IN THE SUPREME COURT OF FLORIDA

CASE NO. 80,786
Florida Bar No: 184170

SAMUEL FRIEDLAND FAMILY ENTERPRISES, d/b/a THE DIPLOMAT HOTEL, INC., DIPLOMAT HOTEL, INC., BILL'S SUNRISE BOAT RENTALS-SUNRISE WATER SPORTS, INC., SUNRISE WATER SPORTS, INC., WILLIAM THORLA, et al.,

Petitioners,

vs.

PAULA AMOROSO and ROBERT AMOROSO, her husband,

Respondents.

ON PETITION FOR DISCRETIONARY REVIEW FROM THE FOURTH DISTRICT COURT OF APPEAL OF FLORIDA

BRIEF OF PETITIONERS ON THE MERITS

SAMUEL FRIEDLAND FAMILY ENTERPRISES, d/b/a THE DIPLOMAT HOTEL, INC., DIPLOMAT HOTEL, INC., BILL'S SUNRISE BOAT RENTALS-SUNRISE WATER SPORTS, INC., SUNRISE WATER SPORTS, INC., and WILLIAM THORLA

(With Appendix)

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TABLE OF CITATIONS

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POINTS ON APPEAL

I. THE TRIAL COURT CORRECTLY ENTERED A DIRECTED VERDICT ON MRS. AMOROSO'S CLAIM OF STRICT LIABILITY AGAINST THE DIPLOMAT AND SUNRISE.

II. THE TRIAL COURT CORRECTLY DIRECTED A VERDICT ON THE PLAINTIFF'S CLAIM OF BREACH OF IMPLIED WARRANTY; AND THERE WAS NO LEGAL BASIS FOR THE FOURTH DISTRICT TO HOLD IMPLIED WARRANTY OF FITNESS FOR ORDINARY USE IS AVAILABLE IN A LEASE TRANSACTION FOR THE FIRST TIME IN FLORIDA.

III. THE TRIAL COURT CORRECTLY DIRECTED A VERDICT IN FAVOR OF THE DIPLOMAT AND SUNRISE ON THE ISSUE OF NEGLIGENCE.

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INTRODUCTION

The Petitioners/Defendants, Samuel Friedland Family Enterprises d/b/a the Diplomat Hotel, Inc., a Florida Corporation, will be referred to as The Diplomat; Sunrise Water, Inc., a Florida Corporation; Bill's Sunrise Boat Rentals-Sunrise Water Sports, Inc., A Florida Corporation and William Thoral, as the last known Director and Officer of Sunrise Water Sports, Inc., will be referred to in the singular as Sunrise.

The Respondent/Plaintiff, Paula Amoroso, will be referred to by name or as Plaintiff. Robert Amoroso, her husband, will be referred to by name.

The Defendant, Atlantic Sailing Center, Inc., a Florida Corporation, will be referred to as Atlantic Sailing.

The Defendants, Robin Rhodenbaugh, Rhodenbaugh's Sheet Metal Repairs, Inc. and Florida Insurance Guaranty Association, will be referred to collectively in the singular as Rhodenbaugh.

For purposes of continuity and ease of reference the Trial Transcript which appears in the Record at 1 to 758 will be designated by the letter "T" followed by the day of trial and the page number.

All references to the Complaint will be to the Sixth Amended Complaint appearing in the Record at 1376 to 1413.

All emphasis in the Brief is that of the writer unless otherwise indicated.

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STATEMENT OF THE FACTS AND CASE

Overview of Trial

The Plaintiff conceded below that this was simply a negligence case, involving a broken sailboat mast. The Diplomat Hotel rented some beach area to Sunrise, who leased it to Atlantic Sailing, who rented a sailboat to the Plaintiff. The Fourth District held that the Hotel was strictly liable; but this has never been nor should be the law in Florida.

The Plaintiff went after the deep pocket of the Diplomat Hotel, by mixing and matching all types of product liability causes of action against the Defendants. The two main parties involved; the welder, who repaired the mast, and Atlantic Sailing, which had the mast repaired and rented the boat to the Plaintiff; received Directed Verdicts in their favor; which were affirmed on appeal. Amoroso v. Samuel Friedland Family Enterprises, 17 FLW D889 (Fla. 4th DCA, April 8, 1992), Rehearing Denied, 17 FLW D2348 (Fla. 4th DCA, October 14, 1992).

In reversing the other Directed Verdicts for the remaining Defendants, the Fourth District took it upon itself to adopt new law in Florida, imposing strict liability on all commercial lessors, in conflict with existing law from this Court. It later certified the case to this Court, for approval of its vast and unnecessary expansion of liability. Even if the Court does approve the Fourth District's new theories of liability, they do not apply to the Diplomat Hotel, which is in the business of renting rooms, not sailboats.

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The trial court went to great lengths to allow the Plaintiff to prove up her claim against the Defendants, that she was injured by a "defective" Hobie Cat sailboat. However, after putting on her case-in-chief for a week, the Plaintiff simply established that an accident occurred and that her husband was negligent in his handling of the sailboat. The direct evidence presented by the Plaintiff was simply that Atlantic Sailing had a Hobie Cat with a side bar that had a crack in it. Atlantic Sailing took it to a professional welder, Rhodenbaugh, who repaired the aluminum side bar. Plaintiff's husband rented the same exact sailboat on three separate occasions, after it was repaired and he was aware of the repair. On the third occasion he executed what is known as an uncontrolled jibe; which is simply that the boat is brought around too quickly into the wind and the mast whips across the bow of the sailboat, putting stress on all the parts and the side bar cracked in a different spot. Mrs. Amoroso was allegedly injured, when the mast came loose as a result of the crack in the side bar and it fell into the water.

In her case-in-chief, Mrs. Amoroso presented expert testimony that instead of welding the side bar, the professional welder, who had been hired by and paid by Atlantic Sailing, should have told Atlantic Sailing to replace the side bar, instead of having it welded. No evidence was presented by the Plaintiff that the weld itself was improper or defective or that the weld caused the accident. Furthermore, it was undisputed that the crack in the side bar was not where the side bar had

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been repaired. No evidence was presented on negligent maintenance. The bottom line to the Plaintiff's case-in-chief was that Rhodenbaugh, the professional welder, should have known to replace the side bar and that he should have told Atlantic, who should have told Sunrise, who should have told the Diplomat Hotel. Since none of those things happened the Plaintiff said all of the Defendants were liable.

Since the only negligence that was established in the Plaintiff's case-in-chief was that of Mr. Amoroso in his improper sailing of the boat, namely performing an uncontrolled jibe, which caused the extra stress on the side bar, Directed Verdicts were entered in favor of all the Defendants; half of which were reversed by the Fourth District.

Specific Facts

Around 1981, Sunrise bought six sailboats from Portech, including two 14 foot Hobie Cats (T III, 102-105). Sunrise then entered into a lease with the Diplomat Hotel, allowing it to rent the Hobie Cats from a small shack on the Diplomat's beach property (T III, 102-105). The shack said Sunrise Water Sports, Inc. (T III, 102). Sunrise in turn subleased its beach site concession to Atlantic Sailing, which rented boats to anyone who was interested (T III, 136-139). Atlantic Sailing was a sublessee for approximately two years prior to Mrs. Amoroso's accident (T III, 117).

In the early part of July, 1983, two years after Sunrise bought the sailboats and subleased its concession to rent the

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sailboats to Atlantic, one of the side bars on a 14 foot Hobie Cat became partially cracked. Atlantic Sailing took the six foot aluminum side bar to Rhodenbaugh, a professional welder, to have it fixed (T III, 50). Rhodenbaugh had previously repaired the Hobie Cats for Atlantic, but never did any work for Sunrise, the boat owner, nor the Diplomat Hotel (T III, 83-84). Rhodenbaugh never told Mr. Harrison of Atlantic Sailing to replace the crossbar (T III, 54). Rhodenbaugh felt it was a good strong weld (T III, 69).

Approximately ten days later, Mr. and Mrs. Amoroso arrived at the Diplomat Hotel for a Teamsters' Union Convention (T IV, 13). Apparently the Plaintiff's husband owned a ten foot Sunfish which he sailed on weekends on a lake near their home in New Hampshire (T III, 13-14; 219). Mr. Amoroso subsequently rented the 14 foot Hobie Cat from Jim Harrison of Atlantic Sailing and used it twice without any incident (T IV, 235, 237).

The Hobie Cat was a Tequila Sunrise model, containing the Hobie Cat colors and logo (T IV, 235). Mr. Harrison of Atlantic Sailing instructed Mr. Amoroso regarding the rules about staying within 300 yards off shore, not to come too close to shore; and if he felt uneasy or uncertain about going out on the Hobie Cat Mr. Harrison would go with him, but Amoroso felt that was not necessary (T IV, 143). Mr. Amoroso then inspected the boats, looked at the two fourteen foot Hobie Cats, picked out the welded spot on one and asked about it. Harrison told him that it had been repaired (T IV, 143-145). Harrison told Amoroso that he

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could use the other 14 foot Hobie Cat, that had not been repaired, but Amoroso returned the following day specifically asking to rent that particular Hobie Cat (T IV, 145-146). Mr. Amoroso signed a contract for the rental of the boat with Atlantic Sailing (T IV, 147-150).

Amoroso and his wife went sailing for approximately an hour on the first day, after Mr. Amoroso refused to let Harrison take him for a test sail; since he was confident that he knew what he was doing (T IV, 152). Amoroso had no problem with the boat and a few days later Mr. Amoroso came down and rented the exact same boat again, because he felt good about it and had no problems with it (T IV, 153-154). This time Amoroso took out a friend, Muriel Hankcard, again sailing for approximately an hour (T IV, 257). Harrison observed Amoroso sailing and that he was not doing anything improper and seemed to know what he was doing (T IV, 156-157).

The third time Amoroso rented the exact same repaired boat from Atlantic Sailing. He again took out Mrs. Amoroso, who was quite nervous and hesitant, but he was insistent on her sailing with him (T IV, 34; 158). Harrison told Mr. Amoroso not to jibe the boat that day, as it was windier than before; because he did not want Mrs. Amoroso to get hit in the head with the boom swinging back and forth; and because she was a big woman (T IV, 159). After sailing out for a few minutes, apparently Amoroso began uncontrolled jibes, which caused the boom to whip around to the other side of the boat (which could not only hurt

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someone, but could also cause rigging damage)(T IV, 171-172). During the time Amoroso was sailing the 14 foot catamaran the side bar cracked approximately an inch and a half away from the outside portion where it had been welded; which ultimately caused the mast to come loose and allegedly hit Mrs. Amoroso on her neck and shoulder, as she was lying down holding on to the mast with her right hand (T IV, 21-11). Mrs. Amoroso claimed that she put her hands over her head but still got hit on the neck and entangled in the wires and sail (T IV, 24).

After the boat drifted ashore, Amoroso came up to Harrison at the rental shack, told him everything was fine, but that his wife might have been hit in the head (T III, 146). Harrison responded that he saw the mast go down, but his wife was not anywhere near it and her head was not near it (T III, 146). Amoroso then stated that perhaps a wire touched her shoulder instead (T III, 146). Later on in the day, Amoroso came down with another gentleman to take photographs of the crossbar, stating it was possible that he could make some money out of this and the other gentleman responded that it was the Diplomat they should go for it (T III, 147). Amoroso then told Harrison of Atlantic, "Don't worry. We are not going after you, kid" (T III, 148).

Four years later Mrs. Amoroso filed a Complaint against an assortment of Defendants, including the Diplomat and Sunrise (R 759, 761). Mrs. Amoroso's Sixth Amended Complaint brought product liability actions against the Hotel for negligence,

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breach of warranty and strict liability, claiming that the Hotel was liable because of the acts of its actual or apparent agents, Sunrise and Atlantic Sailing (R 1376-1413). Basically, Mrs. Amoroso's Complaint alleged that the Hotel was negligent, through Sunrise and Atlantic for renting the Hobie Cat with a defective mast and by failing to inspect, maintain and repair the Hobie Cat and by failing to provide warnings of the defective mast to the Plaintiffs. Mr. Amoroso only brought a derivative claim for loss of consortium (R 1376-1413). Mrs. Amoroso's suit against the Diplomat for strict liability and breach of implied warranty claimed that the Hotel was liable through the acts of its agents, Sunrise and Atlantic Sailing (R 1376-1413).

After long and careful consideration by the trial court, Directed Verdicts were entered in favor of all the Defendants, as no evidence whatsoever was presented to support any of the counts of the Complaint against the various Defendants (T IV, 2, 66-331; DV 3-25 [R 47-72]).

On appeal, the Fourth District affirmed the Directed Verdicts against the renter of the sailboat, Atlantic Sailing; and the repairer of the sailboat, Rhodenbaugh. Amoroso, D890; D892. In affirming the Directed Verdict for the welder, the Appellate Court held that he had no duty to tell Atlantic, that hired him; that the crossbar should be replaced and not repaired. Amoroso, D890. However, in the opinion, the Court also found that the negligence count could go forward against the Diplomat and Sunrise; apparently, on the testimony of the welder, that the

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repair could have weakened the crossbar, rendering it "defective." Amoroso, D889; D891-892.

More importantly, the Appellate Court held that the Hotel and the owner/renter of the six sailboats were "commercial lessors;" and could be liable under the theories of breach of implied warranty of merchantability and strict liability; just like manufacturers and retailers in products liability law. Amoroso, D890-891.

The Defendants moved for Rehearing on the basis that these product liability theories had never been applied to a Hotel and owner of six sailboats, and it was not up to the Fourth District to adopt this new law. Rehearing was denied, but the Court certified the question regarding commercial lessors being held strictly liable. Amoroso, D2348. In his dissent, Judge Letts, agreed that any change in the law was up to this Court; but that regardless of what this Court adopted, these product liability theories were not meant to apply to the Diplomat Hotel. Amoroso, D2348-2349.

The Defendants petitioned this Court for review, as there is no legal or public policy reason to expand products liability law to all commercial lessors, to make them strictly liable; and no basis whatsoever to find that the Hotel and the owner/renter of six small sailboats are "commercial lessors," equivalent to manufacturers, retailers and sellers, as envisioned by the Restatement and standard Florida products liability law.

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SUMMARY OF ARGUMENT

The Plaintiff conceded below that this was simply a negligence case, involving a broken sailboat mast. The Diplomat Hotel rented some beach area to Sunrise, who leased it to Atlantic Sailing, who rented a sailboat to the Plaintiff. The Fourth District held that the Hotel was strictly liable; but this has never been nor should be the law in Florida.

The reason that strict liability and products liability exists is to impose on the entity, who makes the product or puts it in the channels of trade, the cost of injuries or damages caused by those products. That is because those entities have the knowledge, ability, and resources to examine these products to ensure that they are safe, to design them safely, to inspect them, etc. Clearly, there is nothing in the Restatement or this Court's decision in West, which would impose on a hotel the duty to inspect or insure the safety of a small sailboat; rented by an entity, which simply rents beach property from the hotel. To hold that every person or business that rents anything in Florida is a commercial lessor and therefore, subject to the doctrine of strict liability, serves no public policy purpose whatsoever. Parties like the Diplomat Hotel have no expertise in the inspection and repair of products like the rented sailboat; they use independent contractors like Rhodenbaugh. In contrast to the Diplomat, lessors like Ryder Truck Rental, or Hertz, which are mass dealers in chattels of a specific type, do have the financial ability, the technical ability, and the opportunity to

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inspect the products that they lease to insure their safety. It is these commercial lessors that have been traditionally held liable under the doctrine of strict liability or breach of implied warranty. Johnson; West; infra.

It is important to remember that strict liability means negligence as a matter of law, or negligence per se; the effect of which is to remove the burden from the user of proving any specific acts of negligence. West, infra. To hold every person in Florida who rents any product to this high standard is an astronomical increase in liability in Florida, and certainly not one envisioned by this Court in its decision in West.

The decision in West makes it clear that it is the manufacturer or seller that is engaged in the business of selling such a product that is held to the standard of strict liability, because it is that entity which has control over the product and has the duty to see that it is reasonably safe; knowing that the product is going to be used without inspection. West, infra. Clearly, the Diplomat Hotel did not put any sailboats into the stream of commerce, did not manufacturer or design any sailboats, has no expertise in sailboats, would not be able to detect any defects in a sailboat, and is not a manufacturer or seller, retailer or distributor of sailboats. Furthermore, the fact that the Diplomat rented a small beach area to Sunrise, who subleased it to Atlantic, who rented a sailboat to the Plaintiff, does not in anyway shape or form render the Hotel a "commercial lessor" of sailboats, sufficient to impose any products liability upon the

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Hotel.

It is respectfully submitted that the Fourth District's decision below must be reversed; that this Court hold that there is no extension of strict liability to every commercial lessor; or to limit such an imposition of strict liability to those businesses which are mass dealers in the product in question. Regardless of how this Court rules on the issue of strict liability and its application to commercial lessors, the opinion below still must be reversed; as the Diplomat Hotel and Sunrise do not fall into any category sufficient to find that either is a "commercial lessor" whose business falls within the distributive chain of small Hobie Cat boats or are mass dealers in small Hobie Cat boats. The Fourth District's opinion regarding the Petitioners in this case must be reversed and the Directed Verdicts affirmed in favor of the Diplomat and Sunrise.

The Fourth District held that the implied Johnson warranty of merchantability applied to fitness for ordinary use. While the court claimed that no public policy reason was given to limit this expansion of liability, it over looked the fact that before Amoroso no such common law implied warranty of fitness for ordinary use ever existed in any lease transaction. The public policy reason for not expanding the implied warranty in Florida is that this liability will put the ordinary small commercial lessor out of business; who from time to time rents lawnmowers, weed eaters, or even sailboats, and who must now guarantee/insure their use.

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A critical factor in Mrs. Amoroso's case was that the evidence of negligence for failure to replace the crossbar went only to Rhodenbaugh, the independent contractor/welder. The Fourth District glossed over this to avoid the clear law that the Defendants were not liable for the negligence of an independent contractor. The court simply stated: "evidence was presented that there was negligence in failing to replace the crossbar." Amoroso, D891. The Fourth District ignores the welder's status and held the hotel and boat owner liable. This bizarre result is even more anomalous, since the Directed Verdict in favor of the welder for no negligent repair and finding no duty to tell Atlantic to replace the crossbar was affirmed by the Fourth District. Amoroso, D892.

In the absence of any evidence of any negligence on the part of the Diplomat and Sunrise, the Directed Verdicts in their favor should have been affirmed.

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I. THE TRIAL COURT CORRECTLY ENTERED A DIRECTED VERDICT ON MRS. AMOROSO'S CLAIM OF STRICT LIABILITY AGAINST THE DIPLOMAT AND SUNRISE.

This case is basically a negligence action, which both the Plaintiff and the Fourth District Court of Appeal have turned into a massive products liability morass. In doing so, the Fourth District has adopted two new theories of liability to be imposed against commercial lessors. It then went one step further and held that a hotel, whose business it is to rent rooms, was a "commercial lessor" of a small sailboat; and therefore, could be held strictly liable, and liable for breach of implied warranty of merchantability. This has never been the law in Florida, nor should it be; since there is absolutely no legal or public policy reason to adopt and apply these vast new theories of liability to every commercial lease transaction in the State. This would mean that every small business which rents a lawnmower, weed eater, etc., would be strictly liable for those products. The end result of this is that all these mom and pop companies will be out of business in no time; which is why strict liability has always been limited, when applied, to mass dealers in chattels.

Furthermore, even if this Court were to adopt the two new theories, as applied to commercial lessors, the Diplomat and Sunrise simply do not fit into those categories, and therefore the Directed Verdicts on these counts must be affirmed in their favor.

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The Diplomat Hotel rented an area of its beach to Sunrise. Sunrise had a little shack on this area of the beach that said Sunrise Water Sports, Inc. Sunrise in turn subleased the shack to Atlantic Sailing, who was in charge of renting six small Hobie Cats owned by Sunrise. Atlantic Sailing rented these boats to anybody who chose to use them.

In the case below, the Plaintiff's husband examined the Hobie Cats and picked one that had a crossbar that had previously contained a partial crack, which had been welded. Aware of the repair to the boat, Mr. Amoroso rented the sailboat on three separate occasions without incident. On the fourth occasion, Mr. Amoroso executed an uncontrolled jibe and ultimately the crossbar cracked; which caused the mast to pop out of the device holding it, and the mast fell over into the water. Mrs. Amoroso, who was laying down on the catamaran, claimed that went the mast popped out that somehow she was injured by it.

Having proven no theory of liability against any of the Defendants at trial, the judge entered seven Directed Verdicts in favor of the Defendants. The Directed Verdicts in favor of the renter, Atlantic Sailing, was affirmed, as well as the Directed Verdict for the repairer, Rhodenbaugh, the welder. Therefore, the two parties which were alleged to be actively negligent were released from all liability by Directed Verdicts, which were affirmed on appeal. Amoroso, supra.

Sunrise was left in the lawsuit as the principle for Atlantic and therefore, vicariously liable for any derelictions

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on the part of Atlantic. Amoroso, D890. The Fourth District then went on to hold that the Diplomat Hotel and Sunrise were commercial lessors and therefore, strictly liable for the defective sailboat, and were liable under the breach of implied warranty of merchantability or fitness for ordinary use. Amoroso, D890-891.

In holding the Hotel and Sunrise liable under the theory of strict liability, the Court announced that it was adopting this theory for the first time in Florida, to hold all commercial lessors strictly liable for any product they lease or rent under any circumstances. The Fourth District found that since Sunrise and Diplomat were in the chain of distribution of the product, the Hobie Cat sailboat, that strict liability extended to them as commercial lessors. Amoroso, D891. Therefore, the Fourth District held that not only was the Diplomat and Sunrise strictly liable under the newly adopted doctrine of strict liability, but the doctrine applied to every commercial lease transaction in Florida as well. Amoroso, D891.

Apparently, the Fourth District did not take into consideration the effect of this vast increase in liability in Florida. For example, a homeowner, who goes to his local mom and pop hardware store to rent a lawnmower or edger, can now bring a suit in strict liability, or implied warranty of fitness for ordinary use, against the hardware store, if the lawnmower or weed eater is defective and causes an injury to him. The ordinary mom and pop store or operation does not have the ability

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to do the inspections, to guarantee the safety of the product as does the manufacturer, the seller, the retailer, etc. Under current Florida law, the standard negligence causes of action are more than adequate to allow plaintiffs to recover from injuries that they suffer, like the weed eater smacking their toe. Clearly, to impose liability at this level, such as mom and pop hardware stores and renters of six sailboats, was not envisioned by the holding in West v. Caterpillar Tractor Company, Inc., 336 So.2d 80 (Fla. 1976); which was that "a manufacturer may be held liable under the theory of strict liability and tort."

Furthermore, there is nothing in West or any other case cited by the Fourth District in Amoroso, that allows or provides authority for holding that the Hotel, which is in the business of renting rooms, somehow is magically transformed into a commercial lessor, subject to strict liability and breach of implied warranties, when it rents a section of its beach to an owner of six small Hobie Cats, who rents those Hobie Cats to anyone who chooses to use them. Clearly, this is not the situation of one who is a mass dealer in chattels, as envisioned under Restatement in Florida law. W.E. Johnson Equipment Co. v. United Airlines, Inc., 238 So.2d 98 (Fla. 1970); see also, Futch v. Ryder Truck Rental, Inc., 391 So.2d 808 (Fla. 5th DCA 1980).

The reason that strict liability and products liability exists is to impose on the entity, who makes the product or puts it in the channels of trade, the cost of injuries or damages caused by those products. That is because those entities have

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the knowledge, ability, and resources to examine these products to ensure that they are safe, to design them safely, to inspect them, etc. Clearly, there is nothing in the Restatement or this Court's decision in West, which would impose on a hotel the duty to inspect or insure the safety of a small sailboat; rented by an entity, which simply rents beach property from the hotel. To hold that every person or business that rents anything in Florida is a commercial lessor and therefore, subject to the doctrine of strict liability, serves no public policy purpose whatsoever. Parties like the Diplomat Hotel have no expertise in the inspection and repair of products like the rented sailboat; they use independent contractors like Rhodenbaugh. In contrast to the Diplomat, lessors like Ryder Truck Rental, or Hertz, which are a mass dealers in chattels of a specific type, do have the financial ability, the technical ability, and the opportunity to inspect the products that they lease to insure their safety. It is these commercial lessors that have been traditionally held liable under the doctrine of strict liability or breach of implied warranty. Johnson; West; supra.

It is important to remember that strict liability means negligence as a matter of law, or negligence per se; the effect of which is to remove the burden from the user of proving any specific acts of negligence. West, supra. To hold every person in Florida who rents any product to this high standard is an astronomical increase in liability in Florida, and certainly not one envisioned by this Court in its decision in West.

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In West, this Court adopted the Restatement (Second) products liability:

> Restatement (Second) of Torts §402 A:
>
> "(1) One who sells any product in a defective condition unreasonably dangerous to the user of consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> "(a) the seller is engaged in the business of selling such a product, and
>
> "(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> "(2) The rule stated in Subsection (1) applies although
>
> "(a) the seller has exercised all possible care in the preparation and sale of his product, and
>
> "(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller."
>
> Strict liability was adopted at an early date by the California Supreme Court in Greenman v. Yuba Power Prod., Inc., 59 Cal.2d 57, 27 Cal.Rptr. 697, 377 P.2d 897, 13 A.L.R.3d 1049, 1054 (1963):
>
> "A manufacturer is strictly liable in tort when an article he placed on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being."
>
> West, 84.

The holding in West is:

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> We now hold that a manufacturer may be held liable under the theory of strict liability in tort, as distinguished from breach of implied warranty of merchantability, for injury to a user of the product or bystander..."
>
> West, 89.

The decision in West makes it clear that it is the manufacturer or seller that is engaged in the business of selling such a product that is held to the standard of strict liability, because it is that entity which has control over the product and has the duty to see that it is reasonably safe; knowing that the product is going to be used without inspection. West, supra. Clearly, the Diplomat Hotel did not put any sailboats into the stream of commerce, did not manufacturer or design any sailboats, has no expertise in sailboats, would not be able to detect any defects in a sailboat, and is not a manufacturer or seller, retailer or distributor of sailboats. Furthermore, the fact that the Diplomat rented a small beach area to Sunrise, who subleased it to Atlantic, who rented a sailboat to the Plaintiff, does not in anyway shape or form render the Hotel a "commercial lessor" of sailboats, sufficient to impose any products liability upon the Hotel.

As noted by Judge Letts in his dissent in Amoroso, in West, this Court restricted its holding to manufacturers of products; and the Defendant in West was a manufacturer of Caterpiller tractor trailers and the word "manufacturer, manufacturer, manufacturer was used in excess of 20 times in the opinion." Amoroso, D2348. Furthermore, the word "lessor" is never used in

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the West opinion, and there is no indication that this Court had ever intended to apply the doctrine of strict liability to every commercial lessor.

While this Court has never even advocated the use of strict liability against retailers, the various appellate courts in Florida have done so. Visnoski v. J.C. Penny Company, 477 So.2d 29 (Fla. 2d DCA 1985); Perry v. Luby Chevrolet, Inc., 446 So.2d 1150 (Fla. 3d DCA 1984); Adobe Building Centers, Inc. v. Reynolds, 403 So.2d 1033 (Fla. 4th DCA 1981), Petition for Review dismissed, 411 So.2d 380 (Fla. 1981). Similarly, a dealer, who sells used goods as is, is not liable under the theory of strict liability for any manufacturing defects. Keith v. Russell T. Bundy & Associates, Inc., 495 So.2d 1223 (Fla. 5th DCA 1986). Therefore, it was a gigantic leap for the Fourth District to impose strict liability on every commercial lessor of a used product, where such liability had been restricted in Florida to the manufacturers, distributors, sellers, and retailers, of substantially unchanged products.

Not a single cases cited by the Fourth District in applying strict liability to commercial lessors is in any way persuasive authority for extending the doctrine of strict liability. As pointed out by Judge Letts in his dissent on rehearing, in Mobley v. South Florida Beverage Corporation, 500 So.2d 292 (Fla. 3rd DCA 1986), review denied, 510 So.2d 598 (Fla. 1987), the court apparently upheld a strict liability count against a retailer, specifically noting that "others higher up in the distributive

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chain are not liable." Amoroso, D2348. In Mobley, a woman had purchased four 32 oz. Pepsi Cola bottles and as she was walking home from the supermarket, when the bottom fell out of the cardboard box that held them. Mobley, 293. There was expert testimony that the failure occurred because the carton had been exposed to excess moisture, as the supermarket had put it in an area where there was persistent flooding. Mobley, 293. The Third District held, therefore, there was ample evidence that the carton was in a defective condition where it was "sold" to Mrs. Mobley. Mobley, 293. Therefore, such a showing, in and of itself, created a jury question under the doctrine of strict liability. Mobley, 293. The Third District went on to find that based on three intermediate appellate court decisions in Florida, that Restatement §402 A, on strict liability, applied to retailers; such as the supermarket, as well as the manufacturers. Mobley, 293.

In dicta, the Third District stated that since the retailer would have been liable for defects in its product that it sold over which it had no control, it was even more responsible to an innocent purchaser like the plaintiff, for a defect which was created after the product came into the possession of the retailer and sold to the plaintiff in this defective condition. Mobley, 293. Under those circumstances, where the product became defective after it left the manufacturer, due to the specific active negligence on the part of the retailer, the retailer was liable in strict liability; even though the manufacturer and

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distributors higher up in the distributive chain would not have been liable. Mobley, 293.

As noted by Judge Letts in his dissent, the Diplomat Hotel is not a retailer in this case and is not higher up in the distributive chain of the sailboat. In fact, it is not in the distributive chain at all regarding the sailboat. Therefore, the Diplomat Hotel cannot not be strictly liable under the Mobley decision, and furthermore, the Mobley does not address lessors in any manner whatsoever. Therefore, Mobley does not impose strict liability on the Diplomat Hotel and it cannot form any basis for the adoption of strict liability in relation to every and all commercial leases. The fact that the Diplomat's lessee, Sunrise, had a sublessee, Atlantic, which repaired the boat and may or may not have resulted in the crossbar cracking, and may or may not have resulted in some injury to the Plaintiff, is simply a situation of ordinary negligence and not one of strict liability.

Furthermore, there is nothing in Mobley that in any way, shape, or form, allows the Fourth District to hold for the first time in Florida that the doctrine of strict liability should be applied to each and every commercial lessor in Florida.

The Fourth District relied on the Futch, supra, decision, as some evidence that Florida cases have applied strict liability to a commercial lessor. Again, as distinguished by Judge Letts, in Futch, the defendant was Ryder Truck Rental, a commercial lessor, who was in the business of leasing trucks and who was a mass dealer in the chattel in question. Once again, as pointed out by

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Judge Letts, there is no analogy between Ryder or Hertz, or any of the mass renters of trucks and automobiles in the United States, and the Hotel, which was primarily engaged in the hotel business, and whose business it was to rent rooms; which leased some beach area to the owner of six small Hobie Cats.

If the doctrine of strict liability is to be applied in the commercial lease transaction, then clearly it should be limited to those defendants like Ryder, Hertz, etc., who are in the business of renting the particular product that is the subject of the suit, and who are mass dealers in those products; who can afford to undertake inspections; who have the expertise and knowledge to know what defects to look for; and who have the ability to inspect these products, etc., to insure their safety. Certainly, even under the Futch decision, there is no basis or public policy reason to impose strict liability on every single commercial lease transaction in Florida. If this were the case, not only would every mom and pop operation, like the hardware store mentioned above, be subject to strict liability, but it would only take one more small step to impose strict liability on every commercial lessor of property as well. Since a rental of property is a "commercial lease transaction," it falls under the umbrella of the new strict liability, and now we have strict premises liability in Florida. Once again, there is no law or public policy reason for this gigantic expansion of liability in Florida.

In Futch, supra, the Fifth District held that the open and

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obvious nature of a defect does not eliminate a cause of action, and basically held that since the patent danger doctrine no longer existed in Florida, that products liability causes of action could be brought against lessors. Amoroso, D2348-2349; Futch, 810. As pointed out by Judge Letts below, in Futch, the court simply stated that since there was abandonment of the strict patent danger doctrine, causes of action could be brought against lessors and it simply applied that rational to allow the products liability causes of action to be brought against Ryder Truck.

Futch was based on the prior decision in Ford v. Highlands Insurance Company, 369 So.2d 77 (Fla. 1st DCA), cert. denied, 378 So.2d 345 (1979), which had extended products liability actions to lessors, where the lessor in that case was Hertz. In other words, all of these cases involved a defendant who was a nationwide lessor, whose principle course of business was the mass rental of the truck or tractor, which was allegedly defective. Futch; Ford; supra; Amoroso, D2348-2349.

Once again, the up shot of these cases is simply that the intermediate appellate courts in Florida have extended product liability causes of action to lessors, only in situations where the lessor is a mass dealer in the chattel which is allegedly defective. Therefore, if this Court should adopt or approve the Fourth District's decision below, imposing strict liability on all commercial lease transactions, then clearly a limitation would be necessary and this would be to limit liability to those

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lessors who are mass dealers in the particular products found defective. Under the facts of the present case, this would not apply to the Diplomat, or even Sunrise; where the Diplomat simply rented some beach area to Sunrise, who in turn rented out its six small sailboats to the general public.

The final case relied on by the Fourth District to impose the strict liability on commercial lessors was a medical malpractice suit in North Miami General Hospital, Inc. v. Goldberg, 520 So.2d 650 (Fla. 3d DCA 1988). In that case, the Third District noted that the underlying basis of the strict liability doctrine as expressed in §402(A) of the Restatement (Second) of Torts (1965), as adopted by this Court in West, was that those who profit from the sale or distribution of a particular product to the public, rather than an innocent person injured by it should bear the financial burden of undetectable product defects. Amoroso, D891; North Miami, 652.

The Third District went on to note that the rational of this doctrine inherently required the defendant to be one which was in "a business within the product's distributive chain;" citing to Mobley. North Miami, 652. Therefore, once again, even the Third District was limiting the application of the strict liability doctrine to accompany whose business it was to be within the product's distributive chain. North Miami, 652.

In excluding the hospital for the injury produced by a defective product, the court looked to those cases where retailers, manufacturers, distributors, and "lessors," were held

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liable. For lessors, the Third District cited to Futch. North Miami, 652, fn. 5. Therefore, the best that could be said of the cases relied on by the Fourth District below is that, intermediate appellate courts in Florida have held a commercial lessor, who is in the business of dealing with the chattel in question, who is a mass dealer in that chattel, and who is in the distributive chain for that chattel can be liable under the doctrine of strict liability.

Clearly, the Diplomat Hotel is not in the distributive chain of Hobie Cat sailboats. By no stretch of the imagination can it be considered a mass dealer in this chattel, or even in the business involving this chattel. Therefore, it was clear error for the Court to apply strict liability to the Hotel, even if the sua sponte adoption of strict liability was correct.

As pointed out by Judge Letts in his dissent, the only entity that can even come close to being a retailer, or supplier, or distributor, or someone in the distributive chain of Hobie Cat sailboats, would be Sunrise and/or Atlantic, who owned the six boats and rented them out to the public. Amoroso, D2348-2349. This is further substantiated by the North Miami case, where the Third District pointed out that hospitals were not engaged in the business of selling products or equipment, used in the course of their priminary function of providing medical services. North Miami, 652. Similarly, the Hotel is certainly not engaged in the business of selling products or equipment, used in the course of their primary function of providing hotel space for tourists and

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conventioneers.

Therefore, the best that could be said for the caselaw relied on by the Fourth to impose strict liability on every commercial lease transactions in Florida is that: (1) this Court has never adopted the application of strict liability to every commercial lease transaction; and (2) the intermediate courts that have done so have limited it to commercial lease transactions, where the defendant is in a business in the product's distributive chain and is a mass dealer in that particular alleged defective chattel.

The Fourth District has not provided any public policy rational for imposing this vast new liability on every commercial lease transaction in Florida. It is clear that under the current scheme there are ample methods for plaintiffs to recover against those involved in commercial lease transactions. There are breach of contract actions, there are negligence actions, there are breach of warranty actions, etc. Therefore, there really is no need to hold every commercial lessor strictly liable, or negligent per se, for every product that is leased. If such liability is to be imposed in a commercial lease transaction, then clearly it must be limited to those entities that are in the business of leasing this particular chattel on a mass scale, because it is those entities that have the ability, expertise, etc., to insure the safety of those products. That is not entities like the Diplomat and Sunrise, where the alleged negligent act arose out of the rental of a single small Hobie Cat

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out of a "fleet" of six small Hobie Cats owned by Sunrise.

While the question certified to this Court was whether the doctrine of strict liability, regarding defective products, extended to commercial lease transaction of those products, in the Fourth District's opinion it held that the strict liability doctrine applied to "a commercial lease transaction." Therefore, the opinion below by the Fourth District is established law, that the doctrine of strict liability applies to any commercial lease transaction, which of course would include property rental transactions. In other words, by simply holding that the doctrine of strict liability applied to a commercial lease transaction, the Fourth District has inadvertently adopted strict premises liability as well. The blanket decision of the Fourth District imposing strict liability on every commercial lease transaction would render every commercial lessor of property strictly liable for any damage caused on that property. Before the decision of the Fourth District, there was no such thing in Florida as "strict premises liability." The Fourth District created this strict commercial premises liability, as well as vastly expanding the doctrine of strict liability to cover every single leased product in Florida, regardless of what the product is and regardless of who the lessor is. The implications and impact of the decision in this case are easily seen, for every single commercial lessor will be strictly liable for every product leased and every commercial lessor of property, as well, will be strictly liable for all damages occurring on that

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property. In other words, the Fourth District has effectively eliminated any requirements of proving negligence on the part of any commercial lessor in Florida, through the blanket imposition of the doctrine of strict liability.

As pointed out by the Third District in Hartley v. Ocean Reef Club, Inc., 476 So.2d 1327 (Fla. 3d DCA 1985), the establishment of a new cause of action, which would have a major impact on business relationships is best left to the legislature. To allow a new cause of action which overrules long standing Florida law would create uncertainty in contract relationships. This result would run contrary to the basic function of the law, which is to "foster certainty in business relationships" Hartley, 1329. The Third District then pointed out that a significant change in the law, such as a new cause of action, is best left to the legislature, as the appropriate branch of the government, to decide issues involving perception and declaration of public policy, which underlines tort liability. Hartley, 1329.

If this Court should decide that it wishes to act now, as opposed to leaving the matter to the legislature, then it is submitted that there is no public policy reason to impose strict liability on every "commercial lease transaction." Amoroso, D891.

The imposition of strict liability to every commercial transaction in Florida will certainly have a serious effect in the free-flow of commerce in this State. There is little question that the Fourth District's opinion below creates

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uncertainty in business relationships and will cause a major disruption in future lease transactions in Florida. Where there are ample causes of action currently available to plaintiffs in commercial lease transactions, there simply is no reason to impose strict liability on every commercial lease transaction in Florida, whether for products or property. At best, the imposition of strict liability should be kept to those businesses who are in the distributive chain of the product in question, which businesses are also mass dealers in that particular chattel. They have the financial ability and expertise to guarantee the safety of those products.

It is respectfully submitted that the Fourth District's decision below must be reversed; that this Court hold that there is no extension of strict liability to every commercial lessor; or to limit such an imposition of strict liability to those businesses which are mass dealers in the product in question. Regardless of how this Court rules on the issue of strict liability and its application to commercial lessors, the opinion below still must be reversed; as the Diplomat Hotel and Sunrise do not fall into any category sufficient to find that either is a "commercial lessor" whose business falls within the distributive chain of small Hobie Cat boats or are mass dealers in small Hobie Cat boats. The Fourth District's opinion regarding the Petitioners in this case must be reversed and the Directed Verdicts affirmed in favor of the Diplomat and Sunrise.

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II. THE TRIAL COURT CORRECTLY DIRECTED A VERDICT ON THE PLAINTIFF'S CLAIM OF BREACH OF IMPLIED WARRANTY; AND THERE WAS NO LEGAL BASIS FOR THE FOURTH DISTRICT TO HOLD IMPLIED WARRANTY OF FITNESS FOR ORDINARY USE IS AVAILABLE IN A LEASE TRANSACTION FOR THE FIRST TIME IN FLORIDA.

Just as the Fourth District imposed strict liability on every commercial lease transaction for the first time in Florida, it also held that there is an implied warranty of fitness for ordinary use in every lease transaction in Florida. Amoroso, D890-891. Apparently, the Fourth District felt that since there were cases that held that implied warranties of merchantability for particular purpose applied in a commercial transaction setting, where the defendant was a mass dealer in that particular chattel, somehow it could once again make a gigantic leap to impose a different type liability in every commercial lease transaction in Florida. Furthermore, the Court went one step further and held that the Diplomat Hotel could be liable for Sunrise's rental of one of its six small sailing boats, since this "constitutes a commercial leasing operation of boats for profit." Amoroso, D890-891.

Clearly, the Hotel is not in a commercial leasing operation for boats for profits, under any view of the facts below. It is in the business of renting hotel rooms, and again this blanket imposition of liability to the Hotel, as well as any other commercial entity who is even tangentially involved in the lease of a product, was totally unwarranted and without any legal support.

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It is important to remember that the Plaintiff's cause of action was for negligent repair. The Plaintiff's Complaint alleged only that the welder had a duty to properly weld or replace the crossbar. It was undisputed that Rhodenbaugh was an independent contractor hired by Atlantic Sailing. Because there was no legal way of imposing the negligence of the independent contractor/welder on the Hotel, the Plaintiff attempted to mix and match various product liability theories in order to reach the deep pocket of the Diplomat. Mrs. Amoroso alleged in her Complaint that the hotel was liable for breach of implied warranty as the "renter" of the Hobie Cat. Of course, the evidence at trial established that the Diplomat Hotel was simply the landlord, which leased some beach property to Sunrise, which subleased the property to Atlantic Sailing and it was Atlantic Sailing which rented the sailboat. However, even assuming arguendo that the Diplomat was the "lessor" of the sailboat, as opposed to Sunrise or Atlantic Sailing, the breach of implied warranty claim did not exist, as a matter of established law.

It is axiomatic that to bring a product liability claim for breach of implied warranty and fitness for ordinary use, the Plaintiff must prove that: (1) she was a foreseeable user of the product; (2) the product was being used in the intended manner at the time of the injury; (3) the product was defective when it left the manufacturer or when transferred from the warrantor; and (4) the defect in the product caused her injury. Vandercook and Son, Incorporated v. Thorpe, 395 Fed.2d 104 (5th Cir. 1968);

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Sansing v. Firestone Tires Rubber Co., 354 So.2d 895 (Fla. 4th DCA 1978); 41 Fla.Jur.2d, Products Liability, § 22.

The Plaintiff put on absolutely no evidence whatsoever that the defect in the crossbar, which she claimed at trial was an improper weld, existed at the time it left the manufacturer; which evidence Mrs. Amoroso could not put into the Record, because it did not exist. Furthermore, the Plaintiff claimed that an improper weld rendered the crossbar defective and that the welder should have known to replace it. She also argued below that the welder had a duty to tell Atlantic Sailing to replace it. The Fourth District affirmed the Directed Verdict for the welder, finding no negligent weld and no duty to tell Atlantic to replace the bar. Amoroso; supra. However, the Court held that the proper welding by the independent contractor made the crossbar defective and so the hotel and the owner/Sunrise were liable for breach of implied warranty of fitness for ordinary use. Clearly, if such a warranty exists, it applied to the welder, who caused the alleged product defect to begin with.

Finally, failure to replace the crossbar was alleged and adduced only against the welder and not the Diplomat and Sunrise. There was no testimony that the Hotel or Sunrise knew or should have known that the bar should have been replaced.

The Fourth District boot-strapped this Court's opinion in Johnson, supra, to impose the new implied warranty of fitness for ordinary use in a lease transaction. Amoroso, D890. However, Johnson, like all the other cases including lessors, involved a

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mass dealer in leased products.

In Johnson this Court set out a three-part test to impose liability on a lessor or a bailor for hire for breach of implied warranty or fitness for a "particular purpose". It is important to remember that Mrs. Amoroso did not sue for breach of warranty for a particular purpose, but rather expressly sued for breach of warranty for ordinary use. So to begin with Johnson does not even apply under her implied warranty Count, since she did not even sue for breach of warranty for a particular purpose.

Furthermore, she failed to meet the three part test; which is that the implied warranty will be applicable to hold a lessor liable where: (1) the lessor possessed or should have possessed expertise in the character of the leased chattel; (2) where the lessee's reliance upon the lessor's selection of a suitable chattel was commercially reasonable; and (3) where the lessor was a mass dealer in the chattel leased. Johnson, 100. Therefore, where the lessor or bailor for hire has reason to know of the particular purpose for which the leased chattel is required and the lessee is relying on the lessor's judgment to finish the chattel for that particular purpose, then an implied warranty of fitness will be imposed where the lessor is a mass dealer in that chattel. Johnson, 100.

Applying Johnson criteria still does not help the Plaintiff, nor does it allow for a warranty of fitness for ordinary use. First, the Diplomat does not possess nor should it possess expertise in the character of Hobie Cat sailboats. Second, the

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Diplomat did not select the Hobie Cats for rental. Third, the Diplomat was not a mass dealer in small Hobie Cat sailboats. Finally, the Diplomat had no knowledge of any particular purpose for the boat's use. It was this total failure to be able to meet the Johnson criteria that forced the Plaintiff to sue an alleged implied warranty for ordinary use.

The Fourth District held that the implied Johnson warranty of merchantability applied to fitness for ordinary use. While the court claimed that no public policy reason was given to limit this expansion of liability, it over looked the fact that before Amoroso no such common law implied warranty of fitness for ordinary use ever existed in any lease transaction. The public policy reason for not expanding the implied warranty in Florida is that this liability will put the ordinary small commercial lessor out of business; who from time to time rents lawnmowers, weed eaters, or even sailboats, and who must now guarantee/insure their use.

The statutes cited by the Fourth District do not change the result in this case. The UCC requires those who regularly deal in business to sell, or lease large quantities of goods to ensure their fitness for ordinary purposes and warrant their use for a particular purpose. Fla. Stat. §680.212; §680.213; Amoroso, supra. For the purpose of warranties of merchantability, a merchant is one who regularly deals in goods of that kind, such as those who manufacturer, distribute, sell, or lease mass quantities of those goods. This is the law even under the case

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cited by the Fourth District. Bert Smith Oldsmobile, Inc. v. Franklin, 400 So.2d 1235 (Fla. 2d DCA 1981)(used car dealer was liable for warranty of merchantability and fitness accompanying sale of used car); see also, Fuquay v. Revels Motors, Inc., 389 So.2d 1238 (Fla. 1st DCA 1980)(used car business liable for warranties of merchantability and fitness).

On the other hand, those who are small volume sellers (or lessors) are not held liable for warranties of merchantability or fitness. Czarnecki v. Roller, 726 F. Supp. (S.D. Fla. 1989)(yacht seller was not a "merchant" for purposes of imposing liability for breach of implied warranty of merchantability, either by virtue of fact that he may have sold five boats during one-year period, or that he hired broker to facilitate sale of yacht); Joyce v. Combank/Longwood, 405 So.2d 1358 (Fla. 5th DCA 1981)(in sale of repossessed car, bank was not a "merchant" and sale did not carry with it implied warranty of merchantability, notwithstanding bank's sale of four other repossessed vehicles in same year).

Just like the bank in Joyce, certainly the Diplomat and Sunrise are not "merchants" for the imposition of implied warranties and the Fourth District was in clear error to so hold. The blanket opinion below holds that every single sale or lease for profit in Florida now comes with implied warranties of fitness and merchantability for ordinary use. This was not the intent of the common law, nor the Uniform Commercial Code. Amoroso has gone far afield to vastly increase commercial

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liability in Florida.

The Fourth District's excuse is that the law places the risk of loss associated with the use of defective products on those who created the risk and who can best protect against it. Amoroso, D891. These parties are, by law, the mass dealers in chattels and not the Diplomat or Sunrise; who can be sued for ordinary negligence. Therefore, if this Court is to adopt the new law that an implied warranty or fitness for ordinary use attaches to every "commercial lease transaction" in Florida, it should at the very least limit the liability to those who are mass dealers in chattels, and the Directed Verdicts for the Diplomat and Sunrise must be affirmed.

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III. THE TRIAL COURT CORRECTLY DIRECTED A VERDICT IN FAVOR OF THE DIPLOMAT AND SUNRISE ON THE ISSUE OF NEGLIGENCE.

The sum and substance of the Plaintiff's expert testimony at trial was simply that the welder, an independent contractor, should have replaced, rather than repaired, the crossbar for the sailboat (T IV, 90). It was undisputed that Mrs. Amoroso put on no evidence whatsoever regarding any maintenance standards, requirements, etc., and no evidence that any such standards were violated. The Fourth District gratuitously held that the independent contractor/welder had performed a non-negligent weld which rendered the crossbar defective, and therefore Mrs. Amoroso was entitled to go forward against the Diplomat and Sunrise based on the defect created by the independent contractor. Of course, there is no such law in Florida. In other words, the Plaintiff put on no expert testimony or any testimony whatsoever that Atlantic Sailing, Sunrise, or the Diplomat, knew or should have known to replace the crossbar as opposed to repairing it. Rather, the only evidence presented at trial below was that the independent contractor/expert/welder should have replaced, rather than repaired, the crossbar.

It is important to remember that this is not a summary judgment case, even though the Fourth District treated it as if it was. Rather, Mrs. Amoroso had a week long trial in which to establish any negligence against any of the Defendants. The outcome was that the trial court directed a verdict in favor of the welder, finding that the weld that he performed was not

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negligent and that the welder had no duty to inform Atlantic Sailing that the crossbar should have been repaired instead of replaced. This Directed Verdict was affirmed by the Fourth District based on the only evidence presented at trial, that the only party who knew or should have known to replace the crossbar, as opposed to repairing it, was the independent welder. In other words, Mrs. Amoroso put on no evidence whatsoever that Atlantic Sailing knew or should have known to replace the crossbar. The Fourth District determined that the proper weld to the crossbar may have caused a weakened area, which caused a defect in the crossbar, which caused the crossbar to break, which caused the mast to pop out, which may or may not have fallen in the area of Mrs. Amoroso. The Fourth District made the same quantum leap that the Plaintiff did, to find that the defect caused by the welder somehow could be imputed to Atlantic Sailing, even though no evidence was presented at trial whatsoever; that Atlantic Sailing knew or should have known to replace rather than repair the crossbar. It was for this reason, that the trial court directed a verdict in favor of the Defendants.

Because the Plaintiff was not able to establish any cause of action for negligent repair against Atlantic Sailing, Sunrise, and the Diplomat, she relied on her products liability causes of action in order to impute liability to the Defendants with the deep pockets. In the absence of causes of action for breach of implied warranty of fitness for ordinary use and strict liability, the Plaintiff was left only with her cause of action

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for negligent repair. However, her evidence at trial was only that the independent welder should have known to replace the crossbar, as opposed to repairing it. In light of the undisputed evidence presented in the Plaintiff's case in chief, the Directed Verdict for the Defendants on the issue of negligence was correct and should have been affirmed by the Fourth District. Basically, the Fourth District gratuitously found that Atlantic Sailing knew or should have known to replace, as opposed to repair the crossbar. However, there was absolutely no evidence of this at trial whatsoever. Amoroso, D891-892.

The Fourth District stated by failing to replace the crossbar and repairing it instead, Mrs. Amoroso was offering proof that it was not being kept in good condition. However, the Fourth District overlooked the fact that, at trial, the only evidence that repair instead of replacement was negligence, was the expert testimony which was that the welder who should have known that repairing instead of replacement would cause the boat to be defective. Therefore, in light of the undisputed evidence at trial, the Directed Verdict for the Diplomat should have been affirmed. The welder caused the defect. The expert testimony was that the welder should have known to repair, as opposed to replace the crossbar, and no evidence was presented that anyone else should have known to replace, as opposed to repair, the crossbar. In fact, the Directed Verdict in favor of the welder established that he had no duty to inform anyone else that it should have been replace. Therefore there simply is no way of

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imputing the actions of the independent contractor; who according to the Fourth District created the defect in question; to Atlantic Sailing, Sunrise, or the Diplomat.

Regarding the Directed Verdict entered in favor of Sunrise, the Fourth District gratuitously again simply found that since the Plaintiff stated that Sunrise was the owner of the boat, somehow this magically converted the Count against Sunrise into a negligence action, and therefore it reversed the Directed Verdict in favor of Sunrise. Amoroso, D891-892.

Mrs. Amoroso only argued below that since Sunrise was the owner of the boat, that this somehow automatically meant that Sunrise was liable for any negligent repair or failure to replace the crossbar done by the independent contractor, hired by Atlantic Sailing and paid by Atlantic Sailing (DV 16-18). There is no such law in Florida, so Mrs. Amoroso tried to impose liability on Sunrise, under the Johnson, supra, case. The reason Mrs. Amoroso relied solely on this Court's decision in Johnson, is because a sailboat is not a dangerous instrumentality and therefore there is no legal basis to impose vicarious liability on Sunrise, for the sailboat rented by Atlantic Sailing and repaired by Rhodenbaugh, the independent contractor. As previously mentioned however, Johnson simply imposes liability for breach of implied warranty of fitness for a particular use, upon lessors who are mass dealers in chattels that are leased; where the lessor has or should have expertise in the characteristics of the leased chattel; and where there was

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reliance by the lessee on the lessor's selection of a suitable chattel for a particular purpose. Johnson, 100.

Not one shred of evidence was presented that Atlantic Sailing, Sunrise, or the Diplomat, was negligent in renting a Hobie Cat that had been properly repaired by an independent contractor; or that any of these entities knew or should have known to replace the crossbar. Atlantic relied on the expertise of the welder and no evidence was presented that this was negligence. Rather, the evidence was that Atlantic had taken other crossbars to Rhodenbaugh to repair and there was never any problem with the boats afterwards. No expert testified, no standards were produced and nothing at trial in any way established that Atlantic Sailing knew or should have known to replace the crossbar. This was simply a gratuitous finding by the Fourth District, which basically made the same quantum leap to impose liability on the Defendants, based on the acts of the independent contractor.

Mr. Amoroso rented the Hobie Cat, after inspecting it, looking at the repaired, welded crossbar, and he rented the same boat on three different occasions; without incident. In her case-in-chief Mrs. Amoroso produced evidence through direct testimony that her husband was negligent in improperly sailing the boat and putting excessive stress on the rigging.

Even assuming that Mrs. Amoroso pled a claim for negligent repair against Sunrise, she produced absolutely no evidence which would entitle her to recover against the owner of the sailboat,

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for the negligent repair or creation of a defect by the independent contractor and the trial court correctly Directed a Verdict as a matter of law, in favor of Sunrise.

A critical factor in Mrs. Amoroso's case was that the evidence of negligence for failure to replace the crossbar went only to Rhodenbaugh, the independent contractor/welder. The Fourth District glossed over this to avoid the clear law that the Defendants were not liable for the negligence of an independent contractor. The court simply stated: "evidence was presented that there was negligence in failing to replace the crossbar." Amoroso, D891. The Fourth District ignores the welder's status and held the hotel and boat owner liable. This bizarre result is even more anomalous, since the Directed Verdict in favor of the welder for no negligent repair and finding no duty to tell Atlantic to replace the crossbar was affirmed by the Fourth District. Amoroso, D892.

In the absence of any evidence of any negligence on the part of the Diplomat and Sunrise, the Directed Verdicts in their favor should have been affirmed.

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CONCLUSION

The new causes of action in Florida for strict liability and breach of implied warranty of fitness for ordinary use announced by the Fourth District are in direct conflict with this Court's decision in West, and Johnson, supra; and therefore, the opinion below must be reversed. There is no law or public policy reason for this Court to adopt these new theories of liability; or to apply them to the Diplomat and Sunrise. Based on the complete lack of any evidence of any negligence whatsoever on the part of the Diplomat or Sunrise, the Directed Verdicts in favor of these Defendants must be affirmed.

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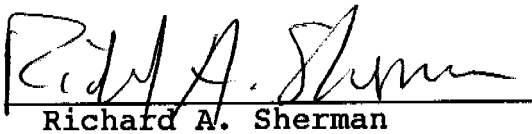
By: 
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