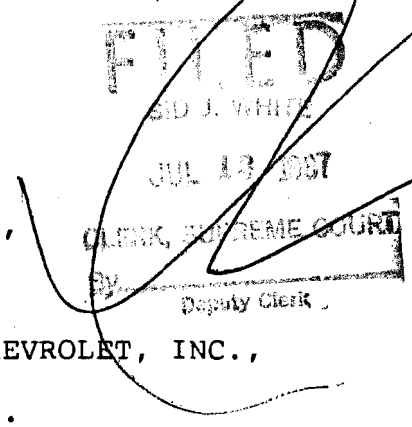
IN THE SUPREME COURT OF FLORIDA



JULIE HORNE,

Petitioner,

vs.

VIC POTAMKIN CHEVROLET, INC.,

Respondent.

Case No. 70,499
FL BAR ID #0105417
FL BAR ID #0558699

ANSWER BRIEF OF AMICUS CURIAE,
FLORIDA AUTOMOBILE DEALERS ASSOCIATION

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STATEMENT OF THE CASE AND FACTS

By order dated June 2, 1987, this Court granted the motion of the Florida Automobile Dealers Association ("FADA") to appear in this cause as amicus curiae. FADA is comprised of approximately 800 franchised dealers of new motor vehicles in Florida.

FADA adopts and incorporates by reference the statement of the case and facts contained in Respondent's brief. Amicus would only add for emphasis the following admitted facts:

(1) When Ms. Nora Newry, the actual tortfeasor in this case, came to Vic Potamkin Chevrolet to purchase a car, she had in her possession a valid Florida restricted driver's license. (TR 30).

(2) At the time Ms. Newry left Potamkin Chevrolet with her new car, she was accompanied by Appellee, Ms. Junie Horne, who was seated in the front passenger seat and had in her possession a valid Florida driver's license. (TR 82-83).

(3) Before Ms. Newry had the accident giving rise to Appellee's injuries, she and Potamkin Chevrolet had perfected the sale to her of the automobile that was later involved in the accident. At the moment of Appellee's injuries, Ms. Newry owned -- legally and beneficially-- the automobile. (TR 70).

SUMMARY OF ARGUMENT

Petitioner invites the Court to impose liability for the negligent operation of an automobile upon a vendor who lawfully sold and surrendered possession of the vehicle to a duly licensed operator. Such a decision would create a new cause of action never before recognized by Florida law, would ignore the dangerous instrumentality liability framework already present in the state, and would usurp the clear intent of the Legislature to regulate in this field. The practical result of such a decision would be to exchange a predictable, easily-applied standard for one which is ill-defined and incapable of definition. The product of such an exchange will be the disruption of the orderly process of commercial transactions and an increase in the cost of automobiles to the citizens of this State. Therefore, the Court should decline Petitioner's ill-advised invitation and affirm the decision of the District Court.

ARGUMENT

THE APPLICATION OF THE RESTATEMENT OF TORTS' CONCEPT OF NEGLIGENT ENTRUSTMENT TO SALES OF AUTOMOBILES IN FLORIDA IS AN UNWARRANTED IMPOSITION OF A NEW CAUSE OF ACTION WHICH IS OUT OF STEP WITH THE EXISTING LEGAL FRAMEWORK IN THIS STATE FOR ASSESSING LIABILITY FOR NEGLIGENT OPERATION OF A MOTOR VEHICLE.

Basic Florida law teaches that one cannot be held liable in tort absent a legal duty owed to the injured person:

> A cause of action in negligence, however, must be based upon a legal obligation for the benefit of another .... 'Negligence in the air, so to speak, will not do.' .... In the absence of a duty to the plaintiff, actionable negligence does not exist.

Robertson v. Deak Perera (Miami), Inc., 396 So.2d 749 (Fla. 3d DCA), petition for review denied, 407 So.2d 1105 (Fla. 1981). By this action, Petitioner invites the Court to create and impose a duty upon vendors of automobiles not to sell an automobile to one who might negligently operate that vehicle after it has left the ownership, possession and control of the seller. Neither statutory nor decisional law of this state dictates the imposition of such a duty under the circumstances of this case.

A. The Existing Framework of Florida Law Governing the Range of Liability Associated With the Negligent Operation of a Motor Vehicle is Fundamentally Different from Liability Predicated on Negligent Entrustment.

In Florida, apart from the concept of respondeat superior, the duty or legal responsibility of one not operating or in control of a vehicle is predicated upon ownership of the vehicle and its consensual use by another. This duty is embodied in the dangerous instrumentality doctrine, unique to this state, which has long been a part of the common law of Florida, and is still thriving today.[1] See Anderson v. Southern Cotton Oil Co., 73 Fla. 432, 74 So. 975 (1917); Avis Rent-A-Car Systems, Inc. v. Garmas, 440 So.2d 1311 (1983).

The dangerous instrumentality doctrine is based upon the realization that, although an automobile is not dangerous per se, it is peculiarly dangerous in operation. Therefore,

> [t]he owners of automobiles in this state are bound to observe statutory regulations of their use and assume liability commensurate with the dangers to which the owners or their agents subject others in using the automobiles on the public highways. The principles of the common law do not permit the owner . . . to authorize another

[1]See Note, The Dangerous Instrumentality Doctrine: Unique Automobile Law in Florida, 5 U. Fla. L. Rev. 412 (1952) which observes: "Only Florida, however has purported to apply judicially a dangerous instrumentality theory to automobiles. This doctrine has proved to be an effective device for imposing liability upon an automobile owner who would not otherwise be liable under common law concepts." Id. at 413.

> to use such instrumentality on the public highways without imposing upon such owner liability for negligent use. The liability grows out of the obligation of the owner to have the vehicle . . . properly operated when it is by his authority on the public highway.

Anderson v. Southern Cotton Oil Co., 73 Fla. at 441, 74 So. at 978. The salutary effect of the doctrine is to prevent the owner from avoiding liability by raising the driver's intervening negligence as a defense. In Florida, an automobile owner may not "shift the responsibility connected with the custody of such instruments" to the driver, thus avoiding liability. Southern Cotton Oil Co. v. Anderson, 86 So. 629, 632 (Fla. 1920) (quoting Barmore v. Vicksburg, S. & P.R. Co., 85 Miss. 426, 38 So. 210 (1905)).

Under the dangerous instrumentality analysis, if the owner of an automobile permits another to operate his vehicle, and the operator negligently injures a third person, the owner is liable in tort to the injured party. This liability exists regardless of the relationship between the owner and borrower (i.e., no principal/agent or master/servant relationship required) or whether the entrustment itself was negligent. Susco Car Rental System of Florida v. Leonard, 112 So.2d 832 (Fla. 1959).

So complete is the owner's potential liability that the only defenses possible are 1) the owner did not in fact consent to use of the vehicle by the negligent operator; or 2) no ownership. The adoption and evolution of the dangerous instrumentality doctrine has thus bred recognition of a brightly defined, indeed, axiomatic message --liability associated with the negligent use of a motor vehicle ceases or terminates upon the divestment of ownership of the vehicle.

While the dangerous instrumentality doctrine has evolved as the Florida benchmark of an automobile owner's liability for the negligent acts of a third person operator, other states have utilized the theory of negligent entrustment as the basis for justifying the imposition of liability upon a non-operator owner of a motor vehicle.

Traditionally, the theory of negligent entrustment has been applied only to bailment situations, and is derivative of the general concept of ownership. Lumbermens Mutual Casualty Co. v. Kosies, 124 Ariz. 136, 602 P.2d 517 (Ariz. Ct. App. 1979); Hines v. Nelson, 547 S.W 2d 378 (Tex. Civ. App. 1977); see also Williams v. Steves Industries, Inc., 699 S.W.2d 570 (Tex. 1985). Obviously, negligent entrustment, like dangerous instrumentality, derived from a societal need to find a theoretical basis for imposing liability on owners of certain chattel, where damage to third parties resulted from negligent

use by a consensual operator. However, a fundamental difference in the two theories is present in that negligent entrustment principles require a showing of independent fault on the part of the owner, beyond simply permitting the use of the vehicle. In contrast, the dangerous instrumentality doctrine requires no showing beyond ownership of the vehicle, the owner's consent to its use by another, and negligence in operation by the operator. Thus, while negligence in its pure form remains the essential ingredient of the theory of negligent entrustment, it has little, if any, role to play in the application of the dangerous instrumentality doctrine.

The differences described above are more than mere observations regarding the workings of the two theories; rather, they constitute fundamental policy choices which govern distinct liability systems. The distinctive character of Florida's well-established dangerous instrumentality doctrine, and the policy choices it reflects, must be given due consideration in any decision whether to alter the existing framework for assessing the range of liability associated with the use of motor vehicles in this State.

B. Within the Legal Framework of this State's Laws Governing the Assessment of Liability for the Operation of a Motor Vehicle, the Theory of Negligent Entrustment Has Not Acquired a Sufficient Foothold to Justify a Carte Blanche Recognition and Application of the Restatement's View as the Prevailing Law of this State.

Petitioner suggests that the concept of negligent entrustment, at least as it pertains to motor vehicle liability, is so engrained in Florida law that the application of the concept to the sale of a motor vehicle represents a mere minor extension of a well-settled theory of tort liability[2]. This is simply not the case, and Petitioner's reliance upon the decisions in Rio v. Minton, 291 So.2d 214 (Fla. 2d DCA 1974) and Mullins v. Harrell, 490 So.2d 1338 (Fla. 5th DCA 1986) as definitive pronouncements that Florida has adopted the Restatement's version of negligent entrustment as an operative and independent theory of liability must be carefully scrutinized. In Rio, the court was faced with an automobile owner who entrusted possession of his car to an intoxicated minor who killed himself in an accident. The trial court dismissed the wrongful death complaint against the owner on the

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[2] That negligent entrustment is not an established cause of action in Florida is evident from the question certified to this Court: "Should Florida adopt Section 390 of the Restatement (Second) of the Law of Torts, and, if so, should the section be construed so as to extend liability to a seller of a chattel as well?"

ground that it failed to allege any cognizable breach of a legal obligation or duty by the owner. The district court, citing the First Restatement, held that the complaint stated a cause of action for negligent entrustment.[3]

More recently, the Fifth District approved the use of negligent entrustment, although it found no liability under the facts of Mullins. In that case, the owner of a truck put it in the shop to have the engine replaced. The owner refused to pick the vehicle up on Saturday, so Mullins, the shop proprietor, left the truck and keys with Mutchler, an individual who lived adjacent to the business premises. While driving the vehicle on a personal errand, Mutchler negligently set fire to it, and destroyed the truck completely. Mullins appealed a final judgment against him in favor of the owner's insurance company based upon theories of respondeat superior and negligent entrustment.

The district court held that even if Mutchler were Mullins' employee, the use of the truck for personal errands

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[3] Apparently realizing that the application of the negligent entrustment theory was unsupported by Florida law, the Rio court attempted to read recognition of that cause of action into this Court's decision in Engelman v. Traeger, 136 So. 527 (Fla. 1931). To the contrary, Engelman was a thorough exegesis of the basis and extent of an automobile owner's liability under the dangerous instrumentality doctrine, and did not employ the theory of negligent entrustment in its analysis.

was beyond the scope of his employment and would not support vicarious liability. However, the court was willing to apply negligent entrustment to the facts, and concluded that there was no evidence that the entrustment was negligent.

Amicus has no quarrel with the results of either of these cases, although it is respectfully suggested that the underpinnings of liability could have been more carefully and artfully analyzed. In Rio, under application of the dangerous instrumentality doctrine, the owner of the vehicle would have unquestionably borne full legal responsibility had the minor operated the vehicle to cause harm to a third person. Why should the result be different where the minor operated the vehicle to cause harm to himself? In this situation, it is clear that legal fault, independent of the principles of the dangerous instrumentality doctrine, was present in the owner's act of placing unfettered possession of his vehicle in the hands of an intoxicated minor. Indeed, the allegations of the complaint, if true, were ample to establish that the owner intended or at least should have known that his act would aid and abet the commission of an unlawful act --the operation of a motor vehicle by an intoxicated individual who may have been unlicensed to operate a vehicle in the first place.[4] Where the

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[4] It is not clear from the opinion whether the minor had a

entrustment of the vehicle enables the possessor to engage in unlawful activity, the occurrence of which is readily apparent to the entrustor at the time possession is effected, the imposition of legal fault associated with such entrustment hardly represents a new cause of action foreign to the liability framework of this State.[5]

Similarly, the decision in Mullins is thoroughly consistent with the existing bailment duty of care. Under his contract of bailment with the owner, Mullins was obliged to exercise reasonable care in entrusting the vehicle to a third

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[5] Florida has long recognized that the sale of a product in violation of a statutory proscription can be a proper basis for the imposition of liability against the vendor. Davis v. Shiappacossee, 155 So.2d 365 (Fla. 1963) (sale of liquor to a minor); Tamiami Gun Shop v. Klein, 109 So.2d 189 (Fla. 1959) (sale of a firearm to a minor). Such a statutory duty of care is closely akin to the common law duty of care which extends to certain classes of people. Indeed, all but one of the sales cases cited on pages 13 and 14 of Petitioner's brief were concerned with a vendor's common law duty to refrain from selling a potentially dangerous article to a minor --a class which has traditionally been protected from its own inability to appreciate danger and its tendency to recklessness. Similarly, the other case cited by Petitioner concerned the sale of a firearm to an intoxicated person --another class traditionally protected from its own lack of judgment. In all the sales cases cited by Petitioner, the vendor basically stood in loco parentis, a concept which does not apply to the facts before the Court. Therefore, contrary to Petitioner's bold assertion, since there was no taint of illegality known to the dealer in Ms. Newry's possession and operation of the vehicle following the sale, the fact that Nora Newry was a duly licensed driver is clearly relevant in light of meaningful analytical distinctions. (Petitioner's Brief at 18, et seq.)

party. Consequently, the Mullins court hardly needed to recognize negligent entrustment as announced in the Restatement view in order to reach the result fashioned in that case.

Rio and Mullins simply do not represent a pristine application of the theory of negligent entrustment as outlined and espoused in the Restatement view. If, indeed, some form of negligent entrustment is abroad in this state with respect to motor vehicle liability in general, its foundation to date is hardly a clarion call for the announcement and subsequent evolution of a totally independent cause of action; rather, each new set of facts should be considered and deliberated upon with the confines and reasonable extensions of traditional concepts and limitations attending the dangerous instrumentality doctrine and other tort doctrines already in place in the legal framework of this state.

Finally, the Petitioner's reference to the decisions in Angell v. F. Avanzini Lumber Co., 363 So.2d 571 (Fla. 2d DCA 1978) and Life Insurance Co. of Georgia v. Lopez, 443 So.2d 947 (Fla. 1983) are easily distinguishable based on the operative facts peculiar to those cases. In both Angell and Lopez, the sale of the product abetted the commission of intentional wrongful and unlawful acts, and the seller in both cases had substantial information and knowledge of facts and

circumstances that revealed an imminent propensity for such illegal acts to occur. The extension of the rationale of these cases to encompass post-sale negligent and unintentional, but lawful, use of the product is a giant step indeed.

C. A Clear Majority of Those States Recognizing the Restatement's View of the Negligent Entrustment Theory as Related to Motor Vehicles has Refused to Extend the Theory to Embrace Liability Attributable to a Sale of a Vehicle.

Petitioner asserts that this Court should impose liability upon an automobile vendor for the negligent operation of a motor vehicle committed by a purchaser of the vehicle after a lawful sale by the vendor. Not only is this proposed extension of liability insupportable under long-standing principles of Florida law, but other states that have considered such an extension have rejected it out of hand.

Research indicates that eight states[6] have addressed the question of applying negligent entrustment to the sale of automobiles. Unlike Florida, each of these states already had a negligent entrustment liability framework in place for bailments. Even so, of those eight states, only two, California and Alaska, have sanctioned the extension of that

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[6] Those states are: Tennessee, Illinois, Colorado, Kansas, Georgia, Texas, California, and Alaska.

pre-existing framework to include the sale of automobiles.[7] In rejecting a plaintiff's attempt to apply negligent entrustment to sales, an Illinois court of appeals held that such liability should not be extended to a seller as a matter of public policy, noting:

> [w]hile creating a new duty would assist injured plaintiffs by spreading the loss among a new class of defendants, up to now society has been satisfied to rely upon the liability of the driver alone to adequately compensate injured plaintiffs. The fortuitous circumstance of one driver's inability to pay for damages he has

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[7] Those cases which have refused to extend liability to a vendor of an automobile include:

Irwin v. Arnett (Tenn.App., Dec. 12, 1986) (No. C. A. 162);
Tosh v. Scott, 129 Ill.App.3d 322, 84 Ill.Dec. 631, 472 N.E.2d 591 (1984);
Baker v. Bratrsovsky, 689 P.2d 722 (Col. Ct. App. 1984);
Kirk v. Miller, 7 Kan.App.2d 504, 644 P.2d 486 (1982);
Pugmire Lincoln Mercury, Inc. v. Sorrells, 142 Ga.App. 444, 236 S.E.2d 113 (Ga. 1977);
Rush v. Smitherman, 294 S.W. 2d 873 (Tx. Ct. App. 1956);

The Georgia and Colorado courts did not reject application of negligent entrustment to sales unequivocally, but pretermitted the question since, under the facts presented, there was no suggestion of "actual knowledge." Nevertheless, neither court actually embraced the negligent entrustment theory as applied to sales.

The two California cases relied upon by Petitioner which extend liability to a vendor, Johnson v. Casetta, 197 Cal.App. 171, 17 Cal.Rptr. 81 (1961) and Roland v. Golden Bay Chevrolet, 161 Cal.App.3d 102, 207 Cal.Rptr. 413 (1984), are readily distinguishable from our facts since both dealt with the sale of automobiles to unlicensed drivers. The Alaska case cited by Petitioner, Flieger v. Barcia, 674 P.2d 299 (1983), is notable for its utter lack of any analysis whatever.

> caused should not be a reason to open new arenas of schemes.

Tosh v. Scott, 129 Ill.App.3d 322, 84 Ill.Dec. 631, 472 N.E.2d 591, 593 (1984) (quoting Fugate v. Galvin, 84 Ill.App.3d 573, 40 Ill.Dec. 318, 406 N.E.2d 19 (1980)).

It is clear from the foregoing that most courts that have considered applying negligent entrustment to the sale of automobiles have demurred, including those in states previously recognizing negligent entrustment in bailment situations. In Florida the law of owner liability is expressed as the doctrine of dangerous instrumentality, and negligent entrustment is not the principal operative scheme or basis for assessing tort liability for motor vehicle use. In order to apply negligent entrustment to the sale of automobiles, the Court will be required to impose a new cause of action, the evolution of which must certainly lead to a disruption of the well-established and clearly delineated liability foundation presently in place in this State.

D. Any Fundamental Change in the Law Should Come from the Legislature, Which Has Already Indicated an Interest in Regulating this Field

In addition to the common law framework, the Florida Legislature has acted in this area to immunize automobile vendors from liability for the negligence of retail customers

after sale. Section 319.22(2), Florida Statutes (1985), an integral part of the regulation of motor vehicle transfers since before 1955, provides:

> An owner or co-owner who has made a bona fide sale or transfer of a motor vehicle or mobile home and has delivered possession thereof to a purchaser shall not, by reason of any of the provisions of this chapter, be deemed the owner or co-owner of such vehicle or mobile home so as to be subject to civil liability for the operation of such vehicle or mobile home thereafter by another when such owner or co-owner has fulfilled either of the following requirements....[8]

The undisputed facts of this case reflect that Potamkin Chevrolet properly transferred the title and ownership of the subject automobile to Nora Newry prior to the accident. (TR 70).

This Court has held that the statute provides complete immunity to a vendor once the beneficial ownership of the automobile has passed to the buyer. In Palmer v. R.S. Evans,

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[8] Those requirements are, in pertinent part:

> (a) When such owner or coowner has made proper endorsement and delivery of the certificate of title as provided by this chapter . . . .
>
> (b) When such owner or coowner has delivered to the department, or placed in the United States mail, addressed to the department, either the certificate of title properly endorsed or a notice in the form prescribed by the department.

§ 319.22(2)(a)(b), Florida Statutes (1985).

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§ 319.22(2)(a)(b), Florida Statutes (1985).

p. 16a are slightly different

Jacksonville, Inc., 81 So.2d 635 (Fla. 1955), the Court affirmed a trial court judgment finding no liability against an automobile dealer because the dealer was not the owner of the automobile at the time of the accident. In so doing, the Court interpreted Section 319.22(2) and held:

> [I]t is clear that under this section no civil liability can accrue to a seller who has complied with the title certificate requirements ....

Id. at 636 (emphasis added). As observed by the First District Court of Appeal:

> In an uninterrupted line of decisions the Supreme Court of Florida has held that the seller of an automobile who retains [only] the naked legal title thereto [but who transfers beneficial title], is not subject to the tort liability imposed upon the owner of an automobile operated by another.

Williams v. Davidson, 179 So.2d 387, 389 (Fla. 1st DCA 1965); accord, McAfee v. Killingsworth, 98 So.2d 738 (Fla. 1957); Platt v. Dreda, 79 So.2d 670 (Fla. 1955); Whalen v. Hill, 219 So.2d 727 (Fla. 3d DCA 1969).

The clear intent of Section 319.22(2), Florida Statutes, is to immunize automobile vendors from liability for the negligent acts of the customer once a transaction is completed and the vehicle has passed from the vendor's custody and control. The statutory language is itself broad enough to apply to the present case and to bar Petitioner's recovery

under a negligent entrustment theory. To hold otherwise would be to vitiate the express legislative intent apparent in this long-established statutory provision.

Even should the Court find that the statutory language is insufficiently broad to specifically bar an action against an automobile seller for negligent entrustment, it should exercise judicial restraint and decline to impose a new common law cause of action in this area.

In the recent case of Bankston v. Brennan, 12 F.L.W. 243 (Fla. May 21, 1987), the Court was invited to recognize a common law cause of action against a social host who served alcohol to a minor, in favor of a person injured by that minor, an action which did not previously exist in Florida. The Court noted that the Legislature had actively entered the field and had indicated "a desire to make decisions concerning the scope of civil liability in this area" by virtue of its prior regulation of alcoholic beverages and, specifically, its prior limitation of vendor liability. Id. at 244. The Court observed:

> The issue of civil liability for a social host has broad ramifications, and as we recently observed, of the three branches of government, the judiciary is the least capable of receiving public input and resolving broad public policy questions based on a societal consensus. Shands Teaching Hospital and Clinics, Inc. v. Smith, 497 So.2d 644, 646 (Fla. 1986)....While creating such a cause of action may be socially desirable ... the legislature is best

equipped to resolve the competing considerations implicated by such a cause of action. We agree with the observation of the Nebraska Supreme Court when faced with a similar issue:

> We are mindful of the misery caused by drunken drivers and the losses sustained by both individuals and society at the hands of drunken drivers, but the task of limiting and defining a new cause of action which could grow from a fact nucleus formed from any combination of numerous permutations of the fact situation before us is properly within the realm of the Legislature.

Homes v. Circo, 196 Neb. 496, 504, 244 N.W.2d 65, 70 (1976).

Id. at 244. Surely if judicial deference and restraint is appropriate in the face of the egregious social ill encountered in Bankston, it is even more appropriate in the present case, where the existing liability framework and attendant policy considerations are well-defined and the pressure attributable to a social need to expand the existing legal framework is minimal at best.

In sum, as the law presently stands, an automobile seller does not owe a legal duty to the public to protect against subsequent negligent acts committed by the purchaser after a legal sale. Both the statutory and common law reflect this policy judgment. The Court should refrain from imposing an entirely new theory of liability against motor vehicle vendors in an area where the Legislature has evidenced specific concern

for regulation and has in fact expressly opted to immunize motor vehicle vendors from liability imposed under the existing and well-defined legal framework.

E. The Extension of Negligent Entrustment to Encompass Liability of a Motor Vehicle Vendor for Acts of the Vehicle's Operator Occurring After Lawful Sale of the Vehicle Runs Counter to Sound Policy Considerations.

On the issue of owner liability after a completed sale, Florida has a well-established, bright line test: while he owns the vehicle, his liability to third parties for the negligence of one driving with his consent is virtually absolute. When he ceases to be the owner, his liability ceases, just as absolutely. Petitioner now urges the Court to eviscerate this familiar test in favor of what can only be described as murky law possessed of no discernible parameters.

Petitioner asserts that the effect of introducing negligent entrustment into automobile sales will be small, since liability will attach only if the vendor has <u>actual knowledge</u> of the buyer's incompetence. But Petitioner fails to indicate what kind of certainty is enough to trigger liability.

For example, the customer, a licensed driver, fails to come to a complete halt at a stop sign during a test drive of his prospective new car. Is this sufficient to put the salesman or seller on inquiry notice? If a subsequent

investigation of the customer's driving record reveals one moving violation and a couple of parking tickets, is this indicative of driver incompetence? Must the seller inquire into the circumstances of the violation to determine whether there was negligence involved? If there were no negligence associated with the traffic ticket, how may the seller purge itself of notice? Assume further that the customer is well-known to his family and friends as a careless driver, if the purchaser exhibits some symptom of incompetent or inadequate driving skills, is the seller obliged to scout out this fact as well as the customer's official driving record? What if the vendor decides either to discontinue the practice of test drives or to send the customer alone, will that permit it to sell with impunity, or will that fact alone constitute a form of negligence? Suppose a person, known to the seller to be the town drunk, comes in to buy a car when he is absolutely sober, but after the purchase becomes intoxicated and is responsible for a wreck? Will an injured third party, or even the drunk himself, have recourse against the vendor who "knew or should have known" of the drunk's propensity to become an incompetent driver?

Equally troublesome is the question, how far in time would the seller's duty extend? Petitioner's facile answer," until the disability ceases," begs the question. How does a lawfully

licensed but incompetently skilled driver become competent? If the purchaser was incompetently skilled when he or she purchased the vehicle, is the vendor on the "hook" for an accident caused by the purchaser a month after the sale? What about a year later? These policy considerations have proved to be unsettling to other courts which have refused to embrace the concept of liability championed by Petitioner.[9]

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[9] In two similar cases involving donor liability, courts in New Jersey and Tennessee rejected the extension of negligent entrustment. The New Jersey court observed:

> None of the cases reviewed discuss the problem of public policy which seems important to the court in this situation. If the donor of a car has an obligation to inquire into the donee's driving ability, so also would the vendor of a car. Must the vendor who advertises a car for sale check the background of the stranger who comes to purchase? Must an automobile dealer check the driving ability of every potential purchaser? The answer is obviously no. Such a requirement would unduly hamper commerce and would pose an undue burden on ordinary business relationships.

Sikora v. Wade, 135 N.J. Super. 62, 342 A.2d 580, 582 (1975). Likewise, the Tennessee court noted:

> If a father incurs liability by giving an automobile to his son, knowing him to be drunken or incompetent driver, when would it end? Would it last for the life of the automobile? Would it apply to a new automobile in the event of a trade-in? Or would liability attach to a dealer who sold an automobile to a known incompetent or drunken driver? Or to a filling station operator who

The duty of care and attendant cause of action that Petitioner urges the Court to adopt go far beyond any liability heretofore imposed in this State. This indeterminate duty to protect indefinitely against possible future acts of negligence of a buyer is both manifestly unreasonable and disruptive of the orderly process of commercial transactions. The existing bright line test will be replaced by an unfathomable network of liability that will be woefully lacking in the degree of certainty which a responsible legal system should strive to foster in the area of commercial dealings.

One can also expect that adoption of the cause of action advocated by Petitioner will eventually force automobile vendors to screen their customers for defective driving records or lack of driving ability, without clearly delineating the parameters. The costs associated with such protective

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> sold such a person gas, knowing of his propensity?
>
> The legislature has not seen fit to impose any such liability. We think it would be judicial legislation if we undertook to go past that now recognized by existing holdings. The very paucity of authorities on this interesting question leads to the belief that such liability is not recognized in other jurisdictions.

Brown v. Harkleroad, 287 S.W.2d 92, 96 (Tenn.App. 1956). Precisely these concerns are present in the instant case.

measures, not to mention the added expense of the additional underwriting risks attending liability insurance for commercial vendors, will be passed along as increased product costs.

On balance, the imposition of the liability urged by Petitioner will unduly hamper the free flow of commerce and pose an undue burden on ordinary business relationships, while making products more expensive. Accordingly, the Court should decline Petitioner's invitation to supplant a certain, well-tread rule of law with ill-fitting new common law scheme of liability destined to become a cipher. Such rejection would be consistent with the notion that "[a] basic function of the law is to foster certainty in business relationships, not to create uncertainty by establishing ambivalent criteria for the construction of those relationships." Muller v. Stromberg Carlson Corp., 427 So.2d 266, 270 (Fla. 2d DCA 1983). The Legislature, not the courts, is the appropriate body to effect such a radical change in Florida commerce, should such change, in fact, be warranted.

CONCLUSION

Because the imposition of a legal duty upon Vic Potamkin Chevrolet is, within the context of this case, contrary to the statutory and common law of Florida, and because the creation of such a duty lies with the Legislature rather than the courts, the Florida Automobile Dealers Association respectfully requests that this Court affirm the decision of the Third District Court of Appeal.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by mail to DENNIS WEBB, ESQUIRE, Henry T. Courtney, P.A., Suite 1611, New World Tower, 100 North Biscayne Boulevard, Miami, FL 33132; PATRICE A. TALISMAN, ESQUIRE, Daniels & Hicks, P.A., Suite 2400, New World Tower, 100 North Biscayne Boulevard, Miami, FL 33132; RICHARD S. SHERMAN, ESQUIRE, Suite 102 North Justice Building, 524 South Andrews Avenue, Fort Lauderdale, FL 33301; and DAVID T. HEWITT, ESQUIRE, 2900 Southwest 29th Terrace, Fifth Floor, Miami, FL 33131, this 13th day of July, 1987.

Neil L Owen
Attorney