SUPREME COURT OF FLORIDA

CASE NOS. 70,846 and 70,847

STEVEN G. RINKER, GLENN G. RINKER,
CLARENCE JACKSON, et al.

Petitioners,

vs.

BARBARA TURNIPSEED and
JOSEPH TUNRIPSEED,

Respondents.

BRIEF OF RESPONDENT
BARBARA TURNIPSEED

Mitchell L. Lundeen, Esquire
GEORGE, HARTZ & LUNDEEN, P.A.
333 Justice Building East
524 South Andrews Avenue
Fort Lauderdale, Florida 33301
(305) 462-1620

TOPICAL INDEX TO BRIEF

TABLE OF AUTHORITIES

OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS

Respondent, Barbara Turnipseed, accepts the procedural chronology as well as the State4ment of Facts set forth in the briefs of Petitioners, Clarence Jackson, Steven G. Rinker and Glenn G. Rinker.

QUESTION CERTIFIED FOR REVIEW

> 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?

SUMMARY OF ARGUMENT

Petitioner invites the Court to adopt Section 390 of the Restatement of Torts and impose liability for the negligent operation of an automobile upon a seller who lawfully sold a vehicle to a licensed individual. Adoption of the Restatement, particularly by extending liability to a seller of a chattel would open a Pandora's box of litigation. There should be no liability on the part of Barbara Turnipseed for injuries caused by Steven Rinker after the sale of the vehicle because Florida does not and should not recognize the tort theory of negligent sale. This would not only create a new cause of action, but would usurp the legislative intent of Section 319.22, Florida Statutes (1985). This Statute clearly indicates that the public policy of Florida is that no civil liability exists on the part of the former owner for

LAW OFFICES GEORGE, HARTZ & LUNDEEN, P. A.
SUITE 333 JUSTICE BUILDING EAST, 524 SOUTH ANDREWS AVENUE, FORT LAUDERDALE, FLORIDA 33301 • TEL. (305) 462-1620

operation of a vehicle by another. Thus, the Court should affirm the decision of the District Court.

LAW OFFICES GEORGE, HARTZ & LUNDEEN, P. A.
SUITE 333 JUSTICE BUILDING EAST, 524 SOUTH ANDREWS AVENUE, FORT LAUDERDALE, FLORIDA 33301 • TEL. (305) 462-1620

ARGUMENT

THE ADOPTION OF SECTION 390 OF THE RESTATEMENT (SECOND) OF THE LAW OF TORTS SHOULD NOT BE CONSTRUED TO EXTEND LIABILITY TO A SELLER OF A CHATTEL.

The Third District Court of Appeal denied Petitioner's request to extend the law of negligent entrustment to include negligent sales and it is respectfully submitted that the reasoning and logic is valid and the opinion should be affirmed. This is particularly true since adopting the theory of negligent sale would improperly extend the laws of negligence particularly in light of legislative intent, public policy, and existing case law.

Section 390, Restatement of Torts (2nd) provides that supplying a chattel for the use of another knowing that because of youth, inexperience or otherwise use of the chattel involves unreasonable risk of physical harm to a third person, will subject the supplier to liability. This general premise is expanded in the comment section where they discuss the doctrine of negligent sale. Although pure theory may lead one to conclude that this is reasonable, a closer examination reveals the fallacy of this argument.

In the first place, no case in Florida has applied the Restatement section to the sale of a vehicle. The few cases which discuss the Restatement section are neligent entrustment of a motor vehicle by the owner to one whom the owner has reason to believe cannot safely operate the vehicle. These that exist in

LAW OFFICES GEORGE, HARTZ & LUNDEEN, P.A.
SUITE 333 JUSTICE BUILDING EAST, 524 SOUTH ANDREWS AVENUE, FORT LAUDERDALE, FLORIDA 33301 • TEL. (305) 462-1620

Florida include Clooney v. Geeting, 352 So.2d 1216 (Fla. 2d DCA 1977) and Rio v. Minto, 291 so.2d 214 (Fla. 2d DCA 1973.

It is interesting to note that other jurisdictions utilize the theory of negligent entrustment in order to allow recovery to an injured party where no other theory will allow the recovery. The adoption of the Restatement is not necessary, nor appropriate, in Florida because of the dangerous instrumentality doctrine. Through the dangerous instrumentality doctrine, Florida has protected injured parties by establishing a duty for an individual who is not operating or in control of his vehicle. This in essence provides that as long as the owner gives consent to another for operating his vehicle, then he cannot avoid liability. See Anderson v. Southern Cotton Oil Co., 74 So. 975 (1917), Susco Car Rental Systems of Florida v. Leonard, 112 So.2d 832 (Fla. 1959)

These other jurisdictions, including Arizona, Texas, Missouri, Maryland, Massachusetts and Montana clearly state that the theory of negligent entrustment is based on the ownership and control of the vehicle. See Lumbermens Mutual, Casualty Co. v. Kosies, 124 Ariz. 136, 602 P.2d 517,519 (1979), Mundy v. Pirie-Slaughter Motor Co., 146 Tex. 314, 206 S.W. 2d 587 (1948), Evans v. Allen Auto Rental, Inc., 555 S.W. 2d 325 (Mo. 1977), Rounds v. Phillips, 166 Md. 151, 170 A. 532 (1934), Bahm v. Dormanen, 543 P.2d 379 (Mont. 1975) and Barnstable County Mutual Fire Insurance Co. v. Lally, 373 N. E. 2d 966, 969 (Mass. 1978).

Because of the limited case law in their favor, the Petitioner attempts to argue that there is no difference between

LAW OFFICES GEORGE, HARTZ & LUNDEEN, P. A.
SUITE 333 JUSTICE BUILDING EAST, 524 SOUTH ANDREWS AVENUE, FORT LAUDERDALE, FLORIDA 33301 • TEL. (305) 462-1620

entrusting a vehicle and selling a vehicle. They receive some support in this argument because Section 390 deals with both entrustment and sale. However, a material distinction does in fact exist. This distinction is the right of control. Once a sale occurs, the owner loses all right of control. In a negligent entrustment case, the owner continues to maintain this right of control and may exert his right to the chattel at any time.

The Petitioner herein cites the cases of Johnson v. Casetta, 197 Cal. App. 2d 272 (17 Cal. Rptr. 81 (1961) and Kahlenberg v. Goldstein, 431 A.2d 76 (Md. Ct. App. 1981) in support of their position that ownership and control are totally irrelevant. Both of these cases are easily distinguishable from the case sub judice. In Johnson, the sale was to an unlicensed driver. Secondly, in Johnson the doctrine of negligent sale had limitations placed on it by the court. The court recognized that liability would last only as long as the original incompetence of the driver continues. They state that:

> "An intoxicated driver may become sober and an inexperienced driver may acquire experience. Then such original incompetence could no longer be a proximate cause of an accident and, therefore, the liability of the seller on this theory would no longer exist." Johnson v. Casetta, supra, at page 83.

Assuming arguendo that this court adopts the theory of "negligent sale", there would be no liability in this case. There is no evidence that at the time of sale Steven Rinker was incompetent. Not only was this fact not present, but the accident did not happen for five (5) days after the sale. Because they allege that he was under the influence of drugs or alcohol, opposed to

LAW OFFICES GEORGE, HARTZ & LUNDEEN, P.A.
SUITE 333 JUSTICE BUILDING EAST, 524 SOUTH ANDREWS AVENUE, FORT LAUDERDALE, FLORIDA 33301 • TEL. (305) 462-1620

being an inexperienced driver, this type of incompetence would not continue for a period of five (5) days. This distinction was the reason that Judge Schwartz concurred in the affirmance of this case even though he dissented in Potamkin v. Horne, 505 So.2d 560 (Fla. 3d DCA 1987).

The Petitioner also relies on the case of Kahlenberg v. Goldstein. This case is also distinguishable. In Kahlenberg there was a gift of an automobile to a member of the donor's immediate family. The Petitioner obviously realized this distinction and attempted to place the facts of our case within the ambit of Kahlenberg by stating that Joseph Turnipseed was a "surrogate" father. This argument must fail and the distinction of family versus an outside purchaser must be recognized.

Another very important factor in this case is that a decision adopting the restatement would be contrary to the public policy which exists in the State of Florida. Section 319.22, Florida Statutes (1985) states:

> 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 . . .

The remaining requirements include proper endorsement and delivery of a Certificate of Title. This Statute is consistent with the dangerous instrumentality doctrine and clearly makes ownership the crucial factor as far as potential liability. By adopting negligent sale as a basis for liability the Court would clearly undermine the language of this Statute. Even if the Court were to feel that negligent entrustment or negligent sale might be appropriate, it is respectfully suggested that judicial restraint be utilized and allow the legislature to regulate this area. This is certainly a recognized method of dealing with this type of problem and was done by this Court in Bankston v. Brennan, 12 FLW 243 (Fla. May 21, 1987).

In Palmer v. R. S. Evans, Jacksonville, Inc., 81 So.2d 635 (Fla. 1955) this court affirmed the trial court finding no liability against an automobile dealer because the dealer was not the owner. The court held that at page 636 that it is clear that under this section no civil liability can accrue to a seller who has complied with the title certificate requirements. There is no logical argument that Steven Rinker did not own the car at the time of this accident, Williams v. Davidson, 179 So.2d 387 (Fla. 1st DCA 1965); Platt v. Dreda, 79 So.2d 670 (Fla. 1955); Whalen v.Hill, 219 So.2d 727 (Fla. 3rd DCA 1969). Most of the cases which have interpreted the Restatement section as a basis for liability have involved the negligent entrustment of the motor vehicle by the owner to one whom the owner has reason to believe cannot safely operate the vehicle. This situation is recognized in Florida as indicated by the cases of Clooney v. Geeting, 352

LAW OFFICES GEORGE, HARTZ & LUNDEEN, P. A.
SUITE 333 JUSTICE BUILDING EAST, 524 SOUTH ANDREWS AVENUE, FORT LAUDERDALE, FLORIDA 33301 • TEL. (305) 462-1620

So.2d 1216 (Fla. 2d DCA 1977) and Rio v. Minto, 291 So.2d 214 (Fla. 2d DCA 1973). There have been no cases in Florida which have applied this section to the sale of a vehicle.

One of the remaining problems is the difficulty which would follow in determining when there was a "negligent sale" This was recognized by the Court in Mills v. Continental Parking Corp., 86 Nev. 724, 475 P.2d 673 (1970) where the Court discussed the negligent entrustment theory. They were concerned about the possible consequences of adopting this policy and stated:

> "The imposition of civil liability in the circumstances here alleged would lead to unforeseeable consequences limited only by the scope of ones imagination. We decline to venture into that wonderland." Mills at Page 674.

The problems that exist are two-fold -- one, what acts would indicate an unreasonable risk of harm to others and secondly, when would the seller's responsibility end. These are two questions that would be very difficult to answer and for these reasons alone, the restatement should not be adopted.

LAW OFFICES GEORGE, HARTZ & LUNDEEN, P.A.
SUITE 333 JUSTICE BUILDING EAST, 524 SOUTH ANDREWS AVENUE, FORT LAUDERDALE, FLORIDA 33301 • TEL. (305) 462-1620

CONCLUSION

The third opinion of the Third District Court of Appeals in this case must be affirmed and the certified question answered in the negative. This result must be reached as a result of the public policy reasons involved and the fact that the Legislature and case law in Florida clearly holds that an owner should be responsible, but that the duty should not extend further.

Respectfully submitted,

GEORGE, HARTZ & LUNDEEN, P.A.
333 Justice Building East
524 South Andrews Avenue
Fort Lauderdale, Florida 33301
(305) 462-1620

BY: J. Gordon Rothwell
for MITCHELL L. LUNDEEN

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the above and foregoing was mailed this 31st day of August, 1987 to: JOE UNGER, ESQUIRE, 606 Concord Building, 66 West Flagler Street, Miami, Florida 33130, JAMES GILMOUR, ESQUIRE, 150 West Flagler Street, Suite 2650, Miami, Florida 33130, ROBERT I. SPIEGELMAN, ESQUIRE, Suite M-113, 19 West Flagler Street, Miami, Florida 33130, GELN R. GOLDSMITH, ESQUIRE, 3929 Ponce de Leon Boulevard, Coral Gables, Florida 33134, KENNETH SHEROUSE, JR., ESQUIRE, 1999, S. W. 27th Avenue, Miami, Florida 33145 and LAURA S. ROTSTEIN, ESQUIRE, 11th Floor, 66 West Flagler Street, Miami, Florida 33130.

GEORGE, HARTZ & LUNDEEN, P.A.
333 Justice Building East
524 South Andrews Avenue
Fort Lauderdale, Florida 33301
462-1620

BY: J. Gordon Rothwell
for MITCHELL L. LUNDEEN