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 REPLY BRIEF ON THE MERITS

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REPLY TO STATEMENT OF THE CASE AND FACTS

In its Statement of the Case and Facts, Vic Potamkin Chevrolet, Inc., attempts to minimize Newry's lack of driving skills, its own knowledge of that incompetency, and its failure to take any action in reference to that knowledge. This violates the principle that the evidence is to be viewed in the light most favorable to the jury verdict.

In this regard, it should be noted that Potamkin has never challenged the sufficiency of the evidence to show that Newry, in fact, could not drive a car without endangering others; that Potamkin knew this; and, notwithstanding this knowledge, it sold her a car for her to drive, taking no steps to either prevent her from driving it and injuring others or to even warn a known passenger of her inability to drive safely. Of course, no sufficiency argument could seriously be made in light of Irigary's statements that Newry was the most frightening driver he had ever driven with; that he knew she couldn't drive; that he wouldn't want his children driving with her; and that she wouldn't make it one block without having an accident. (T.61-64). Potamkin has also never argued that neither the accident nor Junie Horne's injuries were foreseeable.

Therefore, the evidence is more than sufficient to support the verdict finding that Potamkin was negligent in entrusting a car to Newry and that such negligence was a proximate cause of Horne's injuries. Accordingly, any attempt by Potamkin to characterize this suit as one imposing liability on a

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car dealer simply because it sold a car to someone who subsequently had an accident is totally unjustified and unsupported by the record.

Also unjustified is Potamkin's assertion that Irigary told Newry to bring someone with her to pick up the car because she had a restricted license. First of all, Irigary mentioned this statement for the very first time at trial. (T.65-66). The jury had a right to find he never actually said it. Further, Irigary testified that he didn't even notice that Newry's license was restricted and, that, in the case of an adult he didn't know what such a license meant. (T.55,56-57). Therefore, it is clear that any statement he may have made to Newry was not motivated by her possession of a restricted license.

Finally, Potamkin distorts the record by continually stating that the trial judge recognized that a cause of action for negligent entrustment against a seller did not exist in Florida. It is clear from reading the entire colloquy between counsel and the court that the trial court did not believe Potamkin's assertion that current Florida law would not allow a recovery under the circumstances of this case and believed that the instructions he gave were a proper reflection of Florida law. (T.116-120).

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REPLY TO ARGUMENT

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

A. NEWRY'S POSSESSION OF A RESTRICTED DRIVER'S LICENSE DOES NOT ESTABLISH THAT POTAMKIN WAS NOT NEGLIGENT, AS A MATTER OF LAW.

Potamkin states that the crux of this case is that when Newry left its car lot she was driving legally because she had a restricted license. It is in error -- Newry's possession of a restricted license is as much the crux of this case as the fact that the car that was sold was a Chevrolet. Her possession of that license did not automatically make her a competent driver or establish irrefutably that she was such. In fact, as demonstrated by Irigary's testimony, she was not.

Irigary said that Newry could not drive; that she was the most frightening driver he had ever seen; that he wouldn't let his children drive with her; and, that she would not make it one block without having an accident. (T.61-64). Clearly, he did not rely on Newry's possession of a license to believe she knew how to drive. As his testimony reflects, he knew she was an incompetent driver -- not just one with poor driving skills as Potamkin asserts. Further, he knew that she intended to drive the car and that her driving was going to result in injury to others. Under these circumstances, it was negligent for Potamkin to simply turn possession of the vehicle over to Newry.

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It is not relieved of liability for that negligence, as a matter of law, because Newry was not violating any licensing law at the time of the accident or because it did not violate any statute in selling her the car.[1] The fact that one complies with a statute or does not violate one is not conclusive evidence that it was not negligent. Statutes only set out minimum standards of care, the question in a negligence action is whether a defendant acted with reasonable care and that question is uniquely one for a jury to answer.

The fallacy in Potamkin's argument is demonstrated by the following analogy: Assume that the State of Florida still inspects motor vehicles and that part of this inspection includes a check to make sure the brakes work. Potamkin has on its lot a car that bears a sticker certifying that it has passed the inspection; yet a Potamkin salesman has driven the car and knows that its brakes do not work. Potamkin sells the car and someone is injured as a result of the brakes not working. Clearly, under these circumstances Potamkin would be negligent and responsible for the injuries incurred in the accident; it would not be relieved of liability as a matter of law because the state had previously and erroneously certified that the car's brakes did work. By the same token, here, Potamkin knew that Newry could not safely drive a car but intended to do so, and it let her

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[1] At the time of the accident itself, Newry was obviously violating some law since she went to court and pled guilty. (T.22).

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loose to wreak havoc on the streets of Miami. It cannot escape liability for that negligence by pointing to the fact that the state gave her a restricted license.

That Newry had a restricted license is just one fact for the jury to consider in determining her competency as a driver and Potamkin's knowledge of that competency. The jury was informed of this and still found Potamkin negligent. That finding is more than supported by the evidence and has not been challenged by Potamkin.

Finally, Potamkin attempts to make much of the fact that the two California cases, Johnson v. Casetta, 197 Cal.App.2d 272, 17 Cal.Rptr. 81 (1961) and Roland v. Golden Bay Chevrolet, 161 Cal.App.3d 102, 207 Cal.Rptr. 413 (1984), involved sales to unlicensed drivers. First of all, it fails to note that in other cases, specifically Golembe v. Blumberg, 27 N.Y.S.2d 692 (N.Y.Sup. 1941) and Fleiger v. Barcia, 674 P.2d 299 (Alaska 1983), the question of whether the entrustee possessed a license is viewed as immaterial. Further, what the California cases really hold is that knowledge that a driver is unlicensed is sufficient to put an entrustor upon inquiry as to the competency of the driver and, therefore, sufficient to create an issue as to the entrustor's negligence. Roland, 207 Cal.Rptr. at 418. Here, Potamkin had actual knowledge that Newry was an incompetent driver. Under the California cases, this was more than sufficient to establish an issue for the jury as to Potamkin's negligence. Accordingly, Potamkin was not entitled to a directed

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verdict and the final judgment rendered in accordance with the jury verdict should be reinstated.

B. SECTION 319.22 AND THE DANGEROUS INSTRUMENTALITY DOCTRINE DO NOT PRECLUDE RECOVERY HERE.

Potamkin and the Florida Automobile Dealers Association (FADA) both contend that Horne is not entitled to a recovery under Florida statutory and case law. By this, they mean §319.22, Fla. Stat., and the dangerous instrumentality doctrine. These arguments have no merit.

The dangerous instrumentality doctrine subjects one who owns or has possession of an automobile to vicarious liability for the actions of a person whom he has allowed to drive it which injure a third person.[2] Susco Car Rental System of Florida v. Leonard, 112 So.2d 832 (Fla. 1959); Frankel v. Fleming, 69 So.2d 887 (Fla. 1954). Here, however, Potamkin's liability was not vicarious. Rather, it arose from its direct obligation to refrain from selling a car once it possessed actual knowledge of the purchaser's deficient driving ability and her intention to drive. Thus, the dangerous instrumentality doctrine is irrelevant to this case.

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2 If the one to whom the car is given negligently drives the vehicle thereby injuring himself, the owner is not liable for such injuries under this doctrine. Raydel, Ltd. v. Medcalfe, 178 So.2d 569 (Fla. 1965). Thus, contrary to FADA's assertion, the injured plaintiff/driver in Rio v. Minton, 291 So.2d 214 (Fla. 2d DCA 1974) did not have a right to recover against the owner of the car but for the negligent entrustment doctrine.

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FADA however, contends that by adopting this doctrine, this Court has expressed policy choices which preclude the adoption of negligent entrustment. This is illogical. The dangerous instrumentality doctrine arose out of the dangerous character of motor vehicles and the enormous risks involved in their operation. Susco Car Rental System of Florida v. Leonard, 112 So.2d 832 (Fla. 1959). These same risks justify application of the negligent entrustment theory of liability.

Section 319.22 is also of no use to Potamkin. This statute states in relevant part:

> An owner or coowner who has made a bona fide sale or transfer of a motor vehicle and has delivered possession thereof to a purchaser shall not, by reason of any of the provisions of this law, be deemed the owner or coowner of such vehicle so as to be subject to civil liability for the operation of such vehicle thereafter by another when such owner or coowner has fulfilled either of the following requirements:
>
> (a) When such owner or coowner has made proper endorsement and deliver of the certificate of title as provided by this law...

Thus, the statute provides immunity to a dealer after the transfer of title. This case, on the other hand, arises from a demonstrated negligence on the part of the car dealer in selling an automobile when it had actual knowledge that an incompetent driver intended to purchase and drive the car. Thus, Potamkin's duty arose prior to the transfer of title and it can seek no refuge in § 319.22.

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Further, the exact language of the statute -- "shall not ... be deemed the owner" -- indicates that it has as its only purpose the protection of those who have properly transferred title to a purchaser from being held vicariously liable for the negligence of the purchaser in driving the vehicle. This subsection has never been construed to free one from liability for his own negligence in entrusting a car to an incompetent driver.[3] See Boland v. Suncoat Rent-A-Scooter, 439 So.2d 916 (Fla. 2d DCA 1983) (holding that §327.32, which insulates a boat owner from vicarious liability for actions of the operator, does not operate to insulate the owner from liability under the theory of negligent entrustment). Thus, this statute also does not provide defense to Potamkin in this case.

C. SECTION 390 APPLIES TO SELLERS.

Potamkin next makes the strained argument that Section 390 of the Restatement Second of Torts does not apply to sellers. This argument totally overlooks the comments to this Section. Comment (a) states:

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

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3 All of the cases cited by Potamkin and FADA deal only with the question of whether the car seller should be held vicariously liable for the actions of the purchaser.

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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 to liability to C.

Thus, it is clear that Section 390 applies to sellers in general and to the seller of cars in particular. Accordingly, this argument of Potamkin also fails.

D. NEGLIGENT ENTRUSTMENT INCLUDES A SALE.

Potamkin and FADA further assert that a sale, as a matter of law, insulates one from liability under the doctrine of negligent entrustment. As shown in the initial brief, this is not true. Vendors of many products have been held to be negligent for selling their goods to incompetent users, e.g., Angell v. F. Avanzini Lumber Co., 363 So.2d 571 (Fla. 2d DCA 1978). and cases cited at pages 13 and 14 of Petitioner's Initial Brief.[4]

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[4] Potamkin and FADA assert that these cases are distinguishable because they involve sales to minors and drunks. However, the buyer's status as a minor or drunk is simply what gave the defendants knowledge that the sale would endanger others. Here, Potamkin notwithstanding Newry's age and sobriety, also knew that the sale of its car would endanger others. It is this knowledge that establishes its liability. The distinction cited is immaterial.

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Vendors of automobiles are also subject to liability for negligently entrusting their products to incompetent purchasers. Johnson v. Casetta, supra; Roland v. Golden Bay Chevrolet, supra; Fleiger v. Barcia, supra; Pugmire Lincoln Mercury, Inc. v. Sorrells, 142 Ga. App. 144, 236 S.E.2d 113 (1977)(addendum); Baker v. Bratsovsky, 689 P.2d 722 (Col. App. 1984). See also Golembe v. Blumberg, supra (donor of vehicle liable for negligent entrustment).[5]

There is no reason why there should be a distinction between the lending of a car to one known to be incompetent to use it and the sale of a car to such a person. As Justice Duncan stated in his dissent in Estes v. Gibson, 257 S.W.2d 604, 608 (Ky. App. 1953):

> I am unable to discern a reasonable basis for distinction in the negligence of one who lends his car and one who gives a car to a known incompetent or reckless driver. If there is a distinction, the more reasonable view would suggest that one who gives an automobile to a known incompetent driver, placing in him the power to use it at any and all times, drunk or sober, sane or insane, is more negligent than one who merely lends the vehicle for one specific occasion.
>
> Under the majority opinion, the appellee, simply because she had title to the car transferred to her son, is placed in a position where a cause of action cannot be stated against her. In doing so, I think the opinion draws a distinction without a difference.

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[5] Although Pugmire and Baker were actually decided on the ground that the seller had no knowledge of the buyer's incompetency, the courts seemed to accept that a seller could be liable.

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Justice Duncan also points out that where a negligent loan occurs, liability of the entrustor does not rest upon the fact of ownership but upon the negligence of the owner in entrusting the vehicle to an incompetent and reckless driver. Id. Thus, as the Court said in Fleiger, 674 P.2d at 302, since it is the seller's own negligence which establishes its liability, the matter of ownership on the date of the accident is irrelevant.

Thus, the method of transferring control of the vehicle to the incompetent is immaterial -- the fact that control of a dangerous instrumentality has been given to one whom the entrustor knows is going to injure others with it is the only material fact. Here, the evidence was more than sufficient to establish that Potamkin knew that Newry planned on driving the car and that such would result in injury to others. Notwithstanding this knowledge, it provided her the vehicle. Potamkin was clearly negligent. The final judgment finding it liable for Horne's injuries should be reinstated.

E. PUBLIC POLICY REASONS REQUIRE THIS HOLDING.

Finally, Potamkin and FADA assert that affirming the judgment for Horne in this case will disrupt the entire commercial world and retard the free flow of commerce. They predicate this assertion on the premise that in order to protect themselves, car dealers would be required to inquire into or test a purchaser's fitness to drive and this would greatly increase the cost of products.

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However, all that this case stands for is the proposition that one who sells a car to a purchaser knowing that that person intends to drive the car and that her driving skills are so incompetent that doing so within one hour and one mile of taking possession of the car she will injure someone with it is responsible for the injuries that occur when that purchaser drives the car for the very first time.

The heart of this case and of Potamkin's liability is Potamkin's actual knowledge that Horne was an incompetent driver and would injure someone. Since only actual knowledge triggers a dealer's liability, there will be no incentive or need for a dealer to inquire into or test a purchaser's ability to drive nor will there be any imposition of liability because there were facts which put a dealer on inquiry notice of the purchaser's abilities. It is only when a seller actually knows that a buyer is incompetent and he sells anyway that he incurs liability. Actual knowledge is a simple and definite concept not given to shades of gray. As is shown by the cases of Pugmire Lincoln Mercury, supra; Baker, supra; Kirk v. Miller, 644 P.2d 486 (Kan.App. 1982), there will not always be a question for the jury.

Nor is there any need for this Court to impose a liability that is indefinite in time. In this case Potamkin's liability ended after approximately one hour -- when Newry totalled the car the first time she tried to drive it. This Court can easily hold that in order for a dealer to be liable for

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selling to an incompetent purchasher, the purchaser must be so incompetent that he or she is at all times incapable of driving the car safely. Therefore, showing that the purchaser was able to drive the car safely for days or weeks would insulate the dealer from liability as a matter of law.

This case clearly does not impose on automobile dealers an indeterminate duty of indefinite length. Liability can be limited to a case where the facts as extreme as those shown here. Reinstating the jury verdict in Horne's favor will not open a Pandora's box of litigation; it will merely place liability where it belongs -- in the hands of a grossly negligent defendant.

CONCLUSION

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

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I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of Petitioner was mailed this 8th day of September, 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; and GEORGE MEROS, ESQ., P.O. Drawer 190, Tallahassee, FL 32302.

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