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IN THE SUPREME COURT OF FLORIDA

CASE NO. 80,786
Florida Bar No: 184170

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

Petitioners,

vs.

PAULA AMOROSO and ROBERT AMOROSO, her husband,

Respondents.

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

REPLY BRIEF OF PETITIONERS ON THE MERITS

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

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TABLE OF CITATIONS

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POINTS ON APPEAL

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

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

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

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

The Fourth District Court of Appeal has adopted two new theories of liability to be imposed against commercial lessors. It then went one step further and held that a hotel, whose business it is to rent rooms, was a "commercial lessor" of a small sailboat; and therefore could be held strictly liable and liable for breach of implied warranty of merchantability. This has never been the law in Florida, nor should it be; since there is absolutely no legal or public policy reason to adopt and apply this vast new theories of liability to every commercial lease transaction in the State.

Conspicuously absent from the Brief of Appellee is any meaningful discussion whatsoever of the law used by the Fourth District to adopt the new theory of strict liability. Rather, the Amorosos go out-of-state and rely on a series of cases involving manufacturers or commercial lessors, who are mass dealers in the product leased, in order to support the imposition of strict liability against the Diplomat Hotel. The Amorosos claim that by renting a small portion of its beach to Sunrise, that somehow this magically converted the Diplomat Hotel into a commercial lessor of used sailboats, and therefore a guarantor of any liability arising out of the use of those sailboats under the theory of strict liability. The Amorosos cite no case however that would support such a legal proposition.

The bottom line to this case is that this is simply a

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negligence action against the Hotel, Sunrise, Atlantic, and the welder Rhodenbaugh. Contrary to what the Amorosos state, the only evidence of any negligence they presented at trial was that of the Plaintiffs' alleged expert, who testified that the welder, an independent contractor, should have replaced rather than repaired the crossbar for the sailboat (T IV, 90). In fact, the Fourth District affirmed the trial court's finding that the welder owed no duty to inform Atlantic, the renter of the sailboat, that the crossbar should be replaced and not repaired. Since Rhodenbaugh was an independent contractor and the Amorosos could not impute his negligence to Atlantic and then Sunrise, and then to deep pocket of the Diplomat Hotel, the Amorosos attempted to bring all types of product liability actions instead.

The gist of the Brief of Respondent on the issue of strict liability is simply that the public should always be guaranteed protection from the use of any product, at any time, under any circumstances. Of course, this has never been the law in Florida, or anywhere else. Rather, the Restatement and Florida caselaw have limited strict liability to those entities, which are commercial lessors and are mass dealers in the chattel leased. West v. Caterpillar Tractor Company, Inc., 336 So. 2d 80 (Fla. 1976)(a manufacturer maybe held liable under the theory of strict liability and tort); W.E. Johnson Equipment Co. v. United Airlines, Inc., 238 So. 2d 98 (Fla. 1970)(commercial lessor is a mass dealer in chattel can be subjected to theory of strict liability); Futch v. Ryder Truck Rental, Inc., 391 So. 2d 808 (Fla. 5th DCA 1980)(commercial lessor who is in the business of

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leasing trucks and was a mass dealer in the chattel in question held liable under the doctrine of strict liability).

The fact that strict liability is restricted to commercial lessors, who are mass dealers in the chattel leased, is totally substantiated by simply looking at the cases cited by the Respondents. Each case involves a manufacturer or commercial lessor, which is a mass dealer in the chattel in question. Cintrone v. Hertz Truck Leasing & Rental Service, 212 A.2d 769 (N.J. 1965); Brimbau v. Ausdale Equipment Rental Corporation, 448 A.2d 1292 (R.I. 1982); Coleman v. Hertz Corporation, 534 P.2d 940 (Ok. Ct. App. 1975); Dewberry v. LaFollette, 598 P.2d 241 (Ok. 1979); Rourke v. Garza, 530 S.W.2d 794 (Tex. 1975); Price v. Shell Oil Company, 466 P.2d 722 (Cal. 1970).

The Respondents' reliance on this string of out-of-state cases, as opposed to any discussion of Florida law, substantiates the fact that from West forward this Court has never imposed strict liability on any commercial lessor. Furthermore, the appellate decisions in Florida, which have imposed strict liability on commercial lessors, all involved cases where the commercial lessor was a mass dealer in the chattel leased. The decision in West makes it clear that it is the manufacturer or seller that is engaged in the business of selling such a product, that held to the standard of strict liability, because it is that entity which has control over the product and has the duty to see that it is reasonably safe; knowing that the product is going to be used without inspection. West, 89. Of course, the sailboat in question was a used one which was inspected by the Plaintiff's

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husband, who rented it with the knowledge that it had been repaired/welded.

Also conspicuously absent from the Brief of Respondents is any discussion of the fact that there are ample other theories for recovery against entities like the Diplomat, Sunrise, and Atlantic, whereby injured plaintiffs can be compensated. Therefore, there is no need for the application of strict liability to circumstances like those in the present case. There are breach of contract actions, there are negligence actions, there are breach of warranty actions, etc.

In fact, the Plaintiffs, at trial, conceded that their entire lawsuit was really simply a negligence action brought against the Co-Defendants. Since the Plaintiffs could not impute the negligence of the independent contractor/welder to the other Defendants, the Plaintiffs were attempting to proceed under theories of product liability.

The Fourth District Court of Appeal has effectively eliminated any requirement of proving negligence against any commercial lessor in Florida, through the blanket imposition of the doctrine of strict liability. It did so without any legal precedent whatsoever. Furthermore, it held that a large Hotel was a commercial lessor of six sailboats, rented from a sublessee of a lessee of the Hotel, simply because the Hotel had rented out a section of its beach property. Contrary to what the Respondents assert, this is an incredible increase in the expansion of liability in commercial transactions in Florida.

The imposition of strict liability to every commercial lease

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in Florida will certainly have a serious effect on the free flow of commerce in the State. There is little question that the Fourth District's Opinion below creates uncertainty in business relationships and will cause a major disruption in future lease transactions in Florida. Where there are ample causes of action currently available to plaintiffs in commercial lease transactions, there simply is no reason to impose strict liability on every commercial lease transaction in the State, whether for products or property, new or used. At best, the imposition of strict liability should be kept to those businesses, which are in the distributive chain of the product in question, which businesses are also mass dealers in that particular chattel. They have the financial ability and expertise to guarantee the safety of those products, thus meeting the public policy concerns expressed by the Respondents in their Brief.

It is respectfully submitted that the Fourth District's decision below must be reversed; that this Court hold that there is no extension of strict liability to every commercial lessor; or to limit such imposition of strict liability to those businesses which are mass dealers in the product in question.

Regardless of how this Court rules on the issue of strict liability in its application to commercial lessors, the Opinion below must still be reversed. The Diplomat Hotel and Sunrise do not fall into any category sufficient to find that either is a "commercial lessor," whose business falls within the distributive chain of small Hobie Cat boats or are mass dealers in small Hobie

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Cat boats.

The Fourth District's Opinion regarding the Petitioners in this case must be reversed and the Directed Verdicts affirmed in favor of the Diplomat and Sunrise.

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

The Respondents apparently rely on the "but for" test of causation in order to support the Fourth District's decision; that breach of implied warranty of fitness for ordinary use exists in every single lease transaction in Florida. The Amorosos argue that "but for" the Diplomat renting a small portion of its beach area to Sunrise, who rented it to Atlantic, who rented a boat to Mrs. Amorosos husband, who charged it to his hotel room, Mrs. Amoroso would not have been injured. Therefore, since there is a breach of implied warranty of fitness for a particular use in commercial lease transactions between a commercial lessor, which is a mass dealer in chattel, and the lessee, there is "no logical reasons for not also extending that protection to a lessee in connection with an implied warranty of merchantability or fitness for ordinary use." (Brief of Respondents', 18; citing, Johnson, supra).

Once again, the Amorosos do not present any meaningful discussion of the caselaw or statutes relied on by the Fourth District to impose this new breach of warranty cause of action. Rather they simply argue that the public should be "protected" and there is no reason not to hold every single lessor in Florida liable for this breach of warranty. Of course, under the Amorosos' theory, any member of the public, who walked up the beach or rented a sailboat from Atlantic, would be entitled to

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bring breach of warranty and strict liability actions against Atlantic, Sunrise, and the Diplomat Hotel.

Basically, what the Amorosos are asking is that the public be protected at all costs, from any and all injuries, from any product, obtained in any manner. As previously mentioned, the Plaintiffs conceded at trial that they had an ordinary negligence action available to them against the entities in question. Since they could not prove negligence, they had to attack the Co-Defendants through the theory of products liability. It is respectfully submitted that where other causes of action exist, there is absolutely no legal basis for the Fourth District's conversion of every commercial lessor in Florida to an insurer of every product leased.

The absence of any critical discussion of the law relied on by the Fourth District and recited by the Petitioners substantiates the fact that the Amorosos are simply asking this Court to make every lessor in Florida a guarantor of every product leased. Needless to say, these positions overlooked the fact that the parties by law who are responsible for defective products are those who create the risk and those who can best protect against it, i.e., the mass dealers in chattels, not the Diplomat or Sunrise; who can and were sued under ordinary principles of negligence. Therefore, if this Court is to adopt the new law, that an implied warranty of fitness for ordinary use attaches to every "commercial lease transaction" in Florida, it should at the very least limit the liability to those who are mass dealers in chattels, and the Directed Verdicts for the

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Diplomat and Sunrise must be affirmed.

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

The only negligence established at trial was that of the welder, through the testimony of the Plaintiffs' expert, who opined that the welder knew or should have known to replace the crossbar, as opposed to welding it. Since there was no evidence that the weld had been done improperly and no duty on the part of the welder to tell anybody to replace the crossbar, the Directed Verdict in favor of the welder was affirmed. It is undisputed that the Plaintiff put on no testimony whatsoever, that Atlantic, Sunrise, or the Diplomat, knew or should have known to replace the crossbar as opposed to repairing it; or that there was any violation of any maintenance standards, requirements, etc.; nor was there any evidence of any negligent maintenance. Rather, the only negligence established at trial was that of Mr. Amoroso, who professed expertise in sailboats and sailing; who inspected the sailboat in question; who was informed that the sailboat had been repaired; who specifically chose to rent this repaired sailboat on three separate occasions; and when executing an uncontrolled jibe, put extra stress on the crossbar, which caused it to crack and the mast to fall.

The Fourth District determined that the proper weld to the crossbar could have weakened it, which was based on the testimony of the welder himself. Absent was any evidence whatsoever that Atlantic knew or should have known that welding this crossbar might cause it to become weakened, or in fact that the weld rendered the crossbar defective. The Fourth District

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gratuitously assumed that the mast fell when the crossbar cracked because of the weld; as opposed to the testimony that the mast fell because the crossbar cracked, because of the uncontrolled jibe executed by Mr. Amoroso, which put excessive stress on the sailboat. The best that could be said for the Fourth District's interpretation of the evidence at trial was that the welder was not negligent in causing a defect. Even if this were true, his negligence cannot be imputed to Atlantic, Sunrise, and the Diplomat, since he is an independent contractor and this was undisputed. It was on this basis that the Directed Verdict on negligence was entered by the trial court.

Belatedly, the Appellees argue that the Diplomat, through the theory of apparent agency, had a duty to inform itself about the maintenance of the lessee's, sublessee's rented sailboats, but cites no caselaw to support this proposition whatsoever. Of course, the Diplomat did not rent sailboats, it rented an area of its beach to Sunrise, which rented it to Atlantic, which rented sailboats. It was the Plaintiffs' duty to show that Atlantic knew or should have known to repair the crossbar in question as opposed to repairing it. The Plaintiffs put on no testimony of this whatsoever. Rather, their expert testified that the expert/independent contractor/welder knew or should have known to replace rather than repair the crossbar, and that he had no duty to tell anybody else; including Atlantic, Sunrise, and the Diplomat. It was this fatal flaw in the Plaintiffs' case that was the basis for the Directed Verdicts below. It is only after the fact that the Amorosos argued that through the doctrine of

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apparent agency somehow Atlantic should have known to replace this crossbar, but in the absence of any testimony whatsoever presented at trial to support this, the Directed Verdicts were clearly proper and should have been affirmed.

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CONCLUSION

The new causes of action in Florida for strict liability and breach of implied warranty of fitness for ordinary use of the Fourth District are in direct conflict with this Court's decision in West and Johnson, supra; and therefore, the Opinion below must be reversed. There is no law or public policy reason for this Court to adopt these new theories of liability; or to apply them to the Diplomat and Sunrise.

Based on the complete lack of any negligence whatsoever on the part of the Diplomat, Sunrise, Atlantic, or the welder, the Directed Verdicts in favor of the Diplomat and Sunrise must be affirmed.

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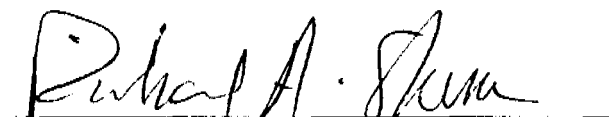
By: 
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