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 TURNIPSEED,

Respondents.

BRIEF OF RESPONDENT JOSEPH TURNIPSEED

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STATEMENT OF THE CASE AND FACTS

Respondent, Joseph Turnipseed, accepts the procedural chronology as well as the Statement of Facts set forth in the briefs of Petitioners Clarence Jackson, Steven G. Rinker and Glenn G. Rinker.[1]

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

There is no liability on the part of Joseph Turnipseed for injuries caused by Steven Rinker after sale of the vehicle owned by Barbara Turnipseed to Rinker because Florida has not and should not recognize the tort theory of "negligent sale" as a basis for imposing liability. Even if this Court were to adopt the negligent entrustment theory of liability set forth in Section 390 of the Restatement (Second) of Torts both common sense and common law from other jurisdictions strongly militate against extending liability under this provision to sellers of chattels.

While no Florida case has directly discussed this matter, cases in other jurisdictions which have examined this legal theory as a basis for liability have rejected it

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[1] The District order certifying the question here to be of exceptional importance "pairs" this case with Potamkin v. Horne, 505 So.2d 560 (Fla. 3d DCA 1987) presently on review in this Court.

for good and sufficient reason. In addition, Section 319.22, Florida Statutes (1985), which deals with the transfer of title to motor vehicles, indicates that it is the public policy of Florida that once title to a motor vehicle has been transferred there should be no civil liability on the part of the former owner for operation of a vehicle by another.

ARGUMENT

IF ADOPTED AS THE LAW OF FLORIDA, 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 liability of Joseph Turnipseed for injuries involving the vehicle which had been sold to Steven Rinker could only be based on a theory never before espoused by any Florida court. This new theory--"negligent sale" would have to be engrafted onto the common law of this state by not only adopting Section 390, Restatement of Torts (Second). but also extending its provisions to sellers of chattels.

The Restatement section 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, subjects the supplier to liability for resuting physical harm. Comment A of the Restatement section, not the Restatement section itself, includes a seller within the provisions of the Restatement section. Respondent, Joseph Turnipseed, submits that both logic and common sense dictate

rejection of the doctrine of negligent sale espoused by the enumerated comment to the Restatement section.

Most of the cases which have interpreted this section as a basis for liability have not involved the negligent sale of a motor vehicle but 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. Such situations in Florida have involved an employer negligently entrusting a truck owned by the employer to an employee, Clooney v. Geeting, 352 So.2d 1216 (Fla. 2d DCA 1977); and an onwer who allowed an intoxicated minor to drive the owner's vehicle, Rio v. Minton, 291 So.2d 214 (Fla. 2d DCA 1973). No case in Florida has applied the Restatement section of the sale of a vehicle.

The question of whether the "negligent entrustment" basis of liability imposed upon the owner of a vehicle should be extended to one who has sold and transferred title to another was discussed and rejected in Rush v. Smitherman, 294 S.W.2d 873 (Ct.App. Tex. 1956). Rush was a death action resulting from an automobile collision caused by an unlicensed driver who had purchased the vehicle from an automobile dealer. The Rush decision refused to attach liability under a common law rule of negligent sale, reasoning that a bailor entrusts that which is his to another, while a vendor does not entrust but sells a vehicle. When the accident occurred in the Rush case (as here), the purchaser was not driving the vehicle by force of

authority or permission from anyone. The purchaser was driving a car which he owned and for which he needed permission from no one to operate.

Almost 30 years after Rush, an Illinois court was faced with the same situation in Tosh v. Scott, 129 Ill.App. 3d 322, 472 N.E.2d 591 (Ct.App. 1984). This was an action against a driver and his father for injuries sustained by a third party where the automobile had previously been sold to the son by his father. "The liability of [the father] was predicated on the negligent sale of the automobile to his son." Tosh v. Scott, supra at 592. The complaint alleged that the father had sold the automobile to his son knowing that he did not have a valid license, knowing that he had a severe drinking problem, knowing that he had been convicted on at least three prior occasions of operating a vehicle while under the influence of intoxicating beverages, and knowing there was a reasonable likelihood that the son would operate the vehicle while under the influence of intoxicating liquor. Despite these allegations (which parallel petitioners' claims against Joseph Turnipseed) the complaint was held not to state a cause of action against the father.

The court notes that there were no Illinois cases imposing liability for the negligent sale of an automobile and that the plaintiffs were attempting to equate the sale of a motor vehicle to a negligent entrustment. The argument of petitioners here parallels that of the plaintiffs in Tosh

and should be rejected for the same reasons. This basis for liability, the court in Tosh reasoned, could not be supported since the essential element of a negligent entrustment is the defendant's ownerwhip or right to control the vehicle, which is missing in the situation where the vehicle is sold to another.

As a matter of public policy, the court determined that liability should not be extended to a seller, basing its decision upon the rationale stated in the earlier Tennessee decision of Brown v. Harkleroad, 39 Tenn.App. 657, 287 S.W.2d 92, 96 (1955). The Brown case involved the gift of an automobile from a father to his son where the father knew or should have known that the son was an alcoholic and wreckless driver. In reversing a judgment against the father, the court held:

> "If a father incurs liability by giving an automobile to his son, knowing him to be drunken or incompetent driver, when would it end? Would it last for the life of the automobile? Would it apply to a new automobile in the event of a trade-in? Or would liability attach to a known incompetent or drunken driver? Or to a filling station operator who sold such a person gas, knowing of his propensity?
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> The legislature has not seen fit to impose any such liability. We think it would be judicial legislation if we undertook to go past that now recognized by existing holdings. The very paucity of authorities on this interesting question leads us to the belief that such liability is not recognized in other jurisdictions."

Based on this reasoning, the court in Tosh refused to

attach liability for damage caused by the negligent act of a driver against any person other than the driver unless that person was the owner or had the right to control the vehicle. See also, Williams v. Chaney, 620 S.W.2d 809 (Ct. Civ.App. Tex. 1981); Estes v. Gibson, 729 S.W. 604, 36 A.L.R.2d 257 (Ky. 1953).

The Estes case was an action against the mother of a driver who had given the automobile to her son when she knew him to be a habitual drunkard and drug addict. The complaint against the mother was dismissed and this was affirmed on appeal. The reasoning of the court applies foursquare to the situation with which this Court now deals:

> "To impose legal liability there must always be a reasonably close causal connection between an act and the resulting injury. The vicarious liability of an owner or controller for putting an automobile which is not in itself inherently a dangerous instrumentality in possession of another person known to be habitually unfit to drive it, with the foreseeable and probable consequences that he will hurt somebody, is at most a secondary liability. The doctrine ought not to be extended where the parties sought to be charged had no control over the machine and the other party actually committing the injurious wrong was the owner, sui juris. In addition, and ordinarily as here, the causation is too tenuous and too remote. There are too many probable and imponderable intervening events and conditions between the gift of the car and its negligent operation by the owner driver." Estes v. Gibson, supra at pages 607-608.

Here, the connection of Joseph Turnipseed to the automobile driven by Steven Rinker is even more tenuous.

The car was not owned by Mr. Turnipseed at the time of the sale. It was owned by his ex-wife. He was acting as her agent in the sale to a friend of his son. He had no control over the vehicle after the sale. The accident occurred several days after the sale.

Other cases preclude liability under a theory of negligent sale because of the total absence of the right to control the vehicle or the driver once the sale has been consummated. This view is expressed in the author's comment to the annotation titled "Liability Based on Entrusting Automobile to One Who is Intoxicated or Know to be Excessive User of Intoxicants" found at 19 ALR.3d 1175 (1965). The comment is made that the person who may be held liable for negligently entrusting a vehicle to another who was known as a habitual drunkard is ordinarily the owner of a vehicle but such liability can also be imposed upon any other person who has control over the use of the vehicle and is negligent in entrusting it to another.

The view requiring either ownership or the right to control to support a basis of liability has been discussed and approved in American Mutual Fire Insurance Company v. Passmore, 275 S.C. 618, 274 S.E.2d 416 (1981)

Mills v. Continental Parking Corp., 86 Nev. 724, 475 P.2d 673 (1970) involved a parking attendant who surrendered a vehicle to the owner when the attendant had knowledge the owner was inebriated. A pedestrian was killed by the drunken driver-owner. A death action was dismissed.

The dismissal was affirmed on appeal.

In the affirmance, the appellate court determined that although the negligent entrustment theory could apply where one who has the right to control a vehicle and permits another to use it in circumstances where he knew or should have known that such use may create an unreasonable risk of harm to others, it would not apply where the right to control is absent. It is the reasoning of the Mills decision which is relevant to the issue in the instant case:

> "The imposition of civil liability in the circumstances here alleged would lead to unforeseeable consequences limited only by the scope of one's imagination. We decline to venture into that wonderland." Mills v. Continental Parking Corp., at supra at page 674.

See also, Connell v. Carl's Air Conditioning, 97 Nev. 436, 634 P.2d 673 (1981).

To impose liability upon one who has sold a vehicle to another even though the seller knows or should have known that the purchaser had been an alcohol and drug abuser invites litigation based on unforeseeable consequences limited only by the scope of one's imagination. When would the seller's responsibility end--within a week, within a month, within a year? Just as in the Mills case, this Court should decline to venture into that "wonderland."[2]

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[2] Jackson states, ". . .the liability of the Turnipseeds no longer exists" because when Steven Rinker's deposition was

Even though the person to whom a car is sold has been known in the past to abuse alcohol and drugs, there are so many imponderable intervening events and conditions which could occur that to assess liability on the theory of negligent sale stretches the chain of causation beyond permissible limits. It is for this reason that no Florida case has in the past or should in the future impose liability under the negligent sale theory. It was for this reason that the trial judge here refused to recognize the existence of this theory of liability in Florida and was affirmed by the District Court of Appeal.

Petitioners rely upon Section 390 of the Restatement of Torts (Second) to support their position that the theory of negligent sale should be made a part of the law of Florida. One case cited by petitioners discusses the applicability of Section 390 of the Restatement where a father gifted a car to his son knowing the son's history of a bad driving record. While the appellate court upheld the view that the negligent entrustment theory was properly submitted to the jury, the court comments that its examination of Section 390 as it applies to the gift of an automobile to a son is not an indication that the court embraces the applicability of

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2 (continued) taken two and a half years after the accident he was not taking drugs anymore. (Brief of Petitioner, Jackson, at page 19) When did liability cease to exist--on the date drugs were last used; when the deposition disclosed this fact? Would liability re-exist if Steven Rinker began taking drugs again? This is the "wonderland" of liability into which the court refused to venture in the Mills case.

this section to any other mode of supply, including sale. The court is very specific in determining that its holding goes no further than to recognize that the principle expressed in Section 390 applies where a gift of an automobile is made to a member of the donor's immediate family. Only because there was legally sufficient evidence from which the trial jury could have found that the father gave the car to his son as opposed to the son purchasing it individually was the father not entitled to a directed verdict. Kahlenberg v. Goldstein, 290 Md. 477, 431 A.2d 76, 22 ALR 4 719 (1981). Thus, despite the wording of Section 390 some courts examining its provisions have refused to extend it into the area of negligent sale.

Petitioners rely on a California decision in Johnson v. Casetta, 197 Cal.App.2d 272, 17 Cal. Rptr. 81 (1961). While the Johnson decision would uphold a finding of liability on the basis of a negligent sale to one whom the seller knew or should have known was incompetent to operate the automobile under the authority of Section 390 of the Restatement, this view has been rejected by the cases discussed above.

Even the doctrine of negligent sale in Johnson was not imposed without limitation. There, the defendants posed the question of how long the liability of the seller would last. The court answers that liability would last only as long as the original incompetence of the driver continues. "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.

What is comprehended within this statement of the court is a sale to one who is intoxicated or incompetent at the time of the sale. Here, there is neither evidence nor inference that at the time of the sale Steven Rinker was intoxicated or incompetent to handle a vehicle. What a sober and drug-free Steven Rinker would do after the sale of the vehicle is the imponderable which stretches the chain of causation beyond permissible limits and must absolve the seller (and the seller's agent) of liability for Steven Rinker's actions. This is the position taken by Judge Schwartz in his special concurrence to the District Court's decision.

Judge Schwartz reasoned that while the case involved sale of an automobile to a person known to be an abuser of drugs and alcohol at the time of sale, the sellers were not bound to know that the purchaser would operate the car after he became incompetent. This critical distinction caused Judge Schwartz to concur in the affirmance in this case even though he joined in the dissent to Potamkin v. Horne, supra, where the seller was aware of the purchaser's inability to drive at the time of sale and this inability immediately caused injury.

Petitioners' basic argument is that there is no

difference between lending (entrusting) a vehicle to an incompetent and selling a vehicle to an incompetent. There is a distinction and it is a material distinction.

In the case of an owned vehicle which is entrusted, the right of control over the vehicle remains in the owner. In the case of a sale of vehicle, all right to control that vehicle has passed from the owner to the purchaser. It is this right of control which is the crucial distinction between a "negligent entrustment" and the sale of a vehicle.

While no case directly discusses this point, it is instructive to look at public policy which may otherwise exist in either the common law or statutes of Florida. Indeed, such public policy against imposing the negligent sale theory is found in the provisions of Section 319.22 of the Florida Statutes concerning transfer of title. Subsection (2) provides that where an owner has made a bona fide sale of a motor vehicle and has delivered possession to a purchaser, that seller shall not by reason of any of the provisions of the statute governing certificates of title be deemed the owner of the vehicle so as to be subject to civil liability for the operation of the vehicle thereafter by another when a proper endorsement and delivery of a certificate of title has occurred. This statute makes divestiture of ownership the crucial event insofar as potential liability for injury caused by a motor vehicle which has been sold. If this Court were to embrace a theory of negligent sale as a basis for liability, the clearly

expressed intent of this statute would be thwarted.

The trial judge correctly ruled that Joseph Turnipseed was entitled to judgment as a matter of law because of the absence of a negligent sale theory of liability in Florida. In the absence of the existence of such a doctrine there can be no basis for liability. The better reasoned cases from other jurisdictions reject the negligent sale theory. This Court should adopt the better reasoned view by answering the certified question in the negative.

Petitioner, Clarence Jackson, argues that the doctrine of negligent sale should apply to create liability in this case regardless of the decision in Potamkin v. Horne, supra. The reasoning is contained in the following statement: "It did not take a crystal ball to predict that putting Steven Rinker behind the wheel of an automobile would soon cause injury to someone." (Brief of Petitioner, Jackson, at page 23)

Thus reasoning ignores the basic premise of non-liability of this case as distinguished from Potamkin. In Potamkin, the purchaser was under an observed disability aat the time of sale. Here, Steven Rinker was not incompetent at the time of sale. The accident giving rise to this litigation did not occur until several days after the sale. There is less reason to impose liability here than in Potamkin.

CONCLUSION

For the reasons and under the authorities set forth above, it is respectfully submitted that the trial court correctly determined that a theory of "negligent sale" does not exist in Florida so as to impose liability on Joseph Turnipseed, an agent of the owner, who was instrumental in accomplishing the sale to Steven Rinker. It is urged that this Court adopt the determination of the majority en banc decision in Potamkin and not impose upon sellers of chattels the duty to protect the world against incompetent product users. A duty to protect a stranger to the sale against the tortious conduct of the purchaser should not exist where the seller is not in control of the injuring instrumentality. The element of control or the right to control has always been the sine qua non of liability in cases of injury caused by an instrumentality operated by one other than the owner. See, Susco Car Rental System of Florida v. Leonard, 112 So.2d 832 (Fla. 1959).

It is respectfully requested that this Court answer in the negative that part of the certified question dealing with extending liability under Section 390, Restatement (Second) of the Law of Torts to the seller of a chattel. In the alternative, since the sellers here sold the vehicle to a purchaser competent at the time of sale, this conduct should not fall within the ambit of the negligent

entrustment theory of liability espoused by Section 390.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail upon all counsel on the attached Service List, this 24th day of August, 1987.

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