IN THE SUPREME COURT OF FLORIDA

CASE NO. 70,499

Florida Bar No: 184170

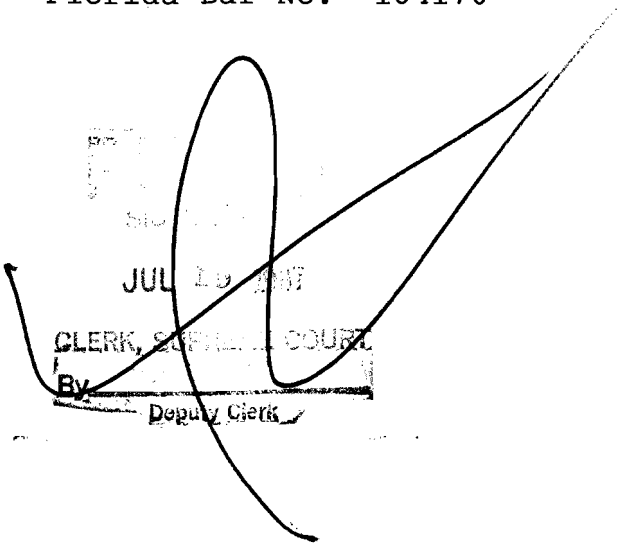
JUNIE HORNE,

Petitioner,

vs.

VIC POTAMKIN CHEVROLET, INC.,

Respondent.



BRIEF OF RESPONDENT ON THE MERITS

BRIEF OF RESPONDENT VIC POTAMKIN CHEVROLET, INC.

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TABLE OF CONTENTS

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POINT ON APPEAL

THIS COURT SHOULD AFFIRM THE DECISION BELOW AND ANSWER THE CERTIFIED QUESTION IN THE NEGATIVE SUCH THAT A DUTY NOT TO SELL IS NOT IMPOSED UPON AUTOMOBILE DEALERS OR OTHER SELLERS.

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INTRODUCTION

Respondent Vic Potamkin Chevrolet, Inc. will be referred to as Potamkin or Defendant.

Petitioner Junie Horne will be referred to as Horne or Plaintiff.

The Record on Appeal will be designated by the letter "R" and the trial Transcript by the Letter "T". All emphasis in the Brief is that of the writer unless otherwise indicated.

The original Third District Opinion of Vic Potamkin Chevrolet v. Horne, 11 F.L.W. 1770 (Fla. 3d DCA August 12, 1986) will be referred to as Potamkin I. The substituted opinion of the court on Motion for Rehearing En Banc Vic Potamkin Chevrolet Inc. v. Horne, 12 F.L.W. 960 (Fla. 3d DCA April 9, 1987) will be referred to as Potamkin II.

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STATEMENT OF THE FACTS AND CASE

What transpired was that Vic Potamkin Chevrolet, sold a car to someone who subsequently had an accident injuring a passenger. The passenger sued Potamkin for selling a car to a bad driver. The trial court indicated that it was aware that under the law of Florida there was no cause of action for selling a car to a bad driver, but that "if it is not the law, it should be", and allowed the case to go to the jury. The jury returned a Verdict against Vic Potamkin Chevrolet for $195,000. The Third District Court of Appeal sitting En Banc reversed the Judgment against Potamkin and certified the following question 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?

Potamkin II, 961.

The original appeal centered around the improper finding of liability, under the theory of negligent entrustment, against Potamkin for selling a car to a buyer, who later had an accident and caused injuries to the Plaintiff Horne. In spite of the recognition by the lower court that a cause of action for negligent entrustment against a seller does not exist in Florida, the case was tried under that theory and the jury was instructed on it. The trial court stated that if there was no cause of action, there should be. The issue on appeal then was framed as being a question of whether the appellate court should extend the law of negligent entrustment to include negligent sales.

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Potamkin II, 960. The Third District withdrew the original Opinion which had found a cause of action for negligent sale, reversed the Judgment and certified the question as one of great public importance.

Basically what happened was that Nora Newry was hired as a maid for the Potamkin family two months before the accident (T 23). Newry decided that she wanted to buy a car. She spoke to Vic Potamkin's brother-in-law, Morty Janis, about it, who told her to go to a Potamkin lot and pick out a car (T 28). On March 9, 1982 Newry selected her car. She gave the salesman, Oscar Irigaray, information to prepare the sales documents, including her valid Florida driver's license (T 55). Newry had a valid restricted driver's license and she was not in violation of the license restriction at the time of the accident (T 203).

At trial Mr. Newry testified that she had taken a road test, but was issued a restricted license because she could not parallel park:

> Q: Now, do you currently have a Florida operators driver's license?
>
> A: No. I didn't.
>
> Q: Do you have any driver's license?
>
> A: I have a restricted driver's license which is valid.
>
> Q: Do you have it with you now?
>
> A: No. I don't.
>
> Q: Where is it?
>
> A: It's home at my house.
>
> Q: Is that the same restricted license to

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your knowledge that you had at the time of the accident?

A: Yes.

Q: Have you ever tried to take the operator's actual driving test?

A: Not since--yes. I have before that, but not since.

Q: You tried to take it before?

A: The accident, yes.

Q: The accident happened on March 9 of 1982. You tried to take the test where you had to drive with somebody?

A: What? If I have--oh, the instructor took me out. Yes. I say I have to take the test and I fail in the parallel parking.

(T 19-20)

After the preliminary work was done on the car sale, the salesman then let Newry test drive the car (T 59). Newry had difficulty handling the car. She began heading toward parked cars and then corrected her direction. Later she approached a bus and it appeared that she was not sufficiently slowing down so the salesman reached over and turned the steering wheel so as to avoid a possible accident (T 60). He told her to bring back someone with her to pick up the car since he did not feel she was driving adequately, and had a restricted license (T 65).

Later that afternoon Newry returned to the lot to pick up the car with Morty Janis and his wife. The papers were signed and the purchase completed (T 70). Newry noticed an old friend Junie Horne who was also buying a car at that time (T 36). Newry invited Mrs. Horne and her husband over to her house to visit after they were finished a Potamkin's (T 40). Newry waited

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almost an hour for the Hornes to buy their car (T 83). It was then decided that Horne would drive with Newry to her house. Newry left Potamkin's and drove down McArthur Causeway with Horne sitting in the passenger seat (T 46, 86).

Newry was driving normally when she drifted a little to the right of the road, in order to let a car behind her pass (T 43, 81). She came back to the left and apparently lost control of the car (T 43). The car travelled across the causeway and hit a tree on the left side of the road (T 81).

Mrs. Horne sustained injuries in the accident and sued Newry, the salesman, Irigaray, and Vic Potamkin Chevrolet (R 1). A Default Judgment was entered against Newry, she did not appear at trial and her prior deposition testimony was read to the jury (T 18-46, 182). During the jury instruction conference Horne first dismissed her claim against Irigaray, the salesman for Potamkin (T 181). Later when the issue of comparative negligence arose the Plaintiff avoided presenting this issue to the jury by dismissing the car's owner and driver, Newry (T 194). The only Defendant left was Vic Potamkin Chevrolet and the cause of action against it was negligent entrustment.

The use of the theory of negligent entrustment was challenged numerous times during the trial because Florida has never recognized it as a theory of recovery against a seller of a car. Prior to Potamkin's Motion for Directed Verdict a discussion took place regarding jury instructions (T 115-120). At this point the trial court clearly recognized the fact that there was no law in Florida that allowed the Plaintiff's use of

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the theory of negligent entrustment. The court indicated it knew Florida law was to the contrary barring the Plaintiff's action against the seller, Potamkin (T 117-118). Rather then proceeding under existing Florida law the trial court stated it would allow the case to proceed under the theory of negligent entrustment and let the District Court of Appeal decide whether this was right or not.

> As I say, if that's the law, then I think the law ought to be changed and I will give the district court a shot to do it.
>
> (T 119)

Potamkin moved for a Directed Verdict three times (T 165), 182, 195, 196) raising the issue that there was no case law in Florida allowing a suit for negligent entrustment against a seller and non-owner of a car.

The jury returned a Verdict against Potamkin for one hundred and ninety-five thousand dollars ($195,000), (R 98) and the Post-Trial Motions were denied (R 47, 118, 119).

Potamkin appealed asserting that it was entitled to a Directed Verdict, as it could not be liable under the dangerous instrumentality doctrine or the theory of negligent entrustment; that no liability existed under current Florida case law and statutes; and that it was error to instruct the jury on negligent entrustment.

The original panel Opinion affirmed the Judgment against Potamkin, holding that a car dealer has a duty to refuse to sell a car to a buyer if it has actual knowledge that the purchaser lacks competent driving skills. Vic Potamkin Chevrolet, Inc. v.

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Horne, 11 F.L.W. 1770 (Fla. 3d DCA August 12, 1986). The Opinion stated that there could be no liability under the dangerous instrumentality doctrine since Potamkin did not own the car when the accident occurred. The panel found that Potamkin was directly negligent because it did not refrain from selling the car once it had actual knowledge of the purchaser's driving ability and her intention to drive. Potamkin I, 1770. The court then adopted the law of California and refused to apply current Florida law and F.S.A. Section 319.22(2), which insulated Potamkin from liability. Potamkin I, 1771.

The dissent in the panel Opinion began by noting that only the Supreme Court or the legislature could adopt a new cause of action for negligent sale. Potamkin I, 1771. More importantly however it points out that the common law and statutory law in Florida holds that a dealer cannot be held liable for the subsequent negligent acts of a buyer in the operation of a car. Potamkin I, 1771. Further the majority attempted to limit recovery to situations where the seller has actual knowledge of the buyer's incompetency, which would require a probe into a buyer's background to determine the buyer's fitness to use the product. Potamkin I, 1771. This new duty of inquiry would create uncertainty in business relationships and retard the free flow of commerce. Finally the dissent states that Newry was legally qualified to drive and that the State of Florida, not Potamkin, is invested with the duty and authority to determine who is qualified to drive and the court should not impose a duty not to sell upon auto dealers. Potamkin I, 1772.

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Potamkin moved for Rehearing and Rehearing En Banc. The Third District granted rehearing en banc on the grounds that the case was of exceptional importance.

Potamkin II, 960.

The majority of the court en banc withdrew the panel Opinion, reversed the Judgment against Potamkin and declined to extend the law of negligent entrustment to include negligent sales. Potamkin II, 960. The Opinion agrees with the dissent in Potamkin I, that Florida law imposes no liability or duty to protect without actual or constructive control of the instrumentality. Potamkin II, 961. In addition the Third District recognized that Newry fully complied with Florida law and therefore was legally authorized to drive. Potamkin II, 961. The appellate court then certified the case as one of great public importance.

It is respectfully submitted that the Third District's En Banc Decision reflects correct Florida law and public policy and that this Court should answer the certified question in the negative and not extend liability to a seller.

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SUMMARY OF ARGUMENT

In reviewing the Third District's application of Florida's common law and statutory law, which does not impose liability on an auto dealer for selling a car to a person who is legally authorized to drive it, the following points mandate that the certified question be answered in the negative and that this Court affirm the Decision below. A simple recognition of the adverse consequences of imposing a duty not to sell forces the conclusion that the theory of negligent entrustment should not be extended to include negligent sales, especially as applied to car dealers.

(1). The first point which we want to make forcefully is the fact that a State of Florida driving official had determined that the buyer could drive a car if she had a licensed driver in the front seat with her, which she did have. Therefore, when Potamkin turned the car over to her she was driving legally.

In other words, when she had taken her driving test the state driving official had determined that she could not drive well enough to get a regular license, but could drive well enough to get a restricted license, such that she could drive if a licensed driver was in the front seat with her. It must be assumed that the driving officials have procedures to prevent someone from having a restricted license if they are a menace, senile, etc.; otherwise how could a car salesman be expected to reject somone from driving with a restricted license if a state driving official can not.

The bottom line is that the state driving officials are the

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onew invested with the duty and authority to determine who can drive and who can not, and not car salesmen.

Mrs. Newry's trial testimony as to this was that she took the driving test and failed the parallel parking portion (T 19-20).

Therefore, this is the key point on the liability of Potamkin, that the State of Florida is the entity which has the responsibility to determine who can drive and under what circumstances, and not car salesmen. Since the proper state official driving examiner determined that she could drive with licensed adult in the front seat, a car dealership should not be held liable because a car salesman did not second guess the state driving examiner.

(2). The second point we wish to make is that the cases cited by the Petitioner generally fall in to two classes, (a) the few cases in which a car was sold to someone who did not have a driver's license, and (b) cases involving selling various dangerous items to minors.

There is no case where liability had been held to exist where a car was sold to someone when a state driving license examiner had given a driving test to the person, and the state driving examiner had determined she could drive well enough to give her a restricted license to drive with an adult in the front seat. As the appellate court recognized Newry was legally authorized to drive. If she had poor driving skills, such that she should not have been driving, it is the state examiner that should make this determination, not a car dealership.

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(3). The third point is that it takes no prophet to know that in the litigious atmosphere of Florida the recognition of a new cause of action for negligent sale will be a new "deep pocket" that attorneys will seek to go after. Some of the obvious theories are as follows:

> (a) Anytime someone sells a car to a neighbor or someone he knows, and the person subsequently has an accident, it will give rise to a cause of action against the seller since he had seen the person drive and had "actual knowledge" of his driving ability.
>
> (b) Anytime someone goes on a test drive of a car either with a salesman of a car dealership or a private seller, this will create a potential cause of action since the person is on "actual notice" of the buyer's driving ability.

To try to limit this holding to this specific case as the dissenting Opinion suggests is unrealistic. There will inevitably be a proliferation of litigation on this issue as parties view the seller as a potential deep pocket. The question of whether the seller had "actual knowledge" of poor driving skills will undoubtedly always be a question for the jury.

(4). Additionally, the question is unanswered as to how far in time the seller is liable for the tort of the buyer, after selling the car. Presumably this also will be a jury question, and the Respondent merely suggests that time would run out when "the driver becomes competent" (which realistically could be a period of years, if ever).

(5). F.S.A. Section 319.22 (1981) specifically provides immunity to car dealers once the car is sold. The only responsible party is the owner, under the dangerous

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instrumentality doctrine. Even under the negligent entrustment theory Potamkin can not be liable, because to be liable for negligent entrustment the party charged must have owned or controlled the car.

(6). The Petitioner ignores both the common and statutory law of Florida, which compels that the certified question be answered in the negative. She also presents no public policy reasons to impose a duty not to sell, whereby the seller will become a guarantor of the acts of the buyer. Horne entered into a valid contract to purchase a car that she was legally authorized to drive, no liability can be found under these facts and the Third District's Opinion must be affirmed.

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THIS COURT SHOULD AFFIRM THE DECISION BELOW AND ANSWER THE CERTIFIED QUESTION IN THE NEGATIVE SUCH THAT A DUTY NOT TO SELL IS NOT IMPOSED UPON AUTOMOBILE DEALERS OR OTHER SELLERS.

The Third District declined the Petitioner's request to extend the law of negligent entrustment to include negligent sales, and it is respectfully submitted that the Opinion below be affirmed. Finding this an issue of great public importance, the intermediate court certified the following question; which must be answered in the negative; in recognition of current Florida common and statutory law and strong public policy that mandates that a duty not to sell cannot be imposed upon a seller, especially a car dealer:

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?

A. No Case Law Holds That it is Negligent to Enter Into a Valid Contract to Sell a Car to a Party Legally Authorized to Drive It.

Potamkin sold a car to a legally authorized driver and breached no contractual duties or statutory obligations. Potamkin II, 961. Therefore the Opinion below must be affirmed as the Defendant breached no duty owed to the Plaintiff and the dealer cannot be required to second guess the State of Florida, which is invested with the duty to determine who is qualified to drive.

A State of Florida driving official determined that Newry could drive a car if she had a licensed driver in the front seat with her, which she did have. Therefore, when Potamkin turned

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the car over to her she was driving legally.

In other words, when she had taken her driving test the state driving official had determined that she could not drive well enough to get a regular license, but could drive well enough to get a restricted license, such that she could drive if a licensed driver was in the front seat with her.

Mrs. Newry's trial testimony as to this was that when she took the road test she failed parallel parking and was only issued a restricted driver's license (T 19-20).

Therefore, this is a key point of Potamkin, that the State of Florida is the entity which has the responsibility to determine who can drive and under what circumstances, and not car salesman. Since the proper state official driving examiner determined that she could drive with a licensed adult in the front seat, a car dealership should not be held liable because a car salesman did not second guess the state driving examiner.

There is no case where liability had been held to exist where a car was sold to someone when a state driving license examiner had given a driving test to the person, and the state driving examiner had determined she could drive well enough to give her a restricted license to drive with an adult in the front seat.

This is the crux of this case; Newry had a restricted license from the State of Florida and when she left Potamkin she had a licensed driver in the front seat, she was driving legally. A car salesman or car dealer should not be charged with having to second guess the state drivers license examiner.

The Petitioner refers to Newry as an "incompetent driver".

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Of course, this is a word choice designed to seek to bolster her position, but is not accurate. Newry was certainly not legally incompetent and, in fact, as the Third District recognized, she had a valid drivers license and was driving legally, she was legally competent.

The correct choice of words would be that she had "poor driving skills". However, this leads into the question of at what point are driving skills poor enough that the person should not be driving, even with a licensed adult. This certainly is a judgmental question for the state driving examiner, who issued her the license. This once again leads into the fact that the crux of the case is that she could drive well enough to give her a restricted license, and at the time she left Potamkin she was driving legally.

This would be an entirely different case if she had no license and they turned the car over to her. Then she would be a legally incompetent driver.

The Petitioner claims that the fact that Newry was a validly licensed driver is irrelevant to whether she was a negligent driver. This argument is totally without merit. Moreover even the main California case she relies upon notes the California statutory law does not prohibit the sale of a motor vehicle to an unlicensed person. Johnson v. Casetta, 197 Cal.App.2d 272, 17 Cal.Rptr. 81 (1981). Further every California case cited by Horne involves a car sale to an "unlicensed driver".

Potamkin had the complete right to rely upon the State of Florida's determination that Newry was competent to drive in

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Florida, if she complied with statutory requirements, which she did.

Horne's assertion that Florida allows unqualified drivers out on the highway, by handing out restricted licenses with no determination of their competency, only bolsters Potamkin's argument that only the State could be negligent, as it is responsible for evaluating the ability of drivers and car salesman have no duty to second guess this determination. Of course the State is immune from suit based on these determinations. Dietrick v. Department of Highway Safety and Motor Vehicles, 496 So.2d 2121 (Fla. 5th DCA 1986).

> It is for the State of Florida, not Potamkin to determine who is qualified to drive. The legislature has not commissioned automobile dealers to serve as agents of the Department of Motor Vehicles to act as a secondary screening mechanism for detecting bad drivers. Until such time and in view of the present statutory and common law scheme, this court should not impose on automobile dealers a duty to sell.
>
> Potamkin II, 961.

B. No Liability Against a Seller/Non-Owner in Florida

Horne completely ignores F.S.A. Section 319.22 (1981) and case law which holds that no liability can be imposed upon a seller, who has no control or ownership of the car at the time of the accident. Palmer v. R.S. Evans, Jacksonville, Inc., 81 So.2d 635 (Fla. 1955); Whalen v. Hill, 219 So.2d 727 (Fla. 3d DCA 1969). Instead she just asks this Court to change Florida law so she can recover. Horne dismissed her claim against the driver Newry, during trial, leaving only the seller Potamkin, as a source of recovery.

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By statute and case law Potamkin Chevrolet could not be the owner of Newry's car nor could it have control over it. Potamkin sold the car to Newry, prior to her driving it off the lot and causing the accident which injured the Petitioner, Horne (T 116, 119, 199, 200).

Ownership and control are required to impose liability under the dangerous instrumentality doctrine of Florida and the negligent entrustment theory.

F.S.A. Section 319.22 (1981) expressly releases a seller from possible liability:

> (2) 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...

Case law also supports this finding. In Whalen v. Hill, 219 So.2d 727 (Fla. 3d DCA 1969), the court found that once title and possession of the car as transferred, the former owners could not be held liable for injuries sustained in a later accident which involved the car. Only the current owner could be found liable under the dangerous instrumentality doctrine.

A case from this Court directly on point is Palmer v. R.S., Jacksonville, Inc., 81 So.2d 635 (Fla. 1955). Here the buyer purchased a car, drove if off the used car lot and twenty minutes later struck a motorcycle injuring the plaintiff/appellant. The plaintiff sued the driver and the dealership. A question as to

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ownership of the car was raised as the purchase contract was not fully executed. The jury found that the driver was the owner of the car and that there was no basis for liability against the dealer.

This Court specifically addressed Section 319.22(2) noting that it provides immunity to a seller from liability arising from an accident which takes place after the sale:

> ...the true import of Section 319.22(2) as it affects the possible tort liability of the seller of an automobile into focus. ...it is clear that under this section no civil liability can accrue to a seller who has complied with the title certificate requirement...
>
> Palmer, at 636.

There is no question that in the present case a sale took place and that the liability for the accident was that solely of the owner/driver, Newry.

A question as to beneficial ownership of a car, involved in an accident, also arose in Register v. Redding, 126 So.2d 289, 291 (Fla. 1st DCA 1961), and it precluded Summary Judgment.

> It has been held that mere retention of title to a motor vehicle as security for payment of the purchase price thereof is not sufficient to impose tort liability on the titleholder for the negligent operation of the vehicle by another. If the facts establish a definite intention to make transfer of the beneficial ownership of the motor vehicle to a purchaser, and such intention is coupled with actual delivery of the vehicle and tender and acceptance of a part of payment on the purchase price, the sale of the vehicle will in legal effect be consider effectuated and the vendor absolved from any liability for the vehicle's subsequent negligent operation.

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Along with ownership, to be held liable in Florida for the misuse or negligent operation of the owner's vehicle, the car must be operated by someone under his authority and permission or he must have control of its operation. Ray v. Earl, 277 So.2d 73 (Fla. 2d DCA 1973). Potamkin did not own the car in question and therefore, had no authority over it. Only Newry, as registered owner, fit this description.

Under current Florida law no action may be brought against a seller of a car for an accident that take place subsequent to the sale. The Third District's Opinion directly reflects the intent of the legislature and common law in Florida and it must be affirmed and the certified question answered in the negative.

C. Adoption of Restatement of Torts Does Not Require The Imposition on Auto Dealers of Duty Not to Sell

Even if this Court should expressly adopt Section 390 of the Restatement of Torts, this section does not require the imposition of a duty not to sell upon dealers, as the Restatement contemplates control over the chattel, before liability is imposed. This is clearly demonstrated in California where negligent entrustment in a sale situation can only be used where the buyer is an unlicensed driver and therefore has no legal control over the vehicle.

Negligent entrustment is another theory, like dangerous instrumentality, used to hold the owner or the one in control of a vehicle responsible for injuries caused by the driver. The theory originated with the 2 Restatement Law of Torts, Second Section 390.

> One who supplies directly or through a third person a chattel for the use of another

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> whom the supplier knew of from facts known to him should know to be likely because of his youth, inexperience or otherwise, to use it in a manner involving unreasonable risk to bodily harm to himself and others whom the supplier should expect to share in, or be in the vicinity of its use, is subject to liability for bodily harm caused thereby to them.

In comment (b), it is stated that Section 390 is a special application of the rule stated in Section 308, which is:

> It is negligence to permit a third person to use a thing or to engage in an activity which is under the control of the actor, if the actor knows or should know that such a person intends or is likely to use the thing or to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others.

Under the comment to this section control is defined as:

> ...That the third person is entitled to possess or use the thing or engage in the activity only by the consent of the actor, and that the actor has reason to believe that by withholding consent he can prevent the third person from using the thing or engaging in the activity.

It is clear under the Restatement that a dealership does not fall into the category of person held liable, since they have no control over the actions of the driver, and Potamkin could not consent to her using her own car.

A well established rule of law has evolved by applying Section 390 to the use of motor vehicles, and holding the owner liable for negligent entrustment in loaning the car to an incompetent driver.

> The common-law rule that the owner of a motor vehicle who lends it to another, or permits or consents to its use by another is no liable for the negligence of the person to

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> whom the vehicle is entrusted, in the absence of circumstances calling for the application of the doctrine of respondent superior, is subject to limitation where an owner entrusts his motor vehicle to one unskilled in its operation, or who is an incompetent, reckless, or careless driver and likely to cause injury to others in operation it...
>
> Liability for the negligence of an incompetent or reckless driver to whom a motor vehicle is entrusted does not arise out of the relationship of the parties, but from the act of entrustment of the motor vehicle, with permission to operate it, to one whose incompetence or recklessness is known or should have been known by the owner.
>
> 74 Am.Jur.2d Automobiles and Highway Traffic, Section 643.

The cases cited by the Petitioner for the application of Section 390 to auto dealers all involve the sale of inherently dangerous items or dangerous instrumentalities to parties that were legally incompetent, due to the fact they were minors, or they were incompetent because they were drunk. In the present case Potamkin fulfilled its contractual duty to sell a car to Newry, a sober adult, that was legally qualified to buy and drive the car. These facts do not require the imposition of a duty not to sell upon the dealer under Section 390, especially where Potamkin had no ownership or control of the car.

D. Potamkin Not Liable Even if Negligent Entrustment Theory is Applied.

Even if negligent entrustment were a cause of action against a dealership in Florida, Horne would still not recover as she has failed to meet all the criteria for establishing liability. In examining the standards which must be met we must look to those states that have recognized this cause of action. We find that

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these states use this theory for the exact same purposes that Florida uses its dangerous instrumentality rule.

Ownership and Control Required to Impose Liability

The Arizona courts have established that negligent entrustment is a tort which is tied to the entrustor's ownership.

> In order to prove negligent entrustment it is necessary for the plaintiff to show, among other things, that the defendant owned or controlled the motor vehicle concerned and gave the driver permission to operate the vehicle. It is evident that negligent entrustment as a distinct and specific cause of action is not exclusive of, but rather is derived from the more general concept of ownership, operation and use of a motor vehicle.
>
> Lumbermens Mutual, Casualty Co. v. Kosies, 124 Ariz. 136, 602 P.2d 517, 519 (1979).

The Texas court of appeals has delineated the policy behind negligent entrustment and the elements required to establish liability.

> The basis of responsibility under the doctrine of negligent entrustment is the defendant's own negligence in permitting his motor vehicle to become a dangerous instrumentality by putting it into the driver's control with knowledge of the potential danger existing by reason of the incompetence of reckless nature of the driver. Mundy v. Pirie-Slaughter Motor Co., 146 Tex. 314, 206 S.W. 2d 587 (1948). The following elements must be proven in order to establish the owner's liability under the doctrine of negligent entrustment.
>
> (1) Entrustment by the owner.
>
> (2) Negligence in entrustment to a driver who the owner knows or hold have know is a reckless or incompetent driver;
>
> (3) Negligence by the driver on the occasion in question; and

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(4) Driver's negligence was the proximate cause of the occurrence in question.

Mundy v. Pirie-Slaughter Motor Co., supra; Arias v. Aguilar, 515 S.W. 2d 313 (Tex. Civ. App. -- Corpus Christi 1974, no writ); Firestone Fire & Rubber Co. v. Blacksher, 477 S.W.2d 338 (Tex. Civ. App--El Paso 1972, no writ).

Hines v. Nelson, 547 S.W.2d 378, 385 (Tex. Civ.App. 1977).

It is clear that Texas has the same intent as Florida, to hold the owner responsible for the use of a dangerous instrumentality.

The Supreme Court of Missouri, sitting en banc, adopted these same criteria. They reversed and remanded a case where the jury instruction failed to require a finding of all the essential facts necessary to establish this legal proposition. This court discussed Restatement Section 390 as a basis for a cause of action against the owner/lessor where it was alleged the owner had leased a truck to a driver he knew to be incompetent. Evans v. Allen Auto Rental, Inc., 555 S.W.2d 325 (Mo. 1977). Florida of course, holds the owner/lessor responsible under the dangerous instrumentality rule. Susco Car Rental System v. Leonard, 112 So.2d 852 (Fla. 1959).

Maryland, Massachusetts and Montana also hold that the theory of negligent entrustment is based on the ownership and control of the vehicle. Maryland has a long history of use of the negligent entrustment theory which began with the case of Rounds v. Phillips, 166 Md. 151, 170 A. 532 (1934). The Supreme Court of Montana adopted the rationale of the Maryland cases and again points out that ownership and control of the vehicle are the basis of the negligent entrustment theory.

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> Specifically the theory of negligent entrustment provides that the owner or one in control of the vehicle and responsible for its use who is negligent in entrusting it to another can be held liable for such negligent entrustment....
>
> From the above sections and official comments, it is clear that the basis of negligent entrustment is founded on control which is greater then physical power to prevent. A superior if not exclusive legal right to the object is precondition to the imposition of the legal duty.
>
> Bahm v. Dormanen, 543 P.2d 379 (Mont. 1975).

The Supreme Court of Massachusetts used the same policy in Barnstable County Mutual Fire Insurance Co. v. Lally, 373 N.E.2d 966, 969 (Mass. 1978).

> In Leone v. Doren, 363 Mass., 1,292 N.E. 2d 19, partially vacated on other grounds, 363 Mass. 886, 297 N.E.2d 493 (1973). we stated that under the common law, negligent entrustment "may be inferred (1) by reason of [the defendant's] violation of G.L.C. 90, Section 12, or (2) aside from any violation of the statute, by reason of his knowingly allowing an incompetent operator to drive the defendant's vehicle. In either case, it is necessary for the plaintiff to show, among other things, that the defendant owned and controlled the motor vehicle concerned, and that the defendant gave the driver permission to operate the vehicle" (emphasis added). Id. at 6-7, 292 N.E.2d at 25. It is evident from this statement that "negligent entrustment" as a distinct and specific cause of action is not exclusive of, but rather, is derived from the more general concepts of ownership, operation, and use of a motor vehicle.

Horne asserts that contrary to this abundant case law, ownership and control are totally irrelevant. She relies first on Roland v. Golden Bay Chevrolet, 163 Cal.App.3d 102, 207

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Cal.Rptr. 413 (1984), which states that ownership is not required for liability to attach only if the "claimant can show that the person entrusting the vehicle has actual knowledge of facts from which he should have known that the driver was unlicensed". Roland, 417-418. Therefore even under California law Potamkin would not be liable to Horne, since it sold the car to a validly licensed driver. Roland, supra.

The other two cases Hornes used to support her argument are equally unpersuasive. In Pugmire lincoln Mercury Inc. v. Sorrellis, 142 Ga.App. 444, 236 S.E.2d 113 (1979) the appellate court expressly declines to address the issue of ownership; noting that it was also undecided whether an action in negligent entrustment could be brought against a vendor. Pugmire, 114.

In Fleiger v. Garcia, 674 P.2d 299 (Alaska 1983) the specially concurring opinion asserts that on remand the lower court "should first determine whether the sale of the car was completed at the time of the accident. Ownership of the car may not be irrelvant as the court asserts". Fleiger, 302. The court goes on to note that the doctrine of negligent entrustment applied to the sale of a car has not clearly been accepted in Alaska. Fleiger, 302.

Under the law of the State of Florida an automobile dealer who sells a vehicle to a licensed driver is not liable for negligent entrustment. This is true throughout the country and a case directly on point is Colburn v. Freeman, 566 So.2d 276 (Idaho 1977), which held that a dealer is not liable for negligent acts of the owner in causing an accident after the car

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was sold. Idaho, like California, and several other states, impose liability on car owners by statute rather than common law. The Idaho statute reads in part; I.C. Section 49-1404:

> Every owner of a motor vehicle is liable and responsible for the death or injury to a person or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, expressed or implied, of such owner, and the negligence of such person shall be imputed to the owner for all purposes of civil damages.

The court's interpretation of the legislative intent was that the purpose was to hold an owner responsible for damages done by his vehicle when it is operated by another person with his permission. In this case the defendant, Freeman, bought the car from Smith Chevrolet with two checks. It was later discovered that the checks were bad and Smith unsuccessfully attempted to recover the car. In the meantime, the defendant was involved in an accident and the accident victim sued Freeman and Smith Chevrolet. The court found that Smith Chevrolet was not the owner, as they believed the car was legally sold to Freeman. Therefore, since it was sold to the defendants, they cold not be found to have given permission to the defendant to drive the car at the time of the accident.

In the instant case, Potamkin sold a car to a licensed Florida driver. Potamkin was not the owner of the car when the accident took place, and could not have given permission to Nora Newry to drive the car; therefore it can not be liable under the dangerous instrumentality doctrine or the negligent entrustment theory.

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E. Imposition of a Duty on a Seller to Guarantee Acts of a Buyer Would be Manifestly Unreasonable.

The Petitioner presents no case law that substantiates her claim that this case would be held to its facts and that limitless liability will not result, if a duty not to sell is imposed.

To adopt Section 390 and apply it to a seller imposes new and unreasonable duties upon the sellers of automobiles. In order to protect themselves from possible liability, car sellers will be obligated to "test" a purchaser's fitness to drive. It is not the function of car sellers to conduct an independent evaluation of a driver's competency when the State has already granted the driver the privilege to operate motor vehicle.

The Petitioner quickly dispenses with the adverse consequences which will flow from the adoption of the negligent sale theory. Horne states it will be unnecessary for a car seller to inquire into a buyer's background to determine the driver's fitness to purchase an automobile, since all the car dealer will be charged with is actual knowledge. Actual knowledge is a broad term encompassing many types of situations, especially to a lay person such as a car seller. For instance, if a buyer relays to the seller that he is in need of a vehicle because his previous car was totalled in an accident, does this constitute actual knowledge of the driver's incompetency? In order to protect itself from liability the car seller will be required to make judgment calls concerning the driver's competency.

In fact a New Jersey court discussed these public policy consequences and rejected such application of the negligent

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entrustment doctrine:

> 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 be vendor of a car. Must the vendor who advertises a car for sale check the background of the stranger who comes to purchase. The answer is obviously no. Such a requirement would unduly hamper commerce and would pose an undue burden on ordinary business relationships. It is one thing to impose liability on the possessor of a car who lends it to a person known to be a dangerous driver, but it is quite another to take the two steps required in order to hold defendant McErlean (sic) in this litigation. The first step would be to impose a duty of inquiry upon the possessor when he has no actual knowledge as to the driving ability of the borrower, and the second would be to impose such liability after title to the car has been transferred.

Sikora v. Wade, 342 A.2d 580, 582 (N.J. Super. Ct. 1975)

This rationale was restated in the Third District's Opinion regarding the duty not to sell:

> Notwithstanding Horne's argument that we can limit negligent entrustment with respect to sales to instances where the seller "knows" of the buyer's incompetency to use the product, as a practical matter, sellers, in order to protect themselves from liability, would be required to probe into the buyer's background to determine the buyer's fitness to use the seller's product. The risks naturally assumed by a buyer in the purchase of a product would remain with the seller. As a consequence, sellers would sell fewer products, or they would sell them at a higher cost. The imposition of this new duty not to sell would create uncertainty and retard the free flow of commerce.
>
> Potamkin II, 961.

These policy reasons mandate the affirmance of the Third District's opinion.

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CONCLUSION

A simple recognition of the adverse consequences of this Decision forces the conclusion that the theory of negligent entrustment cannot and should not be applied to car dealers. The Third District Opinion in this case must be affirmed and the certified question answered in the negative.

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