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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REPLY BRIEF OF PETITIONER CLARENCE JACKSON

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INTRODUCTION

Petitioner Clarence Jackson, joined by Petitioners Steven and Glenn Rinker, hereby replies to the Answer Briefs of Respondents Joseph and Barbara Turnipseed. 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.). Reference to the Appendix to Petitioner Jackson's Initial Brief will be designated by the symbol (A.) Reference to the Appendix to this Reply Brief will be designated by the symbol (RA.). All emphasis is supplied by the writer unless otherwise noted.

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POINTS ON APPEAL

I.

WHETHER SECTION 390 OF THE RESTATEMENT (SECOND) OF THE LAW OF TORTS (1966) SHOULD BE ADOPTED AS THE LAW OF THIS STATE BASED UPON THE FACTS OF THIS CASE

II.

WHETHER SECTION 390 OF THE RESTATEMENT (SECOND) OF THE LAW OF TORTS (1966) SHOULD BE CONSTRUED SO AS TO EXTEND LIABILITY TO A SELLER OF A CHATTEL AS WELL

III.

WHETHER ADOPTION OF SECTION 390 RESTATEMENT (SECOND) OF THE LAW OF TORTS (1966), CONSTRUING IT TO EXTEND LIABILITY TO A SELLER OF A CHATTEL AND APPLYING IT TO THE FACTS OF THIS CASE, VIOLATES PUBLIC POLICY OR ENCROACHES ON THE LEGISLATIVE PREROGATIVE

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ARGUMENT

I.

SECTION 390 OF THE RESTATEMENT (SECOND) OF THE LAW OF TORTS (1966) SHOULD BE ADOPTED AS THE LAW OF THIS STATE BASED UPON THE FACTS OF THIS CASE

In entering Summary Judgment on the theory that the doctrine of negligent sale does not exist in the State of Florida, the trial court ignored the fact that Petitioner pleaded a cause of action for negligent entrustment as well as negligent sale. Viewing the facts in the light most favorable to the Petitioner, Joseph Turnipseed and Barbara Turnipseed supplied the 1974 Grand Prix to Steven Rinker, knowing that because of his youth, immaturity, irresponsibility and addiction to drugs and alcohol, he would be likely to use the automobile in a manner involving unreasonable risk of harm to himself and others. Furthermore, there was neither a completed sale of the vehicle nor a bona fide transfer of title to Steven Rinker.

When Barbara Turnipseed, owner of the vehicle in question, visited Florida in December, 1982, she endorsed the title certificate and signed a blank bill of sale, with the understanding that her ex-husband, Joseph Turnipseed, would retain the title until the car was paid for. (S.111; S.124; S.136) Steven Rinker never paid off the car. (S.191-95) Although there was actual delivery of the car and tender and acceptance of the down payment, where the intention was to retain ownership until full payment, there was no completion

of the sale. Cf. Williams v. Davidson, 179 So.2d 387 (Fla. 1st DCA 1965) (in which intention of parties was such that the appellate court found a completed sale, thus relieving the defendant/seller of tort liability to pedestrian who was struck by buyer after taking delivery of the vehicle).

Joseph Turnipseed, as agent for Barbara Turnipseed, went to the tag agency with Steven on January 6, 1983, to transfer the title and obtain a new registration. Joseph Turnipseed persuaded a woman at the tag agency that the car was insured. He provided her with his own address, instead of Steven's. Turnipseed represented that the automobile was exempt from sales tax because it was a gift from Steven's stepmother. (RA.1-5) Joseph Turnipseed knew that Steven Rinker had no automobile insurance and no money to buy insurance; he knew that Steven had no stepmother and that Steven did not reside at 1070 Lugo Avenue in Coral Gables, Florida. Turnipseed knew that Steven did not qualify, under the laws of Florida, for a transfer of title in his name.

The title was issued on March 3, 1983, some three weeks after the accident giving rise to this litigation, based upon material misrepresentations. Section 319.22(2) declares an exemption from civil liability to an owner who has made a bona fide sale or transfer of a motor vehicle and has delivered the vehicle to the purchaser. Where there remains a question of the validity of the transfer, there remains also a question of civil liability. Viewing the facts in the light most favorable to the Petitioner, there exist material issues of fact precluding Summary Judgment on the issue of negligent entrustment.

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The doctrine of negligent entrustment has already been applied to the suppliers of automobiles and firearms under the case law in this state. See Clooney v. Geeting, 352 So.2d 1216 (Fla. 2d DCA 1978); 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). Section 390 of the Restatement (Second) of the Law of Torts (1966) is a codification of the doctrine of negligent entrustment. The Restatement has been cited with approval in Rio v. Minton, 291 So.2d 214 (Fla. 2d DCA 1974) (involving an earlier version) and in Mullins v. Harrel, 490 So.2d 1338 (Fla. 5th DCA 1986). The facts of this case lend themselves to the application of the doctrine of negligent entrustment and the adoption of Section 390 of the Restatement (Second) of the Law of Torts (1966) as the law of this state.

II.

SECTION 390 OF THE RESTATEMENT (SECOND) OF THE LAW OF TORTS (1966) SHOULD BE CONSTRUED SO AS TO EXTEND LIABILITY TO A SELLER OF A CHATTEL AS WELL

Appellees assert that there was a completed sale and/or bona fide transfer of title from Respondent Barbara Turnipseed to Steven Rinker. The evidence is conflicting with regard to the question of Barbara Turnipseed's knowledge of Steven Rinker's propensities. It is undisputed, however, that Joseph Turnipseed, acting as her agent, had actual knowledge that Steven Rinker was a minor; that he was emancipated; that his parents would not provide him with a vehicle;

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that he was a high school drop-out; that he had previously wrecked an automobile and a moped; that he was an alcoholic and a habitual drug abuser who had "copped out" of a rehabilitation program for addicts. Steven Rinker testified on deposition that he was high around Joseph Turnipseed "all the time." (S.164-65) Regardless of whether he staggered out of the tag agency on January 6, 1983, the evidence presented, and the inferences therefrom, reflect that Steven was incompetent to drive an automobile on that date or at any time in the near future.

The salesman at Vic Potamkin Chevrolet who sold the car to Nora Newry was engaged in an arm's-length transaction. He had no experience with Ms. Newry and his only knowledge of her competency to drive was that which he gained by observing her test drive the car on the premises. By contrast, Joseph Turnipseed had a long-standing relationship with Steven Rinker and extensive opportunity to observe Steven's incompetency. Turnipseed's actual knowledge of Steven's incompetency was sufficient to give rise to a duty to prevent harm to Steven and to others. Thus, Turnipseed was himself negligent not only in supplying the automobile, but he also in supplying the means to purchase the automobile. Turnipseed had the unique right to control the situation and that right to control existed prior to the transfer of the car. It existed by virtue of the fact that Turnipseed provided Steven with the ability to earn money; provided him with insurance and used his own address to obtain the new title. Turnipseed had the right to control and the duty to refrain. Failure to do so constitutes direct negligence on his own part. It was foreseeable that injury would occur, and so

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it did on the very first weekend that Steven had possession of the car, returning home from the very first party.

Assuming, without agreeing, that a completed sale and/or bona fide transfer occurred in this case, there is ample precedent for the application of the doctrine of negligent sale. That doctrine already exists by case law. See Angell v. F. Avanzini Lumber Co., 363 So.2d 571 (Fla. 2d DCA 1978). An automobile, like a rifle, is a dangerous instrumentality when in operation. See Southern Cotton Oil Co. v. Anderson, 80 Fla. 725, 86 So. 629 (1920). A youthful, immature alcoholic and drug addict is as incompetent as one exhibiting a mental defect. Thus, there should be no distinction between the liability of one who sells a rifle to an obviously deranged person, as in Angell, and one who sells an automobile to an obviously incompetent one. Neither should there be a valid distinction between lending, giving or selling an automobile to such an incompetent. In obtaining transfer of title to Steven Rinker, Joseph Turnipseed represented that the 1974 Grand Prix was a Christmas gift to Steven Rinker from his stepmother. (RA.1-5) Turnipseed represented that the boy resided in his house and was covered by his insurance. Liability of the Respondents is supportable under the rationale of Kahlenberg v. Goldstein, 431 A.2d 76 (Md. Ct. App. 1981) It is also supportable under the rationale of Johnson v. Casetta, 197 Cal. App.2d 272, 17 Cal. Reptr. 81 (1961).

The court's holding in Johnson v. Casetta does not turn upon the existence of a valid driver's license. Plaintiffs in Johnson did not claim that defendants knew that the driver (Medina) had no license. Id. at 83. Rather, they relied upon the dealer's actual

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knowledge of Medina's inability to drive. The Johnson opinion does not suggest any limitations of liability that would, if applied here, preclude recovery against the Respondents. Casetta delivered the car to Medina on July 1, 1956; the accident for which Johnson sought damages occurred on August 9, 1956, some six weeks later. Steven Rinker's accident took place only five days after delivery of his vehicle. The opinion in Johnson v. Casetta declares, at 83, that liability exists "as long as the original incompetence of the driver continues." A jury could find that Steven Rinker's incompetency ceased to exist some time prior to his deposition of May 15, 1985. Johnson v. Casetta, its antecedents and its progeny, rely upon considerations for the public safety that are no less urgent in Florida that in California.

Respondents rely upon the case of Tosh v. Scott, 472 N.E.2d 591 (Ill. App. 1984), in support of their argument that liability may not be predicated on the negligent sale of an automobile. At the time that Tosh was decided, no Illinois case dealt precisely with that cause of action. The facts in Tosh were uncontroverted that the father's sale to his adult son was a bona fide arm's-length transaction, as evidenced by a canceled check and a valid certificate of title. Furthermore, the son owned another vehicle, a van, and the decision as to which vehicle he would drive on the date of the accident was entirely within the son's discretion. On such facts, the Illinois appellate court refused to shift responsibility for the son's own acts to the father. By contrast to Tosh, Steven Rinker was a minor. He had no other vehicle. Both parents had refused to provide him with a vehicle. It was solely within

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Turnipseed's discretion to prevent the accident that occurred by refusing to facilitate the sale of the 1974 Grand Prix to Steven Rinker.

Rush v. Smitherman, 295 S.W.2d 873 (Tex. Civ. App. 1956), cited by Appellees, is likewise distinguishable. Rush was an action for wrongful death resulting from an automobile collision with an unlicensed driver who had contracted to purchase his automobile from the defendants. The decedent's survivors sued the defendants, sellers of the automobile, for damages. The court found a valid contract to sell. It found further that the sale of an automobile without transfer of the title certificate to the buyer does not defeat the purposes of the Texas Certificate of Title Act. Finding a completed sale and complete control and possession of the vehicle by its owner, the Texas appellate court refused to apply Restatement of Torts Section 390, which, at the time of its decision, applied only to negligent bailments. By contrast, Petitioner seeks application of Section 390 of the Restatement (Second), which applies to sales, gifts and bailments. Petitioner also seeks to establish liability on the part of the seller and her agent who procured a title through misrepresentation. The legislature has declared that a seller who validly transfers title shall henceforth be relieved of liability for torts involving the vehicle. A valid transfer involves proof of insurance. A valid transfer protects the public at all times. A finding of liability in the case at bar would support rather than defeat the purpose of the legislature in enacting Section 319.22, Florida Statutes.

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Appellees' reliance upon Brown v. Harkleroad, 39 Tenn. App. 657, 287 S.W.2d 92 (1955), is also misplaced. Brown was an appeal from a judgment against a father for the tortious acts of his adult son who was a habitually reckless and drunken driver. Brown, like Rush, was decided under the old Restatement which applied to situations of agency or bailment only. The court found that Brown had purchased the automobile as a gift for his son, who was sui juris. Title had validly passed to the son as donee. There was no evidence of a scheme to shield the father from liability. Responsibility for the accident, which occurred some four months after the transfer of title, could not be founded upon Section 390 of the Restatement of Torts. The automobile was not considered a dangerous instrumentality in Tennessee. By contrast, Steven Rinker was a minor at the time that he took possession of the 1974 Pontiac Grand Prix from Joseph Turnipseed. Regardless of whether title had actually transferred, it is clear that the transfer was sought in order to avoid any potential liability on the part of the sellers. The automobile is a dangerous instrumentality in the State of Florida. Appellant seeks adoption of Section 390, Restatement of Torts (Second), which applies to sales, gifts, and bailment.

Estes v. Gibson, 257 S.W.2d 604 (Ky. 1953), also involved a gift of an auto to an adult son known to be inebriate and a drug addict. The son had valid title to the car. An automobile is not a dangerous instrumentality in Kentucky. Estes was also decided under the old Restatement, which was limited in application to agency and bailment situations. Finally, the court found there was sufficient lapse of time and intervening factors or events which

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precluded the mother's responsibility for the son's neligent operation of the automobile. The court, in dictum, declared:

> If, however, at the time of delivery and possession and control, the receiving party was by reason of intoxication or other cause incapacitated from driving the machine with reasonable safety to the public, a different rule would apply.

A different rule must apply in the case at bar. Joseph and Barbara Turnipseed provided an automobile, a dangerous instrumentality while in operation, to Steven, knowing that he was a habitual alcoholic and drug addict at that time and that he liked to drive cars while intoxicated. (S.169-70; 203) There was no significant lapse of time between Steven's taking possession of the car and the accident that gave rise to this litigation. There were no intervening factors or events. The car was taken on a week day; the accident occurred the following weekend. A jury could find that it was foreseeable that a teenager with Steven's propensities would become involved in an accident on the first weekend after he acquired his automobile on coming home from the first party.

Other cases cited by Appellee are distinguishable for a variety of reasons. In Pugmire Lincoln Mercury, Inc. v. Sorrells, 236 S.E.2d 113 (Ga. 1977), the court refused to find an automobile dealer liable for negligent entrustment of an automobile. The court reversed a judgment entered upon verdict against the defendant automobile dealer, finding an absence of any evidence that the vehicle was "entrusted" with actual knowledge of the intended driver's incompetence. The court did not determine whether the evidence showed a "sale" and whether that "sale" is an entrustment. Significantly, in an addendum

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to the Pugmire opinion, Presiding Judge Deen declared:

> I would go further in this case and decide whether or not the "negligent sale" of an automobile amounts to a "negligent entrustment" thereof; ...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 the driver's negligence bodily harm or death results, the supplier may be held liable in tort. Under this analysis, Pugmire could be liable even if there were in fact a "sale" of the Ford, if the sale were made with actual knowledge of Worley's incompetence to operate the vehicle through intoxication...

American Mutual Fire Insurance Company v. Passmore, 274 S.E.2d 416 (S.C. 1981) was a declaratory judgment action brought to determine liability insurance coverage. The court found that the defendant, the named insured, did not have an insurable interest, as required for liability coverage. In Connell v. Carl's Air Conditioning, 634 P.2d 673 (Nev. 1981), the court found that the doctrine of negligent entrustment did not extend to an employer who had neither entrusted nor sold a vehicle to his employee, but had only facilitated the purchase by financing.

Finally, Mills v. Continental Parking Corp., 475 P.2d 673 (Nev. 1970), is a wrongful death action brought by the heirs of a pedestrian who was killed by a drunken driver. The heirs sued the owner of a parking lot which released the vehicle knowing that the driver was intoxicated. Mills does not involve a claim for negligent sale. The Nevada Supreme Court found that the negligent entrustment theory of tort liability did not apply either, since the bailee was duty-bound to surrender control of the car to the

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bailor upon demand or suffer a possible penalty for conversion. The crux of the Mills case is that the parking lot operator had no right to control the automobile at any time. The imposition of civil liability in the circumstances of the Mills case would indeed lead to unforeseeable consequences, limited only by the scope of one's imagination. The Mills court declined to venture in that wonderland. No such problem exists in the case at bar.

Appellant Clarence Jackson seeks adoption of the doctrine of negligent sale as recognized in Section 390 of the Restatement of Torts (Second). Under that doctrine, Appellees would be liable to Appellant for selling an automobile to Steven Rinker with actual knowledge that he would use it in a manner involving an unreasonable risk of harm to himself and others. There is no danger in adopting this doctrine so long as there is knowledge, foreseeability and the absence of an intervening efficient cause. There is no venture into a wonderland of limitless liability where, as here, the supplier of the automobile had the right to control and the power to refrain. Nothing in the case of Mills v. Continental Parking Company precludes the granting of the relief sought by Petitioner here.

III.

ADOPTION OF SECTION 390 RESTATEMENT (SECOND) OF THE LAW OF TORTS (1966), CONSTRUING IT TO EXTEND LIABILITY TO A SELLER OF A CHATTEL AND APPLYING IT TO THE FACTS OF THIS CASE, VIOLATES PUBLIC POLICY OR ENCROACHES ON THE LEGISLATIVE PREROGATIVE

A motor vehicle operated on the public highways is a dangerous

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instrumentality. Southern Cotton Oil Co. v. Anderson. 80 Fla. 725, 86 So. 629 (1920). The issue in Southern Cotton Oil was the responsibility of the master for the negligence of his servant. Resolving the issue in favor of vicarious liability, this Court declared, at 631:

> This responsibility must be measured by the obligation resting on the master or owner of an instrumentality that is peculiarly dangerous in its operation, when he entrusts it to another to operate on the public highways.
>
> The rule is not a new one, and, far from being the enunciation of "a judicial statute," as intimated by counsel for plaintiff in error, it is but the application of an old and well-settled principle to new conditions...

This Court took judicial notice of the reports of the National Safety Council and the United States Census Bureau, which placed the number of deaths from automobile accidents in 1918 at 7,525. It further acknowledged the existing Florida statutes requiring motor vehicles to be registered and maintained in good working order. Having observed the reality of the situation, and the legislature's existing response to the matter, this Court declared that the liability of an owner of a vehicle is not limited to the negligence of an employee of the owner while acting within the scope of his employment, but extends to the negligence of anyone who uses such instrumentality upon the public highways with the authority or permission of the owner. Thus, in an effort to protect the public from the increasing dangers posed by negligent driving, this Court developed a theory of "right to control."

The statistics on automobile accidents and fatalities have risen dramatically since 1918. The requirements for registration,

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licensing and insurance continue to represent a legislative intent to protect injured parties from insolvent drivers. The doctrine of negligent entrustment, already a part of the case law in this state, extended liability directly to the owner of a vehicle in cases not involving a master-servant relationship. That doctrine satisfies the same legislative intent that was espoused by this Court in Southern Cotton Oil. That doctrine bases liability on the concept of "right to control." Such concept is nothing more than a legal fiction. Adoption of Section 390 Restatement of Torts (Second) and extending liability to a seller satisfies the same public necessity and coincides with the same legislative purpose as expressed in such statutes as Section 319.22. Furthermore, it imposes liability for direct negligence.

Appellees ask this Court to engage in speculation regarding the ultimate limits to which tort liability may extend in the future. Petitioners ask the Court to recognize the facts as they exist today. Those facts are that more and more cars are on the road, requiring more and more protection for injured persons. The legislature has already authorized protection; so has this Court. A master cannot shift responsibility to a servant in order to escape liability, Southern Cotton Oil, and a lessor cannot escape liability by shifting responsibility to a lessee. See Susco Car Rental System of Florida v. Leonard, 112 So.2d 832 (Fla. 1959). It follows logically that an owner should not be permitted to escape liability by transferring a vehicle to a driver who he knows to be incompetent.

Holding Respondents liable under the particular circumstances

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found in this case would not open the floodgates of litigation to all sellers of dangerous instrumentalities. The majority of sellers are not aware of the buyer's incompetence. Adopting Section 390 would only hold responsible those people who, despite their knowledge of a person's incompetence, nevertheless negligently provide him with a chattel capable of causing injury. Adoption of Section 390, and construing it to extend liability to the sellers of a chattel, comports with long-established principle of public policy as reflected in in numerous enactments of the legislature and the decisions of this Court.

CONCLUSION

Viewing this record in the light most favorable to Petitioner, it is clear that Summary Judgment was improperly entered against him. There exist material issues of fact relevant to the question of whether Respondents negligently entrusted or sold the vehicle in question to Steven Rinker. Based upon the facts, authorities and arguments 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 applying it to the case at bar. This Court should quash the decision of the Third District Court of Appeal and reverse the Summary Judgment granted in the lower tribunal, returning the cause for trial on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Petitioner Clarence Jackson was mailed this 14th day of September, 1987, to the following counsel of record:

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