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IN THE SUPREME COURT OF FLORIDA

CASE NO.: 80,786

Florida Bar No.: 182928

FILED
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JAN 5 1993
CLERK, SUPREME COURT
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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.
_____/

FROM THE FOURTH DISTRICT COURT OF APPEAL OF FLORIDA

BRIEF ON THE MERITS OF RESPONDENTS, PAULA AMOROSO and ROBERT AMOROSO

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TABLE OF CONTENTS

TABLE OF CITATIONS

Table of Citations (Continuation)

ISSUES ON APPEAL

I. The trial court incorrectly entered a directed verdict on Mrs. Amoroso's claim of strict liability against the DIPLOMAT and SUNRISE and the Fourth District Court of Appeal's reversal of that directed verdict was correct.

II. The trial court erred when it directed a verdict on Plaintiff's claim of breach of implied warranty. The Fourth District was correct in overruling the trial court's directed verdict and in holding that breach of implied warranty of fitness for ordinary use is an available cause of action in a lease transaction in Florida.

III. The trial court incorrectly directed a verdict in favor of the DIPLOMAT and SUNRISE on the issue of negligence and the Fourth District Court of Appeal was correct in reversing the directed verdict of the trial court.

INTRODUCTION

Because of the number of parties involved at the trial below and in this discretionary proceeding, the Respondents, PAULA AMOROSO and ROBERT AMOROSO, her husband, shall identify the parties by their proper names:

1. Petitioners/Defendants, Samuel Friedland Family enterprises d/b/a The Diplomat Hotel, Inc. shall be referred to as "DIPLOMAT";

2. Sunrise Water Sports, Inc., Bill's Sunrise Boat Rentals - Sunrise Water Sports, Inc. and William Thoral as the last known director and officer of Sunrise Water Sports, Inc. shall, collectively, be referred to as "SUNRISE";

3. The Respondents shall be referred to as "PAULA AMOROSO" or "ROBERT AMOROSO", as the context may require;

4. The Defendant, Atlantic Sailing Center, Inc. will be referred to as "ATLANTIC"; and

5. The Defendants, Robin Rhodenbaugh and Rhodenbaugh Sheet Metal Repairs, Inc. will be referred to as "RHODENBAUGH".

6. All references to the transcript of the trial will be referred to by the letters "Tr." followed by the day of the trial and by the appropriate page number.

7. Any references to other records in the Appeal will be identified by the letter "R." followed by the number and/or page number of that item as appears in the Index to the Record on Appeal filed herewith as a part of the Appendix.

STATEMENT OF THE FACTS AND CASE

Proceedings at trial.

This case arose as a result of a serious personal injury suffered by one of the guests at the Diplomat Hotel while sailing on a catamaran-type sailing vessel made available to guests of the hotel and chargeable to the hotel guests' room. Mrs. Amoroso suffered a serious injury when the mast of a sailboat she was on collapsed on her injuring her neck and left shoulder. The Sixth Amended Complaint set forth Counts against the various parties as follows:

1. Count I was a claim for negligence against the DIPLOMAT;

2. Count II was a claim for strict liability in tort against the DIPLOMAT;

3. Count III was a claim for breach of implied warranty of merchantability and fitness for ordinary use against the DIPLOMAT;

4. Count IV was a claim for negligence against SUNRISE;

5. Count V was a claim for strict liability in tort against SUNRISE;

6. Count VI was a claim for breach of implied warranties of merchantability and fitness for ordinary use against SUNRISE;

7. Count VII was a claim for negligence against ATLANTIC;

8. Count VIII was a claim for strict liability in tort against ATLANTIC;

9. Count IX was a claim for breach of implied warranties of merchantability and fitness for ordinary use against ATLANTIC;

10. Count X was a claim for negligence against RHODENBAUGH and other parties not before this Court;

11. Count XI was a claim against the DIPLOMAT and SUNRISE, on a theory of joint venture;

12. Counts XII and XIII involved claims for destruction of evidence which are not before this Court; and

13. Count XIV was a derivative claim of ROBERT AMOROSO.

After the Plaintiffs rested, and before the Defendants put on any evidence at all, the trial court directed a verdict against the Plaintiffs on every single claim. Mr. and Mrs. Amoroso filed a timely appeal to the District Court of Appeal of Florida, Fourth District, and the Fourth District reversed the trial court except as to the following parties and claims:

1. As to the claims against ATLANTIC, the directed verdict was affirmed on the basis that ATLANTIC was the agent of SUNRISE and the AMOROSOS could not recover both against an agent and its principal for negligence. In addition, the AMOROSOS at trial argued to the Court that SUNRISE was the entity which should be held liable for any derelictions of ATLANTIC, in effect making an election which they were not required to make until after a verdict;

2. The directed verdict against DIPLOMAT, SUNRISE, and ATLANTIC as joint venturers was affirmed;

3. The directed verdict in favor of RHODENBAUGH was affirmed because there was no evidence that the weld

which "repaired" the cross bar supporting the mast was negligently done nor any evidence that RHODENBAUGH had a duty to inform the owner of the sailboat that the bar should be replaced rather than repaired.

Mr. and Mrs. Amoroso offered an expert marine surveyor, most of whose testimony was excluded by the trial court. However, the surveyor was allowed to testify that rather than being repaired the bar on the sailboat mast which failed should have been replaced. This was because that bar was subject to a great deal of stress in sailing and could not take that stress with the repair by the weld. In addition, RHODENBAUGH testified that the crossbar failed right next to his weld and that in some cases the area next to a weld is weakened by welding. Also, trial testimony established that the accident occurred as a result of the crossbar breaking, allowing the mast to fall on Mrs. Amoroso.

Facts Below.

The AMOROSOS adopt the "Specific Facts" as set forth in the Brief of the Petitioner's at pages 4 - 9, inclusive, with the following additions necessary in order to make the "specific" facts fully state what occurred at the trial below:

1. The DIPLOMAT contracted with SUNRISE for SUNRISE to provide boats for rent to the DIPLOMAT's guests. (Tr. day 3, pp. 97, 99, 100). Approximately 99% of SUNRISE's business was from hotel guests. (Tr. day 3, p. 106). The purpose of the agreement between the DIPLOMAT and SUNRISE was to please the hotel's guests and to keep them happy through the rental of boats. (Tr. day 3, pp.

97, 99 - 100). The DIPLOMAT supplied a telephone, its switchboard service and a line from the hotel to the shanty where the boats were rented; consequently a hotel guest could be directly connected with the shanty through the hotel switchboard. (Tr. day 3, p. 108).

2. There was a written lease between the DIPLOMAT and SUNRISE. (Tr. day 3, p. 101). This written agreement called for a minimum rent and additional rent based upon gross sales by SUNRISE and a split of any commissions received by SUNRISE for charters, excursions, etc. where that service was subcontracted using some other entity's equipment. (See R. 1376 - 1473, Exhibit A).

3. There was allegedly a written lease between ATLANTIC and SUNRISE but that lease was never found. (Tr. day 3, pp. 111, 132). Nonetheless, that agreement was entered into with the consent of the DIPLOMAT. (Tr. day 3, p. 134). Also, while ATLANTIC was organized to operate the rental business at the DIPLOMAT (Tr. day 3, p. 90), during the term of the agreement all boats were owned by SUNRISE but SUNRISE took no steps to inspect them or otherwise care for them. (Tr. day 3, pp. 112 - 113).

4. Mr. and Mrs. Amoroso stayed at the DIPLOMAT while attending a convention of the International Longshoremen Association. (Tr. day 4, p. 13). After checking into their hotel the AMOROSOS discovered advertising brochures placed there by the DIPLOMAT which advised them of various activities they could participate in as guests of the hotel including sailboat rental at the DIPLOMAT's beach. (Tr. day 4, p. 223). The AMOROSOS went to

the hotel's beach and observed several sailboats on the beach; several of the sailboats had sails colored in the hotel's color and displayed a large capital "D" on the sail, the same design as the logo of the DIPLOMAT. (Tr. day 4, pp. 14, 227).

5. Security for the sailboat rental was the DIPLOMAT hotel room key. (Tr. day 4, p. 231). The rental was billed on the DIPLOMAT hotel bill. (Tr. day 4, p. 231). Since the AMOROSOS believed they were renting the sailboat from the DIPLOMAT they were fully confident that it would be in good condition. (Tr. day 4, pp. 230 - 231, 249 - 250).

6. The third sailboat rental resulted in the injury to Mrs. Amoroso. (Tr. day 4, p. 237). After sailing for 15 to 20 minutes, Mr. Amoroso heard a cracking noise and witnessed the mast fall on his wife injuring her neck and left shoulder. (Tr. day 4, pp. 240 - 241, 252).

7. An inspection of the boat on the day of the accident indicated that the sailboat side rail (also sometimes referred to as a "cross bar") broke which allowed the mast to come out of its socket and fall on Mrs. Amoroso. (Tr. day 4, p. 245). About one week prior to the accident a crack in the side rail had been repaired by welding. (Tr. day 3, pp. 47, 54, 58). The sidebar failed "right next" to the repaired area. (Tr. day 3, p. 55). RHODENBAUGH testified that where a weld is performed, in some cases the area adjacent to the weld are weakened. *Id.*

8. Charles Stephens, a marine surveyor testified that the rail or bar repaired by RHODENBAUGH should not have been repaired

but rather should have been replaced. (Tr. day 3, p. 268).

The AMOROSOS do not believe that this Court should review this matter at this stage in the proceedings. As previously noted, this matter went to the Fourth District Court of Appeal on an appeal from the entry of directed verdicts at the close of the Plaintiffs' evidence against these various Defendants. Thus, it is the position of the AMOROSOS that, since this case has to be retried, and since the AMOROSOS may not prevail on these issues, any decision by this Court is at best premature. Nonetheless, should this Court decide that the issues are in fact ripe for decision at this time, the AMOROSOS would urge this Court to adopt the reasoning of the Fourth District Court of Appeal as it both comports with existing Florida law and reasonable extensions of same, as well as with the prevailing authority in the United States concerning lease transactions.

SUMMARY OF THE ARGUMENT

The Fourth District Court of Appeal's opinion in this case on the strict liability issue does not represent any extension of the existing law in the State of Florida, but rather a common sense application of that law. Alternatively, if it is an extension of law in the State of Florida to apply strict liability in tort principles to injuries arising to lessees, then given the commercial climate which exists in the State today, as well as the expectations of the public, such an extension is both logical and required. To not grant to the public the protection afforded by holding lessors of products strictly liable in tort for the harm that their goods may cause is to unduly enhance the importance of the type of transaction and to greatly reduce the protection afforded the public.

Likewise, breach of implied warranties of fitness for ordinary use should be available to citizens of the State of Florida and others injured by products within the State put into the stream of commerce by lessors. There is no rational reason to exclude this type of protection from the public because such warranties may effect small businesses. Where a lessor is not involved in a simply isolated transaction but rather, as its sole business or as a part of its other businesses engages in regular lease transactions with the public, that lessor has placed a product in the chain of commerce and should be responsible for any injury the product may cause.

There was ample proof of negligence of the DIPLOMAT and SUNRISE in this case allowed into evidence at the trial below. There was evidence that established that the DIPLOMAT and SUNRISE may have been principals of ATLANTIC, the company which rented the sailboat to the AMOROSOS. There was also evidence which would allow the jury to find that ATLANTIC was negligent in repairing the sailboat cross bar instead of replacing it. There was also evidence that established that ATLANTIC took no steps to inspect or otherwise maintain the hobie cats other than to tighten certain parts of the sailboats it rented which might become loose during their use by guests of the DIPLOMAT HOTEL. ATLANTIC, and based upon principals of agency, THE DIPLOMAT and SUNRISE, cannot escape liability for the harm they caused by deliberately keeping themselves ignorant of what is required in properly maintaining and inspecting sailboats. Once the decision is made by them to go into that business they bear the responsibility of learning what is necessary to inspect and properly maintain the sailboats in order to protect the general public who will be using those boats without inspection for defects.

The Fourth District Court of Appeal was correct in all respects and its opinion should be affirmed by this Court.

ARGUMENT

ISSUE I:

The trial court incorrectly entered a directed verdict on Mrs. Amoroso's claim of strict liability against the DIPLOMAT and SUNRISE and the Fourth District Court of Appeal's reversal of that directed verdict was correct.

The protestations of the DIPLOMAT and SUNRISE notwithstanding, this case was appropriate for the application of the doctrine of strict liability in tort and the trial court should not have directed a verdict against the AMOROSOS on this claim.

This Court adopted strict liability as stated in the A.L.I. Restatement (Second) of Torts § 402 A in *West v. Caterpillar Tractor Co., Inc.*, 336 So.2d 80, 87 (Fla. 1976). The *West* decision was a decision involving a claimed defect of a grader as a result of its manufacture with certain alleged design defects. In responding to the certificate from the United States Court of Appeal for the Fifth Circuit, this Court stated, *inter alia*, that part of the justification for the doctrine of strict liability was that where a manufacturer places on the market a potentially dangerous product for use and consumption and advertises that product, thereby encouraging its use, the manufacturer as a result of those acts undertakes "a certain and special responsibility toward the consuming public who may be injured by it". 336 So.2d at 86. This Court went on to note that the prior decisions of this Court were in conformity with the principal set forth in the Restatement, and that its recognition of the Restatement, § 402 A was "no great new departure from present law". *Id.*

In this case, the DIPLOMAT and SUNRISE seek to have this Court carve out an exception for lessors of a product, notwithstanding the fact that that product causes injury to the ultimate consumer. There is simply no rational basis for such an exception and the Fourth District noted same when it cited with approval *North Miami General Hospital, Inc. v. Goldberg*, 520 So.2d 650 (Fla. 3d DCA 1988) which stated that the public policy underlining the doctrine of strict liability in other consumer contexts was that:

> [T]hose 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 even an undetectable product defect. The rationale of the doctrine thus inherently requires a defendant which is in a business within the product's distributive chain. (Emphasis added)

The Fourth District also noted that in *Futch v. Ryder Truck Rental, Inc.*, 391 So.2d 810 (Fla. 5th DCA 1980) the court applied strict liability to a commercial lessor.

Decisions from other states have reached the same conclusion with regard to the lease of a product. For example, as early as 1965, the Supreme Court of New Jersey held in a breach of warranty action (a complement to the theory of strict liability, see *West*, supra, 336 So.2d at 884) that as between a bailor and a bailee for hire of a vehicle under a "U-drive-it" agreement, liability for flaws or defects in the vehicle not discoverable by ordinary care in inspecting or testing that vehicle rested with the bailor, just as it rested with the manufacturer. See, *Cintrone v. Hertz Truck Leasing & Rental Service*, 212 A.2d 769, 777 - 778 (N.J. 1965). Likewise, in *Brimbau v. Ausdale Equipment Rental Corporation*, 448

A.2d 1292 (R.I. 1982), the Court held that persons in the business of leasing personal property are strictly liable in tort for injuries proximately resulting from the products that they lease in a defective condition which renders the property dangerous. *Id.* at 1298.

In *Coleman v. Hertz Corp.*, 534 P.2d 940 (Ok.Ct.App. 1975) the court held that strict liability included lessors and bailors engaged in the business of leasing chattels to the public where no sale was involved. The Oklahoma Supreme Court later cited *Coleman* with approval, in *Dewberry v. LaFollette*, 598 P.2d 241 (Ok. 1979) and further noted "the evident trend of other jurisdictions is to expand the concept of strict liability to include commercial lessors on the basis such persons put products into the stream of commerce in a fashion not unlike a manufacturer or retailer. *Id.* at 242. (Citations omitted).

The Texas Supreme Court reached the same conclusion in *Rourke v. Garza*, 530 S.W.2d 794 (Tex. 1975). That action involving suit by a welder against a rental company for injuries sustained by the welder in a fall from allegedly dangerous scaffolding which had been supplied by a rental company to the welder's employer, resulted in judgment in favor of the welder. On appeal, the Texas Supreme Court first noted that the rental company contended that the theory of strict liability should not be applicable to the leasing of equipment to an industrial user as distinguished from a sale of equipment. The Court addressed that statement as follows:

> We can see no sound basis for this distinction. Where one is engaged in the business of

> introducing products into the channels of commerce, he will be subject to strict liability for physical harm caused by such products if they are unreasonably dangerous to the user or consumer whether he sells or leases his products.

Id. at 800. (Citations omitted).

Likewise, in *Price v. Shell Oil Co.*, 466 P.2d 722 (Cal. 1970) the California Supreme Court, in an action brought by a mechanic employed by an airline who sued the lessor of a gasoline tank truck for injuries he received when a ladder broke and he fell, held that a non-seller of a product such as a bailor or a lessor, was liable. The court stated the philosophy underlining the purpose of imposing strict liability as:

> [T]o insure that the cost of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves.

Id. at 725, citing *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897 (Cal. 1963).

The Court went on to state:

> Essentially its paramount policy to be promoted by the rule is the protection of otherwise defenseless victims of manufacturing defects and the spreading throughout society of the cost of compensating them....Similarly we can perceive no substantial difference between *sellers* of personal property and *non-sellers*, such as bailors and lessors. In each instance, the seller or non-seller "places [an article] on the market, knowing that it is to be used without inspection for defects, ..." (*Greenman, supra*, 59 Cal.2d at p. 62, 27 Cal. Rptr. at p. 700, 377 P.2d at p. 900) In the light of the policy to be subserved, it should make no difference that the party distributing the article has retained title to it nor can we see how the risk of harm associated with the use of the chattel can vary with the legal form under which it is held.

> Having in mind the market realities and the widespread use of the lease of personalty in today's business world, we think it makes good sense to impose on the lessors of chattels the same liability for physical harm which has been imposed on the manufacturers and retailers. The former, like the latter, are able to bear the cost of compensating for injuries resulting from defects by spreading the loss through an adjustment of the rental.

Id. at 725 - 726. (Emphasis in the decision)

An Indiana court of appeals also reached the same result, concluding that "[A] sale is not necessarily an element required to establish liability under § 402 A ([Restatement 2d] of Torts]. The words 'sells' as contained in the text of § 402 A is merely descriptive, and the product need not be actually sold if it has been injected into the stream of commerce by other means. The test is not the sale, but rather the placing in commerce". *Link v. Sun Oil Co.*, 312 N.E.2d 126, 130 (Ind.Ct.App. 1974).

The decision of the Fourth District below recognizes the commercial realities of today's marketplace. Also, notwithstanding the fact that the DIPLOMAT and SUNRISE believe the Fourth District's decision to be an unwarranted extension of the doctrine of strict liability in Florida, it is not, as the citations by the Court to *Futch v. Ryder Truck Rental, Inc.*, 391 So.2d 810 (Fla. 5th DCA 1980) and *North Miami General Hospital,* 520 So.2d 650 (Fla. 3d DCA 1988) amply indicate.

Petitioners also argue that there should be a retreat from this "expansion" of the doctrine of strict liability because "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". (Brief of Petitioners at p. 14).

Respectfully, there is no basis for the argument on this point made by SUNRISE and the DIPLOMAT. There is no rational reason to carve out an exception in the area of leasing a chattel based upon this "perceived" harm. In addition, research has disclosed no case which has held that strict liability is limited to mass dealers in chattels because of a fear of eliminating "mom and pop companies". Respondents' cite no authority for this broad statement and, indeed there can be none.

The Petitioners then go on to argue that even if strict liability should be applied in a commercial leasing context, because the DIPLOMAT is not a "retailer in this case" and "is not higher up in the distributive chain of the sailboat" [and presumably the same also holds true of SUNRISE although the Brief does not make it clear that the same argument is being made on behalf of SUNRISE. (See, Brief of Respondents, pp. 23 - 29)] then there can be no liability to the AMOROSOS. How the DIPLOMAT can make this argument with a straight face is beyond ken. The record below indicated that the DIPLOMAT entered into a lease for a sailboat rental facility with SUNRISE, which in turn entered into a lease, agreed to by the DIPLOMAT, with ATLANTIC. The record further established that the brochure which resulted in the AMOROSOS' interest in sailboat rental was a DIPLOMAT brochure

placed in the AMOROSOS' room, and that the DIPLOMAT enabled the AMOROSOS to make arrangements for the rental through the hotel telephone system and to charge the boat rental on their hotel room. Finally, the DIPLOMAT allowed its guests to use as security for the rental of the boat, the DIPLOMAT HOTEL room key. In short, the DIPLOMAT was involved in every part of the promotion of the rental of this transaction; it advertised the product; it enabled the product to be offered to its guests through its lease of the beach space to SUNRISE; it made it possible for its guests to rent the boats, billing their hotel room for such rental and further, to secure the rental of the boat, allowed their guests to leave their room key as security. Respectfully, once the DIPLOMAT injected itself to this degree into the rental process it becomes just as significant a part of the chain of distribution as if it were a lessor and it should bear responsibility for the injury to Mrs. Amoroso.

Finally, Petitioners argue that establishment of this "new cause of action" is best left to the legislature. (Brief of Petitioners at p. 30). The Amorosos do not believe that this is a "new cause of action". The analysis undertaken by this Court in *West v. Caterpillar Tractor Co., Inc., supra,* 336 So.2d at 86 ("such a recognition by the Court is no great new departure from present law and, in most instances, accomplishes a change of nomenclature"), is true in this case. The Fourth District's analysis of the requisite authority justifies the decision reached and should be upheld by this Court.

ISSUE II:

> The trial court erred when it directed a verdict on Plaintiff's claim of breach of implied warranty. The Fourth District was correct in overruling the trial court's directed verdict and in holding that breach of implied warranty of fitness for ordinary use is an available cause of action in a lease transaction in Florida.

Much of the argument made in connection with the issue of strict liability applies with equal force to the argument under this heading.

The additions to the Petitioners' Statement of Facts, supra, clearly show the involvement of the DIPLOMAT in the lease transaction involving the AMOROSOS. Indeed, if the DIPLOMAT had not made the land for the sailboat rental available, there could have been no sailboat rental at all and just as clearly, the aim of the agreement between the DIPLOMAT and SUNRISE was to provide services to the DIPLOMAT's guests and to keep them happy through the rental of boats. (Tr. day 3, pp. 97, 99 - 100). Indeed, there was testimony that the DIPLOMAT's staff was to keep an eye over the business. *Id.* Further, the record below clearly established that the DIPLOMAT placed in the AMOROSOS' room a brochure which encouraged them to rent sailboats, and that the DIPLOMAT supplied a telephone, its switchboard service and the line from the hotel to the shanty where the rental took place. (Tr. day 3, p. 108). Also, the DIPLOMAT made it possible for its guests to bill the cost of the boat rental to their room with the monies to be collected by the DIPLOMAT when the room bill was paid. Finally, the DIPLOMAT's guests were allowed to use their DIPLOMAT room key as security for

a sailboat when they rented same. (Tr. day 4, pp. 14, 231). In addition, as previously noted the DIPLOMAT and SUNRISE had a written agreement which set forth the arrangement between the parties concerning the division of the rentals in excess of a stated amount and further the DIPLOMAT agreed to the sublease between SUNRISE and ATLANTIC (Tr. day 3, p. 134). Just as clearly, SUNRISE owned the hobie cats in question, and in turn subleased them under some arrangement to ATLANTIC. This has been conceded by the Petitioners in their brief at page 4.

The AMOROSOS believe that the implied warranty of fitness or merchantability exists between the lessor and lessee in the context of this case, based upon this Court's decision in *W. E. Johnson Equipment Co. v. United Airlines, Inc.*, 238 So.2d 90, (Fla. 1970). In that case, this Court extended implied warranties to lease transactions in a commercial setting, noting strong public policy reasons for such extension. While the implied warranty referred to the *Johnson* case was one of fitness for a particular purpose, there is no logical reason for not also extending that protection to a lessee in connection with an implied warranty of merchantability or fitness for ordinary usage.

In *Ford v. Highlands Insurance Co.*, 369 So.2d 77 (Fla. 1st DCA 1979), the court specifically rejected the defendants' claim that a lessor could not be liable for breach of implied warranty of merchantability. *Id.* at p. 78, fn. 2.

The DIPLOMAT argues that it cannot be liable for injury to Mrs. AMOROSO because it is not a commercial leasing operation of

boats for profit but, is simply in the business of renting hotel rooms. (See Brief of Petitioners at p. 32). The AMOROSOS believe that the DIPLOMAT has missed the point. The focus of the protection afforded under breach of an implied warranty theory is on the protection to be afforded the public. A guest at the DIPLOMAT which rents a sailboat from a portion of the premises of the DIPLOMAT and who is a able to rent that sailboat, in part because of the efforts of the DIPLOMAT, clearly expects that that boat will not be available to him unless it is fit for its ordinary purpose. This is certainly in keeping with the expectation of the general public as recognized by the Florida Legislature through its enactment of §§ 680.212 and 680.213 of the Florida Statutes which now extend implied warranties to lease transactions. Admittedly, the DIPLOMAT is not in the business of only leasing sailboats for use, however, when it makes those sailboats available to its guests, through an arrangement with another, it should not expect because of that arrangement, to escape responsibility to a guest when the guest is injured.

The Petitioners have further misstated or mischaracterized the basis of the lawsuit against the DIPLOMAT and SUNRISE. The theory of liability against the DIPLOMAT under the claim against it for breach of implied warranties was that the hobie cat rented through the auspices of the DIPLOMAT was not of merchantable quality and fit for its ordinary use in that the mast collapsed and injured Mrs. Amoroso. Count III of the Sixth Amended Complaint which is the claim for a breach of implied warranties incorporates

allegations to the affect that the DIPLOMAT allowed the AMOROSOS to lease a defective hobie cat in that it failed to inspect and maintain and repair the hobie cat in a reasonably safe condition. (See ¶ 20a of Sixth Amended Complaint, R. 1376-1413). Thus, it is not true as the DIPLOMAT and SUNRISE seem to state at page 33 of their Brief that the AMOROSOS' Complaint alleged only that the welder had a duty to properly weld or replace the crossbar. Further, as previously pointed out, Mr. Stephens an expert marine surveyor, did testify based upon his investigation that the side rail or crossbar should have been replaced instead of repaired. (Tr. day 3, p. 268). In addition, there was testimony from the welder that the crossbar which allowed the mast to fall failed next to the welder's weld, that the area adjacent to the weld can be weakened as a result of the weld, and that there was substantial corrosion in the area of repair to the crossbar. (Tr. day 3, pp. 55, 268).

The DIPLOMAT and SUNRISE also complain about the quantum of proof elicited by the AMOROSOS at the trial below. Under Florida law, a claim for breach of implied warranty of fitness for ordinary use requires proof of the following elements:

1. That the Plaintiff was a foreseeable user of the product;

2. That the product was being used in the intended manner at the time of the injury;

3. That the product was defective when transferred from the warrantor; and

4. That the defect caused the injury.

Sansing v. Firestone Tire and Rubber Co., 354 So.2d 895 (Fla. 4th DCA 1978).

Here, the Plaintiffs met their burden of proof. To argue that Mrs. Amoroso was not a foreseeable user of the product would be fatuous; she was a guest of the hotel, the facility for renting the boats was on the hotel property, the hotel allowed the charge for rental to be charged to the room, the hotel allowed the room key to be used as security for the rental, the hotel allowed a telephone line and its switchboard to be used in making the rentals and the hotel encouraged the rental of the sailboats in its advertising brochure placed in the room. There was also testimony by Mr. Amoroso concerning how the hobie cat was being used, i.e. sailed. While there was dispute in the testimony as to whether Mr. Amoroso was "jibing" or "tacking" at the time that the crossbar failed allowing the mast to strike Ms. Amoroso, it is nonetheless clear that the sailboat was in fact being sailed and the significance of the conflict in the testimony on the exact maneuver involved prior to the failure, if it in fact is an issue, should have gone to the jury. There was testimony from Mr. Stephens and from the welder which would have allowed the inference to be drawn that when the vessel was transferred from ATLANTIC to Mr. Amoroso it was defective since Mr. Stephens testified that the crossbar should not have been repaired but should have been replaced, and Mr. Rhodenbaugh testified that he did not know to what stresses the sailboat was going to be put under or to the extent to which is weld itself be stressed and further, that the weld could have

weakened the metal adjacent to it, and finally that the crossbar failed almost immediately adjacent to the weld. Finally, it was the failure of the crossbar which allowed the mast to pull out and strike Mrs. Amoroso while the vessel was being sailed by her and her husband. (Tr. day 4, pp. 240 - 241, 252, 34, 79 - 80, 245; day 3, pp. 51 - 52, 68 - 71).

The DIPLOMAT and SUNRISE seem to be claiming that because they were not directly involved in the rental to Mr. and Mrs. Amoroso they have no liability, the doctrine of implied warranty notwithstanding. However, both the DIPLOMAT and SUNRISE overlook and do not challenge the fact that a claim was made by the AMOROSOS that there was an apparent agency between the DIPLOMAT HOTEL, ATLANTIC and SUNRISE. As the opinion of the Fourth District sets forth at 17 F.L.W.D. 890, the AMOROSOS met all of the requirements necessary under Florida law to establish an apparent agency. Thus, both the DIPLOMAT and SUNRISE are responsible for, under principles of agency, the violation of the breach of implied warranty of fitness for a particular fitness for ordinary purpose by ATLANTIC.

Moreover, the claim by the DIPLOMAT and SUNRISE that the AMOROSOS were required to put on some testimony that there was a defect which existed at the time the hobie cat left the manufacturer is disingenuous. If what is being argued by the DIPLOMAT and SUNRISE is in fact correct then there never could be liability on the part of a lessor for a breach of an implied warranty (or for that matter strict liability) for any product which it did not also manufacture. The simple fact is, is that the

language of this Court in *Johnson Equipment Co. v. United Airlines, Inc.*, 238 So.2d 98, 100 (Fla. 1970) is, based upon today's commercial climate, even more true than it was twenty-two years ago:

> Public policy demands that in this day of expanding rental and leasing enterprises the consumer who leases be given protection equivalent to the consumer who purchases.

The AMOROSOS respectfully assert that this is even more true in connection with lessees like themselves who were encouraged, indeed even induced to rent the offending sailboat by the acts of the DIPLOMAT.

ISSUE III:

The trial court incorrectly directed a verdict in favor of the DIPLOMAT and SUNRISE on the issue of negligence and the Fourth District Court of Appeal was correct in reversing the directed verdict of the trial court.

The DIPLOMAT and SUNRISE in a long and convoluted argument attack the action of the Fourth District in reversing the trial court's directed verdict on the issues of negligence. Once again, as occurred below, the DIPLOMAT and SUNRISE have overlooked what occurred in the trial court and failed to apply the appropriate standard.

Under Florida law a verdict should never be directed unless the evidence is such that under no view that the jury might lawfully take of the evidence favorable to the adverse party could a verdict for the adverse party be sustained. See, *e.g.*, *Thundereal Corp. v. Sterling*, 368 So.2d 923 (Fla. 1st DCA 1979), *cert. denied*, 378 So.2d 350; *Macano v. Puhalovich*, 362 So.2d 439 (Fla. 4th DCA 1978), dismissed without opinion, 365 So.2d 714; *Sun Life Ins. Co. v. Evans*, 340 So.2d 957 (Fla. 3d DCA 1976); *Shaw v. Massachusetts Mutual Life Ins. Co.*, 298 So.2d 183 (Fla. 1st DCA 1974), *cert. denied*, 312 So.2d 759; *DeSchull Quendo v. Frisch*, 239 So.2d 274 (Fla. 3d DCA 1970). Because of the importance of the right to trial by jury under our scheme of justice, the authority to direct a verdict must be exercised with caution. *Anderson v. Southern Cotton Oil Co.*, 73 Fla. 432, 74 So. 975 (1917); *Hartnett v. Fowler*, 94 So.2d 724 (Fla. 1957); *Katz v. Bear*, 52 So.2d 903 (Fla. 1951).

In deciding a motion for directed verdict, the evidence and all reasonable inferences to be drawn from it must be viewed in the light most favorable to the party moved against. *Cutchins v. Seaboard A. L. R. Co.*, 101 So.2d 857 (Fla. 1958); *Greene v. Flewelling*, 366 So.2d 777 (Fla. 2d DCA 1978), *cert. denied*, 374 So.2d 99; *Rosier v. Gainesville Inns Associates Ltd.*, 347 So.2d 1100 (Fla. 1st DCA 1977); *Jones Little v. Publix Supermarket, Inc.*, 234 So.2d 132 (Fla. 4th DCA 1970).

What the Fourth District held, based upon the record below was that there was evidence from the expert, Charles Stephens, allowed to be admitted by the trial judge (and a great deal of Mr. Stephens' testimony was excluded by the trial court resulting in a separate issue on appeal which was not addressed by the Fourth District because of its decision on the other points) to the effect that it was negligent for ATLANTIC to repair the crossbar as opposed to having it replaced and since it was the crossbar that failed allowing the mast to fall on Mrs. Amoroso, the nexus between the negligence and the injury was established. The Fourth District noted that the DIPLOMAT might be liable, upon full trial under the theory of apparent agency for the negligence of those below it, and the same would also be true with SUNRISE. In addition, it must be recalled that the directed verdict in favor of SUNRISE on the negligence count was because the trial court was under the impression that the Complaint traveled upon by the AMOROSOS alleged negligence against the DIPLOMAT only and not against SUNRISE. The Complaint alleged negligence on the part of the DIPLOMAT and

SUNRISE (as well as ATLANTIC) in inspecting, maintaining or repairing the boat causing the condition which resulted in the injury to Mrs. Amoroso. Thus, it is not, true as the Petitioner's claim, that the sole basis for liability against the Defendants was the defective weld.

In short, the DIPLOMAT and the SUNRISE are arguing, unlike their argument presented to the Fourth District, that because the welder was granted a directed verdict which was upheld by the Fourth District on the basis on the evidence presented, they are *a fortiori* entitled to a directed verdict on their part regardless of the other evidence presented. Viewing the evidence which the trial court did allow the AMOROSOS to present in accordance with rules applicable to directed verdicts, we find that a question of fact was presented as to the agency relationship between ATLANTIC, SUNRISE, and the DIPLOMAT, which should of been presented to the jury; that the AMOROSOS were guests of the DIPLOMAT at all times when they rented the boat from ATLANTIC and made arrangements to rent the boat from ATLANTIC through the auspices of the hotel including charging the rental to their room and leaving their key as a deposit; that SUNRISE and ATLANTIC took no steps to inspect or otherwise maintain the vessels other than for ATLANTIC to tighten things that might have loosened during vibration of a voyage (Tr. day 3, p. 109); that the bar repaired by the welder had corrosion on it caused by exposure to salt water (Tr. day 3, p. 51); that the bar broke approximately one week after its repair by the welder while the AMOROSOS were sailing (Tr. day 3, pp. 51 - 52, 68); and

when the bar broke the mast fell and struck Mrs. Amoroso leading to her injuries. (Tr. day 4, pp. 24, 240 - 241, 252).

In order to avoid the effect of this evidence, the Petitioners argue that there was no evidence presented as to whether ATLANTIC knew or should have known that the crossbar should have been replaced rather than repaired. This is an incredible argument to be making in light of the testimony that ATLANTIC was in the business of renting these boats to the guests of the DIPLOMAT HOTEL and appears to be nothing more than a veiled claim that a party can escape liability by keeping itself in a state of ignorance concerning the very items which it is loosing upon the general public. It seems axiomatic that, where the bar which supports the mast failed at some point prior to the injury to Mrs. Amoroso and indeed had only been repaired the week before she was injured, there must be, as a matter of law, some duty upon ATLANTIC (and by virtue of the duty upon it, a duty upon SUNRISE and DIPLOMAT as a result of the agency relationship) to learn, if it in fact did not know, whether the type of break which occurred was susceptible to appropriate repair by welding or whether replacement was required. To reiterate, to hold otherwise is to allow a party to escape liability by its own deliberate act of ignorance. In short, as the Fourth District properly held, there was sufficient evidence at this point in the proceedings of the trial below to require the trial court to deny the motions for directed verdict.

CONCLUSION

The decision of the Fourth District Court of Appeal should be upheld. The decision of that Court on the strict liability and breach of implied warranty issues represents nothing more than the logical extension of existing Florida case law including this Court's decision in *West v. Caterpillar Tractor Co., Inc.*, 336 So.2d 80 (Fla. 1976). To accept the argument of the Petitioners in this case is to make lessees of goods second class citizens and to reduce the protection to be afforded them arising out of the serendipitous event of an injured person's renting or leasing an article as opposed to buying it. This cannot and should not be the law of the State of Florida. Respectfully then, the AMOROSOS request this Court to affirm in all respects the decision of the Fourth District Court of Appeal.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed on DEC 3 1 1992 to:

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APPENDIX

Torts—Negligence—Strict liability—Product liability—Breach of warranty—Action against hotel, owner of sailboats, rental agent, and repairman arising out of injuries sustained when mast fell after crossbar which had been recently welded by repairman broke—Agency—Evidence that hotel placed brochures in each room advertising the availability of sailing at the hotel, that rental stand was on hotel's beach, that sailboats were paid for by charging them to the room and leaving the room key as security for the rental, that the brochure contained a picture of a sail with the hotel's logo on it, and that neither the owner of the sailboats nor the rental agent were identified as the owner or operator at the beach were sufficient to allege apparent agency relationship between defendants—Evidence that plaintiffs did not inspect sailboat because they assumed anything controlled or rented by hotel would be in good condition established plaintiffs' reliance on hotel's apparent control of sailboat rentals—Error to enter directed verdict in favor of hotel on ground that there was no evidence of apparent agency—Error in entering directed verdict in favor of rental agent without permitting plaintiffs opportunity to elect, post-verdict, whether to hold rental agent or owner/principal liable was not reversible under circumstances—Implied warranties of merchantability and fitness for ordinary use extend to lease transactions in the commercial setting—Plaintiff must be in privity with warrantor to prove liability under implied warranty—Evidence that husband rented the boat but used for security key to hotel room which was rented in both husband and wife's name was sufficient evidence that injured wife was in privity with warrantor to avoid a directed verdict—Lessor is liable for defects in leased product—Evidence established that there was defect in crossbar which caused it to crack and the mast to topple—Error to enter directed verdict in favor of defendants on implied warranty count—Strict liability applies to commercial lessor—Privity is not required to impose liability based on strict liability—Evidence that crossbar had been broken and had been welded back together and that replacement rather than repair of the broken bar was required as the repaired bar could not stand the stresses of sailing was sufficient to establish a defect in the sailboat which existed at the time the boat was rented to plaintiffs—Error to enter directed verdict on strict liability counts—Negligence—In view of evidence that there was negligence in failing to replace crossbar, trial court erred in directing a verdict on negligence count against hotel for failing through its apparent agents to properly inspect, maintain and repair the sailboat—Allegation that owner of boat negligently inspected and/or maintained and/or repaired boat, resulting in defective condition which caused injury to plaintiff, states cause of action in negligence against owner of boat—Evidence failed to establish that repairman negligently performed weld on crossbar or that repairman had duty to inform sailboat owner that bar should be replaced rather than repaired—Directed verdict properly entered in favor of repairman on negligence count

PAULA AMOROSO and ROBERT AMOROSO, her husband, Appellants, v. SAMUEL FRIEDLAND FAMILY ENTERPRISES, d/b/a THE DIPLOMAT HOTEL, INC., a Florida corporation, THE DIPLOMAT HOTEL, INC., a Florida corporation; SUNRISE WATER SPORTS, INC., a Florida corporation; WILLIAM THORAL, as the last known director and officer of SUNRISE WATER SPORTS, INC., ATLANTIC SAILING CENTER, INC., a Florida corporation; FLORIDA INSURANCE GUARANTEE ASSOCIATION, INC.; ROBIN RHODENBAUGH; MISTRAL, INC., a Florida corporation; NAUTILIS, INC., a Florida corporation; and RHODENBAUGH'S SHEET METAL REPAIRS, INC., a Florida corporation, Appellees. 4th District. Case No. 90-2773. Opinion filed April 8, 1992. Appeal from the Circuit Court for Broward County; Robert L. Andrews, Judge. C. Robert Murray of Canning, [illegible], P.A., Miami, for appellants. Richard A. Sherman and Rosemary B. Wilder of Law Offices of Richard A. Sherman, P.A., and Gregg J. [illegible] of Pomeroy & Pomeroy, P.A., Fort Lauderdale, for Appellees-Samuel Friedland Family Enterprises, Diplomat Hotel, Inc., Bill's Sunrise Boat [illegible] Sunrise Water Sports, Inc., Sunrise Water Sports, Inc., and William [illegible]. David L. Wells of Vernis & Bowling, P.A., Fort Lauderdale, for Rhodenbaugh and FIGA. Bill Ullman, Miami, for Atlantic Sailing Center, Inc.

(WARNER, J.) Appellants claim that the trial court erred in directing a verdict against them in this negligence/products liability case. We affirm in part and reverse in part.

Appellants, Mr. and Mrs. Amoroso, were guests at the Diplomat Hotel in Hollywood, Florida. During their stay they decided to rent a sailboat. The sailboat stand was located on the Diplomat's premises and was advertised in the guest rooms. Reservations were made through the hotel telephone system, and charges for the rentals were billed to the hotel rooms. However, the sailboats were owned by Sunrise Water Sports, Inc. (Sunrise) which contracted with the Diplomat to operate the rental stand. Sunrise in turn had an arrangement with Atlantic Sailing Center, Inc. to handle the rentals. Atlantic was organized to operate the rental business at the Diplomat.

Mr. Amoroso had rented sailboats two times previously from the stand without incident. On the third time Mr. Amoroso arranged for a sailboat rental, a crossbar on the sailboat broke, causing the mast to fall, striking Mrs. Amoroso. As a result of injuries sustained, the Amorosos filed suit against the Diplomat, Sunrise, Atlantic, and a welder who had repaired the crossbar a few days before the accident. The sixth amended complaint alleged causes of action for negligent repair and maintenance, breach of implied warranties of fitness and merchantability, and strict liability against Diplomat, Sunrise, and Atlantic. The complaint alleged negligence against the welder.

At trial, the Amorosos offered several experts. While much of their testimony was excluded by the trial judge for various reasons, an expert on marine accidents was permitted to testify that in his opinion the cracked crossbar which had been welded together before the accident should have been replaced rather than repaired, because the bar was subject to a lot of stress in sailing and could not take such stress with the weld. The welder also testified that the crossbar failed right next to the weld, and that in some cases the area next to the weld is weakened by the weld. Finally, the testimony established that the accident occurred as a result of the crossbar breaking.

The trial court directed a verdict in favor of Atlantic and against appellants on the ground that Atlantic was at most the agent of Sunrise and that anything it did should be held against Sunrise as the principal. He next directed a verdict on the implied warranty counts without specifically addressing the implied warranty of fitness for ordinary use or merchantability. Next, the court directed a verdict in favor of the welder on the grounds that there was no evidence presented that the weld was negligently done, and there was no legal duty on the welder to advise Atlantic or Sunrise that the crossbar had to be replaced rather than repaired. As to the strict liability counts, the trial court stated that "there is no such thing as strict liability" and directed a verdict. From the reading of all of the arguments, we believe that the court was of the opinion that the doctrine of strict liability would not apply in cases of rentals. The trial court also directed a verdict in favor of the Diplomat Hotel on the ground that there was not a joint venture or apparent authority established between the Diplomat and Sunrise or Atlantic to hold the Diplomat liable. Finally, the judge directed a verdict in favor of Sunrise on the negligence claim because, as he read the complaint, he thought appellants were suing the Diplomat in the negligence count (count IV). Thus, he did not rule directly on whether there was sufficient evidence of negligent maintenance or repair to go to the jury.

The appellants raise several points on appeal. First, they claim that the trial court erred in directing a verdict as to Diplomat, Sunrise, and Atlantic because the evidence was sufficient to [illegible]

either an actual or apparent agency relationship between them. Second, the evidence established a joint venture among the parties sufficient to withstand a directed verdict. Third, the court erred in its direction of a verdict on the strict liability and implied warranty counts. Fourth, the court erred in directing a verdict against the welder. Finally, they claim that several evidentiary errors require reversal.

The starting point of any review of a final judgment entered on a directed verdict is the general pronouncements regarding the direction of verdicts. A trial court may direct a verdict against a plaintiff only if no evidence is introduced on which the jury may lawfully find for the plaintiff. 55 Fla. Jur. 2d *Trials* § 84 (1982) and cases cited therein. In other words, where there is any evidence, albeit disputed, which supports the cause of action alleged, the trial court should not remove the case from the jury's consideration. Furthermore, on appeal a trial court's reasoning is not the controlling factor. The question before the court on review is whether the result reached by the court was correct. *See Johnson v. Davis*, 449 So.2d 344 (Fla. 3d DCA 1984); *Gavel v. Girton*, 183 So.2d 10 (Fla. 2d DCA 1966).

AGENCY

In order to prove an apparent agency between the Diplomat Hotel and Atlantic or Sunrise, the Amorosos must prove:

(1) A representation by the principal;
(2) Reliance on that representation by a third person; and
(3) A change of position by the third person in reliance upon the representation to his detriment.

Orlando Executive Park, Inc. v. Robbins, 433 So.2d 491 (Fla. 1983); *Holiday Inns, Inc. v. Shelburne*, 576 So.2d 322 (Fla. 4th DCA 1991). As noted in *Shelburne*, the doctrine rests on appearances created by the principal, not the agent. *Id.* at 333. *Shelburne* also cites with approval *Sapp v. City of Tallahassee*, 348 So.2d 363 (Fla. 1st DCA 1977), which states:

> [C]ontrol and domination need not be actual but may be binding upon the principal if apparent. That is, if the principal has held the agent out to the public as being possessed of the requisite authority, and a third person is aware of his authority and has relied on it to his detriment, the principal is estopped from denying the agency relationship.

Id. at 367.

Here there was sufficient evidence of each element of apparent agency to preclude the direction of a verdict against the Diplomat. The Diplomat placed brochures in each room advertising the availability of sailing at the hotel. The rental stand was on the Diplomat Beach. Both Mr. and Mrs. Amoroso testified that neither Sunrise nor Atlantic were identified as the owner or operator at the beach. The sailboats were paid for by charging them to the room and leaving the room key as security for the rental. Mrs. Amoroso also testified that she saw in the brochure a sail with the Diplomat logo on it. Just as in *Shelburne* this evidence taken together was sufficient to show that the Diplomat represented to their guests that the sailboat rental stand was a part of the hotel operations.

Secondly, there was evidence of the Amorosos' reliance upon the representation of the Diplomat's control of the sailboat rentals. Regarding her failure to inspect the sailboat being rented, Mrs. Amoroso testified, "I would assume that if the Diplomat is renting something, it is in good condition. I didn't even think that there could be possibly anything wrong with it." Similarly, her husband testified that he rented the sailboat from the Diplomat because "[I] had full faith on [sic] the Diplomat Hotel. If the Diplomat Hotel was renting something, why should I inspect it? . . . I put my trust in the Diplomat Hotel".

Finally, the third element is met by the rental of the sailboat by the Amorosos, which led to the accident and Mrs. Amoroso's injuries. Since all of the elements of apparent agency were met, it was error to direct a verdict in favor of the Diplomat on the issue of [illegible]

With respect to the directed verdict in favor of Atlantic, the trial court concluded that since Atlantic was the agent of Sunrise, and a third party cannot recover both against an agent and its principal for negligence, Atlantic as agent would be entitled to a directed verdict. As this case involved the existence of at most an "undisclosed" agency relationship between Sunrise and Atlantic, the appellants were entitled to hold either the agent or the principal liable. *Collins v. Aetna Ins. Co.*, 103 Fla. 848, 138 So. 369 (1931). However, while the appellants had to elect which party to hold liable, they were not required to elect until after the verdict as to whom they wished to take judgment against. *Bertram Yacht Sales, Inc. v. West*, 209 So.2d 677 (Fla. 3d DCA 1968). Nevertheless, they did not object or dispute their right to hold both Atlantic and Sunrise in the case until after the verdict and in fact argued to the court that Sunrise was the one who should be held liable for any derelictions of Atlantic. In light of this concession, we find no reversible error with respect to the directed verdict in favor of Atlantic.

With respect to the directed verdict on the theory that the Diplomat, Sunrise, and Atlantic were joint venturers, we affirm.

IMPLIED WARRANTY OF MERCHANTABILITY

Appellants sued the Diplomat and Sunrise on the theory of breach of implied warranty of merchantability or fitness for ordinary use. Appellees first claim that there is no implied warranty of fitness or merchantability between a lessor and lessee. We disagree. In *W.E. Johnson Equipment Co. v. United Airlines, Inc.*, 238 So.2d 98 (Fla. 1970), the court extended implied warranties to lease transactions in the commercial setting, noting "[p]ublic policy demands that in this day of expanding rental and leasing enterprises the consumer who leases be given protection equivalent to the consumer who purchases." *Id.* at 100. While the court specifically addressed the implied warranty of fitness for a particular purpose, the public policy extension made by the court applies equally, if not more so, to implied warranties of merchantability or fitness for ordinary use. *See Ford v. Highlands Ins. Co.*, 369 So.2d 77, 78 n. 2 (Fla. 1st DCA 1979). In fact, the *Johnson* court noted that the precursor for its opinion was its case of *Williamson v. Phillipoff*, 66 Fla. 549, 64 So. 269 (1914), which held that a bailed chattel must be of a character and condition as contemplated by the contract, and the bailor would be liable for damages caused by defects in the product. That standard is not appreciably different from an implied warranty of merchantability which requires that the goods be fit for the ordinary purpose of such goods. *See* § 672.314, Fla. Stat. (1989). Appellees have advanced no argument as to why the public policy arguments which impelled the court to apply an implied warranty of fitness for a particular purpose to lease transactions would not apply equally to an implied warranty of fitness for ordinary use. Since *Johnson*, the commercial lease business has only grown at an increased rate. Especially in the context of the short term rental, the renter must rely on the lessor to provide a chattel fit for its ordinary use. The renter of a car expects that it will function as an automobile, and its wheels won't fall off during the rental period. Likewise, the renter of a sailboat should expect that its mast will not break and fall down during the period of the rental. We hold that there is an implied warranty of fitness for ordinary use in a lease transaction.[1]

Appellees next argue that even if *Johnson* does apply, it would not apply to them under the standards enunciated in the opinion because they are not a "mass dealer in the chattel leased". *Johnson*, 238 So.2d at 100. This statement in *Johnson* is taken out of context. The court listed several factors to take into consideration in determining whether the particular lease transaction would imply a warranty of fitness. One of those criteria was whether the lessor was a mass dealer in the leased chattel, "or whether the transaction was an isolated occurrence." *Id.* What the court was implying was that the lessor's [illegible]

offered for lease before the court will deem that an implied warranty will exist. However, we have no problem in determining that appellees' operation constitutes a commercial leasing operation of boats for profit and that commercial reasonableness would dictate that the lessor should be responsible for damages caused by the defects in the boats which it leases.

The elements to prove liability under an implied warranty theory are:

(1) That the plaintiff was a foreseeable user of the product.

(2) That the product was being used in the intended manner at the time of the injury;

(3) That the product was defective when transferred from the warrantor;

(4) That the defect caused the injury.

Sansing v. Firestone Tire & Rubber Co., 354 So.2d 895 (Fla. 4th DCA 1978). However, in *Kramer v. Piper Aircraft Corp.*, 520 So.2d 37 (Fla. 1988), the supreme court held that a no-privity claim for breach of implied warranty was abolished by the adoption of strict liability in Florida in *West v. Caterpillar Tractor Co.*, 336 So.2d 80 (Fla. 1976). Therefore with respect to the first element, the plaintiff must be in privity with the warrantor.

Appellees have made a claim that it was Mr. Amoroso who rented the boat, thus eliminating the privity requirement as to Mrs. Amoroso. The evidence is susceptible to differing constructions. Both Mr. and Mrs. Amoroso went to the sailboat rental window. Although Mr. Amoroso handed the attendant the key, the rental was charged to the room which was in both Mr. and Mrs. Amoroso's name. Therefore, there was sufficient evidence of privity to avoid a directed verdict.

Appellees also contend that there was no proof that there was any defect in the sailboat from the time it left the manufacturer, citing as authority *Vandercook & Son, Inc. v. Thorpe*, 395 F.2d 104 (5th Cir. 1968). While an allegation of a manufacturing defect is necessary in a cause of action for breach of implied warranty against the manufacturer or its dealer, where a lessor is being sued, the defect in the product may and frequently will arise after the manufacture. The lessor is liable for defects in the product leased, especially if created by the lessor or of which the lessor has knowledge. As in the case of strict liability, the policy of the law is to place the risk of loss associated with the use of defective products on those who have created the risk and who can best protect against it. Certainly, the commercial lessor is in a better position than the lessee to supervise the condition of its boats, cars or the like and keep them free of defects. In like manner, a seller of used cars may be liable for implied warranties of merchantability and fitness, unless properly disclaimed, even though the defects asserted arose after the manufacture of the car. *See Bert Smith Oldsmobile, Inc. v. Franklin*, 400 So.2d 1235 (Fla. 2d DCA 1981). The lessor is in a similar position. From the evidence presented in this case it is apparent that there was a defect in the rail which caused it to crack and the mast to topple. Thus, the trial court erred in directing a verdict on the implied warranty count.

STRICT LIABILITY

The trial court also erred in directing a verdict on the strict liability counts against the Diplomat and Sunrise. In *West v. Caterpillar Tractor Co., Inc.*, 336 So.2d 80 (Fla. 1976), the supreme court adopted the doctrine of strict liability as set forth in Restatement (Second) of Torts § 402A (1965), which provides that the seller of a product "in a defective condition unreasonably dangerous to the user or consumer" is subject to liability for [illegible] caused to the ultimate consumer if (1) the seller is engaged [in] the business of selling the product, and (2) it is expected to and does reach the consumer without substantial change in the condition in which it is sold. The doctrine also eliminates any requirement of privity between the ultimate consumer and the seller. *Id.* [illegible]

Appellees [illegible] that the trial court [illegible] [illegible]

was not the renter of the sailboat; (2) that there was no proof of manufacturing defect; and (3) that the doctrine of strict liabilit[y] does not extend to lessors.[2] The first claim is completely witho[ut] merit because strict liability does not require privity to impos[e] liability. *Kramer v. Piper Aircraft Corp.*, 520 So.2d 37 (Fl[a]. 1988); Restatement (Second) of Torts § 402A(2)(b) (1965). Th[e] second contention is likewise without merit. Even if no manufac[turing] defect is shown, the seller is liable for defects over which [it] has control. As the court stated in *Mobley v. South Florida Beverage Corp.*, 500 So.2d 292, 293 (Fla. 3d DCA 1986):

> Since a retailer is liable for defects over which it has no control it is all the more obviously responsible to an innocent purchase[r] like the plaintiff for a defect which was created only after th[e] product came into its possession—and for which, therefore, th[e] manufacturer and others high up in the distributive chain are no[t] liable.

There was evidence here that the crossbar had broken and ha[d] been welded back together. An expert testified that replacemen[t] rather than repair of the broken bar was required as the repaire[d] bar could not stand the stresses of sailing. Therefore, there wa[s] sufficient evidence of a defect in the boat which existed at th[e] time the boat was rented to the Amorosos to sustain a cause o[f] action.

Finally, the claim that strict liability does not apply to lessor[s] has been addressed only briefly in Florida cases. In *Futch v. Ryder Truck Rental, Inc.*, 391 So.2d 810 (Fla. 5th DCA 1980), the court applied strict liability to a commercial lessor, and in *North Miami General Hosp., Inc. v. Goldberg*, 520 So.2d 650 (Fla. 3d DCA 1988), the court noting that the doctrine had been applied in other consumer contexts including lease transactions, explained that:

> [T]hose 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 even an undetectable product defect. The rationale of the doctrine thus inherently requires a defendant which is in a business within the product's distributive chain.

Id. at 652. By far the vast majority of courts which have considered the question have extended strict liability to the commercial lessor. *See Strict Liability of Lessors of Personalty*, 52 A.L.R. 3d 121 (1973). Thus, we hold that the doctrine of strict liability applies to a commercial lease transaction and that the court erred in directing a verdict holding that it did not apply.

NEGLIGENCE

Because of our holding that the Diplomat hotel may be liable on a theory of apparent agency theory, given the evidence presented that there was negligence in failing to replace the crossbar, we also hold that the court erred in directing a verdict on the negligence count against the Diplomat for failing through its apparent agents to properly inspect, maintain and repair the sailboat. While the appellees and trial court somehow thought that a claim that the crossbar should have been replaced rather than repaired did not constitute negligent maintenance or repair, we disagree. To maintain something means to keep it in good condition and repair. By failing to replace the crossbar and repairing it instead, the appellants were offering proof that it was not being kept in good condition. This is sufficient to survive a directed verdict.

Finally, with respect to the directed verdict in favor of Sunrise on the negligence count, we disagree with the trial court that the count alleged a cause of action in negligence against the Diplomat rather than Sunrise. Although the count alleged that Sunrise was the agent of the Diplomat, it alleged that Sunrise owned the boat in question. It also alleged that the defendants negligently inspected and/or maintained [illegible]

the negligence count.

We affirm the directed verdict in favor of the welder. There was no evidence presented from which a jury could conclude that the weld was negligently done, nor that the welder had a duty to inform the sailboat owner that the bar should be replaced rather than repaired, nor do we deem that he had such a duty as a matter of law.

While there was evidence produced through cross-examination which shed doubt on some of the particulars of the appellants' case, these are issues for the jury to decide. The appellants put on evidence sufficient to survive a directed verdict and on which they were entitled to argue to the jury. We therefore remand for a new trial consistent with this opinion. Because of our disposition of the points on directed verdict, we do not address the remaining evidentiary points raised. (LETTS, J., concurs in conclusion only. FARMER, J., concurs.)

---

[1]Parenthetically, we would note that the legislature has now extended implied warranties to lease transactions in sections 680.212 and 680.213, Florida Statutes (1991), undoubtedly in recognition of the substantial commercial impact that lease transactions have in our economy. This statutory enactment does not negate the earlier existence of common law warranties as provided in case law.

[2]In its ruling the trial court also thought that the doctrine of strict liability applied only to inherently dangerous products, i.e., dangerous instrumentalities. The appellees do not argue that point. The doctrine of strict liability applies not only to inherently dangerous products but to any product which when defective is dangerous and causes injuries. Zyferman v. Taylor, 444 So.2d 1088 (Fla. 4th DCA 1984).

*   *   *

Torts—Legal malpractice—Plaintiff's claim that law firm missed statute of limitations deadline for filing medical malpractice suit on behalf of plaintiff—Affidavit signed by attorney from defendant law firm merely stating that firm did not breach any duty of care in handling plaintiff's claim but failing to explain why case was not filed within statute of limitations insufficient to shift burden of proof to plaintiff and to remove all doubt as to existence of issue of material fact—Plaintiff was not required to file counter affidavit where negligence of attorney appears on face of pleadings and is unrebutted by affidavits to the contrary—Error to grant law firm's motion for summary judgment

DONNA GALLOWAY, Appellant, v. LAW OFFICES OF MERKLE, BRIGHT and SULLIVAN, P.A., Appellee. 4th District. Case No. 91-2244. Opinion filed April 8, 1992. Appeal from the Circuit Court for Palm Beach County; W. Matthew Stevenson, Judge. Robert Garven, Sunrise, for appellant. Kenneth White of Cooney, Haliczer, Mattson, Lance, Blackburn, Pettis & Richards, P.A., Fort Lauderdale, for appellee.

(PER CURIAM.) This appeal arises out of a legal malpractice claim. Appellant's suit claimed that the appellee law firm missed a statute of limitations deadline for filing a medical malpractice suit on behalf of appellant. The law firm moved for summary judgment with an affidavit signed by the attorney from the firm who handled appellant's case stating that the firm did not breach any duty of care in the handling of appellant's claim. Based solely on this affidavit and the failure of appellant to produce an expert's affidavit rebutting appellee's affidavit, the trial court granted summary judgment, relying on the case of *Pritchard v. Peppercorn & Peppercorn, Inc.*, 96 So.2d 769 (Fla. 1957). We reverse.

The disposition of this case is controlled by the seminal case of *Holl v. Talcott*, 191 So.2d 40 (Fla. 1966), which held that on a motion for summary judgment, the burden to prove the nonexistence of a material fact is on the moving party. Thus, the trial court must look not only to the existence of affidavits but to their contents to determine whether the moving party has met its burden of proof. The *Holl* case is factually similar to the present case. In *Holl*, a medical malpractice action, affidavits were filed [illegible]

to a vegetative state after treatment had been administered. Therefore, the court held that such affidavits did not remove all doubt as to the existence of material issues of fact and were insufficient to shift the burden of proof to the plaintiff. *See also North Broward Hosp. Dist. v. Royster*, 544 So.2d 1131 (Fla. 4th DCA 1989); *Brooks v. Serrano*, 209 So.2d 279 (Fla. 4th DCA 1968).

Similarly, in this case the affidavit of the attorney who worked on appellant's file merely stated that appellant's file was handled in accordance with the community standard of care, but the affidavit nowhere attempts to explain why this case was not filed within the statute of limitations as alleged in the complaint. Without such explanation, the burden of proof was never shifted to appellant, and *Pritchard v. Peppercorn & Peppercorn, Inc* never comes into play. There remains a glaring issue of material fact on the face of this record, where an allegation that the case was not filed within the applicable statute of limitations remains unchallenged.

We also agree with appellant that under the facts of this case a counter affidavit was not necessary where the negligence of the attorney appears on the face of the pleadings and is unrebutted by affidavits to the contrary. Appellant alleged in her complaint that she turned her file over to the appellee who agreed to investigate and prosecute her malpractice claim. Despite the knowledge of the statute of limitations, appellee retained her file until after the statute of limitations had run, after which time appellee advised appellant that it would not be able to pursue her claim. In his affidavit the lawyer handling the file did not controvert these factual allegations. We think the unexplained failure to file within a statute of limitations as described in this complaint is such an apparent breach of a duty of care as to obviate the need for expert testimony from appellant on a motion for summary judgment. *Cf Dykema v. Godfrey*, 467 So.2d 824 (Fla. 1st DCA 1985); *Surits v. Kelner*, 155 So.2d 831 (Fla. 3d DCA 1963), *cert. denied*, 165 So.2d 178 (Fla. 1964).

For the foregoing reasons, we reverse and remand for further proceedings. (DOWNEY and WARNER, JJ., and OWEN, William C., Jr., Senior Judge, concur.)

*   *   *

Criminal law—Cross-examination—Limitation—Prosecution witness—Criminal prosecution against witness

DAVID TURNER, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 91-0802. Decision filed April 8, 1992. Appeal from the Circuit Court for Indian River County; James B. Balsiger, Judge. Richard L. Jorandby, Public Defender, and Cherry Grant, Assistant Public Defender, West Palm Beach, for appellant. Robert A. Butterworth, Attorney General, Tallahassee and Sarah B. Mayer, Assistant Attorney General, West Palm Beach, for appellee.

(PER CURIAM.) AFFIRMED. (LETTS and DELL, JJ., concur. ANSTEAD, J., dissents with opinion.)

(ANSTEAD, J., dissenting.) The appellant claims error in the trial court's refusal to allow him to cross-examine an important state witness about a state criminal prosecution against the witness. This case cannot be materially distinguished from our recent holding in *Auchmuty v. State*, No. 90-2007 (Fla. 4th DCA Mar. 4, 1992) [17 F.L.W. D629], in which Judge Farmer, writing for the court stated:

> The trial judge barred the defense from questioning the witness about this pending prosecution and whether he and the state had any arrangements or understandings that might conceivably affect the credibility of the witness's evidence. His decision appears to have been based on his assumption that the probative value of this evidence would be outweighed by its "prejudicial" nature—presumably that it might influence the jury to disbelieve this eyewitness.
>
> A wide range of cross-examination is usually allowed of the state's witnesses. [illegible]

District. Case No. 91-0146. L.T. Case No. 87-27030 (17). Opinion filed October 14, 1992. Appeal from the Circuit Court for Broward County; Linda L. Vitale, Judge. Steven L. Goldman of Entin, Schwartz, Goldman, Margules & Moore, P.A., Miami, for appellant. Constance G. Grayson of Schantz, Schatzman & Aaronson, P.A., Miami, for Appellee-Britton, Cassel, Schantz & Schatzman, P.A.

(DOWNEY, J.) Appellant J.E.I. Airlines (J.E.I.), a Delaware corporation, appeals the trial court's order granting appellees' summary judgment and dismissing appellant's complaint.

The case arose out of a contract between J.E.I. and Stephen Quinto (Quinto) regarding the purchase of stock in Northeastern International Airways, Inc., for cash and transfer of stock in J.E.I. Airlines, Inc. It is alleged in appellant's complaint that the Northeastern Stock was to be escrowed with the law firm of Britton, Cassel, et al., for delivery as specified in the contract. In time, the parties disagreed on the status of their respective performance and appellant filed suit for damages.

On November 29, 1990, the trial court entered an Order On Defendant's Motion for Summary Judgment and Final Order of Dismissal, and this appeal ensued.

There are two aspects to the order under review. One grants summary judgment based upon appellant's status as a dissolved foreign corporation. The other dismisses the cause as a sanction for failing to appear for a deposition on the date that the court ordered. The main thrust of appellant's attack is that the trial court refused to give it adequate time to comply with the court's orders.

Our conclusion from a study of this record is that the trial court erred in dismissing the cause for the discovery violation and in granting the summary judgment.

On November 20, 1990, the trial court filed a Pre-Trial Conference Order, which ordered appellant to submit to deposition by November 27, 1990, or the case would be dismissed. When appellant, or its representative, did not appear for the deposition, without any hearing on the matter, the court entered the order dismissing the cause for such failure. Appellant argues that, had a hearing been held, it could have informed the court that its designee for deposition was out of the country when the pretrial order was entered and counsel had been unable to effectuate his timely presence. Be that as it may, the order imposing the sanction of dismissal is defective because it fails to find that appellant's conduct demonstrated a deliberate and contumacious disregard of the court's authority or evidenced a willful failure to submit to discovery. *Bernaad v. Hintz*, 530 So. 2d 1055 (Fla. 4th DCA 1988). Such finding is a sine qua non for entry of so severe a sanction.

The second aspect of the order appealed is the granting of summary judgment for failure to have its corporate existence reinstated. The order directing appellant to reinstate its corporate existence was entered November 20, 1990, and the summary judgment followed on November 29, 1990. As appellant argues, it was physically impossible to accomplish the reinstatement within that time frame. We are not unaware that appellant's corporate existence had been suspended for several years. However, at the point in time when that became an issue, a reasonable amount of time should have been allowed to enable appellant to effect a reinstatement, and the cause could have been abated in the interim.

Accordingly, the order appealed from is reversed and the cause is remanded to the trial court with directions to allow appellant a reasonable time to effect corporate reinstatement if it has not already been accomplished, and a reasonable time to present a representative for discovery purposes.

REVERSED. (STONE and POLEN, JJ., concur.)

* * *

Torts—Negligence—Strict liability—Product liability—Breach of warranty—Action against hotel, owner of sailboats, rental agent, [illegible] broke—Question certified whether doctrine of strict liability to defective products extends to commercial lease transactions those products

PAULA AMOROSO and ROBERT AMOROSO, her husband, Appellants, SAMUEL FRIEDLAND FAMILY ENTERPRISES, d/b/a THE DIPLOM HOTEL, INC., a Florida corporation, THE DIPLOMAT HOTEL, INC., Florida corporation; SUNRISE WATER SPORTS, INC., a Florida corpo tion; WILLIAM THORAL, as the last known director and officer of SUNRI WATER SPORTS, INC., ATLANTIC SAILING CENTER, INC., a Flor corporation; FLORIDA INSURANCE GUARANTEE ASSOCIATION, IN ROBIN RHODENBAUGH; MISTRAL, INC., a Florida corporation; NA TILIS, INC., a Florida corporation; and RHODENBAUGH'S SHEET MET REPAIRS, INC., a Florida corporation, Appellees. 4th District. Case No. 9 2773. Opinion filed October 14, 1992. Appeal from the Circuit Court f Broward County; Robert L. Andrews, Judge. C. Robert Murray of Cannin Murray & Feltz, P.A., Miami, for appellants. Richard A. Sherman and Ro mary B. Wilder of Law Offices of Richard A. Sherman, P.A., and Gregg Pomeroy of Pomeroy & Pomeroy, P.A., Fort Lauderdale, for Appellees-San el Friedland Family Enterprises, Diplomat Hotel, Inc., Bill's Sunrise Bo Rentals-Sunrise Water Sports, Inc., Sunrise Water Sports, Inc., and Willia Thorla. David L. Wills of Vernis & Bowling, P.A., Fort Lauderdale, f Rhodenbaugh and FIGA. Bill Ullman, Miami, for Atlantic Sailing Center, Inc.

ON MOTION FOR REHEARING
[Original Opinion at 17 F.L.W. D889]

(PER CURIAM.) We deny rehearing but certify the followir question as one of great public importance:

> WHETHER THE DOCTRINE OF STRICT LIABILITY AS T DEFECTIVE PRODUCTS EXTENDS TO COMMERCIA LEASE TRANSACTIONS OF THOSE PRODUCTS?

(WARNER, J., concurs. FARMER, J., concurs specially witl out opinion in denial of rehearing only. LETTS, J., dissents wit opinion.)

(LETTS, J., dissenting in part.) I would grant the motion fc rehearing insofar as it pertains to the issue of the Diplomat Hc tel's strict liability.

The holding in *West v. Caterpillar Tractor Co., Inc.*, 33 So.2d 80, 89 (Fla. 1986), was that "a *manufacturer* may be hel liable under the theory of strict liability in tort." (Emphasi supplied). Admittedly, the *Caterpillar Tractor* court spoke ap provingly of, and adopted the ALI Restatement (Second) of Tort §402A, which refers to "seller" as distinct from manufacturer; however, it is obvious to me that the actual holding is restricted t manufacturers. Not only was the *Caterpillar Tractor* defendant manufacturer making caterpillar tractors, but the words "manu facture," "manufactured," or "manufacturer," appear ii excess of twenty times in the opinion. True, the words "seller" or "distributor" appear, but only infrequently, and the wor "lessor" is never utilized. As a consequence, though I dissent ir part, I wholeheartedly approve of the certified question. Ou Supreme Court may well expand the doctrine, but in my view, i has not yet done so and neither should we.

The other Florida cases cited by the majority in support of th application of the doctrine to a lessor are not convincing. For example, in *Mobley v. South Florida Beverage Corporation*, 50C So.2d 292, 293 (Fla. 3d DCA 1986), *rev. denied*, 509 So.2d 1117 (Fla. 1987), the court apparently upheld a strict liability count against a *retailer* specifically noting that "others higher up the distributive chain are not liable." The Diplomat Hotel is clearly not the retailer in the case now before us. That doubtful distinction belongs to Sunrise and/or Atlantic who own the six boats and rent them not necessarily to Diplomat Hotel guests. The Diplomat Hotel unquestionably is not higher up in the distributive chain and therefore under *Mobley*, is not strictly liable.

The other case relied upon by the majority is *Futch v. Ryder Truck Rental*, 391 So.2d 808 (Fla. 5th DCA 1980), where the court, in noting the abandonment of the strict patent danger doctrine as an exception to liability, extended it to lessors. The [illegible]

course of business is the mass rental of trucks. I do not believe there is a compelling analogy between Ryder Truck Rental and a hotel primarily engaged in the hotel business which leases a each to the owner of six small Hoby Cats (Tequila Sunrise Models). By the same token, I do not believe the words "seller" or "lessor" under section 402A of the Restatement were ever intended, under *Caterpillar Tractor*, to impose strict liability under the facts of this case.

As to the balance of the majority opinion, I continue to concur in conclusion only.

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[1]The majority opinion concludes that the word "seller" also encompasses a "lessor," the latter word describing the Diplomat Hotel in this case. See W.E. Johnson Equipment Co., Inc. v. United Airlines, Inc., 238 So.2d 98 (Fla. 1970).

* * *

Dissolution of marriage—Trial court erroneously concluded that wife would have to contribute toward enhancement of husband's separately-owned assets in order for the appreciation in those assets to constitute marital property—On remand, trial court should determine which of separately owned assets were enhanced as result of husband's labor in enterprise during the marriage and then equitably distribute the marital property—Husband's contention that trial court awarded wife permanent rather than rehabilitative alimony as a punishment to husband for his marital indiscretions unsupported by record—Husband's obligation to pay health insurance and medical expenses for wife and minor children to be limited to "reasonable and necessary" expenses—Abuse of discretion to impose lien on over one million dollars of husband's assets to secure an award of $100,000 lump sum alimony and an award of permanent alimony

JAMES A. WATFORD, Appellant/Cross Appellee, v. TERESA WATFORD, Appellee/Cross Appellant. 4th District. Case No. 91-0658. L.T. Case No. 89-CA. Opinion filed October 14, 1992. Appeal and cross appeal from the Circuit Court for Okeechobee County; William L. Hendry, Judge. Timothy W. Gaskill of DeSantis, Cook & Gaskill, North Palm Beach, and John R. Cook, Okeechobee, for appellant/cross appellee. Joseph D. Farish, Jr. of Farish, Farish & Romani, West Palm Beach, for appellee/cross appellant.

(WARNER, J.) This is an appeal of a final judgment of dissolution of marriage in which the wife was awarded lump sum alimony, permanent alimony, child support, and attorney's fees and costs. Both the husband and wife appeal, claiming errors on the part of the trial court. We reverse.

Appellant husband and appellee wife were married in 1979. The wife filed for divorce in 1989. During the marriage the husband worked for his family's trucking business, and the wife stayed at home and took care of their two children. The wife has experienced serious health problems, including a bone marrow transplant from which she has had host-donor complications. The court also heard testimony that the husband engaged in an adulterous relationship while married.

Appellant owned a 24% interest in his family's trucking business which was given to him by his father during the marriage. He also was given 45% interest in an incorporated cattle ranch and a 25% interest in investment acreage, all of which are family owned corporations. The husband also had a $50,000 cash surrender value of a life insurance policy and an interest in a family trust in excess of $500,000. The trial court found that the husband's net worth was in excess of $1,000,000 and possibly as high as $3,000,000. Finally, the trial court determined that the husband's income was at least $115,00 after taxes, and there was testimony to substantiate an additional $30,000 per year in benefits to the husband.

The trial court concluded that there were no marital assets because all of the husband's assets came from his parents. Since there was no enhancement in value of these as a result of the wife's labor, the appreciation in these assets also was not a marital asset. In order not to leave the wife penniless, the trial court awarded the wife (1) the husband's interest in the marital home; (2) lump sum alimony of $100,000 [illegible]

school tuition; (5) full health and accident insurance for the wife and children; (6) ordered the husband to pay any future deductibles or unrecovered medical expenses for the children; and (7) attorney's fees and costs. The court further ordered that the wife's award would be secured by a lien on the husband's assets.

Appellant claims first that the trial court erred in awarding the wife lump sum alimony. Conversely, the wife claims that the trial court erred in determining that there were no marital assets subject to equitable distribution. We agree with the wife's contention.

The husband's assets were gifts from his parents of various shares of the family businesses. The husband worked in the businesses, particularly the trucking company, during the marriage. Marital appreciation of separately-owned assets is subject to equitable distribution if either spouse expended marital labor on that asset. *Pfleger v. Pfleger*, 558 So.2d 198 (Fla. 2d DCA 1990); *see also Sanders v. Sanders*, 547 So.2d 1014 (Fla. 1st DCA 1989). Here the trial court erroneously concluded that the wife would have to contribute toward the enhancement of the asset for the appreciation to constitute marital property. This was error. The husband worked in the trucking company full-time during the marriage. At least as to that asset, its appreciation of over $500,000 during the marriage is a marital asset subject to equitable distribution. On remand the court should determine which of the separately owned assets were enhanced as a result of the husband's labor in the enterprise, thus making the appreciation marital property. Then the trial court should equitably distribute the marital property. In order to accomplish this we also reverse the awards of the marital home and the lump sum alimony so that the court can fashion anew an equitable financial solution in this case.

The husband also complains that the trial court should have awarded only rehabilitative alimony and that the decision to award permanent alimony was the result of the court's consideration of his adultery. There is nothing in the record to support the contention that the trial court awarded permanent alimony as a punishment to the husband for his marital indiscretions. Evidence was taken on this issue, and the trial court considered it as it is entitled to do pursuant to section 61.08(1), Florida Statutes (1989). The husband's citation to *Noah v. Noah*, 491 So.2d 1124 (Fla. 1986) is simply inapposite. Indeed, absent the evidence of adultery there was a sufficient basis for the award of permanent alimony. The wife was obtaining a nursing degree, but even if she were to find employment there was no testimony that her level of earnings would be adequate to support her in the marital life-style. In fact, the combination of her potential future earnings, child support, and the alimony awarded, after taxes, would not cover all of the wife's expenses. Combined with her history of serious illness, we find no abuse of discretion. However, because we are reversing the equitable distribution determination, the trial court may reconsider the alimony award after determining the equitable distribution and what effect that may have on the wife's available income.

The trial court also ordered the husband to provide full health coverage for the wife and minor children and to pay any deductible amounts and medical expenses not covered by insurance. The Fifth District has held that it is error to fail to set such limits, *see Marsh v. Marsh*, 553 So.2d 366 (Fla. 5th DCA 1989); *Richards v. Richards*, 477 So.2d 620 (Fla. 5th DCA 1985). The approach of this district has been slightly different. In *Brandenburg v. Brandenburg*, 550 So.2d 565 (Fla. 4th DCA 1989), we held that a limitation in the final judgment of "reasonable and necessary" medical expenses was an adequate limitation as either party could apply for relief from such expenses should the circumstances require it. In *Black v. Black*, [illegible] (Fla. 4th DCA 1986), we remanded a final judgment [illegible] to include a limitation [illegible] by the husband and [illegible]

IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT OF FLORIDA

CASE No. 90-2773

PAULA AMOROSO & ROBERT AMOROSO, her husband
Appellant (s)

Vs.

SAMUEL FRIEDLAND FAMILY ENTERPRISES , etc ., et al
Appellee(s)

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VOLUME 1 : Cont' INDEX TO RECORD

DATE FILED	INSTRUMENT	PAGE
11/16/90	Transcript of Proceeding Taken on Sept 11, 1990	1 - 24
11/16/90	Transcript of Proceeding Taken on Sept 10, 1990	25 - 46
11/16/90	Transcript of Proceeding Taken on Sept 14, 1990	47 - 72
11/16/90 Volume 2	Transcript of Proceeding Taken on Sept 11, 1990	73 - 132
11/19/90 Volume 3	Transcript of Proceeding Taken on Sept 12, 1990	133 - 282
11/19/90 Volume 4	Transcript of Proceeding Taken on Sept 12 , 1990	283 - 425
11/19/90 Volume 5	Transcript of Proceeding Taken on Sept 13, 1990	426 - 575
11/19/90 Volume 6	Transcript of Proceeding Taken on Sept 13, 1990	576 - 758
3/30/87	Complaint for Damages	759 - 761
5/15/87	Amended Complaint for Damages	762 - 765
6/1/87	Motion to Amend Amended Complaint for Damages	767 - 770
6/15/90	Agreed order on Plaintiffs' Motion to Amend the Amended Complaint for Damages	771
6/25/90	Motion to Amend Second Amended Complaint for Damages	772 - 777
7/1/87	Defendant, Florida Insurance Guaranty Association's Motion to Dismiss	778 - 779
7/1/87	Defendant, Robin Rodenbough's Motion to Dismiss	780
7/2/90	Certificate of Service of Motion to Dismiss	781 -
7/8/87	Agreed Order on Plaintiffs' Motion to Amend the Second Amended Complaint for Damages	782

VOLUME 6 : Cont' INDEX TO RECORD

VOLUME 6 : Cont' INDEX TO RECORD

VOLUME 10 : Cont' INDEX TO RECORD

VOLUME 10: Cont' INDEX TO RECORD

VOLUME 11: Cont' INDEX TO RECORD

VOLUME 11 : Cont' INDEX TO RECORD

VOLUME 11: Cont' INDEX TO RECORD

VOLUME 11 : Cont' INDEX TO RECORD

VOLUME 11 : Con't INDEX TO RECORD

VOLUME 12 : Con't INDEX TO RECORD