the Act's two other increasingly broader definitions of consumer.[46] The District Court offered no opinion as to whether the Plaintiff qualifies as a "buyer" under the Sellers analysis.[47] Relying on case law directly on point from a variety of different federal and State jurisdictions (including two recent Florida cases dealing with this very issue) the Second DCA

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[41] Cerasani at * 3.
[42] See Defendant's Notice to Invoke Jurisdiction; see also absence of cross-notice by Plaintiff.
[43] Cerasani at * 4.
[44] See Plaintiff/Appellant's Initial Brief to the District Court generally beginning at page 9.
[45] Id at pages 9-14.
[46] See Plaintiff/Appellant's Initial Brief to the District Court generally beginning at page 9.
[47] See Cerasani v. Honda, 916 So.2d 843 (Fla. 2nd DCA 2005) generally.

analyzed the issue within a broader context than had the First DCA.[48] The court held that since the Plaintiff properly alleged that she received the consumer good during the duration of a written warranty, she qualifies as a category two consumer.[49] The court also held that since the Plaintiff properly alleged she is entitled either by the terms of the written warranty or by State law to enforce the written warranty against the warrantor that she also qualifies as a category three consumer.[50] The District Court further held that Honda's written warranty was a "written warranty" as defined by the federal Act[51] and that the Plaintiff was therefore entitled to bring suit under the Act against the warrantor.[52] The District Court reversed the trial court as to Count I and ordered the case reinstated.[53] Honda appeals the District Court's interpretation of the plain language of the federal Act,[54] and in so doing asks the Supreme Court to reverse four virtually identical District Court decisions.[55]

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[48] The Cerasani court relied, among others, on Mesa v. BMW, 904 So.2d 450 (Fla. 3rd DCA 2005); O'Connor v. BMW, 905 So.2d 235 (Fla. 2nd DCA 2005).
[49] Cerasani at 846.
[50] Cerasani at 847.
[51] Cerasani at 846.
[52] Cerasani at 847.
[53] Cerasani at 847.
[54] See Honda's Notice to Invoke Discretionary Jurisdiction.
[55] Mesa v. BMW, 904 So.2d 450 (Fla. 3rd DCA 2005); O'Connor v. BMW, 905 So.2d 235 (Fla. 2nd DCA 2005); Cerasani v. Honda, 916 So.2d 843 (Fla. 2nd DCA 2005); Brophy v. DaimlerChrysler, 2005 WL 2693308 (Fla. 2nd DCA 2005).

VII. JURISDICTION

The Florida Supreme Court has the authority as the highest court of the State to resolve legal conflicts created by the district courts of appeal. See Florida Constitution, Article V, § 3(b)(3). As in each of the other three virtually identical district court decisions which came out when this one did, the Second District Court of Appeal certified conflict with the First District's decision in Sellers v. Frank Griffin AMC Jeep "to the extent that Sellers concluded that the Magnuson-Moss Act does not apply to lease transactions." See Cerasani v. Honda at 847. Based on the express language of this, and the other three cases dealing with this same issue, the Supreme Court has jurisdiction over this matter.

But whether the Supreme Court *has* discretionary jurisdiction is one issue, and whether it elects to *exercise* that jurisdiction is another matter entirely. Padovano, *Florida Appellate Practice* § 3.10 (West's Florida Practice Series, 2006 edition). Notwithstanding the District Court's certification, the Plaintiff submits that there is no real conflict between the First DCA's holding in Sellers and the Second District's holdings in this case, Brophy v. DaimlerChrysler, and O'Connor v. BMW or the Third District's holding in Mesa v. BMW. The Sellers court was asked whether a vehicle lessee can qualify as a "buyer" under the Magnuson-Moss

Warranty Act in order to enforce the written warranty.[56] The Sellers court answered that question in the affirmative,[57] and established a 10-point test to use in determining whether the automobile lease is sufficiently akin to a sale so as to fairly be treated as such.[58] The Sellers court expressly stated that a lessee may qualify as a consumer "buyer" under the federal Act if enough of those 10 factors are satisfied.[59] The Sellers court was not asked to analyze the issue within the context of the Warranty Act's other two definitions of consumer.[60]

In this case, however, the Second District was asked to decide (as it was in O'Connor v. BMW and Brophy v. DaimlerChrysler, and as the Third District was

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[56] Compare Sellers at 150 ("Appellants argue that section 672.608 is applicable to this lease transaction because section 672.102, defining the scope of application of chapter 672 governing sales, provides that "unless the context otherwise requires, this chapter applies to transactions in goods," and appellants' lease of this vehicle was a "transaction in goods" as so defined") to Sellers at 156 ("Much the same analysis is applicable in determining whether this is a consumer transaction which constitutes a "sale" under the Magnuson-Moss Act").

[57] See, e.g., Sellers at 151. "Florida courts have observed this directive in holding that leases of equipment may be "transactions in goods[.] * * * In other states, certain lease transactions found by the courts to possess essential characteristics that are equivalent to a sale have been held subject to part 2 (Sales) of the UCC. See, e.g., Lousin, *Heller & Co., et al. v. Convalescent Home, et al.: Leases, Sales and the Scope of Article Two of the U.C.C. in Illinois,* 67 Ill.B.J. 468, 473 n. 43 (citing seventeen cases where article 2 of the UCC has been applied to lease transactions)." (Citations to case law omitted).

[58] Sellers at 151.

[59] "We conclude, therefore, that an equipment lease may be a 'transaction in goods' subject to the provisions of chapter 672 if the requisite incidents of a sale are present 'unless the context otherwise requires.'" Sellers at 151. "Much the same analysis is applicable in determining whether this is a consumer transaction which constitutes a "sale" under the Magnuson-Moss Act." Sellers at 156.

[60] See Sellers generally.

in Mesa v. BMW) whether a lessee qualifies as a consumer under *any* of the Act's three definitions.[61] Both the Second and the Third District hold that a vehicle lessee qualifies as a category two consumer where, as here, the Plaintiff alleges having received the vehicle during the duration of a written warranty.[62] Both the Second and Third Districts also hold that a vehicle lessee qualifies as a category three consumer where, again as here, the Plaintiff alleges she is entitled either by the written warranty itself or by State law to enforce the warranty against the warrantor.[63] Neither the Second District nor the Third held that a vehicle lessee cannot *also* qualify as a category one consumer "buyer."[64] In fact, neither District appear to have even considered whether a vehicle lessee can qualify as a consumer "buyer" – perhaps because the issue is so much more easily decided within the plain language of the Warranty Act's two other broader definitions of consumer.[65]

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[61] See Plaintiff/Appellant's Initial Brief to the District Court in this case; see also Mesa v. BMW, 904 So.2d 450, 453 (Fla. 3rd DCA 2005); and O'Connor v. BMW, 905 So.2d 235, 236-237 (Fla. 2nd DCA 2005).

[62] Cerasani at 846; see also Mesa v. BMW, 904 So.2d 450, 456 (Fla. 3rd DCA 2005); O'Connor v. BMW, 905 So.2d 235, 240 (Fla. 2nd DCA 2005); Brophy v. DaimlerChrysler, 2005 WL 2693308, * 2 (Fla. 2nd DCA 2005).

[63] Cerasani at 847; see also Mesa at 456; O'Connor at 240; Brophy at * 2.

[64] See Cerasani, Mesa, O'Connor, and Brophy generally regarding the district courts' focus on the more expansive definitions provided for a category two consumer and a category three consumer versus any analysis as to whether a lessee qualifies as a category one consumer.

[65] See, e.g., O'Connor v. BMW, 905 So.2d 235, 240 (Fla. 2nd DCA 2005):

> "As a matter of statutory construction, there would be no reason for the Act to provide three alternative definitions of "consumer" if the protection provided by the Act was intended to apply only to a new car buyer, and not to one who leases

The Plaintiff suggests that there is not as yet a conflict among the Districts given the fact that the First District analyzed the issue within the context of a category one consumer, and the Second and Third Districts analyzed the issue within the context of category two and category three consumers.[66] However, to the extent (if any) that the Supreme Court disagrees and concludes there is conflict among the Districts, the Plaintiff obviously contends that the Second and Third District Courts of Appeal – having analyzed the issue as they did within a much broader context – properly decided that an automobile lessee does fit within one of the three increasingly broader definitions of "consumer" contained within the federal Warranty Act. And to the extent, if any, that the Supreme Court concludes there is a conflict among the district courts as to how the federal Act defines a

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a new car. The first definition – "buyer" – would cover the territory, and the second and third definitions would be superfluous."

[66] In the case on appeal, the Second DCA analyzed the issue within the context of the Defendant's motion to dismiss (as it did in Brophy v. DaimlerChrysler). Here and in Brophy the district court ruled that the trial court was required to accept the allegations in the Plaintiff's complaint as true and draw inferences in her favor – a principal of law which is not at all unique to this case. In O'Connor v. BMW, the Second DCA considered the issue within the context of a more fully developed factual record, and concluded that the allegations in the Plaintiff's complaint were entirely supported by the record – as they will here when the Plaintiff has the chance to more fully develop the record through discovery. In Mesa v. BMW, the Third DCA also considered the issues on appeal here in the context of a defendant's motion for summary judgment. Like the Second DCA, the Third DCA expressly held that a vehicle lessee qualifies as both a category two and a category three consumer able to enforce under the federal Act.

"written warranty," the Plaintiff likewise contends that the Second and Third District Courts of Appeal properly decided that issue as well.

VIII. THE STANDARD OF REVIEW.

The standard of review for all issues involved in this appeal is *de novo*. First, the Defendant moved to dismiss the Plaintiff's complaint. A motion to dismiss tests the legal sufficiency of the complaint. See Martin v. Principal Mutual Life Ins. Co., 557 So.2d 128 (Fla. 3rd DCA 1990). A dismissal order that determines the legal right to proceed with the action or against a particular defendant is subject to *de novo* review. Padovano, Florida Appellate Practice § 9.4, West's Florida Practice Series, Vol. 2 (2005 Edition). The trial court's order dismissing this case with prejudice is subject to *de novo* review. Additionally, the central issue in this appeal is one of law involving the interpretation of a federal statute. The interpretation of a statute is likewise subject to *de novo* review. See, e.g., Chatlos Foundation, Inc. v. D'Arata, 882 So.2d 1021 (Fla. 5th DCA 2004).[67]

IV. SUMMARY OF THE ARGUMENT

Honda seeks to invoke the discretionary jurisdiction of the Supreme Court based on the erroneous premise that there is currently a conflict among the District

[67] Although Honda correctly states the standard of review as *de novo*, it attempts to confuse the issues by incorrectly suggesting that this case involves nothing more than an issue of contract interpretation – a position Honda did not take below, where it argued that the language of the federal statute provided rights only to "buyers" of consumer goods not lessees. (See, e.g., Honda's Answer Brief to the District Court at pages 6-7.)

Courts of this State about whether a vehicle lessee qualifies as a consumer able to enforce under the federal Warranty Act. There is not as yet, however, a conflict among the district courts of this State. The First DCA held in Seller's v. Frank Griffin Volkswagen that a vehicle lessee may qualify as a category one consumer (a "buyer") under the federal Act if the transaction looks enough like a sale to be treated as one. The Sellers court established a 10-point test to use in determining whether the automobile lease at issue is sufficiently akin to a sale as to fairly be treated as such. The Sellers court expressly stated that a lessee *may* qualify as a consumer "buyer" under the federal Act if enough of those 10 factors are satisfied. To the extent that the Sellers court analyzed the issue, it was correct. In fact, courts around the country have traditionally held that a lease may be treated as a sale for UCC purposes if the transaction looks enough like a sale to warrant being treated that way. The lease transaction at issue here is sufficiently akin to a sale that even within the much more limited context of the Sellers analysis, the Plaintiff qualifies as a consumer "buyer" able to enforce under the federal Act.

Both the Second DCA and the Third DCA were asked to analyze the issue within a much fuller and more developed context than was the Sellers court. While the Sellers court was asked whether a vehicle lessee can qualify as a category one consumer "buyer" (in answer to which the First DCA said yes), both the Second and Third DCA's were asked whether a vehicle lessee qualifies as either a category

one consumer (buyer), a category two consumer (someone to whom the property was transferred during the duration of a written warranty) or a category three consumer (someone entitled by either the warranty or by State law to enforce the warranty). Neither the Second DCA nor the Third DCA in any way expressly contradicted the First DCA's holding that a lessee may, under certain circumstances, qualify as a "buyer" under the federal Act. In fact, neither district court appears to have considered the issue within the more limited context of a category one consumer – opting instead to find the answer within the Act's much broader definitions of category two and category three consumers. In O'Connor v. BMW, Cerasani v. Honda, and Brophy v. DaimlerChrysler, the Second DCA expressly held that within the facts alleged in this case a vehicle lessee qualifies as both a category two consumer (someone to whom the property was transferred during the duration of a written warranty) and a category three consumer (someone entitled by either the warranty or by State law to enforce the warranty). In Mesa v. BMW, the Third DCA expressly reached the identical holding. Not only are the Second and Third DCA's holdings internally consistent with the plain language of the federal Warranty Act, but they are in complete accord with the overwhelming majority of courts to have analyzed the issues presented here. With only one real exception – the New York case Honda relies on – every court to analyze the issues

involved in this case has done so in the same manner, and have reached the same holdings that Florida's Second and Third DCA's have.

Not only does the Plaintiff qualify as a category one consumer under the First DCA's more limited analysis, she clearly qualifies as a both a category two and a category three consumer under the Second and Third DCA's fuller analysis. The Plaintiff is a consumer able to enforce under the Act, and Honda's written warranty is a written warranty as defined by the federal Act. The analysis applied by Florida's Second and Third DCA's represents the mainstream analysis applied by both federal and State courts. The Magnuson-Moss Warranty Act creates a cause of action for a supplier, warrantor, or service contractor's breach of warranty on certain consumer goods, including the vehicle at issue here. That cause of action applies whether the consumer leases or purchases the good. The Plaintiff's well-pled allegations wed Honda to this lawsuit as surely and securely as any justice of the peace ever wed two young people in love.

IX. ARGUMENT ON THE MERITS.

1. Florida's district courts recognize that Magnuson-Moss applies to vehicle leases as well as purchases.

Each of Florida's three district courts to consider the issues in this appeal has expressly held that the Magnuson-Moss Warranty Act applies to vehicle leases as well as purchases. The First DCA was asked whether a vehicle lessee qualifies as a category one consumer "buyer," and the court expressly stated that the answer to

that question is yes – a lessee may, under certain circumstances, qualify as a category one consumer. The facts of this case qualify the Plaintiff as a category one consumer under the First DCA's analysis. The Second DCA was asked (in this case as well as in O'Connor v. BMW and Brophy v. DaimlerChrysler), whether a vehicle lessee qualifies as either a category one consumer (a buyer), a category two consumer (a person to whom a consumer good was transferred during the duration of a written warranty) or a category three consumer (a person entitled by the warranty itself or by State law to enforce the warranty). The Second DCA didn't say whether a lessee qualifies as a buyer. Instead, the court held – three times last year – that a vehicle lessee qualifies as a category two and a category three consumer. See O'Connor v. BMW, 905 So.2d 235 (Fla. 2nd DCA June 22, 2005); Cerasani v. Honda, 916 So.2d 843 (Fla. 2nd DCA August 10, 2005); and Brophy v. DaimlerChrysler, 2005 WL 2693308 (Fla. 2nd DCA October 21, 2005). The Third DCA reached the very same holding in Mesa v. BMW, 904 So.2d 450 (Fla. 3rd DCA May 4, 2005), *rehearing denied* June 22, 2005. The Magnuson-Moss Warranty Act applies to leases as well as purchases of consumer goods, and Florida's courts have correctly recognized that fact. Whether this case is analyzed within the narrow context of the First DCA's more limited analysis, or with the broader context of the Second and Third DCA's fuller analysis, the Plaintiff in this case fits squarely within the protections afforded by the federal Warranty Act.

A. The Plaintiff is a category one consumer under the Sellers analysis.

In Sellers v. Frank Griffin AMC Jeep, Inc.,[68] the First DCA expressly recognized that a lessee may qualify as a buyer under both the UCC and the federal Warranty Act where the lease is sufficiently akin to a sale to be fairly treated as such.[69] The court explained that

> Since Florida recognizes a strong public policy of liberally construing the provisions of the UCC to provide meaningful remedies to purchasers of defective new cars, we consider the construction of section 672.608 in the context of the transaction before us to determine whether the remedy provided under that section may be made available to [the plaintiff here]. Sellers at 150.

The court further explained that "Florida courts have observed this directive in holding that leases of equipment may be 'transactions in goods' within the definition [of] section 372.101 for the purpose of applying section 672.302." Sellers at 151. The court then identified 10 factors to be used in determining whether a lease may fairly be treated as the equivalent of a sale,[70] and declared that "much the same analysis is applicable in determining whether [a lease] is a consumer transaction which constitutes a 'sale' under the Magnuson-Moss Act."[71] The majority of those 10 factors identified by the Sellers Court as applicable in

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[68] Sellers v. Frank Griffin AMC Jeep, Inc., 526 So.2d 147 (Fla. 1st DCA 1988).
[69] See footnote 60.
[70] Id.
[71] Id at 156. See also Mesa v. BMW at 454 (Fla. 3rd DCA 2005) recognizing the 10-factor test established by the Sellers court.

determining whether a particular lease transaction should be treated as a sale weigh heavily in favor of the Plaintiff in this case.[72]

First, the value of rental payments made by the Plaintiff is comparable to the value of the vehicle amortized over the term of the lease. The vehicle has an agreed upon initial value of $15,772.[73] The lease is for a period of thirty six months,[74] and payments over that period total about $7,710.[75] If the vehicle were purchased initially (instead of leased) and financed over the course of a standard purchase contract, monthly payments would be only somewhat higher than the monthly lease payment.[76]

Second, the Plaintiff has the option to purchase the vehicle at the end of the lease term for the remaining residual value of the vehicle.[77] Not only are payments

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[72] The fact is that the modern automobile lease, designed as it is to replicate all of the essential ownership aspects of a traditional purchase, typically creates a factual situation in which the lease transaction is so similar to a sale as to be largely indistinguishable from a legal and analytical standpoint. The modern automobile lease is substantially like a traditional sale in all relevant respects such that it may generally be treated in a similar manner.

[73] Lease Agreement at "My Monthly Payment/Single Payment. . . ." The Lease expressly provides that "The agreed upon value of the vehicle [is] $15,772.68."

[74] Lease Agreement at number of "Lease Payments" (36 + initial payment).

[75] Lease Agreement at "My Monthly Payment/Single Payment. . . ." ("Base Monthly/Single Payment" plus "Monthly Sales/Use Tax" multiplied by the number of lease payments, plus the initial payment).

[76] Lease Agreement at "My Monthly Payment/Single Payment. . . ." ("Base Monthly/Single Payment" plus "Monthly Sales/Use Tax" establishes the monthly payments due under the terms of the Lease Agreement.

[77] Lease Agreement at "PURCHASE OPTION AT END OF LEASE TERM" expressly provides, "I have an option to purchase the vehicle AS-IS, WHERE-IS at

over the life of the lease equivalent to the value of the vehicle amortized over that same period, but the residual value at the end of the lease period is used to calculate the vehicle's purchase price.[78] The lessee (the Plaintiff in this action) has a contractual option to purchase the vehicle at the end of the lease period – a right of first refusal as it were. The Lessor doesn't want the vehicle back, and in fact actively encourages the lessee to just continue driving the vehicle at the end of the lease term – in an as-is, where-is condition.

Third, the Plaintiff is responsible for all normal incidents of ownership such as insurance for the vehicle, normal service and maintenance, replacement of parts, etc.[79] The Lessor doesn't bear those incidents of ownership – the Plaintiff does.

Fourth, the Plaintiff bears the risk of damage or loss. If the vehicle is in an accident, the Plaintiff's insurance covers the accident damage. In fact, the lease *requires* the Plaintiff to insure the vehicle.[80] The Plaintiff bears the expense of any insurance deductible, and is responsible for ensuring the vehicle is in good repair and is drivable. The Plaintiff – not the lessor – bears the risk of loss due to theft.

Fifth, the vehicle was made available through a dealership that normally

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the end of the Lease Term for [the residual value of the vehicle], plus any [additional] required taxes and fees."

[78] Lease Agreement, id; see also Lease Agreement at "My Monthly Payment/Single Payment. . . ." ("Residual Value").

[79] See, for example, Lease Agreement at "VEHICLE INSURANCE."

[80] Id.

only sells automobiles.[81] The Seller is an authorized Honda retail sales dealership, and doesn't normally act primarily as a financing agency.

Sixth, the Plaintiff pays monthly sales and use taxes on the vehicle at issue in this transaction. In fact, over the life of the lease, the Plaintiff pays over $800 in sales and use taxes on the vehicle.[82]

Seventh, the Plaintiff paid the license and registration fees on the vehicle. At the time of signing, the Plaintiff paid a $90 initial registration fee and a $73 motor vehicle surcharge fee, as well as the initial installment on the monthly sales and use taxes due on the vehicle.[83]

Eighth, the lease agreement permits the lessor to repossess the vehicle and grants remedies similar to those of a lender exercising a purchase money security interest in the vehicle.

Ninth, the Plaintiff was required to make a down payment in order to obtain the vehicle. The Plaintiff paid several hundred dollars at signing[84] – equal to, if not higher than, the down payment typically required in the modern consumer sales transaction thanks to the creative financing applied by most lenders nowadays.

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[81] Plaintiff's Amended Complaint, ¶¶ 2-10.
[82] Lease Agreement at "Estimated Fees and Taxes During Lease Term." ("Lessor estimates this amount to be $823.76.")
[83] Lease Agreement at "Itemization of Amount Due at Lease Signing."
[84] Id.

Sellers stands for the proposition that leases may be treated as sales for UCC and Magnuson-Moss purposes where the lease is sufficiently akin to a sale to warrant such treatment. The lease at issue here bears those "incidents of ownership" required by Sellers to be treated as the equivalent of a sale. In fact, the reality is that in today's world of consumer automobile transactions, a modern automobile lease like the one at issue here conveys all of the legally relevant possessory equivalents of actual ownership and is marketed as the equivalent in all material respects to actual purchase. The lease at issue here carried with it all of the attributes of an installment sales contract, and qualifies the Plaintiff as a consumer even within the limited context of the Sellers court's "buyer" analysis. The Sellers analysis is not inconsistent with Florida's other district courts, which have uniformly held that whether or not a vehicle lessee qualifies as a category one "buyer" a lessee does qualify – at least under the facts alleged here – as either a category two or category three consumer.[85] In fact, at least one appellate court considering the issues raised here has concluded that a vehicle lessee may well qualify as a category one, category two, *and* category three consumer under the Warranty Act[86] – a holding entirely consistent with all of Florida's District Courts.

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[85] See Mesa v. BMW, O'Connor v. BMW, Cerasani v. Honda, and Brophy v. DaimlerChrysler discussed *infra*.

[86] See Dekelaita v. Nissan Motor Corporation, 799 N.E.2d 367, 371 & 374 (Ill. App. 2003), *cert. denied*, discussed in detail *infra*.

B. The Plaintiff is both a category two and a category three consumer under the Mesa , O'Connor, Cerasani, and Brophy analysis.

Although Sellers held that a lessee *may* qualify as a category one consumer "buyer" under certain conditions, the Sellers court wasn't asked to analyze the issue as broadly as the Second and Third Districts were. The Mesa, O'Connor, Cerasani, and Brophy courts went through a much more developed analysis of the plain language of the federal statute and concluded that whether or not a vehicle lessee qualifies as a category one consumer, a lessee does qualify – at least under the facts pled in this case – as both a category two consumer and a category three consumer. Because a plaintiff need only satisfy one of the Warranty Act's three definitions in order to qualify as a consumer entitled to bring suit under the Act, it isn't necessary to analyze the issue solely within the context of a "buyer."

> The Magnuson-Moss Act defines three categories of consumers. ***A category one consumer*** is "a buyer (other than for purposes of resale) of any consumer product"; ***a category two consumer*** is "any person to whom such product is transferred during the duration of an implied or written warranty (or service contract) applicable to the product"; ***and a category three consumer*** is "any other person who is entitled by the terms of such warranty (or service contract) or under applicable State law to enforce against the warrantor (or service contractor) the obligations of the warranty (or service contract)." 15 USC § 2301(3). ***A plaintiff need only meet one of the above definitions to qualify as a consumer under the Act.*** Cerasani at 846-847, citing O'Connor v. BMW, 905 So.2d 235, 237 (Fla. 2nd DCA 2005); Parrot v. DaimlerChrysler Corp., 2005 WL 549486, * 2 (Ariz. App. 2005); Mangold v. Nissan, 809 N.E.2d 251, 253 (Ill. App.

2004); Ryan v. Honda, 869 A.2d 945, 949 (N.J. App. 2005) (emphasis added).

The Mesa, O'Connor, and Brophy courts are in complete agreement – as are the overwhelming majority of other jurisdictions to have considered the issue – that a plaintiff need only satisfy one of those three definitions in order to qualify as a consumer under the Act.[87]

Although the Plaintiff contended (and contends) that she qualifies as a category one, category two, *and* category three consumer under the Warranty Act, the Cerasani court analyzed the issue only within the context of a category two and a category three consumer. Although the court didn't explain why it did not consider the issue within the context of a category one consumer, the Mesa court did. In Mesa (the most developed of the four decisions holding that a vehicle lessee qualifies as both a category two and category three consumer under the Act), the court expressly stated its rationale for refusing to analyze the issue within the context of a category one consumer. The Mesa court concluded that the Sellers court's reliance on State-law definitions to interpret the federal Warranty Act were unnecessary[88] because the plain language of the federal Act itself defined the class

[87] Mesa at 453; O'Connor at 236; Brophy at * 1.

[88] See Mesa v. BMW, 904 So.2d 450, 455 (Fla. 3rd DCA 2005), "Contrary to the First District's analysis in Sellers, we find it unnecessary to look to the UCC to define the MMWA's terms because the statute is clear on its face."

of plaintiff entitled to bring suit under the Act,[89] the class of defendants who may be sued,[90] and the matters upon which the plaintiff's action may be based.[91]

The Cerasani court went through an analysis of whether the Plaintiff qualifies as either a category two or category three consumer under the Act. Relying on the Second District's holding in O'Connor v. BMW and the Third District's holding in Mesa v. BMW, the court "held that a lessee may qualify as a category two and category three consumer under the Magnuson-Moss Act and that the Act does not require a sale to the ultimate consumer."[92] The court held that the Plaintiff "alleged sufficient facts in her amended complaint to qualify as a category two consumer under the Act,"[93] because she expressly alleged that the vehicle at issue was transferred to her during the duration of a written warranty.[94]

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[89] Mesa at 455, "As noted above, the MMWA allows a 'consumer' to sue a supplier, warrantor, or manufacturer who fails to comply with any obligation under the MMWA, a written warranty, an implied warranty, or a service contract."

[90] Id.

[91] Id.

[92] Cerasani at 846.

[93] Cerasani at 846.

[94] Id. As the Third DCA explained in Mesa v. BMW, "Although the MMWA does not define 'transferred,' we agree with the courts that have held that the word 'transfer' refers to 'the physical transfer of a consumer product and not the legal transfer of its title.'" Mesa at 455-456, and citing Parrot v. DaimlerChrysler Corp., 108 P.3d 922, 925 (Ariz. App. 2005); Mangold v. Nissan, 809 N.E.2d 251, 253 (Ill. App. 2004); Ryan v. Honda, 869 A.2d 945, 949 (N.J. App. 2005); Dekelaita v. Nissan Motor Corporation, 799 N.E.2d 367, 371 (Ill. App. 2003), *appeal denied*, 807 N.E.2d 974 (2004).

In a related matter, Honda also erroneously argued that because the vehicle wasn't sold directly to the *Plaintiff* that Honda's new vehicle written warranty is somehow not a written warranty within the context of a lease transaction.[95] The Warranty Act defines a "written warranty" as:

> Any written affirmation of fact or written promise made in connection with the sale of a consumer product by a supplier to a buyer which relates to the nature of the material or workmanship and affirms or promises that such material or workmanship is defect free or will meet a specified level of performance over a specified period of time, or[96]
>
> Any undertaking in writing in connection with the sale by a supplier of a consumer product to refund, repair, replace, or take other remedial action with respect to such product in the event that such product fails to meet the specifications set forth in the undertaking,[97]
>
> which written affirmation, promise, or undertaking becomes part of the basis of the bargain between a supplier and a buyer for purposes other than resale of such product.[98]

Honda argued that the Act's requirement that the written affirmation, promise, or undertaking be issued in connection with a sale limited the definition's application to situations in which the consumer herself buys the vehicle.[99] The court correctly explained, however, that nothing in the plain language of the Act

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[95] Id.
[96] 15 USC §2301(6)(A).
[97] 15 USC §2301(6)(B).
[98] 15 USC §2301(6) sub(A) & (B).
[99] See Honda's Answer Brief to the District Court at pp. 7-23.

requires the sale of the consumer product to be directly to the ultimate consumer.[100] The Act only requires that the written affirmation, promise, or undertaking be issued in connection with ***a*** sale of the consumer product. And as the court pointed out, "where the warranty was made 'in connection with the sale' of the vehicle from the dealer to the leasing company," that sale is sufficient under the Act to qualify the warranty as a "written warranty" under the Warranty Act.[101] The

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[100] Cerasani at 846, "the transaction satisfied the Act's definition of written warranty where the warranty was made 'in connection with the sale' of the vehicle from the dealer to the leasing company."

[101] Cerasani at 846. The court noted that "although Honda argues that the lease shows on its face that the vehicle was never sold to the lessor, but rather the dealership assigned its interest in the lease to the lessor, we conclude that the documents attached to the amended complaint do not conclusively negate Cerasani's claim, and therefore, it was improper to dismiss the complaint."

In addition to the error of its legal argument, Honda misstates the facts of the lease transaction as well. Honda alleges the dealership leased the vehicle directly to the Plaintiff prior to "transferring" the vehicle to Honda Leasing. In fact, Honda never actually acknowledges a sale of the vehicle at all. Honda claims the "transfer" occurred after the lease went into effect, and that the Warranty wasn't even in effect when the Plaintiff drove the vehicle off the lot. (Initial Brief at p. 23-25.) The absurdity of that argument is readily apparent from even a cursory look at the lease itself. Honda Financial Services was the lessor, not the dealership, and the dealership sold the vehicle in order for Honda to lease it. In fact, the lease is even a "Honda Financial Services" lease agreement. (See Lease at AR Vol. 1, pp. 56-127 and at Appendix A-4.) Since Honda's written warranty states it takes effect upon the first retail sale, the warranty was in effect at the time the Plaintiff leased the vehicle. Not only are Honda's factual assertions wrong, but even if they *were* accurate, the trial court was required to view the facts in a light most favorable to the Plaintiff – so the Plaintiff should have gotten the benefit of any doubt on this issue. Furthermore, the Plaintiff's factual assertion that she leased from Honda Financial Services (not the dealership) is supported by the U.S. Supreme Court's decision in Ford Motor Credit Co. v. Cenance, 452 U.S. 155 (1981). The Supreme Court addressed essentially the same argument raised in the

Cerasani court's analysis on this point is in absolute agreement with the express analysis of the Third DCA in Mesa v. BMW,[102] and with the Second DCA's decisions in O'Connor v. BMW[103] and Brophy v. DaimlerChrysler.[104]

In addition to holding the Plaintiff alleged sufficient facts to qualify as a category two consumer who received the vehicle during the duration of the written warranty, the court also held that the Plaintiff had pled sufficient facts to qualify as a category three consumer under the Act by alleging she was able to enforce the terms of the warranty against Honda. As the court explained, "[Cerasani] took the vehicle to authorized Honda dealerships for repair on numerous occasions, and Honda never asserted that the vehicle was not covered by the written warranty. Cerasani at 847. As in all other respects, the Cerasani court's holding on this

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context of an installment sales contract and the obligations of the parties to the contract where an assignment clause was present. The Court held that the contract made the finance company, Ford Motor Credit ("FMCC") the creditor subject to the Truth in Lending Act requirements instead of the dealer. The Supreme Court held that because "the contract and the assignment became operational simultaneously, and the assignment [thus] divested the dealer of any risk in the transaction. * * * It would be elevating form over substance to conclude that FMCC is not a creditor within the meaning of the Act." Cenance at 158. Similarly, by accepting the lease agreement here, Honda Financial Services became the Plaintiff's direct lessor. The Plaintiff's identification of Honda Financial Services as the lessor is completely consistent with both the facts of this transaction and the law as it is applies to those facts. The dealership sold the vehicle to Honda Financial Services, and Honda Financial Services then leased it to the Plaintiff. Since the warranty went into effect either before or at the same time the Plaintiff leased the vehicle, a sale occurred in connection with the issuance of the warranty.

[102] See Mesa v. BMW at 456-458 (Fla. 3rd DCA 2005).

[103] See O'Connor v. BMW at 237-238 (Fla. 2nd DCA 2005).

[104] See Brophy v. DaimlerChrysler at * 1.

matter is also in complete agreement with the express analysis of Mesa v. BMW,[105] O'Connor v. BMW[106] and Brophy v. DaimlerChrysler.[107] As the Cerasani, Mesa, O'Connor and Brophy courts all found, the lessee in each of these cases was allowed time and again to directly enforce the warranty against the Defendant. Never once – in this case or in the others – did the manufacturer dispute the fact that the warranty applied to the vehicle, or that the lessee had the right to require the manufacturer to honor the terms of the warranty. In this case, as well as in Mesa, O'Connor and Brophy, the terms of the warranty itself clearly allowed the lessee to enforce against the warrantor. We know that because the warrantor allowed the warranty to be enforced without contesting that the terms of the warranty somehow precluded the lessee from doing so. Furthermore, as a category three consumer, the Plaintiff can show either that the terms of the warranty allow her to enforce it against the warrantor or that State law allows her to do so.

Even if the terms of the warranty (and the warrantors express conduct) left any room for doubt as to whether Cerasani could enforce the warranty against Honda, there is no doubt that State law allows her to do so. State law generally allows one contracting party to assign rights in property to another contracting party. The lease agreement attached to the Plaintiff's amended complaint includes

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[105] See Mesa v. BMW at 456-458 (Fla. 3rd DCA 2005).
[106] See O'Connor v. BMW at 237-238 (Fla. 2nd DCA 2005).
[107] See Brophy v. DaimlerChrysler at * 1.

an assignment clause expressly assigning the lessor rights in the manufacturer's written warranty to the lessee.[108] As the Third District explained in Mesa v. BMW, "[Since] the lessor assigned its rights to the manufacturer's warranty to [the plaintiff], as evidenced by the language in the leasing agreement * * * under Florida law, [the plaintiff] was entitled to enforce the rights arising from the manufacturer's express warranty.[109] Furthermore, as the Second DCA pointed out in O'Connor v. BMW, since Florida's Lemon Law expressly allows a lessee in the Plaintiff's position to enforce the written warranty directly against the manufacturer/warrantor, State law very clearly allows the Plaintiff to enforce the terms of the written warranty against the warrantor even without regard to an assignment clause.[110]

The Cerasani court held that "[b]ecause the allegations in Cerasani's complaint are sufficient to qualify her as a category two and a category three consumer under the Act, we conclude that the trial court erred in finding that the Magnuson-Moss Act did not apply to Cerasani's transaction." Cerasani at 847. The court's ruling is in complete accord with the express holding of the Third

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[108] The Lease expressly provides that "If the vehicle is new, it is covered by the Manufacturer's New Vehicle Warranty. * * * Lessor assigns to me [the lessee] all of its rights in the above-specified warranties." (AR Vol. 1, pp. 86-127; see also Lease Agreement at Appendix "A-6.")

[109] Mesa at 457-458 (Fla. 3rd DCA 2005), citing, *inter alia*, Nationwide Mutual Fire Ins. Co. v. Central Fla. Physiatrists, 851 So.2d 762, 766 (Fla. 5th DCA 2003).

[110] O'Connor v. BMW at 240-241 (Fla. 2nd DCA 2005), referring to Chapter 681 Fla. Stat., "Florida's New Motor Vehicle Warranty Enforcement Act" (2001).

DCA in Mesa v. BMW, and with the Second DCA in O'Connor v. BMW and Brophy v. DaimlerChrysler. The Cerasani, Mesa, O'Connor, and Brophy courts all held (and for all the same reasons) that leases are covered by the Magnuson-Moss Warranty Act. The holdings of those four courts are not expressly at odds with Sellers. The Sellers court held that a lessee may qualify as a category one consumer, and the Cerasani, Mesa, O'Connor, and Brophy courts held that a lessee does qualify as both a category two consumer and a category three consumer. Because Cerasani, Mesa, O'Connor and Brophy analyze the issues within a different context than Sellers, there is not as yet a conflict among the districts.

2. Other jurisdictions also expressly recognize that lessees qualify as category two and category three consumers under the Warranty Act.

A. Federal Courts.

The United States Seventh Circuit Court of Appeals held on December 12, 2003 that an automobile lessee has a cause of action under Magnuson-Moss.[111] See Voelker v. Porsche Cars North America, Inc., 353 F.3d 516 (7th Cir. Dec. 12, 2003)[112] (**See copy at "A-9"**). The Seventh Circuit reversed a district court decision that had held leases aren't covered by Magnuson-Moss, and in doing so

[111] "A State court [should] naturally be inclined to follow the construction the Federal courts have given the Federal statute." Davis v. Strople, 39 So.2d 468, 470 (Fla. 1949).

[112] The Seventh Circuit's original opinion in Voelker was published at 348 F.3d 639 (7th Cir. November 3, 2003). The court later revised its opinion, but its holding that consumer lessees are covered by the Warranty Act was unchanged. See Voelker, 353 F.3d 516 (7th Cir. Dec. 12, 2003).

expressly held the plaintiff lessee was a consumer for purposes of Magnuson-Moss, and could therefore assert a cause of action for breach of written warranty under the Act. Id. Relying on Dekelaita v. Nissan Motor Corporation, 799 N.E.2d 367 (Ill. App. 2003), *cert. denied*, the court recognized that lessees are consumers under prong three (3) of the definition:

> Finally, we consider whether Voelker has stated a claim as a category three consumer. That is, we ask whether he is "any other person who is entitled by the terms of such warranty (or service contract) *or under applicable State law* to enforce against the warrantor (or service contractor) the obligations of the warranty (or service contract)." 15 USC § 2301(3) (emphasis added). [The lessor] assigned to Voelker "all its rights under the Porsche Limited Warranty." Under the state law of Illinois, ***as an assignee of that warranty, a lessee like Voelker was entitled to enforce the rights arising from the warranty. Therefore, Voelker qualifies as a category three consumer.*** Voelker at 524 (cites omitted; emphasis added).

> In short, because Voelker, under the assignment from [the lessor], is a person entitled to enforce the New Car Limited Warranty [against the warrantor], ***we hold that Voelker may proceed as a category three consumer regarding his claim for breach of written warranty under the Magnuson-Moss Act.*** Id at 525 (emphasis added).

The Defendant in Voelker argued that only a sale to the ultimate consumer qualifies as a "sale" under the Warranty Act, and that without such a sale there is no "written warranty" as defined by Magnuson-Moss. The Seventh Circuit rejected that argument, saying that while a sale might arguably be required for a category one consumer, the same is not true for category two and three consumers.

> ***For [a category three consumer] to state a valid claim * * * the New Car Limited Warranty need not meet the definition of written warranty contained in § 2301(6).*** Because [the lessee] is a category three consumer entitled * * * to enforce the New Car Limited Warranty, he is a consumer allowed under the Magnuson-Moss Act to enforce the New Car Limited Warranty. See 15 USC § 2301(3) (including as consumers those entitled to enforce a warranty "under applicable State law"); ***Dekelaita 2003 Ill. App. LEXIS 1216, 2003 WL 22240509, at *7 (holding that "the third prong does not exclusively require that the warranty meet the Act's definition if in fact it is enforceable under state law").*** Voelker at 525 (emphasis added).

Nothing in the plain language of § 2301(6) demands a sale for the warranty to be enforceable by a category two or three consumer. And again, a category three consumer is "any other person * * * entitled to enforce against the warrantor * * * the obligations of the warranty."[113] Since *this* Plaintiff has clearly been entitled to enforce *this* warranty against *this* Defendant, *this* action is proper.[114]

The U.S. District Court for the Northern District of Illinois has also explicitly held that an automobile lessee has a cause of action under Magnuson-Moss. See Cohen v. AM General Corp., 264 F. Supp. 2d 616 (N.D. Ill. 2003) (**see**

[113] Voelker at 524, citing 15 USC § 2301(3).

[114] The Seventh Circuit is apparently absolutely certain leases are covered by Magnuson-Moss, because on February 18, 2004, the court ruled for a second time that the Warranty Act covers automobile leases. Acting in conformity with the rulings issued in both Voelker and Dekelaita (the Seventh Circuit expressly adopted the rationale in Dekelaita in concluding automobile leases ***are*** covered by the federal Act) the Seventh Circuit reversed the lower court's ruling in Weisberg v. Jaguar Cars, Inc. (See original ruling of the lower court at 2003 WL 1337983, 2003 U.S. Dist. LEXIS 4000 (N.D. Ill. 2003); and Summary Reversal at 2004 U.S. App. LEXIS 5738 **(see copy at "A-11.")**

copy at "A-10"). The court recognized that because lessees are entitled to enforce the written warranty against the manufacturer they qualify as "consumers" under the federal Act. Cohen at 621. The court then perfunctorily dismissed the Defendant's assertion that there wasn't a written warranty. The court held that because "the warranty was issued in connection with the sale of the vehicle from the defendant to [the leasing company]" it qualifies as a written warranty under the Act. Id. The court expressly held that the "sale" mentioned in the definition of a written warranty "is not limited to transactions between the warrantor and ultimate consumer." Id. "[T]he Act does not require us to look at the bundle or rights acquired by the purchaser and the lessee. Instead a plain reading of the Act forces us to simply look for a warranty exchange[d] in connection with a sale." Id at 620. The court said that since the sale to the leasing company wasn't for the purpose of reselling the vehicle, but rather was completed in order to lease the vehicle to the plaintiff, the defendant's warranty was in fact a "written warranty" as defined by the Act. Id. The court held that to interpret the Act differently would render its protections illusory.

> ***[T]he courts' reading of the statute in DiCintio and Diamond would render many purchasers [not just lessees] of automobiles unable to sue for breach of warranty.*** Certainly, many customers plan on selling or trading in a vehicle after years of use. The Act requires us to look for the reason the vehicle was purchased, and the reason was the subsequent lease to plaintiffs, not resale.

> This reading of the Magnuson-Moss Act best serves Congress' goal of "better protecting consumers." H.R. Rep. 93-1107 (June 13, 1974). ***Plaintiffs here fit squarely within the definition of "consumer" in that they are entitled to enforce the warranty by the terms of 15 U.S.C. § 2301(3). If we then determine that this warranty does not qualify as a warranty under the Act, there is nothing for the plaintiffs to enforce***. . . . If ***they*** are unable to do so, the assurances of the manufacturer are empty – no party would be able to enforce the warranty. Cohen at 620-621 (emphasis added).

The Cohen court's analysis of the Act logically and thoroughly explains why an automobile lessee may maintain a cause of action under Magnuson-Moss.

B. Illinois.

Illinois has explicitly ruled that Magnuson-Moss covers automobile leases. See Dekelaita v. Nissan Motor Corporation, 799 N.E.2d 367 (Ill. App. 2003), *cert. denied* (**see copy at "A-12"**). The court looked at the plain language of the statute's three-pronged definition of consumer and held that prongs two and three apply to consumers who aren't buyers, and stated that a sale isn't necessary for such a consumer to be covered by the Act. Id at 369-370. The court also concluded that an automobile lessee probably even satisfies the first definition of consumer even though it includes the word "purchaser" and "sale." Id at 371. The court found persuasive authority for the proposition that "long-term lease agreements are akin to an installment contract or a chattel mortgage, in which the seller's restrictions are aimed at protecting its interests until the balance is paid in

full." Id at 374. While the court suggested an automobile lessee might qualify as a category one consumer, it held that at the very least an automobile lessee qualifies as a category three consumer. Id at 371 & 375-376. In that case (and in this one) the lessee was assigned the rights of the warranty by the leasing company and was entitled to enforce those rights. The court specifically noted that the defendant had serviced the vehicle on numerous occasions pursuant to the warranty and didn't refuse to do so just because the plaintiff was a lessee. Id at 368 and 372.

After holding the plaintiff was a consumer, the court went on to hold that there was a "written warranty" as well. The court expressly stated that while the Act requires that the warranty be issued in connection with the sale of the product, nothing says "that the sale must be between the *consumer* and the supplier." Dekelaita at 373 (emphasis added). ***Where, as here, there was a sale - between the dealer and the lessor*** - * * * ***the warranty gave rise to rights produced "in connection with the sale" as mandated by the Act, and those rights now are enforceable by the plaintiffs as assignees.*** Id. (emphasis added, citations omitted). Here, as in Dekelaita, the Plaintiff is entitled to bring suit under the federal Act.

C. Ohio.

Ohio explicitly recognizes that automobile lessees may bring suit under the federal Act as well. In Szubski v. Mercedes-Benz, U.S.A., LLC, 796 N.E.2d 81 (Oh. Com. Pl. 2003) (**see copy at "A-13"**) the court expressly held that the federal

Act applies to breach of warranty actions involving leases. The Szubski court was asked to determine whether lessees are encompassed under the terms "buyer" and "sale," as those terms are used in the definition of a "written warranty," Like the Cohen and Dekelaita courts, the Szubski court also held that the "sale" referred to isn't limited just to transactions between the warrantor and the ultimate consumer. "Here, the vehicle came with a manufacturer's written warranty at the time it was sold to lessor. * * * [T]herefore, the warranty was made 'in connection with' the sale of a consumer product pursuant to [the Warranty Act]. Szubski at 90. The court expressly held that a vehicle lessee qualifies as a category two consumer under those facts. The court also held that the plaintiff qualified as category three consumer (a person to whom the vehicle was transferred during the duration of the warranty and who was entitled to enforce the warranty). Id. The court concluded that "it would be unreasonable and illogical to conclude that a lessee does not enjoy the same right to enforce a warranty as a purchaser enjoys." Id at 91. The court also concluded that excluding lease transactions would undermine the Act's consumer protection purpose as well. Id. Here, as in Szubski, not only does the Plaintiff clearly have the right to enforce the warranty against the Defendant (under the terms of the warranty *and* State law), but in asking this Court to ignore the book length promise made on this consumer good the Defendant seeks to undermine the consumer protection purpose of the federal Act as well.

D. Wisconsin.

Wisconsin has also considered the arguments made by Honda here, and concluded consumer automobile leases are fully covered by Magnuson-Moss. Peterson v. Volkswagen of America, Inc., 679 N.W.2d 840 (Wisc. App. 2004) **(see copy at "A-14").** In Peterson, as here, the manufacturer argued automobile leases aren't covered by Magnuson-Moss. In an analysis which parallels this brief's, the court held that "where the sale of a vehicle is merely to facilitate a lease, the issuance of the warranty accompanies this sale, and the lessor explicitly transfers its rights in the warranty to the lessee - the lessee is protected by the Magnuson-Moss Act. Id at 846. The Wisconsin Supreme Court subsequently heard the case and agreed in all material respects with the appellate court's analysis, holding that the Plaintiff had pled sufficient facts to proceed under the federal Act. See Peterson v. Volkswagen, 697 N.W.2d 61 (Wisc. 2005) **(see copy at "A-15")**.

E. Arizona.

Arizona has also expressly rejected the arguments made by Honda here. See Parrot v. DaimlerChrysler, 108 P.3d 922 (Ariz. App. 2005) **(see copy at "A-16")**. The Parrot court expressly held that a lessee qualifies as a consumer under the Warranty Act and that the manufacturer's written warranty is a "written warranty" as defined by the Act even within the context of an automobile lease. In fact, the court expressly held that the manufacturer's sale of the vehicle to the dealer

qualifies the warranty as a "written warranty" under the Act where the sale takes place to allow the dealer to lease rather than resell the vehicle. Parrot at 926-927. That holding is consistent with Florida's Third DCA. Mesa at 457. Although Cerasani affirmatively pled she leased from Honda Leasing rather than the dealer (an allegation supported by the record), even assuming Honda *could* show Cerasani leased directly from the dealer, the Parrot and Mesa courts have expressly held that would not change the analysis – the Plaintiff would still be a consumer, and Honda's written warranty would still be a written warranty.

F. New Jersey.

New Jersey has also heard the arguments raised here, and like so many other jurisdictions has expressly rejected them. See Ryan v. American Honda Motor Corp., 869 A.2d 945 (N.J. App. 2005) **(see copy at "A-17")**. Honda argued in Ryan, as it does here, that a lessee doesn't qualify as a consumer. The Ryan court held that an automobile lessee qualifies at the very least as someone entitled either by the terms of the warranty or by State law to enforce the warranty against the manufacturer, and therefore qualifies within at least one of the Act's definitions. In fact, in Ryan the lessee was also enforcing the manufacturer's warranty under New Jersey's Lemon Law – a fact which would seem to *unquestionably* indicate the manufacturer's warranty is enforceable under State law, and which is entirely consistent with the holding of Florida's Second DCA in O'Connor v. BMW in

which the court also pointed out that Florida also allows a lessee to enforce the warranty under its State Lemon Law. O'Connor at 240-241. Honda also argued in Ryan, as here, that the lease was between the plaintiff and the dealer, not a third-party. Like the Parrot and Mesa courts, the Ryan court found that argument unconvincing, explaining that the sale to the dealer was sufficient to qualify the warranty as a written warranty under the Act where the sale to the dealer was to facilitate a lease. Ryan at 952.

> We doubt that a dealer who takes title to a new vehicle would pay for that title unless it received the manufacturer's written warranty for the benefit of all the dealer's customers, whether buyer or lessee. The warranty is undoubtedly a condition of the transaction, that is, a basis of the bargain, and [is thus] "issued in connection with a sale" – the manufacturer's original sale of the car to the lessor. Ryan at 952.
>
> Moreover, if a car manufacturer's written warranty does not apply to a lessee * * * ***the manufacturer should include a clear disclaimer in the written warranty itself, stating that it is not applicable to a leasing customer.*** Ryan at 954.

Even if Honda *could* show Cerasani leased from the dealer, Cerasani would still be a consumer and Honda's written warranty would still be a written warranty.

G. Other States

The decisions in Voelker, Weisberg, Cohen, Dekelaita, Szubski, Peterson (Wisconsin appellate and Supreme Court), Parrot, Ryan, Mesa, O'Connor, Brophy, and Cerasani are entirely consistent with decisions from other jurisdictions that also hold Magnuson-Moss applies to consumer automobile leases. In many of the

States which have analyzed the issues within a more limited context – as did the Sellers court – lease transactions that bear characteristics similar to that of a sale are covered by Magnuson-Moss. See Henderson v. Benson-Hartman Motors, Inc., 41 UCC Rep.Serv. 782, 1983 WL 160532 (Pa. Com. Pl. 1983). The court noted that the great number of commercial transactions entered into by way of a lease should not be subject to different rules than if the same transaction was entered into by way of a traditional sale. Henderson at 25 citing Hertz Commercial Leasing Corp. v. Joseph, 641 S.W.2d 753 (Kent. App. 1982); Heller & Co., Inc. v. Convalescent Home, 49 Ill.App.3d 213 (1977); and Interstate Industrial Uniform Rental Svc., Inc. v. F.R. Lepege Bakery, Inc., 413 A.2d 516 (Maine S.Ct. 1980).[115]

1. The express language of the federal Act protects automobile lessees.

The rulings of the courts cited above are completely in line with the plain meaning of the statutory language of the Act itself, and give effect to Congress' clear intent. When interpreting a statute, the court must first analyze the language of the statute itself. Landreth Timber Co. v. Landreth, 471 U.S. 681, 684-85 (1985); In re Maxway Corp., 27 F.3d 980, 982 (4th Cir.1994). "If the statutory language is unambiguous, in the absence of a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive." Russello v.

[115] It isn't necessary for the Court to conclude this lease is analogous to a sale. The Plaintiff's argument that leases are analogous to sales is simply an alternative theory that has been adopted by some of the courts cited in this section.

United States, 464 U.S. 16, 20 (1983). The express language of the federal Act entitles the Plaintiff to seek relief for the Defendant's breach of warranty.

H. Plaintiff is a "consumer," and entitled to protection under the Act.

The federal Warranty Act provides that "a ***consumer*** who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under this chapter, or under a written warranty, implied warranty, or service contract, may bring suit for damages and other legal and equitable relief." 15 USC § 2310(d) (emphasis added). The Act defines three categories of consumer:

> (1) ***A buyer*** (other than for purposes of resale) of any consumer product;
> (2) ***Any person to whom such product is transferred during the duration of an implied or written warranty*** (or service contract) applicable to the product; and,
> (3) ***Any other person who is entitled*** by the terms of such warranty (or service contract) or under applicable State law ***to enforce against the warrantor*** (or service contractor) the obligations of the warranty (or service contract). 15 USC § 2301(3) (Emphasis added).

The definition of "consumer" provides three independent tests for coverage under the Act. While the Plaintiff need only satisfy one, she satisfies at least two.

(1) The vehicle was transferred to the Plaintiff during the duration of the Defendant's written warranty.

A category two consumer is "any person to whom such product is transferred during the duration of an implied or written warranty applicable to the product." 15 USC § 2301(3). Although Congress provided no explicit guidance in defining "transfer," a transfer must be some transaction short of outright sale

because only the first definition refers to a buyer – the other two definitions refer to a consumer in language that doesn't imply a sale. Congress wouldn't have included one definition to protect a "buyer," and then added two additional and different definitions to provide coverage to "transferees" unless it intended to include conveyances other than just a sale alone. Unless we recognize that commonsense distinction, the second and third definitions are superfluous and redundant – and Courts don't normally interpret legislation in a way that makes a portion of a statute superfluous or redundant. See King v. Internal Revenue Service, 688 F.2d 488, 491 (7th Cir. 1982), statutes shouldn't be construed in a way that renders portions or phrases superfluous. Congress drafted prong two to cover transfers short of actual sale, and courts interpreting the definition of a category two consumer have repeatedly held that in using the term "transfer," Congress meant something other than an outright sale.[116]

The Plaintiff affirmatively pled that the lease was in effect when she received the vehicle.[117] Not only was the trial court required to accept that allegation as true, but the lease itself expressly states that the vehicle "***is*** covered

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[116] See Mesa v. BMW at 455-456, "Although the MMWA does not define 'transferred,' we agree with the courts that have held that the word 'transfer' refers to 'the physical transfer of a consumer product and not the legal transfer of its title.'" See also Parrot v. DaimlerChrysler Corp., 108 P.3d 922, 925 (Ariz. App. 2005); Mangold v. Nissan, 809 N.E.2d 251, 253 (Ill. App. 2004); Ryan v. Honda, 869 A.2d 945, 949 (N.J. App. 2005); Dekelaita v. Nissan Motor Corporation, 799 N.E.2d 367, 371 (Ill. App. 2003), *appeal denied,* 807 N.E.2d 974 (2004).

[117] See Amended Complaint at ¶ 9 (AR Vol. 1, pp. 86-127).

by the Manufacturer's New Vehicle Warranty" at the time the lease was signed.[118] The lease doesn't say the vehicle ***will be*** covered by the warranty after the Plaintiff signs or that it will be covered on some future date to be determined; it says the vehicle ***is*** covered by the warranty. The record shows that the vehicle was transferred to the Plaintiff during the duration of the Manufacturer's written warranty, and because it was the Plaintiff qualifies as a category two consumer.

(2) The Plaintiff is entitled to enforce the Defendant's written warranty.

The Plaintiff also satisfies the third definition of consumer, which is "any other person who is entitled by the terms of such warranty . . . to enforce against the warrantor . . . the obligations of the warranty." 15 USC § 2301(3). The Defendant has not and cannot show that the Plaintiff isn't entitled to enforce the warranty. The fact that the Defendant repaired the vehicle each time the Plaintiff took it in shows the Plaintiff has the right to enforce the warranty.[119] The Defendant never once refused the Plaintiff coverage under the warranty. When the Plaintiff experienced mechanical problems with the vehicle, she repeatedly took it back to the Manufacturer's agents. Each time the Plaintiff took the vehicle in and said, "there's a problem," Honda performed repair work on the vehicle. Honda

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[118] The Lease Agreement at "VEHICLE WARRANTIES" explicitly provides (1) that "if the vehicle is new, it is covered by the Manufacturer's New Vehicle Warranty;" and, (2) that the "Lessor assigns to [Cerasani] all of its rights in the above specified warrant[y]." See also Amended Complaint at ¶¶ 8, 9, 10, 11.

[119] Amended Complaint at ¶¶ 13, 14, 15, 16, 17.

allowed the Plaintiff to enforce the written warranty without ever once questioning the propriety of that enforcement. Even if it could be argued the Plaintiff had no rights in the warranty when she leased the vehicle (an absurd argument), she gained rights in the warranty when Honda assented to her enforcement of it. But then the lease itself establishes that the Lessor purchased the vehicle, that the written warranty was included as part of that purchase, and that the Lessor assigned its rights in the written warranty to the Plaintiff. The warranty doesn't preclude an assignment of rights, and as a general matter of contract law contracts are assignable unless there's a provision in the contract that explicitly precludes assignment. Even if a contract precludes assignment, however, the parties are still free to assign so long as the non-assigning party actively or passively assents to the assignment. And "a warranty, whether express or implied, is fundamentally a contract." Elizabeth N. v. Riverside Group, Inc., 585 So.2d 376, 378 (Fla. 1st DCA 1991). Even if the Defendant's written warranty had contained an anti-assignment clause, the Defendant assented to the assignment when it allowed the Plaintiff to enforce the warranty as the assignee/lessee.

I. Honda's warranty is a "written warranty" as defined by the federal Act.

The Warranty Act, 15 USC §2301(6) defines a "written warranty" as:

> any written affirmation of fact or promise made in connection with the sale of a consumer product by a supplier to a buyer which relates to the nature or workmanship and affirms or promises that such material or workmanship is defect free or

> will meet a specified level of performance over a specified period of time, or
>
> any undertaking in writing in connection with the sale by a supplier of a consumer product to refund, repair, replace, or take other remedial action with respect to such product in the event that such product fails to meet the specifications set forth in the undertaking
>
> which written affirmation, promise, or undertaking becomes part of the basis of the bargain between a supplier and a buyer for purposes other than resale of such product.

The only two limiting conditions in the Warranty Act's definition of a "written warranty" are that: (1) the warranty must have been "part of the basis of the bargain;" and (2) that the sale occurred "for purposes other than resale." 15 USC § 2301. The Plaintiff pled that the purchase of the vehicle was for purposes other than resale (it was sold to lease the vehicle)[120] and that the warranty served as the basis of the bargain for that sale.[121] Furthermore, the record facts show the Plaintiff's Complaint wasn't simply an artfully drafted pleading. The Lease itself shows both that the warranty accompanied the sale,[122] and that the Lessor bought the vehicle not to resell it, but to lease it to the Plaintiff. The Lease also shows that the Lessor assigned its rights in the warranty to the Plaintiff, and that assignment supports the Plaintiff's allegation that "prior to or contemporaneous to Plaintiff's

[120] Complaint at ¶¶ 6 & 7.
[121] Complaint at ¶ 10.
[122] The Lease Agreement at "VEHICLE WARRANTIES" explicitly recites that "if the Vehicle is new, it is covered by the Manufacturer's New Vehicle Warranty."

lease of the [vehicle], Seller sold the [vehicle] to Lessor for valuable consideration."[123] The Plaintiff's well-pled allegations and the Lease itself both establish that Honda's warranty was made in connection with a sale of a consumer product from a supplier (either Honda indirectly, or via Honda's authorized dealership directly) to a buyer (the Lessor). Nowhere in the Warranty Act or its legislative history are sales between car dealers and leasing companies excluded or labeled as non-qualifying sales. In fact, nowhere in the Warranty Act or its legislative history are *any* sales excluded or labeled as non-qualifying sales.

The Plaintiff pled all of the elements necessary to qualify Honda's warranty as a "written warranty" under the Act, including: **(1)** Prior to or contemporaneous to Plaintiff's lease of the Civic, Seller sold the Civic to Lessor for valuable consideration (Complaint, ¶ 5); **(2)** Lessor purchased the Civic for purposes other than resale (Id, ¶ 6); **(3)** Lessor purchased the Civic to lease to Plaintiff (Id, ¶ 7); **(4)** In consideration for the sale of the Civic, [Honda] issued and supplied to Lessor its written warranty which included three (3) year or thirty-six thousand (36,000) mile bumper to bumper coverage, as well as other warranties fully outlined in the Manufacturer's New Vehicle Limited Written Warranty booklet (Id, ¶ 8; see also ¶ 32); **(5)** At the time Lessor purchased the Civic from Seller, the Civic had been driven approximately seven (7) miles and was covered by Manufacturer's written

[123] Amended Complaint at ¶ 5.

warranty described above (Id, ¶ 9); **(6)** Lessor would not have purchased the Civic without Manufacturer's written warranty described above. Additionally, Plaintiff would not have agreed to lease the Civic without knowledge that Plaintiff would be able to enforce Manufacturer's written warranty (Id, ¶ 10); **(7)** On or about April 1, 2002, Plaintiff took possession of the Civic (Id, ¶ 12); **(8)** On or about April 1, 2002, and with approximately seven (7) miles on the Civic, Lessor assigned its rights in Manufacturer's written warranty to Plaintiff. The transfer of Manufacturer's written warranty occurred during the duration of said warranty (Id, ¶ 11). Because Honda's warranty was issued in connection with the sale of the vehicle to the leasing company and because that sale was for a purpose other than resale, Honda's warranty constitutes a "written warranty" under the Act.

2. The principal case Honda relies on has been criticized as fundamentally flawed by every court to rule on these issues since that opinion was issued.

In 2002 New York issued the first decision in the Act's then twenty-seven year history to hold that an automobile lessee could not, under any circumstances, qualify as a consumer. See DiCintio v. DaimlerChrysler, 768 N.E.2d 1121 (NY 2002). Prior to DiCintio, courts typically analyzed the issue within the context of a category one "buyer." As explained, *supra*, courts routinely held a lessee qualified as a consumer "buyer" if the transaction was sufficiently akin to a sale to be fairly treated as such. But once the DiCintio court declared a lessee couldn't qualify as a consumer under any analysis, courts began to expressly analyze the issue within

the context of the Act's two other broader definitions of consumer. Every court to consider the issue since has rejected the DiCintio analysis.

DiCintio has been widely criticized, and is critically flawed in several ways.[124] Instead of simply focusing on the plain language of the Act's three-pronged definition of consumer, the DiCintio court examined an ambiguous legislative history in an effort to determine whether Congress intended to cover consumers other than just buyers. This indirect analysis led the court to conclude that the absence of any express reference to leases meant they weren't covered by the Act. But in examining the legislative history, the DiCintio court mistakenly relied on the testimony of Fairfax Leary, a University of Pennsylvania Law School professor, who testified before Congress two years before the final version of the Warranty Act became law. DiCintio at 1125. Leary testified in 1973 regarding one definition that, by itself, would have been far less expansive than the full definition ultimately enacted. Id.[125] Leary glossed over the other two fuller and

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[124] See, e.g., the Wisconsin Supreme Court's decision in Peterson v. Volkswagen, 697 N.W.2d 61, 68 (Wisc. 2005), "Ultimately, we conclude that the reasoning of the authorities relied upon by Peterson is more congruent with the plain meaning of the pertinent provisions of the MMWA than the analysis employed by DiCintio."

[125] See also Abraham v. Volkswagen, 795 F.2d 238, 248 (2d Cir. 1986), "It is clear that with regard to written warranties. . .transferees of the original purchaser may enforce them during their effective period. This result flows directly from the statutory definitions of "consumer," "supplier" and "warrantor" . . . . The 1971 bills did not contain such broad definitions and thus allowed sellers to restrict written warranties to original purchasers. The definitions were altered during the legislative process prior to enactment." (citations omitted).

more expansive definitions, and in doing so reached an erroneous conclusion. Id. The DiCintio court relied on Leary's flawed conclusions, and its holding was equally flawed as a result. Nowhere in the legislative history does *any* member of Congress say leases aren't covered by the Act.[126] The DiCintio court's holding (and Honda's argument here) rests on the fundamentally incorrect assumption that because the word "lease" doesn't appear in the Act, leases aren't covered. But there was never any need to explicitly reference leases, because the version of the bill finally enacted into law contains three increasingly broader definitions that include leases (among other things). A category two consumer is a transferee not a buyer, and a lessee clearly fits within that definition. And category three is an even broader catch all provision encompassing "any other person" entitled to enforce the warranty. Category three also clearly encompasses a lessee.

X. CONCLUSION

WHEREFORE, the Respondent prays the Supreme Court will affirm the district court.

[126] The Act became law in 1975. The legislative hearings were recorded in Cong. Rec. S16421 (September 12, 1973); H.Rep 93-1107 (June 1974); Cong Rec. H9305 (September 17, 1974); Cong. Rec. H9396 (September 19, 1974); Cong. Rec. S.18336 (October 4, 1974); Cong. Rec. H12052 (December 16, 1974); Cong. Rec. S21976 (December 18, 1974); and Cong Rec. H12346 (December 19, 1974).

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Rule 9.210 of the Florida Rules of Appellate Procedure.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of this brief was furnished by first-class US Mail to: **Wendy F. Lumish, Esquire**, Carlton Fields PA, 4000 Bank of America Tower, 100 S.E. Second Street, Miami, FL 33131 on **February 6, 2006**.

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