IN THE SUPREME COURT OF FLORIDA

STEVEN G. RINKER and GLENN G. RINKER, et al.,

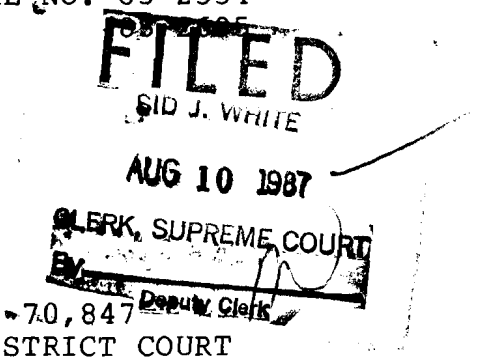
Petitioners,

vs.

BARBARA TURNIPSEED and JOSEPH TURNIPSEED,

Respondents.

CASE NO. 70,846
THIRD DISTRICT COURT
OF APPEAL NO. 85-2534



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ON CERTIFICATION FROM DISTRICT COURT OF APPEAL

THIRD DISTRICT

INITIAL BRIEF OF PETITIONERS

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STATEMENT OF THE CASE

Petitoner, CLARENCE JACKSON, Plaintiff below, sued the Petitioners, STEVEN G. RINKER and GLENN G. RINKER, Defendants below, and Respondents, BARBARA TURNIPSEED and JOSEPH TURNIPSEED, in his second amended complaint, for damages sustained on or about January 11, 1983, (R.37-38), as the result of the negligence of STEVEN RINKER, a minor in the operation of a motor vehicle.

Respondent, BARBARA TURNIPSEED, filed her Answer to second amended complaint (R.166-168); thereafter, Respondent, JOSEPH TURNIPSEED, filed his Answer and affirmative defenses to the second amended complaint of CLARENCE JACKSON (R.187-189).

In the consolidated case of GILBERTO VAZQUEZ and SONIA VAZQUEZ, Plaintiffs, vs. CLARENCE JACKSON, et al., Defendants, VAZQUEZ filed a second amended complaint for damages arising out of the same January 11, 1983 accident. (R.201-208)

The Respondents, JOSEPH TURNIPSEED, and BARBARA TURNIPSEED answered the second amended complaint of GILBERTO and SONIA VAZQUEZ, on September 6, 1985 (R.209-212) and on September 16, 1985.

In the matter of JACKSON vs. RINKER, et.al., the Respondent, JOSEPH TURNIPSEED, filed a motion for summary judgment on February 27, 1985 (R.138-141); the Respondent, BARBARA TURNIPSEED, likewise had heretofore filed a motion for summary judgment and supporting affidavits on January 8, 1985 (R.128-132) and renewed her motion for summary judgment on September 30, 1985, adopting her prior motion

and supporting memorandum of law (R.214).

The Petitioners, STEVEN G. RINKER and GLENN G. RINKER, filed their second amended third party complaint in this cause on August 16, 1985 (R.178-183). Respondent, JOSEPH TURNIPSEED, filed his answer and affirmative defenses to the second amended third party complaint, on August 22, 1985 (R.190-192). The Respondent, BARBARA TURNIPSEED, filed a motion to dismiss, directed to the amended third party complaint August 21, 1985 (R.184-186).

The motions for summary judgment of the Respondents, BARBARA TURNIPSEED and JOSEPH TURNIPSEED, were rescheduled for hearing before the Court, on Monday, September 23, 1985, pursuant to notice mailed July 31, 1985 (R.82).

On September 20, 1985, the trial court, prior to the date the pending motions for summary judgment filed by the Respondents, were scheduled for argument and hearing, entered its order, without argument or hearing, granting the summary judgment for the Respondents, JOSEPH TURNIPSEED and BARBARA TURNIPSEED. (R.228)

Thereafter, the trial court entered a final summary judgment without notice or hearing, in favor of the Respondent, BARBARA TURNIPSEED, on October 8, 1985. (R.229)

This judgment was clarified on February 11, 1986, to expressly include Respondent, JOSEPH TURNIPSEED. (Supp. 218) The Court granted the motions because it felt the doctrine of "negligent sale" was not recognized in Florida.

Petitioner, CLARENCE JACKSON, filed a motion for rehearing October 7, 1985 (R.82-84); Petitioners, STEVEN G. RINKER and GLENN G. RINKER, filed a motion for relief from judgment, etcetera, October 11, 1985 (R.89-91) and their motion for rehearing on October 15, 1985 (R.215-218).

Thereafter, the trial court, entered an order on October 29, 1985, reciting that the cause came on to be heard on Defendants' Motion for Rehearing, and the Court having heard argument of counsel and being otherwise advised in the premises, the trial court denied said motions. (R.219) Contrary to the recitations in the last mentioned order, the matter was disposed of by the trial court, ex parte, without argument and the order was entered sua sponte by the trial court, apparently after its consideration of the written motions then pending before it.

Thereafter, Petitioner, CLARENCE JACKSON filed on November 7, 1985, a notice of appeal (R.220-221) and amended notice of appeal on November 20, 1985 (R.222-223).

Thereafter, on November 25, 1985, Petitioners, STEVEN G. RINKER and GLENN G. RINKER, filed a joinder and notice and amended notice of appeal (R.224-226).

Thereafter, Petitioners, STEVEN G. RINKER and GLENN G. RINKER, filed a notice of appeal on December 2, 1985. (R.231-232A), Directions to Clerk on December 6, 1985 (R.233-234) and on December 17, 1985, amended directions to Clerk. (R.235-236)

Thereafter, the consolidated appeal of the Petitioners was argued before the Third District Court of Appeal, and reargued on rehearing en banc, which, on an opinion filed June 9, 1987, resulted in a per curiam opinion, being rendered by the Third District Court of Appeal, affirming the decision of the lower tribunal on authority of Potamkin v. Horne, No. 84-2813 (Fla. 3d DCA) April 7, 1987. (Rehearing en banc). Petitioners thereafter filed respective suggestions of clarification or, in the alternative, motion to stay mandate on the opinion filed by the Third District Court of Appeal of June 9, 1987. During the pendency of said suggestion and motion to stay, the Petitioners herein filed separate notices to invoke discretionary jurisdiction of the Supreme Court, to review the decision of the Third District Court of Appeal rendered June 9, 1987.

On July 13, 1987, the Third District Court of Appeal, after consideration of the respective motions of Petitioners, ordered that the question reviewed herein, be certified to be of exceptional importance, to the Supreme Court, paring it for review with Pomtamkin v. Horne, 505 So.2d 560 (Fla.3d DCA 1987), and granted Petitioners' Motions for Stay Pending Review in the Supreme Court.

STATEMENT OF FACTS

GLENN G. RINKER, the father of STEVEN G. RINKER, a minor signed his sons application for a Florida driver's license, and pursuant to Section 322.09 (02), Florida Statutes, became statutorily obligated for any damages caused or occasioned by the negligence or willful conduct of his son, while driving a motor vehicle on a highway.

BARBARA TURNIPSEED, a resident of the State of Louisiana, was the natural mother of JOEY TURNIPSEED, a minor, and the divorced wife of JOSEPH TURNIPSEED.

BARBARA TURNIPSEED, prior to the accident giving rise to the damage suits, being the subject matter of this appeal, was the registered owner of a 1974 Pontiac two door sedan, which vehicle was titled in her name in the State of Louisiana, and operated by her son, JOEY TURNIPSEED.

That for a period of time, beginning on or about May, 1982, through and including January 11, 1983, STEVEN G. RINKER, suffered from alcohol and drug dependency, had overdosed on drugs in the summer of 1982, was twice an inpatient in the South Miami Drug Treatment Center, and after his release from said center, still suffered from these conditions, and was a habitual user of drugs and alcohol.

JOEY TURNIPSEED, the minor, moved to Miami in the summer of 1982, and became friends with STEVEN G. RINKER. JOSEPH TURNIPSEED,

the father, had met STEVEN G. RINKER, as a result of the friendship between his son, JOEY, and STEVEN RINKER.

The father, JOSEPH TURNIPSEED, befriended STEVEN G. RINKER, gave him odd jobs around his home to sustain him, namely painting, mowing the lawn, washing boats and waxing cars.

JOEY TURNIPSEED, the son, participated with STEVEN G. RINKER in alcohol and drug capers and when they were out of supply, they obtained the same from the TURNIPSEED home. STEVEN G. RINKER had also observed JOEY'S father under the influence of alcohol and drugs and observed scales (for weighing drugs) in the TURNIPSEED household.

In December, 1982, BARBARA TURNIPSEED came to Miami and stayed at her former husband's home over the Christmas holidays, from approximately December 25th to the 30th.

While BARBARA TURNIPSEED was in Miami, JOSEPH, her ex, discussed with her the sale of the 1974 Grand Prix to STEVEN G. RINKER.

BARBARA TURNIPSEED, by way of background, indicated that her son had moved from Louisiana to Florida to live with his dad, and had driven the car to his father's home in Coral Gables. After the son, JOEY was in his father's home, his dad purchased another car for their son, JOEY, as a Christmas gift. The father, JOSEPH wanted to sell the Pontiac, because he was giving JOEY, their son another car.

BARBARA TURNIPSEED had never seen or met STEVEN G. RINKER, nor did she receive any money from the sale of the 1974 Pontiac.

Prior to December 28, 1982, JOSEPH TURNIPSEED, informed BARBARA TURNIPSEED that he was going to sell the 1974 Pontiac to STEVEN G. RINKER, however as far as she knew, there was never a sale price determined at that time.

JOSEPH TURNIPSEED, the father, had told BARBARA TURNIPSEED, that he was to retain the title to the car until the car was paid for. It was BARBARA TURNIPSEED'S further understanding that her former husband was going to hold the title until he had received payment in full for the vehicle.

BARBARA TURNIPSEED was never informed that payment in full had been made for the vehicle. Title to the vehicle was registered in Steven Rinker's name on March 3, 1983, after the January 11, 1983 accident with JACKSON and VAZQUEZ.

JOSEPH TURNIPSEED had BARBARA TURNIPSEED sign her name to a document called Bill of Sale, however, no notary was present when it was signed. She further signed this document at the request of her former husband and he indicated that he would fill it in.

Further, the documents pertaining to the sale and transfer of the Pontiac were handeled by JOSEPH TURNIPSEED.

JOSEPH TURNIPSEED, prior to the sale of the 1974 Pontiac automobile to STEVEN G. RINKER, knew that he was previously involved in motor vehicle and moped accidents, prior to January 11, 1983.

Also, both JOSEPH and BARBARA TURNIPSEED knew and were aware the 1974 Pontiac was uninsured when it was sold to STEVEN RINKER, and that said minor had no funds with which to insure the same when he received delivery of the vehicle.

STEVEN RINKER received delivery of the 1974 Pontiac on or about January 6, 1983.

On or about January 11, 1983, STEVEN G. RINKER, still a minor, operated the said Pontiac sold to him by the TURNIPSEEDS, after having partied, in Dade County, Florida, at or near the intersection of S.W. 160th Street and S.W. 112 Avenue, and became involved in an accident and collided with motor vehicles operated by CLARENCE JACKSON and GILBERTO VASQUEZ, who were injured, and who initiated two separate suits for their damages against said minor, STEVEN RINKER and GLENN RINKER, his father.

That the subject 1974 Pontiac was sold and delivered to the minor purchaser, without notifying or obtaining the prior approval and consent of GLENN RINKER, STEVEN'S father, and in spite of the knowledge of the TURNIPSEED'S as to the serious pre-existing and long standing drug and alcoholic dependency problems of the intended minor purchaser.

BARBARA TURNIPSEED was aware in December, 1982, that her former husband had arranged to sell the Pontiac automobile titled in her name to her son's friend STEVEN RINKER.

JOSEPH TURNIPSEED indicated to BARBARA TURNIPSEED that he

was to retain the title to the subject Pontiac automobile until the car was paid for. It was BARBARA TURNIPSEED'S understanding that her former husband was going to hold the title to the Pontiac sold to STEVEN RINKER until JOSEPH TURNIPSEED had received payment in full for the motor vehicle.

BARBARA TURNIPSEED further indicated that her former husband, JOSEPH TURNIPSEED handled the entire transaction on her behalf, in connection with the sale of the Pontiac automobile, titled in her name to the minor STEVEN RINKER. He would tell what to sign, what to do and she complied with his directions.

JOSEPH TURNIPSEED in his deposition in his stated that both he and BARBARA TURNIPSEED decided that the 1974 Pontiac automobile was going to be sold to STEVE G. RINKER, it was a joint decision.

That STEVEN RINKER in his deposition was asked at Page 55 by counsel for JOSEPH TURNIPSEED if he knew any reason why the 1974 Pontiac automobile should not have been sold to him, to which he answered that he was in no shape to own a car, probably had the mentality of a ten (10) year old, wanted to be cool and feel good, had no job or any real intentions of getting one and when he purchased the car he didn't know how he could have known any better, namely just to have a car to get what he wanted.

The excerpts of depositions of BARBARA TURNIPSEED, JOSEPH TURNIPSEED and STEVEN RINKER as contained in the appendix and the record supplemented in this appeal, documents the foregoing

statement of facts. Because the index initially prepared by the Clerk of the lower court failed to include the depositions, the RINKERS were unable to designate the page in the record where the same appear by use of a symbol (R).

Following the filing of the Initial Appeal to the Third District Court of Appeal by Petitioners, STEVEN G. RINKER and GLENN G. RINKER, the record on appeal was supplemented by filing of the three depositions aforementioned, by the Petitioner, CLARENCE JACKSON, and the recitations indicated in the brief of CLARENCE JACKSON to the pages supporting statement of facts in this record are hereby adopted and incorporated herein.

SUMMARY OF THE ARGUMENT

Liability should be imposed upon the Respondents, JOSEPH and BARBARA TURNIPSEED, for their own negligence, as Sellers, in negligently selling and entrusting an automobile to a minor, whose incompetence to drive was known to the Sellers prior to the actual sale.

The uncontroverted evidence as reflected by the depositions and discovery in the instant case, show that the Sellers knew that STEVEN RINKER, was a minor, was an alcohol and drug user, was irresponsible as a minor, should not have been trusted with the responsibility inherent in owning and operating a dangerous instrumentality.

Notwithstanding, the Respondents sold the motor vehicle to STEVEN G. RINKER, the inexperienced youth, and knew or should have known, that the minor, because of his incompetence, would be likely to use the motor vehicle in a manner involving unreasonable risk of harm to other motorists.

Just five days following the placing of the motor vehicle in the hands of the incompetent, he became involved in an automobile accident causing serious injuries to the Petitioner, CLARENCE JACKSON and another. Predictably, the minor STEVEN G. RINKER was under the influence of drugs and alcohol on the date and time of said accident giving rise to the suit against him.

Accordingly, the summary judgment, affirmed per curiam by

the Third District Court of Appeal, should be reversed and remanded for trial, by jury, to decide the genuine issues of material fact disclosed in the record, namely whether prior to the sale of said vehicle to the minor incompetent, whether the Respondents knew they were selling the same to a drunk or drugged, incompetent driver and thereby subjected members of the public to great risk of harm.

Accordingly, the facts in this instant appeal, support the adoption of Section 390 of the Restatement (Second) of the Law of Torts, and the same should be construed so as to extend liability to the Respondents as Sellers of the chattel in question as well.

In this instant appeal, the Respondents, the TURNIPSEEDS, should be held accountable under the facts, in that there is no discernable or reasonable basis for distinction in the negligence of one who lends his car and one who gives a car, sells or entrusts an automobile to another, here the minor incompetent, a known-incompetent or reckless driver, and thereby placed said minor incompetent with the power to use said motor vehicle at all times.

The Respondents, the TURNIPSEEDS, by their actions and conduct, thereby placed the automobile, dangerous instrumentality, in the possession and control of a minor, whose track record was known or should have been known by the Respondents, to be habitually unfit to drive it. There was a sufficient casual connection between their negligence and the injury to innocent parties as to render them liable.

CERTIFIED QUESTION ON APPEAL

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?

ARGUMENT

CERTIFIED QUESTION ON APPEAL

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?

Petitioners submit that there existed genuine issues of material fact, pertaining to the issue of whether the Respondents negligently sold and/or entrusted the motor vehicle in question to the minor incompetent, STEVEN RINKER and at the time and date said motor vehicle a dangerous instrumentality was sold to the minor, whether the Respondents knew or should have known that STEVEN G. RINKER, the one to whom the motor vehicle was supplied was likely to use it in a manner involving unreasonable risk of bodily harm to others, and accordingly would be liable for damages arising from the use of the chattel in a manner which might have been anticipated.

Petitioners respectfully submit that the summary judgment in favor of the Respondents, BARBARA and JOSEPH TURNIPSEED, should be reversed and remanded for further proceedings under the certified question herein.

Both sides of the issue certified in this instant appeal were presented in the case of Estes v. Gibson, 257 S.W. 2d 604 (Ky.Ct.App.1953). In that case a parent purchased an automobile for an adult son known to be an inebriate and drug addict. The

Plaintiff was seriously injured as a result of an accident caused by the son. The Kentucky Court held that cause of action was not stated against the parent and said:

> 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 forseeable 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 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.

In a strong dissent, the Court stated that although an automobile is not considered, as dangerous per se, it is one of the most dangerous instrumentalities yet invented when placed in the hands of a dangerous and reckless driver or one whose senses have been dulled by drink or drug.

The dissenting opinion further stated that the majority opinion recognizes the rule set out in Restatement of the Law of Torts that one who supplies a chattel to another, knowing that the person to whom it is supplied is likely to use it in a manner involving unreasonable risk or bodily harm to another, is liable for damages arising from the use of the chattel in a manner which might have been anticipated.

The rule has been applied in Kentucky in instances where an owner lends his automobile to a known incompetent driver. In Brady

v. B. & B. Ice Co., 242 Ky. 138,45 S.W.2d 1051, 1053, the Court said:

> "If an owner lends his automobile to another under circumstances that do not warrant the application of the doctrine of respondent superior, any liability attaching to him does so by reason of his own negligence in knowingly permitting the use of it in such a way as would probably cause injury to others. And if, when such owner intrusts his automobile to another, he knows such other person is an inexperienced, careless, or reckless driver, he is liable for the natural and probable consequences of his act."

The dissent went on to say that the majority opinion erroneously assumed that liability was dependent upon some legal relationship, such as agency or bailment. The Court further said that the authorities make it clear that liability in such instances does not rest upon the fact of ownership but upon the combined negligence of the owner in intrusting the machine to an incompetent and reckless driver and of the driver in its operation.

Finally, the dissent stated:

I am unable to discern a reasonable basis for distinction and 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 all times, drunk or sober, sane or insane, is more negligent than one who merely lends the vehicle for one specific occasion.

The dissent further said that under the majority opinion,

the appellee, simply because title to the car was transferred to the son, the Appellee therein was placed in a position where a cause of action could not be stated against her. The Court concluded that in doing so, the opinion draws a distinction without difference.

Clearly the rational in the dissent would be applicable and would result in the certified question in this instant appeal, being answered in the affirmative, should the Court be predisposed to adopt Section 390 of the Restatement of the Law of Torts to the facts in this instant appeal.

The dangerous instrumentality doctrine subjects, the owner or one who has possession, dominion and control of the vehicle liable for any injury caused by the negligence of another using the automobile with his knowledge and consent. Remark Chemical Co. v. Ross, 101 So.2d 163 (Fla. 3d DCA 1958) and Susco Car Rental System of Florida v. Leonard, 112 So.2d 832 (Fla. 1959). This liability is not based on any fault of the owner or possessor himself; rather, it is entirely vicarious -- the negligence of the driver is imputed to the owner. Here, however, the RINKERS are seeking damages based upon the negligence of the TURNIPSEEDS in selling and entrusting a car to the minor, STEVEN G. RINKER, a person known by them to be incompetent and incapable of safely operating the vehicle. The liability of the Respondents may be said to be not vicarious, but arising from their direct obligation to refrain from selling and entrusting the automobile to a known incompetent operator, once they

possessed actual knowledge of the of the minor's incompetence deficient driving ability, as well as his known drug and alcohol problem which was ongoing prior to date of purchase and post.

In this instant appeal, liability was sought to be imposed against the Respondent/Sellers, under two alternate theories, negligent entrustment and negligent sale.

Since the Kentucky Court did not classify the motor vehicle as a dangerous instrumentality, it would appear that, if a motor vehicle was classified as a dangerous instrumentality, then in all probability the dissenting opinion would have become the majority in the State of Kentucky, and the Kentucky Court which would have reached an opposite conclusion and result.

In this case, there remains a question of fact as to whether JOSEPH TURNIPSEED knew or should have known that STEVEN RINKER, the minor, to whom he sold and entrusted the dangerous instrumentality, possessed the maturity, competence and responsbility to operate the automobile on the highways of the State of Florida. JOSEPH TURNIPSEED in selling and supplying the subject automobile to the minor STEVEN RINKER, acknowledges and admits that he was aware that STEVEN RINKER, had been a patient in a drug abuse clinic, knew and was aware prior to the supplying of the chattel in question, that the minor had been involved in two prior incidents and accidents; had admonished his son, JOEY, in supplying a beer to STEVEN RINKER, to refrain from doing so, in that you should not give

a beer to an alcoholic, and from the sum totality of the facts as presented herein, that JOSEPH TURNIPSEED well knew or clearly should have known of the incompetence and immaturity of STEVEN RINKER and of STEVEN RINKER and thereby should not have sold or entrusted the 1974 Grand Prix into his possession or ownership.

The deposition of JOSEPH TURNIPSEED further disclose that he knew or should have known that by supplying or selling the 1974 Pontiac to STEVEN RINKER, a minor, he thereby created an unreasonable risk of harm to others. JOSEPH TURNIPSEED, in his deposition, at Page 36, lines 21-24, acknowledged that GLENN RINKER, STEVEN'S father, had mentioned something about a drinking problem at one time or another.

GLENN RINKER in his affidavit filed in this cause further stated that he had instructed JOSEPH TURNIPSEED not to sell the automobile to his son because of his drug and alcoholic dependency problems. Clear and material issues of fact as to JOSEPH TURNIPSEED'S knowledge of STEVEN G. RINKER'S drug and alcohol dependency, lack of competence and maturity, should have been submitted to and resolved by a jury, on the issue of whether or not the TURNIPSEED'S were negligent and at fault in supplying or entrusting the dangerous instrumentality in question to the minor.

Section 390 of the Restatement (Second) of Torts, should be construed so as to extend liability to the sellers of the chattel in this appeal, BARBARA and JOSEPH TURNIPSEED. The doctrine of said

restatement, has been recognized in situations such as the one in the case at bar. That section states as follows:

> §390. Chattel for use by person known to be **incompetent.**
>
> 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 or be endangered by its use, is subject to liability for physical harm resulting to them.
>
> Restatement (Second) of Torts §390 (1966) at 314.

Comment (a) of that section applies this rule to anyone, including a **Seller,** who supplies a chattel for the use of another. Id. at 315.

While Florida has not expressly adopted §390 of Restatement (Second) of Torts, the Fifth District cited that section with approval in Mullins v. Harrell, 11 F.L.W. 1488 (Fla. 5th DCA) July 3, 1986, and the Second District quoted the substantially similiar §390 of the original restatement in Rio v. Minton, 291 So.2d 214 (Fla. 2d DCA), cert. denied, 297 So.2d 837 (Fla. 1974). §390 currently "applies to anyone who supplies a chattel for use of another. It applies to Sellers, Lessors, Donors or Lenders, and to all kinds of Bailors..."

Although Florida Courts have not addressed the precise issue before it, other state Courts have considered the question. Under the common law of negligent entrustment, a seller may be held

liable even though it no longer owns the car. Roland v. Golden Bay Chevrolet, 161 Cal. App. 3d 102, -- 207 Cal. Rptr. 413, 416 (1984), dismissed as moot, -- Cal. App. 3d --, 217 Cal. Rptr. 415, 704 P.2d 175 (1985) (en banc); Flieger v. Barcia, 674 P.2d 299 (Alaska 1983). According to California law, the gravamen of the tort of negligent entrustment is "the sale of the automobile with actual or presumptive knowledge that the incompetent person is going to drive it....) Perez v. G.& W. Chevrolet, Inc., 274 Cal. App. 2d 766, -- 79 Cal. Rptr. 287, 289 (1969)

Negligent entrustment has been available to claimants injured in automobile accidents in Florida. Cluney v. Geting, 352 So.2d 1216 (Fla.2d DCA 1978). The issue of whether there has been a bailment or a sale in this case is irrelevant to the question as to whether the party supplying the chattel can be held responsible for negligent entrustment.

In Johnson v. Casetta, 17 Cal.Rptr.81 (Cal.App.1961), an action was instituted by persons injured in an automobile collision against persons who had sold an automobile to another motorist involved on the theory that they had done so with actual knowledge of the vendees inexperience and incompetency as a driver. The superior Court, the trial court rendered a judgment of non-suit on the Plaintiff's opening statement and they appeal.

The District Court of Appeal, First District, California held that liability could be imposed upon an automobile seller and

his salesman for selling an automobile to an inexperienced and incompetent Driver whose conduct in driving injured the Plaintiffs, providing the seller and the salesman had actual knowledge of the vendees incompetency or knowledge of facts from which they should have known such. The judgment of nonsuit and dismissal was reversed and the case was remanded. In Johnsons supra, the California Court cited Knight v. Gosselin, 124 P.2d 454,456, where a judgment was upheld against the Defendant, garage owner, who had delivered an automobile which they had for sale, to an obviously intoxicated perspective purchaser. The Court quotes with approval the following language from Rocca v. Steinmetz, 214 P.257 Supra in that opinion, which stated:

> In its simplest form the question is whether the owner when he permits an incompetent or reckless person, whom he knows to be incompetent or reckless, to take and operate this car, acts as an ordinarily prudent person would be expected to act under the circumstances. If he were to entrust his car to a person whom he knew to be insane or intoxicated or utterly incompetent to run a car, it would certainly shock the common understanding to hold that he was not chargeable with negligence. There can be no difference in principle, but only in degree where he knows the driver to be careless and reckless in the operation of the machine. In any such case consideration for the safety of others requires him to withhold his consent and thereby refrain from participating in any accident that is liable to happen from the careless and reckless driving of such a dangerous instrumentality."

The California Court further stated in its opinion that in

each of the foregoing cases, the Defendant had actual knowledge of, or had knowledge of facts from which he should have known of, the Driver's incompetency.

In the Johnson decision the California Court further stated that the Defendants therein posed the question of how long should the liability of the seller last under the Plaintiff's theory. The Court answered that the answer is, is as long as the original incompetence of the Driver continues. An intoxicated driver may become sober an inexperience driver may acquire experience. Then such original incompetence could no longer be a proximate cause of the accident and therefore, the liability of the seller on this theory would no longer exist.

In reversing the dismissal, the Court stated that inasmuch as the Plaintiff offered to prove that the supplier of the chattel had actual knowledge of the vendees inexperience and incompetency as a driver, the motion of nonsuit should have been denied.

In Kahlenberg v. Goldstein, 431 A2d 76 (1981) the Maryland Court of Appeals recognized the principle of negligent entrustment and stated that the donor of a chattel was responsible for the tortious actions of the donee with the chattel under circumstances in which the donor knew or had reason to know that the donee's use of the chattel could reasonably be expected to cause injury to the donee or others, was applicable where a gift of an auto was made to a member of the donor's immediate family.

The Maryland Court in its opinion at Page 729 stated that it seemed to it that the principal features of the tort of negligent entrustment lie in the knowledge of the supplier concerning the dangerous propensities of the entrustee and in the forseeability of harm. If one who gives an auto to a member of his immediate family has a requisite knowledge, and the other elements of the tort are satisfied, the Court indicated we can see no reason for denying liability exclusively on the basis that title is transferred in addition to possession. **Liability is not based upon continued ownership, but upon the negligent entrustment when it operates as a concurrent cause with the negligence of the entrustee.**

At page 730 of its opinion, the Maryland court further stated that concerning the tort of negligent entrustment, we are dealing with concurrent causation. **The negligence of the supplier consist of furnishing the chattel with a requisite knowledge. This sets in motion one chain of causation which may or may not in fact result in injury. The other chain of causation involves the conduct of the immediate tortfeasor. If physical harm results to one within the class of forseeable Plaintiffs, as a result of the use of the chattel by the entrustee in a manner, which, because of the youth, inexperience or otherwise of the entrustee, the supplier knew or had reason to know, was a likely use and which would involve an unreasonable risk of physical harm, the two chains of causation converge and liability is imposed on the supplier, for his own negli-**

gence. It is within the framework of this analysis that the "right to permit and the power to prohibit" language of the Rounds cases is used.

The court further went on to State that it did not think that title to an automobile as shown by records of the Automobile Commissioner of the State, is conclusive, but that the principle applies not only to the owner of an automobile, but to anyone who has the right to permit and the power to prohibit the use thereof. Having such power and authority, if he does not prohibit his minor son, who he knows is addicted to driving an automobile while under the influence of liquor, and is habitually negligent and reckless in its use, there can be no valid distinction between him, under such circumstances, and the one who has the record title to the automobile in question.

Therefore, it would make no difference whether the dangerous instrumentality is a loan, given as a gift, or sold, the mode of supply being irrelevant.

Appellant further submits that the case law regarding entrustment of a fire arm, classified a dangerous instrumentality, would likewise be analogous and applicable to the case at bar.

The Florida courts have held that the owner of a firearm, a dangerous instrumentality, may be found liable for injury if there was negligence in the entrustment of the firearm. Brien v. 18925 Collins Ave. Corp., 233 So.2d 847 (Fla. 3d DCA 1970) Acosta v.

Daughtry, 268 So.2d 416 (Fla. 3d DCA 1972). Appellant can see no distinction between application of the law as to negligent entrustment of a firearm, and the negligent entrustment of a motor vehicle. Since both have been classified and categorized as dangerous instrumentalities, Appellants submit that is is in fact a question for the jury to decide, and not an issue of law to be summarily disposed of by the Court. The trial court erred in holding that as a matter of law, under the facts there was no negligence, in the sale or entrustment of the automobile in this case to the minor, under the facts and circumstances stated herein.

It is undisputed from the facts in the case in this instant appeal that BARBARA TURNIPSEED was a registered title owner of the 1974 Pontiac, and that she permitted her former husband, JOSEPH TURNIPSEED, to arrange a sale of the vehicle to STEVEN RINKER a minor, whom the supplier JOSEPH TURNIPSEED knew to be involved in alcohol and drug dependency, incompetent to handle a motor vehicle and likely to misuse the dangerous instrumentality being furnished by him, so that he would expose himself and others to injury. The facts as to lack of competency of the minor, STEVEN RINKER, to own and operate a motor vehicle on the highways of the State of Florida, and his multitude of drug problems and related conditions, are unrefuted. It is also unrefuted that JOSEPH TURNIPSEED knew of these conditions, nevertheless he furnished the automobile to a known incompetent driver and thereby placed him in a position and power to

use it at times, drunk or sober, under the drugs or otherwise, and in so doing was negligent or more negligent then one who might have lent the vehicle for one specific occasion.

There clearly was a close causal connection and relationship between the actions and conduct of BARBARA and JOSEPH TURNIPSEED in furnishing and supplying the dangerous instrumentality to the incompetent minor and the resulting injury, which was caused or occasioned by the negligence of the minor, while operating the vehicle in an impaired condition.

It is not reasonable under the facts and circumstances involving the transfer and delivery of the automobile to the minor, to insulate the supplier of the car, on the theory that once the title had been transferred, or delivery made, the supplier or donor of the car has no obligation for the consequences of the incompetent, when the situation was caused or occasioned by the supplier.

We are not dealing with a situation involving an innocent purchaser for value or bona fide deal, but we are dealing with a situation loaded with prior knowledge, potential for harm, and irresponsibility. Certainly the supplier of the vehicle and her agent, should be held accountable and liable for the result and damages caused or occasioned by the negligence of the incompetent in the operation of the dangerous instrumentality placed in his hands.

The Petitioners herein respectfully submit that the

dissenting opinion in Potamkin v. Horne, 505 So.2d 560 (Fla. App. 3d DCA 1987) should be adopted in response to the certified question now pending before this Honorable Court.

The vendors, Respondents, notwithstanding their prior knowledge of STEVEN G. RINKER's incapacity as a minor, incompetence to own and operate a motor vehicle, and lack of maturity because of his drug and alcohol dependency, which was ongoing prior to placing the automobile in his name and control, nevertheless placed the vehicle in his name and control and by their actions proximately caused and contributed to the accident giving rise to this appeal.

The Respondents, the TURNIPSEEDS, by virtue of the foregoing, knew or should have known of the likelihood of the consequences of their action, demonstrated lack of judgment, irresponsibility, negligence and total disregard and indifference towards said minor and the public at large.

The Respondents, acted without approval and consent of the natural parents of STEVEN G. RINKER, permitted to and placed his father in jeopardy for potential civil liability, and did thereby cause and contribute to the action brought by JACKSON and VAZQUEZ to impose liability herein.

Petitioners respectfully submit that the Respondents, the TURNIPSEEDS, should be held legally responsible and accountable for their own negligence in selling and entrusting said automobile to the known minor incompetent as supported by the facts in this record.

Accordingly, the summary judgment and per curiam opinion affirming the same, should be reversed and the cause remanded, as indicated, consistent with the dissenting opinion, to the fact finder to decide and resolve the genuine issues of material fact disclosed by the record, and especially whether prior to the sale of the motor vehicle to the minor, whether the Respondents knew that they were selling and entrusting the same to a drunk or drugged, incompetent driver and thereby subjected members of the public to great risk of harm.

CONCLUSION

That the facts as contained in this instant record on appeal, support the adoption of §390 of the Restatement (Second) of the Law of Torts, and said section should be construed so as to extend liability to the Sellers of the chattel and an opinion be entered herein consistent therewith, and the per curiam opinion of the Third District Court of Appeal affirming the summary judgment of the trial court be reversed and this cause be remanded for trial on the merits.

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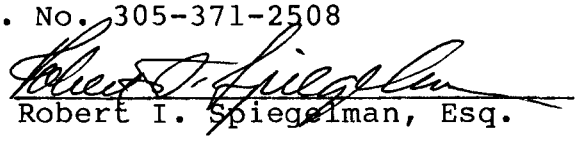
By: 
Robert I. Spiegelman, Esq.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY, that a true and correct copy of the foregoing Initial Brief of Petitioners, STEVEN G. RINKER and GLENN G. RINKER was mailed to Laura S. Rotstein, Esq., of counsel for Stanley M. Rosenblatt, P.A., 11th & 12th Floors, Concord Building, 66 West Flagler Street, Miami, Florida 33130; Mitchell L. Lundeen, Esq., of counsel for George, Hartz & Lundeen, P.A., 333 Justice Building East, 524 South Andrews Avenue, Fort Lauderdale, Florida 33301; James Gilmour, Esq., of counsel for Gilmour, Morgan and Rosenblatt, 608 Concord Building, 66 West Flagler Street, Miami, Florida 33130; Glenn R. Goldsmith, Esq., of counsel for High, Stack, Lazenby & Palahach, 3929 Ponce de Leon Blvd., Coral Gables, Florida 33134; Kenneth B. Sherouse, Jr., Esq., of counsel for Headley, Sherouse & Curran, 1999 S.W. 27th Avenue, Miami, Florida 33145; and Joseph N. Unger, Esq., Suite 606, Concord Building, 66 West Flagler Street, Miami, Florida 33130 6th day of August, 1987.

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