IN THE SUPREME COURT OF FLORIDA

CASE NO. 70,499

JUNIE HORNE,

Petitioner,

vs.

VIC POTAMKIN CHEVROLET, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI FROM THE
DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

PETITIONER'S BRIEF ON THE MERITS

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INTRODUCTION

Vic Potamkin Chevrolet, Inc. appealed from a final judgment rendered pursuant to a jury verdict that found it liable for negligently entrusting an automobile to a person whom it knew was incompetent to drive. A panel of the District Court of Appeal, Third District, affirmed this final judgment holding that under the limited circumstances of this case -- an automobile dealer having actual knowledge that the purchaser planning to drive the vehicle is incompetent to do so -- a dealer has a duty to refrain from selling a car and is liable for damages proximately caused by the breach of that duty.

The Third District, on its own motion, granted rehearing en banc on the ground that the case was of exceptional importance. (R.126-127).[1] On rehearing en banc, the panel's opinion was withdrawn and the court instead held that the law of negligent entrustment does not include a negligent sale. However, recognizing the issue to be a question of great public importance, it certified it to this Court.

STATEMENT OF THE CASE AND FACTS

a. The selection of the car

Nora Newry was the maid of Mrs. Potamkin and her brother-in-law, Morty. (T.19,23). Newry told Morty that she wanted

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1 Unless otherwise indicated, all emphasis is supplied. "R" refers to the record on appeal other than the trial transcript. "T" refers to the trial transcript.

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to buy a car and asked about financing it with the family corporation, Vic Potamkin Chevrolet, Inc. Morty said that he would look into it and get back to her. (T.24). He then told her to go to the Potamkin lots and see someone in particular there who would know that she worked for the Potamkins and would help her find a car she liked. (T.25,26). Newry visited the Potamkin lot on 7th Avenue and the one on Alton Road in Miami Beach. (T.25,27).

At the Miami Beach lot, Newry was assisted by Oscar Irigary, a Potamkin salesman who knew that Newry worked for the Potamkins. (T.52,53). Irigary also knew that Newry was buying the car for herself and that she not only intended to drive it but that she would be the principal driver.(T.64). With Irigary's help, Newry found a car that she liked. (T.53,27).

b. <u>The test drive</u>

Newry agreed to the suggestion that she test drive the car and, in response to Irigary's request, presented a valid, but restricted, driver's license. (T.55). The license was restricted because she had failed the driving portion of the licensing examination. Irigary copied down the license number on the buyer's order form but he did not notice that it was a restricted license because he never checks such things. (T.55-56). In fact, Irigary did not know what a restricted license meant -- he thought it only applied to minors under 18 and that an adult with such a license could drive by herself. He had never been given any training or even a memo on the subject by Potamkin. (T.57-58).

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After Irigary looked at the license, he and Newry got in the car for a test drive. Irigary drove the car off the lot and then parked it in order to let Newry drive. Newry's part of the test drive lasted only a few minutes -- that was more than enough for Irigary since he testified that as soon as Newry began driving he realized that she "could not drive". (T.61). As soon as her part of the test drive began she ran into problems. She headed toward a line of parked cars rather than going around them to the left. It wasn't until Irigary pointed this out that she corrected her direction. Then, she almost hit a bus -- she was approaching it from the rear without reducing her speed. Irigary had to wrest the steering wheel from her in order to avoid an accident. (T.60-61). Additionally, Newry was not even able to stay in her own lane of traffic, she would start to veer over to one side or the other. (T.61).

All in all, Irigary testified that he had never been in a car with anyone whose driving was as frightening as Newry's. (T.62). In fact, when they got back to the car lot, Irigary told another Potamkin employee that there was no way Newry would get one block from the dealership before she had a crash. (T.62-63).

c. <u>The purchase of the car</u>

Notwithstanding his knowledge of Newry's inability to drive and her intent to do just that, Irigary said nothing about this problem to Newry or the Potamkins, except to tell Newry to

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bring somebody with her to pick up the car. (T.64,67).[2] He did not elaborate on this statement. Later that afternoon, one of the employees at the car lot called Newry at the Potamkins to tell her that the car was ready. (T.29). Morty and his wife drove her to the Beach lot. (T.33). Newry and Irigary finished the transaction and Irigary gave Newry the keys. (T.35,68). He never inquired whether Morty or his wife were going to drive Newry home or told them of Newry's inability to drive. (T.66-68).

d. The accident

While Newry was at the Potamkin lot she ran into a friend of hers, Junie Horne, who was also looking for a new car. This meeting was simply a coincidence. (T.36,75-76). Since the two had not seen each other in a while, Newry waited for Horne to finish her business. (T.77,38). The two then talked for a while and decided to continue their visit at Newry's house. (T.78). Newry offered to drive Horne there. Horne had never driven with Newry before, so she agreed. (T.81,38,40). They went out to Newry's car which was parked in front. Newry got in the driver's seat and began to drive. (T.42).

At first everything seemed normal, then, while traveling west on McArthur Causeway, Newry started drifting to the right. Horne told her she was too close to the side, so Newry

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2 Irigary testified about this statement for the very first time at trial. He had not mentioned it during his earlier deposition or interview with Horne's representative. (T.64-66).

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slowed down and then began to pull back up on the road. However, a few seconds later, Newry turned the wheel to the left and hit the gas. She went across her lane of traffic, the other two west-bound lanes of traffic, the median, the three east-bound lanes of traffic, and hit a tree. (T.81, 43-44). Horne was severely injured: she fractured her right ankle and left arm and hit her head. (T.92). This accident happened approximately one mile from the Potamkin car lot.

e. **The proceedings below**

Horne sued Newry, Irigary and Potamkin for damages to compensate her for these injuries. (R.43-44). Only the case against Potamkin went to the jury. (T.181, 194). The theory against it was that it was negligent in selling the car to Newry for her to drive with actual knowledge that she was incompetent to do so and that such negligence was a proximate cause of Horne's injuries. (R.43-44). The jury found in favor of Horne and awarded her $195,000 in compensatory damages. (T.266). Judgment was entered in accordance with this verdict and all post trial motions were denied. (R.117,118,119,125).

Potamkin appealed on the grounds that it was either entitled to a directed verdict or the court erred in instructing the jury on negligent entrustment. The basis of both arguments was that Florida does not recognize this cause of action and, thus, the only permissible theory of recovery was the dangerous instrumentality doctrine which would absolve it of liability.

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A majority of the Third District panel disagreed with Potamkin and affirmed the final judgment. It held that Potamkin's obligation in this cause was defined by the theory of negligent entrustment as set forth in the Restatement (Second) of Torts §390. The panel limited its decision by holding that in order for liability to be imposed on a seller of a motor vehicle the seller must have actual knowledge of the buyer's lack of driving skills and, that, in the absence of such knowledge, the seller has no legal duty or obligation to inquire. It went on to hold that here Potamkin had such actual knowledge of Newry's poor driving skills; that this knowledge imposed on it a duty to refrain from selling her a car it knew she intended to drive; and, that its breach of that duty rendered it liable for the injuries sustained by Horne.

After this opinion was issued, the Third District, on its own motion, granted rehearing en banc on the ground that the case was of exceptional importance. (R.126-127). The court then reversed the judgment under review holding that it declined to extend the law of negligent entrustment to sales. (R.127). However, the court also certified the following question to this Court as one of great public importance:

> 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? (emphasis in original).

(R.131). The dissent also suggested that this case be certified to this Court as one of great public importance. However, it

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limited the question it would certify to the facts of this case:

> IS A SELLER OF AN AUTOMOBILE NEGLIGENT UNDER SECTION 390 OF RESTATEMENT (SECOND) OF TORTS (1966) WHEN IT KNOWINGLY SELLS A CAR TO A DRIVER WHO, AFTER DEMONSTRATING DRIVING INCOMPETENCE, NEVERTHELESS INTENDS TO DRIVE THE VEHICLE?

(R.135).

Horne timely invoked this Court's discretionary jurisdiction and this Court accepted jurisdiction.

ISSUE ON APPEAL

The Third District Court of Appeal sitting en banc certified the following question to this Court for resolution:

> 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? (emphasis in original).

However, where a cause is properly before this Court for review the Court can consider any point. Lawrence v. Florida East Coast Ry. Co., 346 So.2d 1014 (Fla. 1977). See also Life Insurance Co. of Georgia v. Lopez, 443 So.2d 947 (Fla. 1983). Therefore, petitioner Horne suggests that the question actually presented by this cause is much more narrow:

> WHETHER AN AUTOMOBILE DEALER WHO SELLS A CAR TO A DRIVER WITH ACTUAL KNOWLEDGE THAT THE DRIVER IS INCOMPETENT TO DRIVE THE VEHICLE BUT INTENDS TO DO SO IS LIABLE TO ONE IMMEDIATELY INJURED AS A RESULT OF THE DRIVER'S INCOMPETENCE?

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SUMMARY OF ARGUMENT

Vic Potamkin Chevrolet, Inc. knew that Nora Newry was unable to safely drive a car. Notwithstanding this knowledge, Potamkin sold her a car for her to drive. Less than one hour after Newry took possession of this vehicle and after she had driven it one mile, Newry, due to her incompetency as a driver, crashed the car and severly injured Junie Horne. A jury found that Potamkin was negligent in entrusting the car to Newry and that this negligence was a proximate cause of Horne's injuries.

It is clear that under §390 of the Restatement (Second) of Torts, negligent entrustment applies to sellers of automobiles. The doctrine does not require that one be the owner of the car at the time of the accident. The sole question is whether one gave possession and control of an instrumentality to another known to be incompetent to safely use that instrumentality. That is exactly what the evidence showed happened in this cause and what the jury found.

This is also the import of Florida law. Actual knowledge that injury will result from the sale of a product to a specific person gives rise to a duty not to sell. Thus, a firearms dealer has a duty not to sell a gun to one who it knows is incompetent to use it; and, here, Potamkin, had a duty not to sell a car to Newry, who it knew was incompetent to drive, and yet intended to do so. Potamkin's actual knowledge renders it liable for the injuries to Horne which were proximately caused by Newry's incompetency. This liability was incurred within one

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hour and one mile of the transfer of possession of the automobile from Potmakin to Newry. Such a limited liability will have no adverse effect on the free flow of commerce or impose an unreasonable burden on sellers.

ARGUMENT

Based on the reasons and authorities set forth below, it is respectfully submitted that this Court should affirm the final judgment appealed and reverse the en banc decision of the District Court of Appeal, Third District.

POTAMKIN WAS NEGLIGENT IN SELLING A CAR TO NEWRY.

Vic Potamkin Chevrolet, Inc. knew that Nora Newry was unable to safely drive a car. Notwithstanding this knowledge, Potamkin sold her a car for her to drive. Less than one hour after she took possession of this vehicle and after she had driven it one mile, Newry, due to her incompetency as a driver, crashed the car and severely injured Junie Horne. A jury found that Potamkin was negligent in entrusting the car to Newry and that this negligence was a proximate cause of Horne's injuries.[3]

As the court below noted, negligent entrustment is a recognized cause of action in Florida. It has been held applicable in cases involving the bailment of both automobiles and

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[3] It is important to note that Potamkin has never asserted that the evidence was insufficient to establish either Newry's incompetency as a driver or its own actual knowledge of such.

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guns.[4] Engelman v. Traeger, 102 Fla. 756, 136 So. 527 (1931); Rio v. Minton, 291 So.2d 214 (Fla. 2d DCA 1974), cert. den., 297 So.2d 837 (Fla. 1974); Clooney v. Geeting, 352 So.2d 1220 (Fla. 2d DCA 1977); Mullins v. Harrell, 490 So.2d 1338 (Fla. 5th DCA 1986); Brien v. 18925 Collins Avenue Corp., 233 So.2d 847 (Fla. 3d DCA 1970). See also Seabrook v. Taylor, 199 So.2d 315 (Fla. 4th DCA 1967). The question here is whether the doctrine covers the sale of such an item to one known to be incompetent to safely use it.

a. Section 390 applies to negligent sales

Section 390 of the Restatement (Second) of Torts (1966) defines the theory of negligent entrustment as follows:

> One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use is subject to liability for physical harm resulting to them.

The Fifth District cited this section with approval in Mullins, supra, and the Second District quoted the substantially similar §390 of the original Restatement in Rio, supra, and held that it was accepted by this Court in principle in Engelman, supra, in 1931. Rio, 291 So.2d at 215. The only change from the

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4 In Florida, although neither a gun nor an automobile is held to be inherently dangerous, they are both held to be dangerous instrumentalities. Brien, supra.

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first Restatement to the Second was the substitution of the words "has reason to know" for "from facts known to him should know" and "endangered by its use" for "in the vicinity of its use." Thus, the operative language of "supplies...a chattel" was in the original section. This language was interpreted in Golembe v. Blumberg, 27 N.Y.S.2d 692 (N.Y.App.Div. 1941) to render one who gave an automobile to a known incompetent liable to one injured as a result of that incompetency.

This interpretation of §390 was approved by and incorporated into the second Restatement. Comment (a) to §390 now states:

> The rule stated applies to anyone who supplies a chattel for the use of another. It applies to sellers, lessors, donors or lenders, and to all kinds of bailors, irrespective of whether the bailment is gratuitous or for a consideration.

Illustration 6 to Comment (b) is as follows:

> 6. A sells or gives an automobile to B, his adult son, knowing that B is an epileptic, but that B nevertheless intends to drive the car. while B is driving he suffers an epileptic seizure, loses control of the car, and injures C. A is subject o liability to C.

Thus, it is clear that it was the intent of the Reporter that §390 apply to the sale of chattels in general, and specifically to the sale of a car to one who is known to be incapable of driving that car.

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Although several older cases have held that the doctrine of negligent entrustment does not apply to sales or gifts,[5] the more recent cases which have discussed this issue have held, in accordance with the Restatement view, that a car dealer can be liable under the common law theory of negligent entrustment for selling a car to a known incompetent driver. In Johnson v. Casetta, 197 Cal.App.2d 272, 17 Ca. Rptr. 81 (1961), the court, relying on §390, held that a complaint that alleged that a car dealer sold a car to one whom it knew was incompetent to drive stated a cause of action. Johnson was followed in Roland v. Golden Bay Chevrolet, 161 Cal.App.3d 102, 1207 Cal. Rptr. 413 (1984). There the court explicitly held that a car dealer who sold a car to a known incompetent driver would not be liable under the California specific consent statute -- it only applies to those who retain an ownership interest in the car -- but that it would be liable under the common law theory of negligent entrustment. The court specifically stated: "Initially we observe that the retention of actual ownership in a vehicle is not required for liability to attach under the common law doctrine of negligent entrustment." 207 Cal. Rptr. at 417-418.

In Flieger v. Barcia, 674 P.2d 299 (Alaska 1983), the Alaska Supreme Court also held that a car dealer could be liable for negligent entrustment if he sold a car to one known to be an

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5 Shipp v. Davis, 25 Ala. App. 104, 141 So. 366 (1932); Estes v. Gibbons, 257 S.W.2d 604 (Ky. 1953); Brown v. Harkleroad, 39 Tenn.App. 657, 87 S.W.2d 92 (1955); and Rush v. Smithereen, 294 S.W.2d 873 (Tex. Civ. App. 1956).

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incompetent driver. The defendant car dealer, Ward, and the previous owners of the car, the Barcias, were granted summary judgment on the ground they retained no ownership interest in the truck at the time of the accident. The Supreme Court reversed holding:

> As noted above, the Fliegers' complaint against the Barcias and Ward was based solely on allegations of negligent entrustment. Under such a theory, it is unimportant whether the Barcias were still the owners of the truck at the time of the accident. Their liability, if any, is dependent upon their own negligence. Upland Mutual Insurance, Inc. v. Noel, Kan. 145, 519 P.2d 737, 742 (1974).
>
> The issue that needs to be resolved is whether the Barcias or their agent acted negligently in giving possession of the truck to Stringer. The matter of its ownership on the date of the accident is irrelevant.

See also, Pugmire Lincoln Mercury, Inc. v. Sorrells, 142 Ga. App. 444, 236 S.E.2d 113 (1977)(addendum).[6]

The tort of negligent entrustment has also been applied to the sale of other products: a sling shot a minor, Moning v. Alfono, 400 Mich. 425, 254 N.W.2d 759 (1977); a gun to an intoxicated person, Bernethy v. Walt Failor's, Inc., 97 Wash. 2d 929, 653 P.2d 280 (1982); automotive flares to teenagers, Lake Washington School District No. 414 v. Schuck's Auto Supply, Inc., 26 Wash. App. 618, 613 P.2d 561 (1980); potassium chlorate to a minor, Krueger v. Knutson, 111 N.W.2d 526 (Minn. 1961); Wendt v.

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6 As noted above, in 1941 the New York court found that a donor of an automobile could be liable under this theory. Golembe, supra.

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Balletto, 26 Conn. Sup. 367, 224 A.2d 561 (1961); gunpowder to a minor, McEldon v. Drew, 116 N.W. 147 (Iowa 1908); and, gasoline to a minor, Clark v. Ticehurst, 176 Kan. 544, 271 P.2d 295 (1954); Jones v. Robbins, 289 So.2d 104 (La. 1974). Clearly then, Potamkin is liable for Horne's injuries under the Restatement.

b. Florida law prohibits negligent sales

Potamkin is also liable for Horne's injuries under Florida law. As stated, the Second District has held that this Court accepted the Restatement view in 1931. But even without referring to §390, it has been held in Florida that the negligent sale of a product is a proper basis for liability. In Angell v. F. Avanzini Lumber Co., 363 So.2d 561 (Fla. 2d DCA 1978), a retailer sold a rifle to a woman who was acting so erratically that it was foreseeable that her use of the rifle would harm others. Shortly thereafter, this woman did use the rifle to shoot and kill Cummins. Cummins' personal representative filed suit against the retailer alleging, in one count, common law negligence in selling the rifle. The Second District held that this count stated a cause of action.

In Life Insurance Co. of Georgia v. Lopez, 443 So.2d 947 (Fla. 1983), an insurance company sold a large life insurance policy naming Lopez as the insured and his wife as a beneficiary notwithstanding that the company had actual notice that the wife intended to murder Lopez. After the wife tried to drown Lopez, he brought suit against the insurer alleging negligence in issu-

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ing the policy. This Court held that this complaint stated a cause of action:

> [A]n insurer issuing an insurance policy [is] liable in tort to the insured where the policy beneficiary attempts to murder the insured in order to collect the policy benefits and where the insurer had actual notice of the policy beneficiary's murderous intent.

443 So.2d at 948. In both of these cases, thus, the courts held that a defendant's actual knowledge that the sale of its product to a specific buyer would result in harm to a third person rendered it liable to the injured person.

Here, Potamkin sold Newry a car with actual knowledge that she intended to drive it, that she was incapable of driving it safely and that any attempt by her to drive it would result in an accident -- not simply "might possibly result". Based on Lopez and Angell, the only reasonable holding here is that this actual knowledge by Potamkin created a duty on its part not to sell a car to Newry and that the breach of this duty was the proximate cause of Horne's injuries. This is not an undue extension of Florida law.

Nor is it charging the dealer with vicarious liability for the purchaser's acts. The dealer's liability arises solely from its own active, direct negligence in selling a car to one whom it knows is incompetent to drive and yet intends to drive.

c. Policy reasons require this holding

Rejection of the Third District's decision is not only proper under Florida law, it is necessary to avoid absurd

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results. If there is no liability for a sale made with actual knowledge of incompetency, then a dealer could take a trailer full of cars to a junior high school, sell the cars to the thirteen, fourteen and fifteen year olds, hand them the keys, watch them drive off, and not be responsible for any injuries their attempts at driving would result in. Similarly, a dealer would not be liable in the following situation hypothesized by the trial court: a man so drunk he can barely walk, comes into a dealership. He just hit bolita for a hundred thousand dollars and says he wants the reddest, fastest Corvette there is. He has hundred dollar bills coming out of his pockets, but he can hardly walk. The dealer says, "Yes, sir," takes his ten thousand dollars and gives him a bill of sale, motor vehicle certificate, and the keys. Then, the drunk goes out and kills somebody. (T.178). Finally, under such a ruling one could sell or give a loaded gun to a child and not be responsible when he shoots someone.

The important factor in all the entrustment cases is that possession of an item has been given to one who is incompetent to use it safely. The only relevant question is whether possession was transferred with knowledge of that incompetency. The form which that transfer of possession takes is immaterial -- whether the item is sold or rented an incompetent is given the opportunity to use it with the attendant probability that in doing so he will injure someone.

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Recognizing Potamkin's liability in this case does not have the far reaching effect asserted by the Third District. First of all, the facts of this case show actual knowledge by the seller of the driver's incompetency. An opinion affirming this judgment could limit liability accordingly. Such an opinion would not impose on sellers the duty to inquire into or verify the competency of buyers. Rather, unless actual knowledge that a driver was incompetent was handed to a dealer on a silver platter (as it was here), dealers could sell cars without regard to the purchasers' competency to operate such and not incur any liability.

Further, even when the dealer does have actual knowledge of incompetency, the scope of its liability is not unlimited. Rather, it is circumscribed by the proximate cause principle that in order for one to be liable the harm that occurs must be within the scope of the risk created by the negligent conduct. For example, if the dealer is negligent because he sells a car to one whom he knows to be drunk at the time, then the dealer is only liable to one who is injured as a result of that one drunken episode. He is not liable for injuries caused 3 days later when the man drives drunk again nor is he liable for any injuries caused by any other incompetency of the purchaser. Similarly, in a case such as the one at bar, the dealer would only be liable for injuries caused by the purchaser's lack of driving skills and this liability would last only until the purchaser learned to drive properly or totalled the car. The latter

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is what happened first in the case at bar -- the accident occurred less than one hour and one mile of driving after Newry was given possession of the car by Potamkin. Thus, Potamkin's liability existed for only one hour.[7]

Accordingly, any 'new' duty imposed on dealers would actually be very limited. The Third District's concern about a retarding effect on the free flow of commerce is unnecessary. On the other hand, if this Court were to hold that Potamkin had no duty to not sell the car to Newry, even though it knew injury would result from such, there would be a travesty of justice.

d. Newry's restricted license is irrelevant

Finally, Potamkin is not insulated from liability in this case by the fact that Newry had a restricted license and was not violating any law at the time of the accident. The issuance of a restricted license is not a determination by the state of competency to drive. Rule 15A-1.02 of the Department of Safety and Motor Vehicles, Division of Driver Licenses, Florida Administrative Code, states in part:

> Restricted operator licenses shall be issued to persons between 15 and 16 years of age and to persons over 16 years of age who are learning to drive, after qualifying on the road rules, road signs and vision tests... Upon attaining the age of sixteen years and upon qualifying on the demonstration of driving

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7 The opinion could also be limited by holding that in order for one to be liable for selling to a known incompetent, the incompetency must be so extreme that injury directly and immediately results therefrom as it did in this case.

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> ability administered by the Division of Driver Licenses, the applicant may be issued an operator license or have the restriction removed from the restricted operator license.

Thus, one gets a restricted license without demonstrating his or her driving ability to the State. Here, in fact, Newry still had a restricted license because she failed the driving portion of the licensing examination. Thus, just because Newry had a restricted license, does not mean that the State of Florida had determined that she was a competent driver -- it had not -- or that she was, in fact, a competent driver -- she was not.

In fact, Irigary did not rely on Newry's possession of a restricted license in either selling her the car or judging her driving ability. Not only did he not know what a restricted license meant in the case of an adult, it was sheer coincidence that there was a licensed adult in the car with Newry when she drove it away from Potamkin that night. Most important of all, Irigary testified: 1) that as soon as Newry took over control of the car he realized that she could not drive; and, 2) that when he returned from this test drive, he told another salesman that Newry would not make it a block without having an accident. Thus, Irigary actually knew Newry was incompetent. It is because of this actual knowledge of incompetency that Potamkin should be held responsible for Horne's injuries. Such a holding does not have any adverse effect on the licensing procedures of the State of Florida.

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This point is therefore not supported by the facts of this case. It is also not supported by the law. Two black letter principles of the law are: 1) compliance with a statute is not conclusive evidence that one is not negligent; and, 2) evidence that a person does not have a license is not necessarily relevant, much less determinative, of the issue of whether or not that person is driving negligently. Bracken v. Boles, 452 So.2d 540 (Fla. 1984). Consequently, the evidence that Newry had a restricted driver's license was not conclusive on the issue of her competency as a driver but just one more factor for the jury to consider. Thus, this argument also does not require reversal of the judgment appealed nor support the Third District's opinion.

CONCLUSION

Based on the reasons and authorities set forth above, it is respectfully submitted that this Court should affirm the final judgment appealed and reverse the en banc decision of the Distirct Court of Appeal, Third District.

Respectfully submitted,

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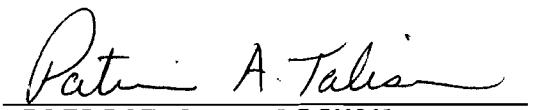
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petitioner's Brief on the Merits and Appendix was mailed this 8th day of June 1987 to: RICHARD S. SHERMAN, ESQ., Suite 102 N. Justice Building, 524 South Andrews Avenue, Fort Lauderdale, FL 33301; DAVID T. HEWITT, ESQ., 2900 S.W. 28th Terrace, Fifth Floor, Miami, Florida; GEORGE MEROS, ESQ., P.O. Drawer 190, Tallahassee, FL 32302; and J. ROBERT McCLURE, JR., Carlton, Fields, Ward, Emmanuel, Smith, Cutler & Kent, P.A., 410 First Florida Bank Building, P.O. Drawer 190, Tallahassee, FL 32302.



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