IN THE SUPREME COURT OF THE STATE OF FLORIDA

JENNY POOLE, etc.,

Petitioner,

v

VETERANS AUTO SALES AND LEASING COMPANY, INC.,

Respondent.

_____/

Supreme Court Case No. 85,232
Fifth DCA Case No. 93-1839
Circuit Court Case No. 91-2434-CA-08-L

Petition From the 5th District

RESPONDENT'S BRIEF ON THE MERITS

DAVID C. BEERS, ESQUIRE
Florida Bar No. 209872
Beers, Jack, Tudhope & Wyatt, P.A.
P. O. Box 948600
Maitland, FL 32794-8600
(407) 660-1818
ATTORNEYS FOR RESPONDENT

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PREFACE

Respondent, Veterans Auto Sales and Leasing Company, Inc., was the Appellant in the Fifth District Court of Appeal, and the Defendant in the trial court. Jenny Poole, as Personal Representative of the Estate of Rebecca Ann Pritchard, deceased, was the Appellee in the Fifth District Court of Appeal, and the Plaintiff at trial. The parties will be referred to as "Poole" and "Veterans."

The following symbols will be used:

R - Record on Appeal

TABLE OF CITATIONS

Statutes

STATEMENT OF THE CASE AND OF THE FACTS

This is an appeal from a decision by the Fifth District Court of Appeal rendered December 30, 1994, which vacated an Order Granting Optional New Trial, and affirmed in part an additur, and reversed in part an additur, entered by the trial court following a four (4) day jury trial from May 17, 1993 through May 20, 1993.

Poole's Initial Complaint (R-Vol. 1, p. 1-4), alleged that on or about September 7, 1989, Veterans owned a 1982 Pontiac Firebird, vehicle identification number 2AX87H7CL513859.

The Complaint further alleged, that on September 7, 1989, the vehicle was occupied by two persons, Velita Dawn Bullock and Margaret Andy. However, because neither individual would admit to driving, and the vehicle left the scene of the accident, the identity of the driver is unknown to Poole (R-Vol. 1, p. 1-4).

The Complaint further alleged that as a direct and proximate result of the injuries sustained by Rebecca Pritchard, while a passenger on a motorcycle owned and operated by George Prior, Ms. Pritchard died on September 9, 1989. It was further alleged that Rebecca Pritchard's death was a proximate result of the negligence of Veterans (R-Vol. 1, p. 14).

The Complaint also alleged the capacity of Jenny Poole to file a lawsuit on behalf of the Estate of Rebecca Ann Pritchard, as her Personal Representative, seeking medical bills and expenses from the time of injury to death, and funeral and burial expenses.

Poole's Complaint also alleged claims on behalf of John J. Thayer, II, a survivor

under the wrongful death act, as the natural minor child of the deceased, for past and future loss of support and services of his mother, and past and future mental pain and suffering as a result of his mother's death, and loss of his mother's instruction, parental companionship and guidance, both past and future.

Poole also alleged claims by two other survivors of Rebecca Pritchard, Sara Danielle Pritchard and Andrew Jason Pritchard, also natural minor children of the deceased, claiming past and future loss of support and services of their mother, past and future mental pain and suffering as a result of their mother's death, and past and future loss of their mother's instruction, parental companionship and guidance due to her death in the accident.

Veterans filed an answer denying that Veterans Auto Sales and Leasing Company, Inc. was the owner of the 1982 Pontiac Firebird at the time of the accident (R-Vol. 1, p. 5-7).

Poole filed a motion for summary judgment on the issue of ownership (R-Vol. 1, p. 173-179), and a memorandum of law in support of plaintiff's motion for partial summary judgment on the issue of ownership (R-Vol. 2, p. 243-249).

Poole argued that because: (a) certain terms on a used car order form executed by a Ms. Velita Bullock, an employee of Veterans, who was interested in purchasing the 1982 Firebird had not been completed; (b) there had been no acceptance of Ms. Bullock by a finance company; and (c) no retail installment sales contract had been signed, so no contract for sale of the 1982 Firebird had been concluded between Veterans and Ms.

Bullock. Therefore, Poole argued Veterans was the owner of the 1982 Firebird on September 7, 1989.

On or about September 23, 1992, Veterans filed a memorandum of law in opposition to Poole's motion for partial summary judgment (R-Vol. 2, p. 255-265), arguing that, Ms. Bullock was the owner of the 1982 Pontiac Firebird, as she had accepted Veterans' offer to purchase the car, and had control and authority over the use of the car at the time of the accident and for a period of approximately 15 days prior thereto. To support that position, Veterans referred to the testimony of its general manager and vice president, Gene Simon, who testified at his deposition on December 11, 1991, that the vehicle in question was sold and delivered to Veterans' employee, Ms. Bullock (R-Simon depo, p. 45 and p. 47) prior to the accident and that Ms. Bullock made a $300.00 down payment on the automobile (R-Simon depo, p. 64).

The deposition testimony of Gene Simon of December 11, 1991, established that the routine practice of Veterans Auto Sales & Leasing Co., Inc. concerning the sale of a vehicle was to provide a Buyer's Order signed by the customer with a deposit (R-Simon depo, p. 26).

Gene Simon agreed on behalf of Veterans to sell the car to Velita Bullock, but he is not familiar with the exact paperwork that was necessary for the car to be titled in her name (R-Simon depo, p. 37).

During her deposition taken May 15, 1992, Ms. Bullock admitted that she had spoken with Veterans' general manager about purchasing the automobile, (R-Bullock depo, p. 18) that she took actual possession of the car on August 23, 1989 (R-Bullock

depo, p. 15 and p. 21), and that she filled out an application for a temporary tag with the Division of Motor Vehicle on August 23, 1989 (R-Bullock depo, p. 30). Veterans also pointed out that a buyer's order (R-Bullock depo, p. 39, Exhibit 2), an odometer disclosure statement (R-Bullock depo, p. 47-48), and an insurance information document disclosing and certifying that Ms. Bullock had full insurance with Colonial Penn on the vehicle in question had all been executed by Ms. Bullock on or before September 5, 1989 (R-Bullock depo, p. 30 and p. 52), two days prior to the accident. Ms. Bullock has asserted forgery with respect to some of her signatures on various title transfer documents (R-Bullock depo, p. 55, Exhibit 5, POA p. 54), although she admitted during her deposition the writing on the insurance disclosure form, "looks like it could be my handwriting" and admitted that it is "possible that I signed it" (R-Bullock depo, p. 54-55).

The Plaintiff submitted supplemental arguments and authorities in favor of the partial summary judgment as to the issue of ownership (R-Vol. 2, p. 267-271).

The record before the Circuit Judge, C. Vernon Mize, at the time of the hearing on Poole's motion for partial summary judgment on the issue of ownership, occurring Wednesday, September 23, 1992 at 3:00 p.m., consisted of the Complaint; the Answer; Plaintiff's Request for Judicial Notice (R-Vol. 1, p. 53-111); Plaintiff's Response to Defendant's Request for Production (R-Vol. 1, p. 15-16); and Plaintiff's Amended Response to Defendant's Request for Production (R-Vol. 1, p. 17-18); and the original interrogatory answers of Plaintiff (R-Vol. 1, p. 19-27); Plaintiff's Request for Admissions

to Defendant (R-Vol. 2, p. 202-206); Defendant's Response to Plaintiff's Request for Admissions (R-Vol. 2, p. 236-237); Defendant's Supplemental Response to Plaintiff's Request to Produce (R-Vol. 2, p. 253); and Defendant's Amended Supplemental Response to Plaintiff's Request to Produce (R-Vol. 2, p. 254).

Before she had settled her liability and had been completely released from the claims of Poole from the September 7, 1989 accident, Bullock gave a sworn deposition in case number 91-908-CA-08-K. In that civil action Bullock was a direct Defendant. The Plaintiff in that action was the motorcycle owner or operator involved in the September 7, 1989 accident, George Prior. Bullock's testimony as to the purchase of the 1982 Pontiac Firebird in her deposition of June 6, 1991, established a sale by Veterans of the Firebird (R-Bullock depo of June 1991, p. 9). While an employee of Veterans, Bullock had an occasion to purchase the 1982 Firebird. She purchased the Firebird towards the end of August, around the 19th or 20th. She spoke to Gene Simon of Veterans who owned the business and he told her to take the car and try it and make sure it was the one she wanted. Simon gave her the bill of sale on it, and she paid so much down and was to make payments on it (R-Bullock depo of June 1991, p. 13-14). There was nothing done about the transfer of the title to the vehicle (R-Bullock depo of June 1991, p. 14). Bullock testified unequivocally she purchased the vehicle through her employer, Veterans Auto Sales (R-Bullock depo of June 1991, p. 15). Bullock took possession of the car and she was more or less happy with it, and she had the car for about two weeks. She was still driving the car on September 6th of 1989 (R-Bullock depo of June 1991, p. 17-18).

Bullock testified that she was under the understanding that since she was purchasing the Firebird, it would be covered under her insurance, even though it wasn't registered in her name (R-Bullock depo of June 1991, p. 68). Bullock had put a down payment of $300 or $400 down on the car (R-Bullock depo of June 1991, p. 68). Bullock also believed she received a receipt for her cash down payment (R-Bullock depo of June 1991, p. 75). Bullock testified that she retained possession of the vehicle from August 19th or 20th up to the time of the accident. She was going to purchase it (R-Bullock depo of June 1991, p. 75-76). Velita Bullock now claims that she knew from day one that since the power of attorney and the application for title had not been signed, she could never have the car titled to her. That is because she never signed the necessary paperwork to title it (R-Bullock depo of May 15, 1992, p. 54).

In that same deposition which was provided by Velita Bullock in this civil action on May 15, 1992, she conceded signing the buyer's order (R-Bullock depo, p. 37).

She also conceded that she was not familiar with the procedures regarding the purchase of the automobiles from Veterans Auto Sales & Leasing Co., Inc. Bullock admits having given Veterans a deposit of $300 on the Firebird prior to September 7, 1989 (R-Bullock depo, p. 37).

She indicated that the Buyer's Order was signed before the accident, that is, on September 5, 1989 (R-Bullock depo, p. 41).

She also indicated that nothing improper had been added to the Buyer's Order (R-Bullock depo, p. 42).

Judge Mize granted Poole's motion for partial summary judgment as to ownership of the vehicle involved in the September 7, 1989 accident and entered an order on October 21, 1992 finding, as a matter of law, that as of September 7, 1989, Veterans owned the 1982 Pontiac Firebird (R-Vol. 2, p. 278-280).

Veterans filed an original Affidavit of Sherry Noble with a notice of filing same in support of a motion for rehearing (R-Vol. 2, p. 330-332).

Veterans served a memorandum of law in support of the motion for reconsideration of Judge Mize's order granting partial summary judgment on the issue of ownership directed to the successor assigned Circuit Judge, Newman D. Brock (R-Vol. 2, p. 370-377).

Judge Brock denied the motion for rehearing and/or reconsideration as to the partial summary judgment on the issue of ownership (R-Vol. 3, p. 409-410).

Poole filed an amended complaint on April 1, 1993 (R-Vol. 3, p. 450-453).

Veterans answered the amended complaint (R-Vol. 3, p. 542-545). A second amended complaint was filed by stipulation following a pretrial conference on Monday, April 26, 1993, wherein the pretrial order reflected Poole was permitted to file a second amended complaint alleging the 1982 Pontiac Firebird was operated with the consent of Veterans. This consent was denied, and by stipulation, Veterans was not required to file an answer to the second amended complaint (R-Vol. 4, p. 631-634).

John J. Thayer, II, the oldest surviving child of the deceased, testified that he had not resided with his mother since moving to Pennsylvania to live with his father in 1983 (R-Vol. 7, p. 63). Jenny Poole had no specific knowledge about the frequency of contact

between the deceased and her elder son (R-Vol. 7, p. 64-65). There was no visitation with Johnny Thayer during the summer of 1989 (R-Vol. 7, p. 63).

The second former husband of the deceased, Scott Pritchard, testified that John J. Thayer, II went to live with his father in Pennsylvania after spending the summer of 1984 (R-Vol. 7, p. 142).

The agreement was that John J. Thayer, II would live in Pennsylvania with his natural father and there would be visitation of summer vacations with the deceased.

The first summer, 1985, Johnny Thayer did come to visit his mother. Then it stopped (R-Vol. 7, p. 145).

John Thayer had saved some of his mother's letters which were admitted into evidence despite objection (R-Vol. 6, p. 865-878).

In the testimony of John Thayer, the teenager established that with the exception of the vist the month before her death, the decedent had not seen her elder son for a number of months.

Jenny Poole's knowledge of the relationship between John Thayer and the decedent is limited at best. In trial testimony, Jenny Poole established that she had not seen Johnny Thayer at all after Johnny went up to Pennsylvania to live with his dad in 1983 (R-Vol. 7, p. 63).

She also testified, directly contrary to the testimony of John Thayer, II, that there was no visitation with the decedent and Johnny Thayer during the summer of 1989 (R-Vol. 7, p. 63). Jenny Poole conceded that she had no specific knowledge about the frequency of contact between the decedent and Johnny Thayer (R-Vol. 7, p. 64).

Poole testified that Rebecca Pritchard knew it was the right thing for Scott Pritchard, her second former husband, to have the two Pritchard children. Scott and his mother had money and could economically take care of the children. Becky couldn't. She had no job. What was she going to do, bartend? Who would watch the children? What would she do? (R-Vol. 7, p. 39). By the terms of the dissolution judgment (R-Vol. 6, p. 1083-1085), the deceased relinquished the primary residential care of the children (R-Vol. 7, p. 40). The children came down for an extended visitation during the summer of 1989 right after they got out of school (R-Vol. 7, p. 41). During the summer immediately before her death, the decedent was not working, but was spending time with her two children, Sara and Jason (R-Vol. 7, p. 58). The children went back up to Georgia to live with Scott Pritchard and his mother, Ellen Pritchard, in the middle of August of 1989 (R-Vol. 7, p. 58). The children moved with Scott Pritchard from Florida to Georgia some time in 1987 (R-Vol. 7, p. 62). Jenny remembers that Becky had the children off and on during the summer of 1987. She doesn't remember what periods or how long (R-Vol. 7, p. 63).

Ms. Ellen Pritchard, the paternal grandmother, testified that the children, Sara and Jason, moved into her house with Scott when Scott and Rebecca Pritchard were separated in 1986 (R-Vol. 7, p. 114). While she admitted that after the separation the children spent time with their mother, Rebecca, she didn't know exactly how much time (R-Vol. 7, p. 118). After the children moved to Georgia in September of 1988, the deceased would call her children (R-Vol. 7, p. 120). She did observe the children's reaction to the news of the death of their mother. They cried and were upset about it, very upset (R-Vol. 7, p. 123). Most of the time, Sara is okay with her mother's death (R-Vol. 7, p. 124). Ellen Pritchard

believes that Sara remembers her mother much better than Jason (R-Vol. 7, p. 124). Both of the children were student of the month during the past month before the May 1993 trial in their elementary school in California (R-Vol. 7, p. 128). Jason's reaction to the death of his mother wasn't quite as severe as Sara's. Jason talks about her, but not as much as Sara. Jason probably doesn't remember Rebecca as well as Sara does because Jason is 14 months younger (R-Vol. 7, p. 129). The children were maybe six and seven when their mother was killed (R-Vol. 7, p. 129). As for Sara, Ms. Ellen Pritchard tries to do some of the things that mothers normally would do with their daughters (R-Vol. 7, p. 129). Neither one of the children were in public school at the time of the separation (R-Vol. 7, p. 132). During the summer when Scott was in Georgia in 1988, the children were with Ellen Pritchard, but Becky would pick them up and keep them often when she wasn't working (R-Vol.7, p. 133). Other than the visits with Dr. Meyers in San Diego, the only counseling the Pritchard children had after Rebecca Pritchard died was with a counselor one time at All Good Elementary in Stone Mountain, Georgia (R-Vol. 7, p. 134). She was not aware of any physical problems the children have had as a result of the loss of their mother (R-Vol. 7, p. 135).

Scott Pritchard testified the final dissolution from the decedent was August 1987 (R-Vol. 7, p. 138). In fact, it was rendered March 18, 1987 (R-Vol. 6, p. 1083). The Dissolution Order incorporated by reference a stipulation and property settlement agreement executed by the deceased and Scott Pritchard on August 25, 1986 (R-Vol. 6, p. 1084-1085).

Scott Pritchard had primary custody of the children, and their mother, now deceased, had every other weekend, summer vacation when they were off from school, and every other major holiday, Mother's Day, and her birthday (R-Vol. 7, p. 148).

Rebecca Pritchard would see the children according to the divorce agreement and occasionally, she would see them more often than that (R-Vol. 7, p. 150).

In the summer of 1989, the children went to stay with their mother in Sanford (R-Vol. 7, p. 150), and they were very, very excited to see their mother because they loved her very much (R-Vol. 7, p. 151). When Scott went to pick the children up, they weren't crazy about going home. He had to take them back to their school though (R-Vol. 7, p. 151). Scott Pritchard does not know how long it took for the children to get better. They still think about their mother (R-Vol. 7, p. 153). Scott Pritchard feels that Sara was very close with her mother. Both kids were very close. They really enjoyed that last summer that they were together. They still talk about a lot of good things about Rebecca (R-Vol. 7, p. 157).

The expert opinion testimony of child psychologist, Dr.Judith Meyers of San Diego, California, was received by videotape deposition. Dr. Meyers, not married and with no children, testified that she was first contacted the last week of March 1993 for consultation in this matter (R-Meyer's depo of April 16, 1993, p. 66 and p. 11).

Dr. Meyers confirmed that she was first contacted not by the father of the two children, but by attorneys for Poole (R-Meyers' depo of April 16, 1993, p. 66).

Dr. Meyers' testimony was based upon two interviews with Scott Pritchard and with the two children totalling certainly less than ten hours (R-Meyers' depo of April 16,

1993, p. 70), and probably no more than two to three hours (R-Meyers' depo of April 16, 1993, p. 13 and 21).

She conceded that she did not know how the children's days or activities were structured (R-Meyers' depo of April 16, 1993, p. 64). She also conceded the children had not received any psychological treatment since their mother's death(R-Meyers' depo of April 16, 1993, p. 18).

Finally, she had no appointment to see the children in the future for treatment (R-Meyers' depo of April 16, 1993, p. 81).

The court accepted as competent, overruling an objection (R-Vol. 8, p. 270-274), the testimony of Jason Pritchard, age nine at the time of trial, and not quite six at the time of his mother's death. He remembers his mother as nice and sweet. He remembers his mother telling him that she loved him. He told his mother than he loved her (R-Vol. 8, p. 275). He can't remember the last time he was with his mother (R-Vol. 8, p. 276). He does remember spending the summer with his mother before she died (R-Vol. 8, p. 276). He remembers being told that his mother had died, and his sister and father crying together with him (R-Vol. 8, p. 277). He thinks about his mother when people tell him and he dreams about it in his sleep (R. Vol. 8, p. 278). He thinks about his mother a couple of times a month (R-vol. 8, p. 278). His sister, Sara, and he don't talk very often about their mother (R-Vol. 8, p. 278). He is real close to Mimi, his grandmother. She does things with him (R-Vol. 8, p. 279).

Sara Danielle Pritchard, age ten years and ten months at the time of trial, and age six years and two months at the time of her mother's death, was also accepted by the court over Veterans' counsel's objection as to her competency to testify (R-Vol. 8, p.

281-284). She remembers her mother and has pictures and jewelry of her mother. She remembers most that her mother was a nice, sweet lady. She loved her mother very much, more than anyone else. Her mother took good care of her (R-Vol. 7, p. 286). She remembers feeling very bad about learning of her mother's death. Rebecca would say I love you, and she said things that would make Sara feel better (R-Vol. 7, p. 287). She still misses her mom the same as she did back right after she died (R-Vol. 8, p. 288).

Counsel for each party made recommendations to the jury as to the verdict (see Appendix).

The jury returned a verdict for the plaintiff on May 20, 1993, in the total amount of $98,042.76 (R-Vol. 4, p. 758-759).

The Plaintiff filed a Motion to Interview Jurors (R-Vol. 4, p. 771-774), and a Motion for Additur and Alternative Motion for New Trial (R-Vol. 4, p. 760-770).

Following the second post-verdict hearing of Friday, June 11, 1993, Judge Brock announced his intention to grant an additur or require a new trial on damages only (R-Vol. 9, p. 474-528).

Veterans timely served a Notice of Disagreement with Order Granting Additur following the June 11, 1993 hearing (R-Vol. 5, p. 816-817).

On Wednesday, July 7, 1993, a third post-verdict hearing occurred.

The court ultimately rendered an Order on July 12, 1993 granting additur and optional new trial (R-Vol. 5, p. 826-830).

Following Veterans' notice of refusal to accept the additur (R-Vol. 5, p. 820-821), Veterans timely filed a Notice of Appeal (R-Vol. 5, p. 834-835).

The Fifth District Court of Appeal rendered its opinion on December 30, 1994, reversing the order granting additur as to non-economic damages for the three minor children, and certified as a question of great public importance, the following:

> IF SECTION 768.74 PERMITS A TRIAL JUDGE TO ORDER A NEW TRIAL UNLESS THE AFFECTED PARTY AGREES TO ACCEPT A REMITTITUR OR ADDITUR WHEN A REASONABLE PERSON COULD AGREE THAT THE RECORD SUPPORTS THE JURY DECISION (ASSUMING NO TRIAL ERROR OR JURY MISCONDUCT), DOES THIS SECTION VIOLATE ARTICLE I, SECTION 22, CONSTITUTION OF THE STATE OF FLORIDA?

Petitioner filed a Notice to Invoke Discretionary Jurisdiction with the Florida Supreme Court on February 17, 1995.

SUMMARY OF ARGUMENT

A. The District Court of Appeal did not err in its review in finding an abuse of discretion of the trial court's authority in granting a new trial to the Plaintiff on the issues of compensatory damages for each of the surviving children's claims for non-economic damages arising from the death of their mother. Since the District Court did not err, there is no requirement for the Florida Supreme Court to answer the certified question from the District Court of Appeal.

B. The Supreme Court should declare Florida Statutes Section 768.74 unconstitutional as violative of Article I, Section 22 of the Constitution of the State of Florida because the statute allows a trial judge the discretion to order a new trial when a reasonable person could agree the record supports the jury decision on damages.

C. The District Court of Appeal did err in failing to reverse the trial court's granting of Poole's Motion for Partial Summary Judgment on the issue of ownership of the automobile involved in the death of Rebecca Ann Pritchard, deceased, and in failing to order a summary judgment for Veterans Auto Sales & Leasing Co., Inc. The Supreme Court need not answer the certified question from the District Court. By ordering the entry of a Final Summary Judgment for Veterans on the issue of ownership of the vehicle, this ruling would terminate the litigation on the current record where the only theory of the liability of Veterans was the application of the dangerous instrumentality doctrine.

ARGUMENT

FIRST POINT ON APPEAL

The District Court did not err in its review in finding an abuse of discretion of the trial court's authority to grant a new trial.

The District Court of Appeal's opinion in this matter is that Judge Newman Brock's granting of an optional new trial was an abuse of his discretion. This abuse of discretion is based upon the District Court of Appeal's analysis of the evidence, and the transcripts of the post-trial hearings. The opinion is also based upon a complete review of the testimony from the trial transcript, including the videotapes of the child psychologist referenced in the Petitioner's Initial Brief.

The District Court of Appeal is in the same position as Judge Brock in determining whether the record supported the jury's award on the non-economic damage claims. If the District Court of Appeal is prohibited from overruling an additur order from a trial judge on a claimed basis that the trial judge observed the witnesses and the Appellate Court cannot observe the demeanor of those witnesses, then the District Court of Appeal's appellate review function of an additur order under Florida Statutes Section 768.74 is meaningless.

It is also argued by the Petitioner that the trial judge's order was not sufficiently specific to give the District Court of Appeal an understanding of the reasons for the optional new trial or additur order. There is no need to relinquish jurisdiction of the trial court because the order was sufficiently specific.

Alternatively, if the Supreme Court feels the order is not specific, then the Plaintiff should bear the risk of reversal by the District Court of Appeal based upon any insufficiency in the facts or conclusions from the trial court's Order Granting Additur or Optional New Trial.

Under Florida Statutes Section 768.74, in determining whether or not the award is adequate, the court shall consider the following criteria:

(a) Whether the amount awarded is indicative of prejudice, passion or corruption on the part of the trier of fact;

(b) Whether it appears the trier of fact ignored the evidence in reaching a verdict or misconceived the merits of the case relating to the amount of damages recoverable;

(c) Whether the trier of fact took the proper elements of damages into account or arrived at the amount of damages by speculation and conjecture;

(d) Whether the amount awarded bears a reasonable relation to the amount of damages proved and the injuries suffered; and

(e) Whether the amount awarded is supported by the evidence and is such that it could be adduced in a logical manner by reasonable persons.

As the trial judge stated at one time during a post-verdict hearing, it had no better handle or feel on a non-economic award than the jury (R-Vol. 9, p. 499). The court made no findings on 768.74(5)(c), and there is nothing in the record to justify any findings.

As was pointed out to the lower court in the hearing on Poole's Motion for Additur and Alternative Motion for New Trial, there was no evidence that the verdict was the result of passion or prejudice (R-Vol. 9, p. 450).

In the case at bar, the cumulative intangible damage verdict suggested by defense counsel was $80,000 (R-Vol. 8, p. 391). The award by the jury, although not precisely identical, was a cumulative total of $80,000. Thus, as to the award of intangible damages, the statement by the lower court in its ruling in the second post-verdict hearing on June 11 1993, "The verdict is even lower than what defense counsel suggested to be fair," is not accurate (R-Vol. 9, p. 499).

The identity of the jury's intangible award with the amount recommended by defense counsel was specifically pointed out to the court at the first post-verdict hearing on June 2, 1993 (R-Vol. 9, p. 452-453).

The trial court stated, "it seems a little shocking is when you look at these figures for Jason has in the past $4,000 for Sara and for, excuse me, for John Thayer $4,000 in the past and for Sara and Jason $6,000 in the past and that was for like three years and then take that quantum leap up to 52 years, actually, it's been like 49 years thereafter approximately to only give $24,000, so it looks to me that the six and twenty-four ratio or four sixteen ratio seems inordinately small." (R-Vol. 9, p. 470).

The trial court also said that the verdict shocked him when he heard the verdict. But when he said shocked, he did not wish to sound like it blew him away, but it surprised him is a better word. It seemed inordinately low at the time to him (R-Vol. 9, p. 470-471).

The trial court ruled that it appeared the triers of fact ignored the evidence in reaching the verdict or misconceived the merits of the case relating to the amount of damages recoverable as to the loss of parental companionship, instruction, guidance and the child's pain and suffering for the reasons previously announced. The trial court

described the extensive testimony by Dr. Judith Meyers of San Diego, California as to the effect it had on the two survivors, Sara and Jason, and by John Thayer's own testimony as it impacted him also. He found the jury did not consider the evidence as they should have on that (R-Vol. 9, p. 518).

The trial court found that under 768.74(5)(d), the amount awarded for the same elements for each of the three children seems to be out of relation to the amount of injuries suffered by the three children for the loss of their mother (R-Vol. 9, p. 518).

The court stated not as strongly 768.74(5)(e) applied on the basis that the amount awarded just wasn't supported by the evidence and could not be adduced in a logical manner by reasonable persons based upon the life expectancy of 52.1 years and the tender age of these children, and the psychological testimony, the letter testimony, and the individual testimony of the children (R-Vol. 9, p. 518).

The court's stated basis for the additur must be analyzed in the context of the court's statements made during the first post-verdict hearing on June 2, 1993.

The court observed that the decedent, at age 28, appeared to be not right on target with where maybe she should be for that age, and by that, he meant the evidence was that she was not really a very stable worker. The evidence was pretty mushy about when she worked at the tavern over at the Foxhead Lounge. The court pointed out that it never came out what reason, but she did not establish a lengthy work record (R-Vol. 9, p. 461).

The trial court also noted during that hearing another negative feature about the case was that the decedent did not have the primary residential care as such of any of the children. John Thayer lived with his father up north. Sara and Jason live now in California with their father, who was a very well spoken, articulate person who apparently

is doing quite well as a sales person in California, and very fortuitous for these children, they had a very gentile, learned grandmother who was a former teacher who almost presented the perfect image of a nice grandmother. So the jury probably felt somewhat comforted with the fact that while these children don't have their mother, they certainly have a nice replacement of sorts (R-Vol. 9, p. 462-463).

The trial court stated its basis for granting the additur was that the loss of instruction, guidance, parental companionship, and mental pain and suffering was woefully inadequate in the verdict of all three surviving children. The court based this on the fact that with Sara Danielle and Andrew Jason, there was a lengthy presentation of testimony from the psychologist in California, Judith Meyers, that it really had an impact on these children, so much so that they had to go to her for evaluation and treatment. That is fairly dramatic (R-Vol. 9, p. 497-498).

The court went on to explain the weaknesses in the Plaintiff's case and the probable basis for the jury's award. The court stated these children seemed to be at least, while on the witness stand, well adjusted children. They had a grandmother that testified and she was a very articulate former school teacher, presented herself very well, and between she and the decedent's surviving former husband, they seem to have their act together for the purposes of rearing these children (R-Vol. 9, p. 509).

The court also pointed out that he realized the father of Sara and Andrew did have custody of these children (R-Vol. 9, p. 498-499).

The trial court also pointed out that the mother did not pay child support pursuant to any judgment (R-Vol. 9, p. 499). The court ruled that the figure just seemed inordinately low. Again, not basing his thoughts on the loss of the decedent, but rather on

the residual effect it had on the surviving children and will have for 52.1 years (R-Vol. 9, p. 499).

The factual basis for the award of general intangible damages to John J. Thayer, II, relies almost exclusively on the testimony of the 14 year old minor child, John J. Thayer, II, at trial.

His mother's letters were hearsay. These statements of the decedent, made in 1984 and 1985 as to what her state of mind was then, should not have been admitted. There was no recognized exception to the hearsay rule to allow these letters into evidence (R-Vol. 4, p. 692-702). There were no letters in 1986, 1987, 1988, or 1989.

There was no testimony as to the frequency of telephone communications, and with the exception of the one summer visitation in 1985, there was no other evidence of extended visitation of John Thayer, II with the deceased. There was no evidence of any financial or economic support by the deceased for John J. Thayer, II.

In Davis v O'Dell, 506 So.2d 1107 (Fla. 4th DCA 1987), an additur was affirmed where the jury awarded $25,000 in a wrongful death case of a 78 year old woman, where her surviving husband had been married to her for 58 years. The verdict was raised by the trial court in granting an additur to $100,000, and that order was affirmed on appeal.

If the trial court's ruling is reinstated, the standard for review of intangible awards for compensatory damages will rely upon "per diem" analysis. The trial judge in this case has acted like a "seventh juror," who has accepted the concept of the per diem argument, and declined to limit the award based on the extremely thin factual evidence provided to the jury of the emotional attachment between the decedent and her elder son.

The trial court has no better judgment on this issue than the six collective jurors sworn to decide the amount based upon the evidence.

The trial court also evidently relied upon the relationship between the award of past mental pain and suffering and loss of parental companionship and guidance as compared on a proportionate basis to the award for future mental pain and suffering and future loss of parental companionship and guidance.

In short, the approximate $1,000 a year award for past intangibles was substantially reduced in the future award to a figure of $1.05 a day according to Plaintiff's counsel (R-Vol. 9, p. 437).

The court also erred in granting an additur to the intangible damages of Sara Danielle Pritchard and Andrew Jason Pritchard.

First, Veterans did object to the competency of both Pritchard children to testify as witnesses. The court overruled these objections. These rulings were made by the court based upon the testimony of the children in the record. Based upon the answers to the court's questions by both Sara Danielle and Andrew Jason, Veterans contends that the objections to their competency as witnesses should have been sustained. The children's entire testimony should be disregarded.

The court cited Florida Statutes Section 768.74(b), as one criteria for the additur. The "extensive testimony" by Dr. Judith Meyers was from a child psychologist selected by Poole's counsel (R-Meyers' depo of April 16, 1993, p. 66). Dr. Meyers has never seen the Pritchard children for treatment, only for evaluation (R-Meyers' depo of April 16, 1993, p. 18 and p. 81). Dr. Meyers' testimony, like any other expert's testimony, can be lawfully rejected by the jury. Dr. Meyers' videotape testimony played to the jury is

included in the record. The Supreme Court may view the videotape to judge the credibility and demeanor of Dr. Meyers.

The only testimony of extended visitation of the deceased with Sara Danielle and Andrew Jason after the August 1986 separation, which occurred when the children were four and three years of age, respectively, was the summer of 1989, just before the deceased's accident.

As the trial court pointed out, the children appeared on the witness stand well adjusted and extremely well cared for by their natural father and their paternal grandmother, Ellen Pritchard. Few cases of this type ever reach juries. The unique factual nature of this case is evident from an analysis of the testimony. To affirm the opinion of the trial court that the verdict was low based on "per diem" arguments will substantially undermine the jury system.

The trial judge has substituted his own opinions as to the award of the mental pain and suffering and lost parental companionship and guidance and instruction elements of damages for those of the jury.

This substitution by the trial judge has not been previously authorized by Florida courts. While it is true that the most recent interpretation of Florida Statutes Section 768.74(5) in Dykes v Spick, 606 So.2d 700 (Fla. 1st DCA 1992), orders a new trial as to past non-economic damages in a personal injury case, Judge Wolf's concurring opinion is instructive. In that opinion, Judge Wolf notes that courts should be extremely reluctant to over turn the factual determination of the jury as to future non-economic damages notwithstanding the passage of the tort reform act. Indeed, in Dykes, the future non-economic damage award of $11,000 was affirmed by the 1st DCA. The trial judge had

even affirmed the past non-economic damage award of $5,000. Frankly, in light of the record evidence of Mr. Dykes' two surgeries and nearly two weeks in hospitals, 12 to 14 weeks of home convalescence, and efforts to return to work resulting in severe pain, including the 14% permanent whole body impairment, the evidence justified a new trial in that case. As in this case, defense counsel's suggested figure for past non-economic loss of $25,000 exceeded the jury's award of $5,000. In the case of John J. Thayer, II, the jury awarded $1,000 less in past non-economic damages and $1,000 more in future non-economic damages than was recommended by defense counsel. The 1st DCA pointed out the obvious that defense counsel's suggested figures were not binding upon the jury or the trial court.

There is ample precedent for the Fifth District Court of Appeal's Order reversing the trial court's order granting a new trial based upon the alleged inadequacy of damages. In Perenic v Castelli, 353 So.2d 1190 (Fla. 4th DCA 1977), the court specifically noted that the weight to be given conflicting evidence is a question for the jury and never one for the court. The only exception to that rule is where the verdict is contrary to the manifest weight of the evidence, which by definition, only occurs when the evidence is clear, obvious, and indisputable. The district court reversed the trial court's ruling.

Similarly, in Nordin v Gregory, 566 So.2d 60 (Fla. 5th DCA 1990), the Court of Appeal reaffirmed the test in reviewing the granting of a motion for new trial based upon inadequate damages is to determine whether it can be said that the jurors, as reasonable men, could not have reached that particular verdict.

Specifically, it must be determined that the jury verdict shocked the judicial conscience of the court to allow it to be disturbed.

In Nordin, the award was an itemized verdict which, if analyzed carefully, affirmed an award of $3,200 in total intangible damages despite a life expectancy of a minor child of substantial length. The past bodily injury award was $2,060, and thus, the relationship of $2,060 in the past, yet only $3,200 for the future, was of proportionate relationship that was acceptable on that record.

It is respectfully requested that the standard adopted by the Florida Supreme Court in Griffis v Hill, 237 So.2d 143 (Fla. 1969), was not met by the trial court's order of additur and/or new trial in this matter. In reviewing the entire record, it is respectfully suggested that reasonable minds could differ as to whether or not the verdict on the issues of past and future intangible compensatory damages to the children was reasonable. The jury's verdict should remain reinstated by the opinion of the Fifth District Court of Appeal.

SECOND POINT ON APPEAL

The Florida Constitution provides in Article I, Section 22 that:

> "The right of trial by jury shall be secured to all and remain inviolate. The qualifications and the number of jurors, not fewer than six, shall be fixed by law."

The application of Florida Statutes Section 768.74 is unconstitutional in that it abridges Veterans' rights to a trial by jury guaranteed by article one, section twenty-two of the Florida Constitution. The initial constitutional validity of Florida Statutes Section 768.74, adopted with Florida's Tort Reform Act in 1986, has never been determined.

Alternatively, Veterans would urge the Florida Supreme Court to declare Florida Statutes Section 768.74 unconstitutional on the basis that the language in the statute is so vague and ambiguous in its efforts to vest the trial court with discretion to void a jury verdict that it violates article one, section nine of the Florida Constitution, in that it denies due process of law to Veterans. Specifically, the standards for review under Florida Statutes Section 768.74 are too vague to permit equal application of the law. Equality before the law is guaranteed to all persons in Florida, including corporations, in article one, section two of the Florida Constitution.

In Radiant Oil Co. v Herring, 200 So. 376 (Fla. 1941), the Florida Supreme Court expanded the common law power of a Florida trial judge in a civil damage jury trial when considering post-trial motions attacking a jury verdict.

The court stated that under the old common law rule, a motion for new trial for inadequacy of damages should not be granted by a trial judge.

Thus, prior to 1941, no Florida common law decision authorized a trial judge in a civil jury case to order either an additur or a new trial, on the basis of the inadequacy of damages awarded by a jury verdict.

Since additur was not recognized at common law in 1845 when Florida first became admitted to the Union and its Constitution was first adopted, Florida Statute Section 768.74 is in derogation of the common law.

Whether or not a specific procedure abridges the constitutional right to a jury trial is determined as of the time that Florida was first admitted to the Union and the Constitution first became effective. B.J.Y. v M.A., 594 So.2d 816 (Fla. 1DCA 1992), approved, 617 So.2d 1061 (Fla. 1993).

Florida Statutes Section 768.74 as applied does abridge the constitutional right to a jury trial because it authorizes a trial judge to grant a new trial if the court finds the amount awarded is excessive or inadequate.

Even if ordering the additur is an abuse of discretion by the trial judge, he can order an alternative new trial, and that order can be sustained under the existing judicial interpretation of Florida Statutes Section 768.74.

As contrasted with the District Court's opinion in Arab Termite and Pest Control of Fla., Inc. v Jenkins, 409 So.2d 1039 (Fla. 1982), the District Court in the instant case determined that the trial court's decision to order an alternative new trial was not affirmatively supported by a review of the entire record.

If Florida Statutes Section 768.74 is applied, as Petitioner contends, to allow a trial judge's order of a new trial to be upheld, simply because the Appellate Court is limited in its review to the judge's decision under a "reasonableness test" as stated in Baptist

Memorial Hospital v Bell, 384 So.2d 145 (Fla. 1980), then the statute is unconstitutional as applied.

Since the entire record upon review supports the jury's decisions on the amount of damages, it would violate the defendant's constitutional right to a jury trial on damages if a trial judge's decision could be upheld through the application of a different standard of review of the new trial order.

By declaring Florida Statutes Section 768.74 unconstitutional, the Florida civil jury system would be consistent with the federal courts.

In the federal courts, it is well settled that the Seventh Amendment to the United States Constitution prohibits the ordering of an additur by a trial judge. See Dimick v Scheidt, 293 U.S. 474 (1935).

While it is true that the Seventh Amendment to the U.S. Constitution is not identical to Article I, Section 22 of the Florida Constitution, the intent and spirit of each of these constitutional provisions is to protect the sanctity of the jury system as it functions to decide disputed issues of fact.

Federal decisions that construe a provision of the U.S. Constitution guaranteeing a right of trial by jury are persuasive in construing state constitutional provisions of similar import. See Dudley v Harrison, McCready & Co., 173 So. 820 (Fla. 1937).

In the case at bar, it was determined by the District Court of Appeal that there was a clear abuse of discretion by the trial judge in granting the Aternative Motion for New Trial and the Order of Additur.

To best protect the constitutional rights of all parties, the Supreme Court should declare unconstitutional Florida Statutes Section 768.74 as violating the Florida Constitution, Article I, Section 22.

THIRD POINT ON APPEAL

The District Court did err in failing to reverse the trial court's granting of Poole's Motion for Partial Summary Judgment on the issue of ownership of the automobile involved in the death of Rebecca Ann Pritchard, deceased, and in failing to order a summary judgment for Veterans Auto Sales & Leasing Co., Inc.

Poole argued in the District Court of Appeal that no affidavit was filed in opposition to Poole's assertion of undisputed facts prior to the hearing of September 23, 1992 at which the predecessor trial judge, The Honorable C. Vernon Mize, granted Poole's Motion for Partial Summary Judgment on ownership of the 1982 Firebird automobile.

At the time of the hearing, Poole had already filed the transcript of the deposition of Gene Simon of December 11, 1991 (see Amended Supplemental Appellate Record, Vol. 1, pages 1 - 82).

The deposition of Gene Simon established Bullock was the owner of the Pontiac Firebird because a common law sale had occurred.

Poole's motion for partial summary judgment on the issue of ownership asserted Gene Simon's deposition created no genuine issue of material fact as to a common law sale of the 1982 Pontiac Firebird.

Poole contends there is nothing in the record to support the contention that financing was to be done through Veterans Finance Co.

Poole provided the support in the record by filing the chain of title to the 1982 Firebird, while requesting the trial court to take judicial notice of it (R-Vol. 1. p. 53 - 111). In the title issued to Velita Bullock by the State of Florida on the 1982 Firebird, Veterans Finance Co. is

listed as the lienholder (see attached copy of registration and title information from State of Florida as Appendix to the Initial Brief of Appellant Veterans in the District Court of Appeal).

The errors by the trial court in the findings made during the hearing of September 23, 1992 include the finding that the Used Car Order, dated September 5, 1989, was not accepted in writing by either the dealer or its authorized representative prior to the accident. This is a factual determination by a trial judge in a matter scheduled for jury trial. Veterans had accepted the sale according to the testimony of Gene Simon.

The trial court also erred in finding that Bullock was a retail buyer within the meaning of Florida Statutes Section 520.

Velita Bullock does not qualify under Florida Statutes Section 520.02(10), as a retail buyer, because Bullock never signed a retail installment sales contract. Since there was no execution of a retail installment sales contract, there is no violation of Florida Statutes Section 520.07.

It is undisputed that there was an oral agreement as to the payments to be made on the balance shown on the Buyer's Order. Since the agreement did not require the title to the Firebird to be retained by Veterans Auto Sales and Leasing Company, Inc., as the title was to be placed in Bullock's name, the agreement was not a retail installment sales contract within the meaning of the definition of Florida Statutes Section 520.02(11).

As was pointed out previously to the trial court, what Poole has done in this case is to use the consumer protection legislation of Florida Statutes Section 520 to attempt to void a common law sale of the 1982 Firebird involved in the accident of September 7, 1989, when the sale occurred prior to that date.

The court erred in finding Bullock was a retail buyer within the meaning of Florida Statutes Section 520.

Oral agreements for the sale of used automobiles are not void and unenforceable pursuant to Florida Statutes Section 520.07 and 520.13, unless they involve retail installment sales contracts.

Poole argues that while conceding that Bullock had possession of the vehicle on the day of the accident, Poole feels that there was no mutually binding enforceable contract, either written or oral, and, therefore, beneficial ownership of the subject vehicle remained in Veterans.

Poole states on page 20 of its Answer Brief in the District Court that the Veterans' argument of an oral agreement between Bullock and Veterans was first raised after the summary judgment hearing of September 23, 1992. Gene Simon's deposition, filed January 6, 1992, established that there was a sale of the automobile by Veterans Auto Sales and Leasing Company, Inc. The security to be retained as a lien upon the motor vehicle was not by the seller, Veterans Auto Sales and Leasing Company, Inc., but by Veterans Finance Co.

The essence of the argument of Poole as to the enforceability of the sales agreement between Bullock and Veterans is contained on page 21 of the Poole's Answer Brief in the District Court of Appeal. At that point, basically Poole is arguing that any oral agreement to finance the vehicle by Veterans Finance Co., was invalid by the terms of Florida Statutes Section 520. Relying on that premise, Poole argues that since there could be no valid financing agreement, a material element of the sales contract was absent, and thus a common law sale could not have occurred.

The argument of Poole on page 25 of the Answer Brief in the District Court of Appeal that the face of the Used Car Order in the instant case requires that all transactions be subject to finance company or bank approval which means that financing arrangements are an essential term of the contract ignores the reality that Veterans Finance Co. had agreed to accept the financing on the basis of payments made from deductions from the paychecks of Velita Bullock by Veterans Auto Sales and Leasing Company, Inc.

Huskamp Motor Company v Hebden, 104 So. 2d 96 (Fla. 3rd DCA 1958), is distinguisable because the financing was not approved until after the automobile accident in that case. By that time, the buyer, Murphy, could not perform his consideration since the trade-in that he was going to provide was totalled or damaged.

Here, the financing was approved by Veterans Auto Sales and Leasing Company, Inc. and Veterans Finance Co. and the parties, Bullock as the buyer, and Veterans Auto Sales as the seller, had fully performed each of their obligations under the common law sale. All that was left to be done was the transfer of the legal title to the automobile, which did occur after the accident. The actual transfer of legal title to the automobile itself need not take place prior to the accident itself, so long as the essential terms of a common law sale have been met.

At no time did Veterans attempt to renege on the sale of the 1982 Pontiac Firebird. The only person attempting to void the sale was the buyer, Velita Bullock. Bullock's claim of non-ownership occurred only after she was already released from any liability from both the claims of the motorcycle driver, George Prior, and the claims of the estate of the motorcycle passenger, Rebecca Ann Pritchard, for the September 7, 1989 accident.

Poole does not dispute that Bullock changed her testimony. Similarly, Poole does not dispute that the trial court had the authority to grant a Motion for Summary Judgment in favor

of Veterans Auto Sales and Leasing Company, Inc. at the time of the hearing of September 23, 1992.

Veterans advocates the legal position that since the trial court had the inherent legal authority to grant a summary judgment for Veterans Auto Sales and Leasing Company, Inc. at the time of the hearing of September 23, 1992, the Supreme Court also has the inherent authority to issue its Mandate ordering the trial court to enter that Summary Judgment on the Issue of Ownership in favor of Veterans Auto Sales and Leasing Company, Inc.

Veterans is requesting the trial court be instructed that it committed error when it granted the Plaintiff's Motion for Partial Summary Judgment on the Issue of Ownership. That error was in not giving legal force and effect to the doctrines which were identified in Veterans' District Court of Appeal Briefs in Point III, that a witness, Velita Bullock, cannot change her testimony without a credible explanation, when she previously testified for her own economic benefit, under oath, that she was in fact the owner of the vehicle.

It is well settled in Florida that summary judgment is proper only where there is no genuine issue as to any material fact that the moving party is entitled to judgment as a matter of law. Taylor v Kenco Chemical and Mfg. Corp., 465 So.2d 581 (Fla. 1st DCA 1985). The burden is on the moving party to establish that no issue of material fact exists and any doubt must be resolved against the movant. Taylor, 582. If the record reflects the existence of any genuine issue of material fact or the possibility of any issue, or if the record raises even the slightest doubt that the issue might exist, summary judgment is improper. Holland v Verheul, 583 So.2d 788 (Fla. 2d DCA 1991).

At the time of the hearing of September 23, 1992, no factual dispute existed as to ownership of the Pontiac Firebird automobile involved in the accident of September 7, 1989 with Rebecca Ann Pritchard. It was legally owned by Bullock.

Poole contends that at the time of the accident, the Firebird was owned by Veterans because the parties had not met an essential condition precedent of the contract of sale, due to certain allegedly necessary documents for the transfer of the title of the Firebird having not been executed.

Veterans contends that Velita Bullock was the beneficial owner of the Firebird at the time of the accident, evidenced by: (a) her oral agreement to buy the vehicle; (b) her exclusive possession, sole authority and control of the automobile for 15 days prior to the accident; (c) her $300.00 down payment on the automobile; and (d) her execution of an odometer disclosure statement, power of attorney, temporary tag, used car order form and insurance information.

The basis for Judge Mize's granting of the motion for partial final summary judgment on the issue of ownership is reflected in the findings of fact that there was no contract of purchase in effect between Veterans and Velita Bullock at the time of the execution of the buyer's order form of September 5, 1989 by Velita Bullock.

The agreement by the general manager of Veterans to sell the Firebird to Velita Bullock, and Velita Bullock's execution of most of the documents by her own admission establishes a sale. Velita Bullock's later claims that a Power of Attorney that was used to transfer title to her name was forged should not be countenanced by the Supreme Court.

That claim is inconsistent with the legal position previously taken by Velita Bullock to obtain a full and complete release for her benefit in other litigation involving the ownership of the identical vehicle.

The financing arrangements provided for this vehicle were through Veterans Finance Co., Inc. Veterans Finance Co., Inc. is not a party to this civil action. Veterans Finance Co., Inc. is a separate entity from Veterans Auto Sales and Leasing Co., Inc. As the lienholder on this vehicle, it may well be that due to failure to comply with Florida Statutes Section 520, Veterans Finance Co., Inc. would not have an ability to foreclose its security interest in any regard on the Firebird.

The absence of a legal binding retail installment sales contract does not mean there was not an acceptance of the offer to sell the vehicle to Velita Bullock by Veterans.

Poole never cited any decision or statute in Florida which requires the sale of a used vehicle to be in writing.

Actually, in the interest of judicial economy, a careful analysis of the record on the issue of ownership of the Firebird involved in the accident establishes, as a matter of law, based upon the undisputed facts, that Velita Bullock was the owner of the Firebird at the time of the accident. Since Bullock and not Veterans was the owner, and since Poole's Second Amended Complaint alleges a theory of liability based solely on the applicability of the dangerous instrumentality doctrine, the Supreme Court should remand this civil action to the trial court with instructions to enter a final summary judgment in favor of Veterans, and Veterans moves formally for a summary judgment in its favor on the basis of non-ownership of the Firebird.

Since Poole filed a summary judgment motion herself on the issue of ownership, under Rule 1.510, within 20 days notice of the application of summary judgment by Veterans, the trial court, and now the Florida Supreme Court, has the judicial authority to enter a final summary judgment for the original non-moving party, Veterans. See Florida Rule of Civil Procedure 1.510, and the cases of Carpineta v Shields, 70 So.2d 573 (Fla. 1954), and John K. Brennan Co. v Central Bank & Trust Co., 164 So.2d 525 (Fla. 2nd DCA 1964).

The significance of the initial judicial error in granting the partial summary judgment on the issue of ownership against Veterans cannot be overstated. Certain tactical decisions were made by Veterans due to that ruling. For example, Veterans was required to amend its pleadings and withdraw the denial of the allegations of consent and proximate causation between the injuries and the accident due to the court's previous ruling on ownership (R-Vol. 7, p. 5-6).

Notwithstanding these pleading amendments, Veterans still objected to the jury instruction F.S.J.I. standard 3.1(d) on negligence on the basis of ownership, thus preserving for error, in this appeal, the issues of ownership, consent, and proximate causation (R-Vol. 8, p. 338).

Florida law is clear that the tort liability imposed on the owner of an automobile operated by another does not extend to one who holds mere naked legal title as security for payment of the purchase price. It is the beneficial ownership which carries with it liability for damages which arise from the automobile's negligent operation. The failure to transfer the title to the Firebird prior to the September 7, 1992 accident is not dispositive that Veterans did not sell the Firebird to Bullock.

The contract between Bullock and Veterans contained no explicit agreement that the title would pass at a time and place other than at the time and place at which Veterans completed its performance by physical delivery of the vehicle to Bullock. It is undisputed that the physical delivery of the vehicle was 15 days before the accident of September 7, 1989.

Bullock's change in testimony should not be countenanced by the Supreme Court. Generally, in a summary judgment setting, even a witness may not change their previous testimony to create issues of fact. This is true even though the witness is not a party to the action. In Andrews v Midland National Insurance Company, 208 So.2d 136 (Fla. 3rd DCA 1968), cert denied 212 So.2d 878 (Fla. 1968), the 3rd DCA examined the issue as to whether the rule disallowing a change in testimony to prevent a summary judgment extends to a witness who signed one affidavit and then signs another which states facts contrary to the first affidavit. The court held that a witness is not irrevocably bound by his first written statement upon the issues of the case. The court may require further evidence on this issue.

In Croft v York, 244 So.2d 161 (Fla. 1st DCA 1971), a physican was permitted to change his testimony as an exception to the general rule precluding discrepancies between a prior deposition and a subsequent affidavit where the physician was a witness and not a party because the court pointed out that the rule of exclusion is applicable only in the absence of a credible explanation by the affiant as to the reason for the discrepancy between his earlier and later opinions. If such an explanation is made, then the rule of exclusion is no longer applicable, and the latest statement may be considered in

determining whether it creates a genuine issue of fact to be resolved only by the jury at trial.

In the York case, it was determined that Dr. York's deposition and affidavit differed due to his careful research and study of the issue prior to offering his affidavit and after providing a deposition. The affidavit was offered in opposition to a motion for summary judgment by the manfacturer of the drug that was alleged to have been contaminated at the time that Dr. York injected the patient. For purposes of the summary judgment action against the manufacturer, Dr. York was a witness, not a party.

Similarly, in the case at bar, Bullock's earlier testimony under oath in the other civil action clearly demonstrated the sale. Her later explanation in the sworn statement obtained by Poole's Attorney Herring, and in her May 15, 1992 deposition, to create an issue of fact as to the sale should be rejected by the Supreme Court. The reason it should be rejected is that the burden was on Poole to establish a credible explanation for the change in testimony by Bullock. No credible explanation having been made in the depositions or by way of affidavit by Bullock, the Supreme Court should enforce the rule of exclusion as to Bullock's May 15, 1992 deposition testimony and her sworn statement obtained by Mr. Herring, and hold her to the statement of the sale, thus eliminating any issue of fact as to the sale and resulting in a summary judgment for Veterans.

While Bullock has attempted to vary her testimony to some extent after having been released by the Plaintiff from any liability under a settlement agreement with her insurer, there is no genuine issue of any material fact that there was a sale, and since physical possession was transferred by Veterans, summary judgment should properly have

been entered for Veterans. See Palm Beach Auto Brokers, Inc. v DeCarlo, 620 So.2d 250 (Fla. 4th DCA 1993).

The case law is replete with examples in which motions for summary judgment granted on this issue have been reversed because genuine issues of material fact were found to exist.

In Stirrup v Reiss, 410 So.2d 537 (Fla. 4th DCA 1982), several youths were riding in a motor boat at night when the boat struck an object, causing personal injury to one of the boat's passengers. The passenger sued the alleged operator of the boat and the alleged owner of the boat and the Circuit Court granted summary judgment in favor of the alleged boat owner, presumably because it was undisputed that at the time of the accident, the alleged boat owner's mother held legal title to the boat. The 4th DCA reversed the Circuit Court's summary judgment as to the alleged boat owner's non-ownership of the boat, finding that there were genuine issues of material fact relating to the question of whether the alleged boat owner was the beneficial owner of the boat at the time of the accident.

The 4th DCA noted that it was clear from the record that the defendant had the use and enjoyment of the boat and further found that a jury could infer that the defendant was the beneficial owner of the boat by virtue of his having the beneficial interest, with control and authority over the use of the boat. Thus, despite uncontroverted evidence that legal title of the boat was in the name of the defendant's mother at the time of the accident, the lower court's summary judgment was reversed because there were genuine issues of material fact which could reasonably result in the belief that the defendant had beneficial ownership of the boat at the time of the accident.

Similarly, in Hogan v Keen, 349 So.2d 175 (Fla. 1st DCA 1977), the First District Court of Appeal reversed a lower court's summary judgment ruling on the issue of automobile ownership at the time of the accident. In Keen, a third party was driving an automobile allegedly owned by Sarah Wentz and was involved in an accident resulting in injuries to a passenger riding in the Wentz's automobile. Wentz was sued as the owner of the vehicle. She claimed she sold the vehicle to her brother, Billy Wentz, prior to the accident. The facts revealed that Billy Wentz had full possession and control of the automobile prior to the accident, made the payments due under the note and paid the insurance on the car, even though the insurance policy remained in Sarah Wentz's name. It was undisputed that there was no written contract concerning the ownership of the automobile. Because there were conflicts present in the record as to the ownership of the automobile at the time of the accident, the 4th DCA reversed the summary judgment on the issue of ownership in favor of a jury determination.

Another example of a reversal of a summary judgment based on ownership at the time of the accident is Smith v Baker, 206 So.2d 409 (Fla. 4th DCA 1968), which involved a wrongful death action against an automobile dealer. The defendant used car dealer allegedly failed to complete the sale of an automobile to one of its employees and therefore was allegedly the owner of the vehicle at the time of the accident. The Circuit Court granted summary judgment in favor of the dealer and the Fourth District Court of Appeal reversed, holding that there were issues of material fact concerning ownership of the vehicle in question which precluded summary judgment.

The facts of Smith showed that William Kinney worked at the defendant's used car lot and became interested in purchasing a car. On October 1, 1964, Kinney was permitted

to take a particular automobile home. The General Manager of the defendant spoke with Kinney's mother a few days later and agreed to accept $79.00 as payment for the car. On October 3, 1964, Kinney delivered a check for $30.00 to the defendant with the remaining $49.00 to be paid at some future unspecified time. No written contracts or transfer documents were executed by Kinney or his mother until after the accident. Because it could reasonably be inferred from those facts that Kinney was the purchaser, his mother was the purchaser, or that no purchase was intended until the documents had been executed, summary judgment was improper, resulting in the Fourth DCA's reversal of the lower court's decision regarding ownership of the vehicle at the time of the accident.

In the present case, as in Stirrup, Hogan, and Smith, at a minimum, there existed genuine issues of material fact as to ownership if other facts exist which create differing inferences as to ownership. Veterans raised several fact issues, all of the type from which varying inferences could be drawn. Under such circumstances, Judge Mize's granting of the Plaintiff's Motion for Summary Judgment on the issue of ownership was error.

If Bullock's changed testimony is excluded, then there is no genuine issue of any material fact that Veterans was not the owner of the vehicle that allegedly struck Ms. Pritchard, and Veterans is entitled to a Final Summary Judgment as a matter of law.

CONCLUSION

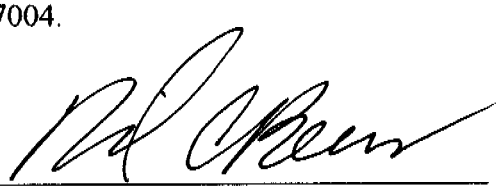
The District Court of Appeal's opinion was correct and the jury verdict should be reinstated except as to those issues that were not disputed.

If the Supreme Court feels the District Court erred, then the court should declare Florida Statutes Section 768.74 unconstitutional. This will have the effect of reinstating the jury's verdict.

The court could avoid answering the certified question by ordering a summary judgment for Veterans Auto Sales and Leasing Co., Inc.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Respondent's Brief on the Merits has been furnished by mail this 2nd day of May1995 to MICHAEL S. HERRING, ESQUIRE, 1101 West First Street, Sanford, FL 32771; CHARLES R. STEPTER, JR., ESQUIRE, 170 East Washington Street, Orlando, FL 32801; and ABBOTT M. HERRING, JR., ESQUIRE, 1302 McGowen, Houston, TX 77004.



DAVID C. BEERS, ESQUIRE
Florida Bar No. 209872
Beers, Jack, Tudhope & Wyatt, P.A.
P. O. Box 948600
Maitland, FL 32794-8600
(407) 660-1818
ATTORNEYS FOR RESPONDENT