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IN THE SUPREME COURT OF FLORIDA

STEVEN G. RINKER, et al.,

Petitioners,

vs.

BARBARA TURNIPSEED and
JOSEPH TURNIPSEED,

Respondents.

****

CLARENCE JACKSON, et al.,

Petitioners,

vs.

BARBARA TURNIPSEED and
JOSEPH TURNIPSEED,

Respondents.

_____/

CASE NO. 70,846
THIRD DISTRICT COURT
OF APPEAL NOS. 85-2695
85-2534

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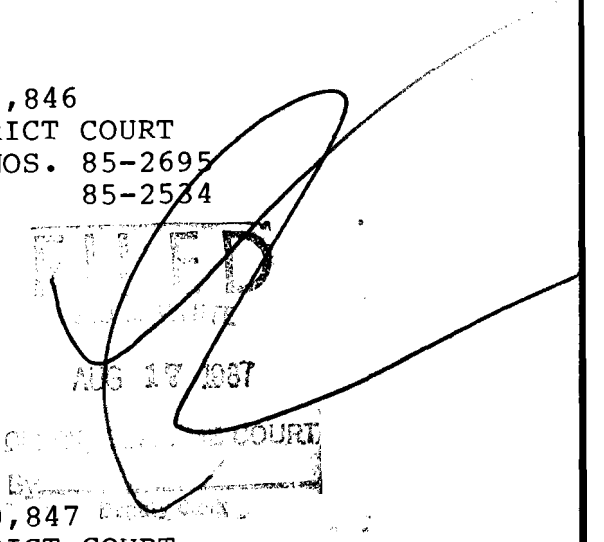

INITIAL BRIEF OF PETITIONER CLARENCE JACKSON

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INTRODUCTION

Petitioner Clarence Jackson files this Initial Brief invoking the discretionary jurisdiction of this Honorable Court on a matter that has been certified by the Third District Court of Appeal as being one of great public importance. The parties will be referred to as they stand before this Court, or by their names. Reference to the record on appeal will be designated by the symbol (R.). Reference to the supplement to the record on appeal will be designated by the symbol (S.). All emphasis is supplied by the writer unless otherwise noted.

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STATEMENT OF THE CASE AND FACTS

Joseph and Barbara Turnipseed were divorced in 1966. (S.5) Barbara remained in Louisiana with their son Joey (S.79-81); Joseph moved to Miami (S.4). During the summer of 1982, Joey moved to Florida to live with his father. (S.9; 91) He drove there in a 1974 Grand Prix that was titled in the name of Barbara Turnipseed. (S.9-10)

In 1981 or 1982, Steven Rinker was living with his father, Glenn Rinker, on the same street as Joseph Turnipseed. Turnipseed employed Steven to do odd jobs around the house. (S.161-62) Although Steven was a minor, Turnipseed would occasionally offer the boy beer. (S.163) When Joey came to live in Miami, he and Steven became good friends. They were enrolled in Palmetto Senior High together. (S.11; 39) The two boys would go out, drink, "do coke" and smoke pot together. They would even take some of the elder Turnipseed's pot when their supplies ran low. Steven was "high" around the elder Turnipseed all the time, and the latter "knew what was going on." (S.164-65)

In July, 1983, Steven was admitted to an alcohol and substance abuse program at South Miami Hospital; the elder Turnipseed knew Steven was in the program; Joey visited Steven at the hospital. Steven left the program a week early and continued smoking pot and drinking alcohol. (S.37; 69; 167) Turnipseed also knew that Steven had nearly died of a drug overdose previously. (S.36-7; 167; 188)

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Joseph Turnipseed knew that Steven had wrecked his father's car, and as a result, the boy was thrown out of the house.; he was legally emancipated in December, 1982. (S.37) Turnipseed knew that Steven had also wrecked a moped; Turnipseed gave Steven money for the repairs. (S.37; 171-72) Turnipseed knew that Steven had dropped out of high school. (S.169) Barbara Turnipseed visited Miami for the Christmas holidays, in December, 1982. (S.13) Joseph had bought their son Joey a new car for Christmas. (S.56; 92; 101) They agreed that Joseph would sell the 1974 Grand Prix, owned by Barbara Turnipseed, to Steven. (S.17-18; 56; 173-75; 189) Barbara Turnipseed endorsed the title certificate and signed a blank bill of sale. (S.47; 88; 90; 138) At the time, the sale price had not been determined; however, it was Barbara Turnipseed's understanding that Joseph would retain title until the car was paid for. (S.120; 124) She later heard that the sale price was $500.00 or $600.00. Joseph told her that Steven had made one payment against the purchase price. She was never informed if the balance was paid. (S.122-23) In fact, Steven "worked off" a down payment of approximately $30.00 to $50.00. Ultimately he paid approximately $150.00, which he earned by working for Joseph Turnipseed. Steven never paid off the car. (S.191-95)

Joseph Turnipseed went to the tag agency with Steven on January 6, 1983, to obtain the registration to the Grand Prix and to apply for a title transfer. Turnipseed supplied all of the information for the applications; Steven merely signed when asked. The

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address provided for the new registration was Joseph Turnipseed's address, not Steven's. Turnipseed spoke to a woman at the tag agency. She asked Turnipseed about liability insurance. She never asked Steven to verify that he had insurance on the car. Turnipseed took care of the matter. He knew that Steven didn't have insurance on the 1974 Pontiac; he knew that Steven didn't have the money to pay for it. Turnipseed gave Steven possession of the car on the day they went to the auto tag agency and told Steven to be careful. (S.177-182; 196; 206-07) When the title certificate arrived, it bore the date March 3, 1987, and the address of Joseph Turnipseed. (S.54)

On January 6, 1983, Joseph Turnipseed gave possession of the vehicle to Steven. (S.53; 196-97; 206) This was the minor's first car. (S.204) Only five days later, on January 11, 1983, Steven Rinker drove his car while under the influence of alcohol and drugs and caused an automobile accident that injured Petitioner Clarence Jackson and Gilberto Vasquez. (R.202) Clarence Jackson filed a Complaint sounding in negligence against Steven Rinker and his father, Glenn Rinker, on December 6, 1983. (R.53-54) Gilberto Vasquez and his wife filed a Complaint against Clarence Jackson, based on the same accident, and the two actions were consolidated on June 18, 1984. (R.92) On March 12, 1984, Glenn Rinker and Steven filed a third-party Complaint against Joseph Turnipseed, which was later amended to include Barbara Turnipseed. (R.60-63; 95-98) On August 18, 1984, Clarence Jackson filed his First

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Amended Complaint, adding Joseph and Barbara Turnipseed as party defendants. (R.72-5)

Barbara Turnipseed and her ex-husband Joseph Turnipseed filed motions for summary judgment on January 2, 1985 and February 26, 1985, respectively. (R.133-34; 138-41)

On June 6, 1985, Clarence Jackson filed his Second Amended Complaint, alleging in pertinent part, that Joseph Turnipseed negligently sold the vehicle involved in the subject accident to Steven Rinker, and that Mr. Turnipseed was acting as Barbara Turnipseed's agent in that regard. (R.161-65)

The Turnipseeds' motions for summary judgment were scheduled for hearing before the Honorable Francis X. Knuck of the Eleventh Judicial Circuit on September 23, 1985. (R.82) On September 18, 1985, Judge Knuck's law clerk telephoned the undersigned law firm and advised that the judge had ruled without hearing. On September 20, 1985, the trial judge entered an order granting the defendants' motions for summary judgment (R.228); final summary judgment was entered on October 8, 1985, and clarified on February 11, 1986, to include Joseph Turnipseed. (R.229; S.218) The basis of Judge Knuck's order was his belief that the doctrine of negligent sale was not recognized in Florida. Post-trial motions were filed by Clarence Jackson and the Rinkers. (R.82-88; 215-18; 89-91) All motions were denied on October 29, 1985. Contrary to the recitations in the court's order, the matter was disposed of by the trial court upon consideration of written motions but without hearing argument of counsel.

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On November 7, 1985, Clarence Jackson filed Notice of Appeal in the Third District Court of Appeal. (R.220-21) The Notice was amended on November 20, 1985. (R.222-23) Thereafter, on November 25, 1985, Steven Rinker and Glenn G. Rinker filed a joinder and Amended Notice of Appeal. (R.224-26) The Rinkers then filed Notice of Appeal on December 2, 1985. (R.231-232A) On January 31, 1986, the Third District consolidated both cases for all appellate purposes. Briefs were filed and oral argument was heard twice. The cause was then set for hearing en banc, together with rehearing en banc, in Potamkin Chevrolet, Inc. v. Horne on December 9, 1986. On June 9, 1987, the Third District rendered a per curiam opinion affirming the decision of the lower court on the authority of Potamkin v. Horne, (Fla. 3d DCA Case No. 84-2813; opinion filed April 7, 1987) (rehearing en banc). Petitioners then filed Suggestions of Certification, or, in the Alternative, Motions to Stay Mandate. While the motions were pending, Petitioners filed separate Notices to Invoke Discretionary Jurisdiction in this Court on July 9, 1987. On June 13, 1987, the Third District Court of Appeal granted Petitioners' Motions and ordered that the question reviewed herein be certified to be of exceptional importance to the Supreme Court, pairing it for review with Potamkin v. Horne, 505 So.2d 560 (Fla. 3d DCA 1987) and granting Petitioners' Motion for Stay Pending Review in the Supreme Court. The Third District certified the following question:

> 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?

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POINTS ON APPEAL

I.

WHETHER FLORIDA SHOULD ADOPT SECTION 390 OF THE RESTATEMENT (SECOND) OF THE LAW OF TORTS

II.

WHETHER SECTION 390 OF THE RESTATEMENT OF THE LAW OF TORTS SHOULD BE CONSTRUED SO AS TO EXTEND LIABILITY TO A SELLER OF A CHATTEL AS WELL

III.

WHETHER THE DOCTRINE OF NEGLIGENT SALE IS APPLICABLE TO THE FACTS OF THIS CASE, REGARDLESS OF THIS COURT'S DECISION IN HORNE V. POTAMKIN CHEVROLET, INC.

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SUMMARY OF ARGUMENT

The doctrine of negligent entrustment has been applied in Florida to situations involving bailment of automobiles and negligence in lending or supplying firearms. Section 390 Restatement (Second) Law of Torts (1966), which codifies the doctrine of negligent entrustment, has been cited with approval, but never recognized by this Court. The facts of this case lend themselves to the adoption and application of Restatement Section 390.

The uncontroverted evidence, as reflected by the depositions and discovery, show that Respondents Joseph and Barbara Turnipseed knew that Steven Rinker was a minor, was an alcohol and drug abuser, was an irresponsible youth who should not have been trusted with the responsibility inherent in operating a dangerous instrumentality. Notwithstanding their actual knowledge, the Respondents supplied Steven with a motor vehicle, knowing that, because of his inexperience and incompetence, he would be likely to use the motor vehicle in a manner involving unreasonable risk of harm to himself and others. Just five days after Respondents supplied the vehicle to this incompetent youth, he became involved in an automobile accident, causing serious injuries to the Petitioner, Clarence Jackson, and another. Predictably, Steven Rinker was under the influence of drugs and alcohol at the time of the accident giving rise to this litigation.

Liability should be imposed upon the Respondents for their negligence in supplying an automobile to a minor whose incompetence

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was known to them prior to the actual transfer. This Court should take the opportunity of ruling here to officially adopt section 390 of the Restatement (Second) of the Law of Torts, regarding negligent entrustment.

Second 390 currently applies to sellers as well as lenders. In adopting section 390, this Court should likewise construe section 390 to apply to a seller as well as an entrustor. In this case, the Respondents should be held accountable regardless of whether they sold or merely lent the car to Steven Rinker. There is no discernable or reasonable basis for distinction in the negligence of one who lends his car and one who gives, sells or entrusts it to another, knowing that person to be reckless and incompetent, and thereby creating a risk of harm to others. If a distinction between sale and entrustment exists, it is that the former is more egregious, since the incompetent can then freely use the vehicle at any and all times rather than a specific occasion. The critical issue here is not control, which is usually constructive, but rather the need to protect an injured plaintiff from a known danger.

This cause was paired, on appeal, with the case of Horne v. Potamkin Chevrolet, Inc. Petitioner believes that the doctrine of negligent sale, as expressed in section 390 Restatement (Second) of the Law of Torts, is applicable under the limited circumstances involved in the Horne case; however, Petitioner also recognizes the possibility that application of the doctrine to Potamkin may impede the free flow of commerce. Petitioner's cause does not

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involve a commercial transaction. It involves a minor with a long-standing history of substance abuse and a long-standing relationship to the suppliers of the vehicle. Under these circumstances, the knowledge of the Respondents created a duty to prevent the harm that occurred by refusing to convey an automobile to a youth whom they knew to be incompetent. Thus, regardless of this Court's ruling in Horne v. Potamkin, this Court should quash the opinion of the Third District Court of Appeal in Jackson v. Turnipseed and remand for trial on the merits.

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ARGUMENT

I.

FLORIDA SHOULD ADOPT SECTION 390 OF THE RESTATEMENT (SECOND) OF THE LAW OF TORTS

Section 390 Restatement (Second) Law of Torts (1966) provides as follows:

> Section 390. Chattel for Use by Person Known to be Incompetent
>
> One who supplies directly or through a third person 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 to be endangered by its use, is subject to liability for physical harm resulting to them.

Restatement 390 expresses the doctrine of negligent entrustment and is applicable in situations where injury occurs and the claimant has no cause of action for vicarious liability. See Clooney v. Geeting, 352 So.2d 1216 (Fla. 2d DCA 1978). The doctrine of negligent entrustment is particularly appropriate when applied, as in Clooney, to bailment of automobiles and to negligence in lending or supplying firearms, as in Acosta v. Daughtry, 267 So.2d 416 (Fla. 3d DCA 1972) and Brien v. 18925 Collins Avenue Corp., 233 So.2d 847 (Fla. 3d DCA 1970). While Florida has not expressly adopted Section 390 of Restatement (Second) of Torts, the Fifth District recently cited it with approval in Mullins v. Harrel, 490 So.2d 1338,

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(Fla. 5th DCA 1968), a cause of action for destruction of a vehicle left with a repairman whose employee drove the truck on a personal errand. Prior to Mullins, the Second District cited an earlier version of Restatement of Torts, section 390 (1934) in Rio v. Minton, 291 So.2d 214 (Fla. 2d DCA 1974), a wrongful death action against an adult who allowed the plaintiff's minor son to drive defendant's automobile knowing that the son had consumed a large quantity of alcoholic beverages and it was foreseeable that he would lose control of the car. In Vic Potamkin Chevrolet, Inc. v. Horne, 12 FLW 960 (Fla. 3d DCA Case No. 84-2813; opinion filed April 7, 1987) (on motion for rehearing en banc), the Third District likewise accepted and approved the idea that a person who loans a chattel to a person he knows is not responsible should be held liable. Given the fact that the concept of negligent entrustment is already so well recognized in the case law of this state, it is logical that this Court should officially recognize the Restatement section 390 as the official statement of the law in this state.

Because a jury might well find that there was no completed sale of the vehicle or that there was no bona fide transfer of title that would otherwise relieve the Turnipseeds of liability under section 319.22(2), Florida Statutes, Petitioner Clarence Jackson sued Joseph and Barbara Turnipseed on alternative theories of liability. Petitioner pleaded a cause of action for negligent entrustment, as well as negligent sale. Given the Turnipseeds' knowledge of Steven's youth, his immaturity and irresponsibility,

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his alcohol and substance abuse, and his history of vehicular accidents, it was foreseeable that providing Steven with an automobile would result in injury to someone on the road. Given the fact that young and incompetent persons are likely to injure others but are less likely to be well covered by insurance to compensate for the injuries, it is logical, even advisable, that this Court should accept Section 390 of the Restatement (Second) of Torts (1966), as the law of negligent entrustment in this State.

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II.

SECTION 390 RESTATEMENT (SECOND) OF THE LAW OF TORTS SHOULD BE CONSTRUED SO AS TO EXTEND LIABILITY TO A SELLER OF A CHATTEL AS WELL

Comment (a) to Section 390 declares that the rule applies to anyone who supplies a chattel for the use of another. It applies to "sellers, lessors, donors or lenders, and to all kinds of bailors, irrespective of whether the bailment is gratuitous or for consideration." In Angell v. F. Avanzini Lumber Co., 363 So.2d 571 (Fla. 2d DCA 1978), the Second District held that a complaint stated a cause of action in common-law negligence where it alleged that a gun dealer sold a rifle to a person exhibiting strange and erratic behavior, and that person shortly thereafter used the rifle to shoot and kill the plaintiff's decedent. The court in Angell did not expressly cite to Section 390, but the rationale behind its decision is identical to the principle expressed in the Restatement. While Florida has not yet applied Restatement Section 390 to any case of negligent sale, a number of other jurisdictions have done so.

In Johnson v. Casetta, 197 Cal. App.2d 272, 17 Cal. Reptr. 81 (1961), an action was instituted by persons injured in an automobile collision against a used car dealer who had sold the vehicle with knowledge that the purchaser was an inexperienced and incompetent driver. Plaintiffs alleged that furnishing an automobile under the circumstances created an unreasonable risk that his operation of the car would endanger persons using the public streets and highways

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of California. The trial court entered a dismissal. The appellate court reversed, applying Section 390. The District Court of Appeal, First District, California, held that liability can be imposed upon a vendor for selling an automobile to an inexperienced and incompetent driver whose conduct in driving injured the plaintiffs, provided the vendor had actual knowledge of the vendee's incompetency. In Johnson v. Casetta, the California district court cited Knight v. Gosselin, 124 P.2d 454 (1932), affirming a judgment against a defendant, garage owner, who delivered an automobile for sale to an obviously intoxicated prospective purchaser. The California court also cited with approval the following language from Rocca v. Steinmetz, 214 P. 257 (1923):

> 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 ordinary 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.

In Johnson, defendants posed the question of how long the liability of the seller should last under the plaintiff's theory.

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The court answered:

> As long as the original incompetency of the driver continues. An intoxicated driver may become sober and an inexperienced driver may acquire experience. Then such original incompetent could no longer be a proximate cause of an accident and, therefore, the liability of the seller on this theory would no longer exist.

In Kahlenberg v. Goldstein, 431 A.2d 76 (Md. Ct. App. 1981), the principle of negligent entrustment was found applicable where a gift of an automobile was made to a member of the donor's immediate family who knew, or had reason to know, that his son's use of the automobile could reasonably be expected to cause injury to himself or others. The Maryland court declared 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 the foreseeability of harm. If one who gives an automobile to a member of his family has that requisite knowledge, and the other elements of the tort are satisfied, the court indicated that there was no reason for denying liability exclusively on the basis that title is transferred in addition to possession. The Maryland court further stated that the tort of negligent entrustment involves concurrent causation. The negligence of the supplier consists of furnishing the chattel with the requisite knowledge of the entrustee's incompetency. This sets in motion one chain of causation which may result in injury. The other chain of causation involves the conduct of the immediate tort feasor. If physical harm results to one within the class of foreseeable plaintiffs, as a result of the use

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of the chattel by the entrustee in a manner which the supplier knew, or had reason to know, was a likely use and would involve an unreasonable risk of physical harm, the two chains of causation converge and liability is imposed on the supplier, for his own negligence. Thus, the right to permit also involves the power to prohibit. See also Pugmire Lincoln Mercury, Inc. v. Sorrells, 236 S.E.2d 113 (Ga. App. 1977), addendum of Judge Deen, declaring:

> It is my opinion that when one supplies to another, whether by sale or loan, an automobile and has actual knowledge of the intended driver's incompetence, then existing, to operate it and due to driver's negligence body harm or death results, the supplier may be held liable in tort.

The theory of Section 390 Restatement (Second) Law of Torts (1966), extending liability to a seller as well as an entrustor should be adopted by this Court in this case. Assuming, without agreeing, that a bona fide sale or transfer occurred and Steven Rinker was, in fact, the owner of the 1974 Grand Prix when, under the influence of drugs and alcohol, he crashed into Petitioner's automobile, there should be concurrent liability of Joseph and Barbara Turnipseed who were the "suppliers" of the vehicle. It is undisputed that the Turnipseeds jointly decided to sell the 1974 Grand Prix to Steven. (S.18) Furthermore, it is undisputed that Joseph Turnipseed knew Steven to be a disturbed youngster with severe alcohol and drug problems. Steven was "high" around Turnipseed all the time and Turnipseed "knew what was going on." (S.165) In fact, Turnipseed chastised his son for offering Steven

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a beer on one occasion, telling Joey that beer should not be offered to an "alcoholic." (S.166-67)

Turnipseed knew that Steven was a high-school dropout; and that Steven was in a drug abuse program before the accident of January 11, and there was evidence that he knew the boy nearly died of a drug overdose previously. (S.188) Steven left the program after three weeks and resumed smoking pot and drinking alcohol. (S.167-69) Furthermore, a reasonable inference exists that Turnipseed knew that Steven and Joey liked to drive cars while intoxicated. Steven testified on deposition that one night he had to sleep at the Turnipseed home because of his intoxicated state and that he vomited on Mr. Turnipseed's yard and bathroom floor after a joy ride in Coconut Grove. (S.169-70; 203) Turnipseed knew that Steven had wrecked his father's car and had also wrecked a moped. (S.171-72) Turnipseed knew that the 1974 Grand Prix was the first car that Steven ever owned and that Steven did not have insurance on the car. (S.204) Joseph Turnipseed's knowledge of all these matters preceded his giving Steven possession of the automobile, yet he saw fit to supply this boy, who he knew to be irresponsible, with his first car. This is something the boy's own father refused to do. According to Steven:

> ...As far as owning an automobile, of course he [Mr. Rinker] wouldn't buy me one, no way! He didn't trust me behind the wheel of anything. He wouldn't even let me drive his car with him in it. (S.171)

Joseph Turnipseed knew that Steven Rinker was legally emancipated

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in December, 1982. (S.37) He knew that Steven could not afford to purchase the automobile. He conveniently provided the boy with an "easy payment plan." (S.193) And although there was a conflict in the evidence of whether Barbara Turnipseed had ever met Steven (S.95; 175), it is well settled that a principal is chargeable with knowledge received by his or her agent while acting within the scope of his authority. Bertram Yacht Yard, Inc. v. Florida Wire & Rigging Works, Inc., 177 So.2d 365 (Fla. 3d DCA 1965). Therefore, Barbara Turnipseed is chargeable with Joseph Turnipseed's knowledge of Steven's incompetence and irresponsibility, since he was acting as her agent in the sale of the automobile. Although the decision to sell the car to Steven was jointly made by the Turnipseeds, only Barbara Turnipseed, as titled owner, could transfer the vehicle and Joseph Turnipseed was acting as her agent in consummating the sale.

From the foregoing, it is clear that the Turnipseeds knew or should have known at the time they supplied Steven with his automobile that the boy, because of his dependency on drugs and alcohol, immaturity, inexperience and general irresponsibility, would be likely to use that dangerous instrumentality in a manner involving unreasonable risk of harm to himself and others. Their knowledge and their negligence occurred prior to any sale or transfer of title. As a result, Section 390 of the Restatement (Second) Law of Torts should be applied to this case to impose liability upon the Turnipseeds for the damage caused by Steven. There is little difference in supplying a habitually intoxicated and irresponsible minor, such as Steven, with a dangerous instru-

mentality capable of inflicting death and serious injury and supplying a person exhibiting erratic behavior with a gun. Furthermore, there is no difference between loaning a vehicle, as in Clooney, and selling a vehicle to an incompetent person. If anything, the latter is more egregious, since the incompetent can then freely use the vehicle at any and all times as opposed to a specific occasion. See Kahlenberg v. Goldstein. Even if the opinion in Kahlenberg, is viewed as being limited to members of one's immediate family, the opinion is relevant to the case at bar; it is clear that Steven looked to Joseph Turnipseed as a surrogate father.

Holding Respondents liable for their negligence in supplying Steven with a vehicle would not be a "venture into Wonderland." Mills v. Continental Parking Corporation, 475 P.2d 673, 674 (Nev. 1970). Liability of the Turnipseeds would only continue as long as Steven's original incompetence continues. The accident of January 11, 1983, had a sobering effect on Steven Rinker. He returned to his mother's home in New York State. When his deposition was taken, on May 15, 1985, he was not taking drugs anymore. (S.213) Thus, the liability of the Turnipseeds no longer exists.

Viewing the record in the light most favorable to the Petitioners, it is clear that summary judgment was improperly entered against them. There exist issues of material fact regarding whether the Turnipseeds negligently sold the vehicle in question to Steven. There exists no doubt whatsoever that they negligently supplied the car to a minor incompetent and irresponsible boy. This Court

should adopt Section 390 Restatement (Second) Law of Torts (1966) and construe that section to extend liability to a seller as well as an entrustor. Summary judgment in favor of Barbara and Joseph Turnipseed should be reversed, and the cause should be remanded for trial on the merits.

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III.

THE DOCTRINE OF NEGLIGENT SALE IS APPLICABLE TO THE FACTS OF THIS CASE, REGARDLESS OF THIS COURT'S DECISION IN HORNE V. POTAMKIN CHEVROLET, INC.

In its opinion of April 7, 1987, in Vic Potamkin Chevrolet, Inc. v. Horne, (on motion for rehearing en banc), the Third District Court of Appeal reversed its earlier decision and declared that once an automobile dealer has transferred ownership of an automobile to a buyer, the dealer cannot be held liable for the buyer's subsequent negligent acts in the operation of the automobile. In certifying the underlying question in this cause, the Third District paired Jackson v. Turnipseed with Horne v. Potamkin, S.Ct. Case No. 70,499; filed May 5, 1987. Petitioner believes that the sale of the car by Potamkin to Nora Newry ceased to be an "arm's length transaction" when the saleman observed Newry's inability to drive and that, under those "limited circumstances," this Court should find Potamkin liable for the injuries to Junie Horne. Nevertheless, Petitioner recognizes that the imposition of the duty to ascertain the driving ability of all prospective drivers might well create uncertainty and retard the free flow of commerce. See Vic Potamkin Chevrolet, Inc. v. Horne, 12 FLW at 961.

Setting aside the question of whether title had actually passed and whether such title, if fraudulently procured, was valid, it is clear that the facts of this case lend themselves more

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strongly to the application of the doctrine of negligent sale than those of Potamkin. Steven Rinker was a minor at the time that he acquired the automobile and injured Petitioner Clarence Jackson. Steven Rinker was a constant visitor in the Turnipseed house; therefore, there was considerable opportunity to observe the boy and to influence his conduct. Joseph Turnipseed knew that Steven Rinker had no insurance, yet, desirous of disposing of the vehicle, Turnipseed assisted Steven in arranging a sale and, possibly, obtaining a new title certificate.

In the court below, Respondents conceded that liability would be proper if Turnipseed had merely lent the automobile to Steven. They cited with approval the case of Estes v. Gibson, 257 S.W. 604, 607 (Ky. 1953) for the proposition that the doctrine of negligent entrustment should not be extended to a situation where the parties charged have no control over the machine. The Estes case arose in the state of Kentucky, where an automobile was not considered a dangerous instrumentality. It also arose under the original version of Restatement Section 390, which did not apply to a sale. What is applicable to the case at bar is the dissent of Judge Duncan, which declares:

> 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.

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The words of Judge Duncan ring true in the circumstances of this case. Here was a youth with an ongoing problem with alcohol and drugs. By contrast to Potamkin, there was a long-standing relationship between Steven and the Turnipseeds that provided the latter with ample opportunity to recognize Steven's disabilities. If it was dangerous to provide the boy with a car on a single occasion, it was that much more dangerous to provide him with a car to drive at will. 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. See Ritchie v. Old Republic Insurance Company, Broward Circuit Case No. 82-11541 (case subsequently settled). In fact, it took only five days for Steven to cause the very injury that was predictable, given the knowledge of Steven's propensities.

The transaction between Steven Rinker and Joseph Turnipseed was not an "arm's length transaction." Turnipseed was aware that Steven Rinker was legally emancipated and had no one else to look to for guidance or assistance. Turnipseed knew of the boy's propensities. Turnipseed knew that the boy desperately wanted to have his own car. From all of this knowledge there arose a duty on the part of Turnipseed that arose prior to transferring the automobile. That duty was not created "from the air." Robertson v.Deak Perera (Miami), Inc., 396 So.2d 749 (Fla. 3d DCA), review denied, 407 So.2d 1105 (Fla. 1981). Knowledge is one of the factors considered by Florida courts in determining whether a duty exists, which, when

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breached, gives rise to a cause of action in negligence. See Life Insurance Company of Georgia v. Lopez, 443 So.2d 941 (Fla. 1983) (seller of insurance has duty to investigate where it has actual knowledge of beneficiary's murderous intentions to its insured); Kolosky v. Winn Dixie Stores, Inc., 472 So.2d 891 (Fla. 4th DCA 1985) (business has duty to maintain store in reasonably safe condition where it knew or should have known of dangerous condition created by boys playing in its store), rev. den., 482 So.2d 350 (Fla. 1986); Noel v. M. Ecker & Co., 445 So.2d 1142 (Fla. 4th DCA 1984) (supplier of equipment owes duty to warn and to provide safety protection to user if it has actual constructive knowledge that equipment is likely to be dangerous for use supplied); Hofmann v. Blackmon, 241 So.2d 752 (Fla. 4th DCA 1970) (physician has duty to use reasonable care to advise and warn members of patient's family of existence of disease once physician knows of patient's contagious disease), cert. den., 245 So.2d 257 (Fla. 1971); Peeler v. Independent Life & Accident Insurance Co., 206 So.2d 34 (Fla. 3d DCA 1967) (cause of action in negligence stated where complaint alleged that insurance company knew or should have known that its doctor was not licensed in Florida and was committing illegal act.

The transaction between Steven Rinker and Joseph Turnipseed was not a commercial transaction. It might better be compared to a family affair. See Kahlenberg v. Goldstein, 431 A.2d 76 (Md. Ct. App. 1981). It is possible, but not necessary, to determine that

Turnipseed had a special duty resting on an in loco parentis relationship. See Nova University, Inc. v. Wagner, 491 So.2d 1116, (Fla. 1986). It is clear that Turnipseed's actual knowledge imposed upon him a duty to prevent injury both to Steven and to other persons riding on the roads and highways of the State of Florida.

The doctrine of negligent entrustment, as originally promulgated, served the purpose of extending liability to the owner of a car whose control was constructive at best. The time has come to extend liability to any seller who has actual knowledge of the danger he invites. The issue is not whether the law previously imposed a duty under these circumstances, but rather "whether the plaintiff's interests are entitled to legal protection against the defendant's conduct." See dissent of Chief Judge Schwartz in Robertson v. Deak Perera (Miami), Inc., 396 So.2d 750 (Fla. 3d DCA 1981). Juries can decide whether conduct is foreseeable and how far the liability should reasonably extend. This Court should decide that liability is permissible. In so deciding, this Court should quash the decision of the Third District Court of Appeal and reverse the summary judgment granted in the lower tribunal, returning this cause for a trial on the merits.

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CONCLUSION

Based on the facts, authorities and argument set forth above, it is respectfully submitted that this Court should adopt section 390 Restatement (Second) of the Law of Torts, construing that section to extend liability to sellers of the chattel, and should enter an order quashing the opinion of the Third District Court of Appeal remanding the cause for trial on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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