NO. SC04-157

IN THE
SUPREME COURT OF FLORIDA

SUN STATE FORD, INC.,	)	Appeal from the Fifth
	)	District Court of Appeal
Petitioner,	)	No. 5D02-2807
	)	
v.	)	There Heard on Appeal
	)	from the Circuit Court
LAVERICA BURCH, et al.,	)	of the Ninth Judicial
	)	Circuit, Orange County
Respondents.	)	
	)	The Honorable R. James
	)	Stroker, Judge Presiding

PETITIONER=S INITIAL BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

STATEMENT OF THE CASE AND FACTS

A. Nature of the Case and Proceedings Below

This is a wrongful death action arising out of a high-speed car chase. Plaintiffs, who are the personal representatives of the decedent and his two minor children, alleged that defendant Willie Gene Beauford (ABeauford@) used an auto owned by defendant Sun State Ford to Achase[] and threaten[]@ decedent at high speed, causing decedent to take evasive action out of Afear of his health and safety@ and resulting in the crash that killed him. (R. 69)

Count II of the first amended complaint alleged that Sun State Ford was liable to plaintiffs under the Adangerous instrumentality@ doctrine because it was the owner of the vehicle Beauford used to chase and threaten decedent. (R.70-2) The trial court entered a summary final judgment in favor of Sun State Ford on the basis that Beauford Awas engaged in an intentional tort at the time of the alleged incident@ and Sun State Ford could not be held vicariously liable for an intentional tort. (R. 546-7)

The Fifth District Court of Appeal reversed. It held that Areckless driving or other intentional misconduct by an operator does not terminate liability under the [dangerous instrumentality] doctrine.@ (App. 1, p. 7) Instead, the District Court ruled that imputed liability under the doctrine ends only Awhen a vehicle is used in a weapon-like manner with the intent to inflict physical injury,@ and that a question of fact existed in this case

because Beauford=s intent Awas unclear.@ (App. 1, pp. 7, 9-10)

B. The Occurrence

In June of 1999, Carla Lewis (a non-party) rented a Ford F-150 pick-up truck from Sun State Ford in Orlando. (R. 213) Lewis loaned the car to defendant Beauford, her brother. (R. 265)

During the early morning hours of June 28, 1999, Beauford used the truck to drive his girlfriend, Teresa Wilson (AWilson@), and her cousin, Bridgett Lee (ALee@), to the Caribbean Club in Orange County. (R. 249-50) While the two women were at the Caribbean Club, Beauford played cards at the home of his friend, Jerome Manning (AManning@), in nearby Eatonville. (R. 249-52) At 3:00 a.m., Wilson called Beauford on his cellular phone and asked him to come get her and Lee at the club. (R. 251-2)

Beauford and Manning drove to the Caribbean Club together in the truck, retrieved Wilson and Lee, and returned to Manning=s house. (R. 252-3) Wilson and Lee then walked to another club called Hero=s, which was about a block away from where Manning lived. (R. 253) Beauford remained at Manning=s house where he sat on the front porch, played cards, and could watch the Hero=s parking lot. (R. 253, 255, 268)

Over the next several hours, Beauford grew increasingly angry with Wilson and Lee, whom he had instructed to Ajust go in and come back out@ of the club. (R. 254, 264-5, 266) Beauford was apparently the subject of an outstanding arrest warrant, was well-known to the Eatonville police, and felt that he was at greater risk of being apprehended if

he remained in the area during the early morning hours, when less people were around and the police would Apull you over for anything they can.@ (R. 251, 253, 264, 265, 268)

At 5:00 a.m., as Hero=s was closing, Beauford stopped playing cards and, while standing on Manning=s front porch, began looking for Wilson and Lee to emerge from the club. (R. 268) He saw them come out, but instead of returning to Manning=s house, they got into a car with a man whom Beauford did not recognize. (R. 268-9, 275) The man with whom Beauford saw Wilson and Lee was the decedent, Aaryon Miles (AMiles@).

Miles drove his car out of the Hero=s parking lot and, with Wilson and Lee as his passengers, sped right past Beauford, who was now standing in Manning=s front yard. (R. 269, 273) This further angered Beauford, who felt that the women saw him as they sped by and that their conduct was intended to challenge his relationship with Wilson. (R. 275-6)

Beauford climbed into the rented truck and began to follow Miles= car, a black convertible, running several stop signs in order to keep up with it. (R. 270) Beauford said that he followed Miles out of concern for the women=s safety, because when Miles sped past him it appeared that Wilson and Miles were pointing at one another and arguing. (R. 269-70, 274) He was also concerned that they might be drinking or taking drugs. (R. 274) Miles soon came to a stoplight, which allowed Beauford to creep up behind him and confirm that Wilson and Lee were in the car. (R. 270) Miles then turned the corner, and Beauford resumed following him. (R. 277)

When Miles reached another intersection, he came to a complete stop. (R. 278) Beauford stopped, too, got out of his truck, and approached Miles= vehicle from the rear. (R. 278) However, before Beauford could reach the car, Miles quickly pulled away. (R. 278) Beauford saw Wilson fall backward into her seat when this occurred, as if she had been sitting up and watching Beauford as he approached. (R. 278) Beauford=s perception was that the women told Miles to stop so that Beauford would be duped into getting out of his car, allowing them to get Aa good head start on him@ and Alose him.@ (R. 279) Now Beauford was Areally mad.@ (R. 280) In his words, A[t]hat=s what started the sure enough chase then.@ (R. 278)

As Miles sped away, he shut off the lights on his car and, with Beauford in hot pursuit, both vehicles began running red lights and making frequent turns, eventually reaching speeds of between 80 and 100 miles per hour. (R. 280-4) Each time Miles applied his brakes, however, Beauford was able to spot the car and continue the chase, Agetting closer and closer to them.@ (R. 282) Miles ultimately lost control of his vehicle, crashed into a tree, and was killed. (R. 285) Wilson and Lee were seriously injured. (R. 285-7) Beauford admitted that if he Ahadn=t been following them at that particular time, they probably wouldn=t have been riding that fast, if [he] wasn=t following them.@ (R. 289)

Lee apparently told the police at the hospital that Miles swerved and lost control of the car because Beauford pointed a gun at them from the truck. (R. 286, 296) Beauford denied that he had a weapon, but was arrested and charged with one count of second

degree murder and two counts of attempted second degree murder. (R. 230, 283-4) Ultimately, he was convicted of willful and wanton reckless driving and possession of a firearm by a convicted felon. (R. 230)

C. **Plaintiffs= First Amended Complaint and Answers to Interrogatories**

In their first amended complaint, plaintiffs alleged that they noticed they Awere being followed@ by Beauford as they were traveling north on Rose Avenue in Orlando. (R. 68) Plaintiffs then alleged as follows:

> [Beauford] began following the vehicle driven by the Plaintiff more closely than reasonable and prudent for the then existing conditions. Further, in addition to following the Plaintiff too closely, [Beauford] carelessly and reckless (sic) pursued the Plaintiff=s (sic), causing Plaintiff to be in fear of his health and safety. As Plaintiff attempted to take evasive action by traveling at a higher rate of speed, [Beauford] also continued to follow too closely, and in such a manner as to make Plaintiff think he was being chased and threatened.

(R. 69)

Similarly, in their answers to interrogatories, plaintiffs provided the following description of the occurrence:

> [Beauford] followed the vehicle driven by the decedent, Aaryon Miles, more closely than reasonable and prudent for the existing conditions. [Beauford] carelessly and reckless (sic) pursued the car driven by the decedent causing him to be in fear of his health and safety and causing decedent to loose (sic) control of his (sic) which resulted in Aaryon Miles being killed.

(R. 313, 318)

Sun State Ford=s amended answer to the first amended complaint raised the

following affirmative defense:

> 7. Plaintiff=s damages, if any, were caused by Defendant, Beauford=s, intentional acts for which Sun State is not liable.

(R. 190)

SUMMARY OF ARGUMENT

Under *Kitchen v. K Mart Corporation*, 697 So. 2d 1200 (Fla. 1997), a retailer who sells a firearm to an obviously intoxicated person who then uses the gun to kill his spouse is liable only if proven negligent. Conversely, under the progeny of Southern Cotton Oil Co. v. Anderson, 86 So. 629 (Fla. 1920), an auto owner who lends his car to a neighbor to pick up his children from school is strictly liable for any accident that ensues.

There is little logic in requiring proof of fault before holding a firearms dealer liable under Kitchen while imposing strict liability on an auto owner under the dangerous instrumentality doctrine. As a matter of public policy, this Court should dispense with the dangerous instrumentality doctrine and adopt a single, uniform standard of fault-based liability for dangerous chattels under '390 of the Restatement (Second) of Torts, like the vast majority of jurisdictions have done.

The primary justification for the dangerous instrumentality doctrine has been Ato provide greater financial responsibility to pay for the carnage on our roads.@ *Kraemer v. General Motors Acceptance Corp.*, 572 So. 2d 1363, 1365 (Fla. 1990). This justification would not be diminished by adopting '390 instead. Rather, the adoption of '390 in lieu of the dangerous instrumentality doctrine would expand the class of persons to whom

financial responsibility would extend. Beneficial ownership would no longer have to be the yardstick. Cf. Aurbach v. Gallina, 753 So. 2d 60 (Fla. 2000). Instead, owners and non-owners alike would be subject to liability based on the more flexible test of foreseeability of harm.

Replacing the dangerous instrumentality doctrine with section 390 would also do more to advance the goal of tort law. Tort law, in Florida as elsewhere, traditionally allocates liability based on fault. Hoffman v. Jones, 280 So. 2d 431, 438 (Fla. 1973)(AIn the field of tort law, the most equitable result that can ever be reached by a court is the equation of liability with fault.@). Tying liability to fault furthers the goal of tort law to deter injurious conduct.

Under '390, liability depends upon the amount of care exercised by auto owners. This creates a greater incentive for them to exercise due care because when the exercise of due care is the standard for liability, rational car owners (like gun dealers) will logically seek to exercise such care. The dangerous instrumentality doctrine does less to advance the goal of deterrence because when liability exists irrespective of fault, a person may disregard the standard of care.

The abolishment of the dangerous instrumentality doctrine and the adoption of '390 in its place will also reduce litigation.

Objective foreseeability (the test under '390) is a question that trial courts may decide as a matter of law. A trial court=s ability to make an early determination of duty

will lead to the prompt settlement of meritorious cases and the swift disposition of frivolous claims. Appellate review of such determinations is de novo. De novo review of such rulings will provide lower courts and litigants with greater predictability of outcome.

Conversely, under the decision below, clear-cut cases of intentional misconduct (like this one) will always require a trial over the subjective intent of the driver, no matter how unforeseeable and spontaneous the occurrence may have been. Moreover, appellate review of such credibility contests is highly deferential. This tends to make the outcome of factually similar cases highly unpredictable, which engenders more litigation.

The utility of the dangerous instrumentality doctrine should be re-examined in the light of these considerations of public policy. But even if the doctrine is retained, this Court should announce a bright-line rule that requires auto owners to protect against intentional torts by permitted users only if the tort is reasonably anticipated and the owner had actual or constructive knowledge of the danger.

Southern Cotton Oil fully supports such a rule, because its rationale for characterizing autos as Adangerous instrumentalities@ was the foreseeability of accidents arising from their ordinary use. The imposition of a duty on auto owners for a driver=s intentional tort based on reasonable foreseeability is consistent with the doctrine=s historical roots and would harmonize the doctrine with *Kitchen*.

Alternatively, the Court should quash the decision below and hold that Beauford=s misconduct in this case was an intentional assault as a matter of law for which Sun State

Ford cannot be held vicariously liable. The District Court overlooked that Beauford=s intent was irrelevant to whether an assault was committed. It was the victim=s apprehension of a battery that mattered, and that apprehension is exactly what plaintiffs= first amended complaint and answers to interrogatories affirmatively described.

Moreover, even if Beauford=s subjective intent mattered (which is denied), the District Court misapprehended the record. Beauford=s initial decision to follow the decedent=s auto may have been motivated by concern over his girlfriend=s safety. However, as Beauford himself explained, it was only after he became enraged over a trick played upon him at an intersection that the chase began in earnest. His pursuit of the decedent from that point forward had nothing to do with concern for his girlfriend=s safety. Instead, Beauford=s conduct was substantially certain to cause the decedent to fear for his safety, and that constituted an assault as a matter of law.

ARGUMENT

THE TRIAL COURT PROPERLY ENTERED SUMMARY JUDGMENT IN FAVOR OF SUN STATE FORD BECAUSE BEAUFORD COMMITTED AN UNFORESEEABLE AND INTENTIONAL TORT

A. Standard of Review

A grant of summary judgment is reviewed *de novo. Dr. Phillips, Inc. v. L & W Supply Corp.*, 790 So. 2d 539, 542 (Fla. 2001).

B. The Touchstone of the Dangerous Instrumentality Doctrine is Foreseeability of Harm

The dangerous instrumentality doctrine was adopted in 1920 in *Southern Cotton Oil Co. v. Anderson*, 86 So. 629 (Fla. 1920). *Southern Cotton Oil* was a case of simple negligence in which an employer allowed one of his employees to use a company-owned vehicle to get lunch. The plaintiff, who was apparently operating a motorcycle, was struck by the defendant=s employee as he returned to work. *See Anderson v. Southern Cotton Oil Co.*, 74 So. 975 (Fla. 1917).

The primary issue that Southern Cotton Oil confronted was whether to extend a doctrine historically limited to inherently dangerous agencies (explosives, firearms, poisons) to the automobile, which the court openly acknowledged was not dangerous *per se*. The court=s resolution of this issue was grounded entirely on the objective foreseeability of harm arising from the ordinary use of an auto.

Quoting Pollock on Torts, the court=s analysis began with the proposition that any man who entrusts an item of Aextraordinary risk@ to another Ais held to insure his neighbor against any consequent harm *not due to some cause beyond human foresight*.@ 86 So. at 631 (emphasis added). With this premise in mind, the court examined whether accidents arising from the ordinary use of automobiles were reasonably foreseeable.

The *ordinary* use of the automobile was a key aspect of the court=s decision-making process. Quoting at length from Thompson on Negligence, the court agreed that it was appropriate to consider first whether an automobile was likely to inflict serious

injury Awhen operated in the *customary* method of use and while being devoted to the purposes *for which it was designed*.@ 86 So. at 634 (emphasis added). Then, citing recent statistics on the high incidence of accidents involving automobiles, the court concluded that the automobile was indeed a Adangerous instrumentality@ because, unlike an object such as a hammer, its ordinary and customary use made harm to persons using the public highways reasonably foreseeable. 86 So. at 636.

Having classified the automobile as a dangerous instrumentality, *Southern Cotton Oil* proceeded to announce the following rule of law:

> [O]ne who authorizes and permits an instrumentality that is peculiarly dangerous in its operation to be used by another on the public highway is liable in damages for injuries to third persons caused by the negligent operation of such instrumentality on the highway by one so authorized by the owner.

86 So. at 638.

Contrary to the decision below (*see* App. 1, p. 6-7), this Court=s decision to limit an auto owner=s vicarious liability to accidents arising from the Anegligent@ operation of a motor vehicle appears to have been quite deliberate. *Southern Cotton Oil* drew heavily on precedents involving the law of master-servant, and the authorities the court relied upon specifically discussed the doctrine=s application to instances where the servant acted Awillfully, wantonly, and in disobedience of the master=s order.@ 86 So. at 634, quoting 1 Thompson, Com. on Neg. '589. Accordingly, *Southern Cotton Oil* could have established a broader rule of vicarious liability if that is what the court had intended, but

the court chose the word Anegligence@ instead. The choice was consistent with the court=s rationale for extending the doctrine to automobiles, *viz.*, operator negligence during the ordinary and customary use of an automobile was reasonably foreseeable.

In the decades that ensued, the dangerous instrumentality doctrine was re-affirmed in many different contexts. *Crenshaw Bros. Produce Co. v. Harper*, 194 So. 353 (Fla. 1940) extended its application to accidents involving fellow servants. Seven years later, in Lynch v. Walker, 31 So. 2d 268 (Fla. 1947), the doctrine was applied to a bailment for hire. In the 1950s the doctrine was made applicable to gratuitous bailments. *May v. Palm Beach Chemical Co.*, 77 So. 2d 468 (Fla. 1955). And during the last three decades of the twentieth century it was extended to long-term lessors of automobiles and to the owners of golf carts and airplanes. Orefice v. Albert, 237 So. 2d 142 (Fla. 1970)(airplane); Meister v. Fisher, 462 So. 2d 1071 (Fla. 1985)(golf cart); *Kraemer v. General Motors Acceptance Corp.*, 572 So. 2d 1363 (Fla. 1990)(lessor).

Significantly, all of these cases involved accidents that occurred during the customary, ordinary, and expected use of the vehicles. One of the only cases to suggest a basis upon which an auto owner might escape liability under the doctrine was *Susco Car Rental System of South Florida v. Leonard*, 112 So. 2d 832 (Fla. 1959). There, the court Aunequivocally endorsed@ the view of the Third District that the doctrine would not apply to a car that was stolen or that Awas not being used for the purpose for which it was rented, i.e. the pleasure, convenience or business of the renter.@ 112 So. 2d at 835.

This statement from *Susco Car Rental* represented a logical corollary of the foreseeability analysis *Southern Cotton Oil* employed forty years earlier. By holding that the doctrine was inapplicable to the theft of an auto, or possibly to its use for something other than the Aordinary purposes for which an automobile is rented,@ *Susco Car Rental* re-affirmed that injuries Adue to some cause beyond human foresight,@ or from the use of a vehicle in a manner other than Afor which it was designed@ (*See Southern Cotton Oil*, 86 So. at 631, 634), were not within the intended scope of the doctrine because reasonable foreseeability of harm would be lacking.

C. The District Courts= Efforts to Ameliorate the Harsh Effects of the Dangerous Instrumentality Doctrine in Cases Involving Intentional Torts have Failed because they Improperly Rely on the Subjective Intent of the Driver rather than the Objective Foreseeability of Harm

Aside from the decision below, only two Florida cases have addressed whether an auto owner is liable under the dangerous instrumentality doctrine for the intentional tort of a permissive user.

The first case to address the intentional tort problem was *Caetano v. Bridges*, 502 So. 2d 51 (Fla. 1st DCA 1987). There, a father loaned his car to his daughter to use as transportation to and from work. Instead of driving to work, the daughter used the auto to search for her boyfriend. She ultimately found him at a tavern in the company of two other women, became enraged with jealousy, and tried to run over the boyfriend with the car as he departed the tavern hand-in-hand with the other women. She missed, striking

one of the two women instead. 502 So. 2d at 52.

The trial court entered summary judgment in favor of the plaintiff and against the father who owned the car used in the attack. The First District reversed. Citing Southern Cotton Oil, the district court emphasized that the dangerous instrumentality doctrine applied only when the driver=s misconduct was negligent, and that an owner Ais not accountable if the operator is involved in intentional misconduct which is not foreseeable.@ 502 So. 2d at 53. However, rather than address whether the defendant father knew or should have known that his daughter might use the auto to commit a battery, the district court remanded the action for trial solely on the issue of the daughter=s subjective intent.

Six years after *Caetano,* a slightly different case involving a driver=s intentional tort came before the First District. In *Sun Chevrolet, Inc. v. Crespo,* 613 So. 2d 105 (Fla. 1st DCA 1993), as here, the defendant-owner was a car rental agency whose permittee loaned the car to another. The driver killed someone in an accident and pled guilty to a charge of vehicular homicide.

Based on the driver=s guilty plea, the plaintiff moved for summary judgment against both the driver and Sun Chevrolet. The trial court granted the motion, but the First District reversed. Citing *Susco Car Rental* and *Caetano,* the court agreed that Athe owner of an automobile who allows his vehicle to be driven on the open road is liable only if the driver is *negligent,*@ and is Anot responsible if the operator is involved in intentional misconduct which is not foreseeable.@ 613 So. 2d at 107 (emphasis by the court).

However, because the driver testified in a deposition that Aa sudden unexplained movement of his vehicle for which he was not responsible caused the accident,@ the First District reversed the judgment against Sun Chevrolet and remanded the action for a trial on the issue of whether the driver was negligent. *Id.*

The decision below parted company with both *Caetano* and *Sun Chevrolet.* The Fifth District held that Athe doctrine is not limited to negligent operation of a vehicle@ and that Areckless driving or other intentional misconduct by an operator does not terminate liability under the doctrine.@ (App. 1, p. 7) The only exception recognized by the Fifth District is when the auto Ais used in a weapon-like manner with the intent to inflict physical injury, . . . unless its use in this manner is reasonably foreseeable.@ (App. 1, pp. 7, 8) Because Beauford testified that he began following Miles out of concern for his girlfriend=s safety, the Fifth District held his intent was Aunclear@ and that a trial was necessary to determine Sun State Ford=s liability.

Significantly, all three district courts agreed that foreseeability of harm was, in one way or another, a factor to be considered under *Southern Cotton Oil.* What the district courts seem to be struggling with is the unfairness of imposing liability without on fault on an auto owner who had no reason to believe his auto would be used recklessly or with the intent to cause injury. The concern is a rationale one, since criminal acts are generally considered unforeseeable in the absence of actual or constructive knowledge of the danger. *See e.g. Wal-Mart Stores, Inc. v. Caruso,* 2004 WL 1196628 (Fla. 4th DCA June

2, 2004). Each district court has fashioned its own solution but, unfortunately, each one is flawed.

For example, *Caetano* expressly held that the owner of an auto Ais not accountable if the operator is involved in intentional misconduct which is not foreseeable.@ 502 So. 2d at 53. However, *Caetano* never analyzed whether the father had any reason to anticipate that his daughter might try to run someone over with a car. Instead, the sole purpose of the remand was to determine whether the daughter intended to strike the plaintiff or simply missed the boyfriend and hit the plaintiff by mistake. This had no bearing on the liability standard that the district court held was applicable to the father, *i.e.* whether he had reason to know of his daughter=s apparent propensity for violence.

The analysis in *Sun Chevrolet* was similarly incomplete. It agreed with *Caetano* that foreseeability was required before the auto owner could be held liable for the driver=s homicidal act, but remanded the case for a trial on whether the accident was due to an Aunexplained movement@ of the vehicle for which the driver claimed he was not responsible. The district court did not explain how the issue of foreseeability was to be resolved if the driver=s act was found to be intentional, particularly when the driver was not the person to whom the defendant had rented the car.

Finally, the court below reasoned that the Adesigned purpose@ of an auto is Aas a conveyance,@ and its use as a weapon Awith the intent to inflict physical injury@ is not the type of liability for which an auto owner should be expected to provide insurance. (App.

1, pp. 7, 8) However, based on the belief that Beauford=s Aintent@ was Aunclear,@ the court held that a trial was necessary to determine Sun State Ford=s liability. (App. 1, pp. 9-10)

The problem with all three decisions is that they strive for a fault-based standard of liability which employs the concept of foreseeability, but then make the mistake of using the subjective intent of the driver to determine whether the misuse of the auto was foreseeable. This improperly confuses the distinct legal concepts of foreseeability and intent, and explains why each case to confront this issue has found a question of fact. *Cf. McCain v. Florida Power Corp.*, 593 So. 2d 500 (Fla. 1992)(district court confused duty, a question of law, and proximate cause, a question of fact).

Foreseeability is an objective standard in which a court determines as a matter of law what a reasonable person would consider likely to occur under a given set of circumstances. McCain, 593 So. 2d 500, 503 (Fla. 1992). Conversely, intent concerns an actor=s subjective state of mind and is generally a question of fact for a jury. Dobbs, The Law of Torts, '24 (2001); see also Spivey v. Battaglia, 258 So. 2d 815 (Fla. 1972).

Southern Cotton Oil=s application of the dangerous instrumentality doctrine to automobiles was a policy decision based on objective foreseeability of harm. The court found that driver negligence was objectively foreseeable because of the statistical frequency of accidents when autos are used for the purpose for which they were designed.

Whether the doctrine applies when a driver commits an intentional tort should depend on whether the owner=s conduct foreseeably Acreated a broader >zone of risk=@ that the intentional tort would be committed. *McCain*, 593 So. 2d at 502. Driver intent should play no part in the analysis unless, of course, the driver=s bad intent was known to the auto owner. But even then, the issue of foreseeability under such circumstances would still be one for the court.

D. Objective Foreseeability of Harm is the Appropriate Test for Imposing Liability on Anyone who Entrusts a Motor Vehicle to Another

AThe core predicate for imposing liability is one of reasonable foreseeability B the cornerstone of our tort law.@ *Malicki v. Doe*, 814 So. 2d 347, 362 (Fla. 2002). Indeed, reasonable foreseeability permeates Florida tort law.

Premises owners are not strictly liable for criminal acts that occur on their property. Rather, A[a]n owner of a premises is only required to protect against criminal acts by third parties if the act is reasonably anticipated and the owner had actual or constructive knowledge of the specific danger.@ Wal-Mart Stores, Inc. v. Caruso, 2004 WL 1196628 (Fla. 4th DCA June 2, 2004), citing Relyea v. State, 385 So. 2d 1378, 1383 (Fla. 4th DCA 1980) and Highlands Ins. Co. v. Gilday, 398 So. 2d 834, 836 (Fla. 4th DCA 1981).

Likewise, one who entrusts a firearm to another is not strictly liable for criminal acts committed by the person to whom the weapon was sold or given. Kitchen v. K-Mart Corp., 697 So. 2d 1200 (Fla. 1997); Williams v. Bumpass, 568 So. 2d 979 (Fla. 5th DCA 1990). Instead, liability is determined on the basis of Aforeseeability of harm rather than ownership.@ Kitchen, 697 So. 2d at 1205, citing Williams, 568 So. 2d at 981-2.

There is little logic in requiring proof of fault before holding a firearm owner or a premises owner liable for the criminal acts of a third party while imposing strict liability for such acts on an auto owner under the dangerous instrumentality doctrine. Indeed, the situation is such that it arguably raises a constitutional question over whether auto owners, as a class, are being denied the equal protection of the law. As a matter of sound public policy, this Court should dispense with the dangerous instrumentality doctrine and adopt section 390 of the Restatement (Second) of Torts (1965) in its place. There are numerous compelling reasons for doing so.

First, the adoption of section 390 in place of the dangerous instrumentality doctrine would unify Florida=s tort law jurisprudence, the express goal of which is to allocate liability based on fault. *Hoffman v. Jones*, 280 So. 2d 431, 438 (Fla. 1973)(AIn the field of tort law, the most equitable result that can ever be reached by a court is the equation of liability with fault.@).

Second, the adoption of section 390 would expand the class of persons to whom financial responsibility for the misuse of an auto would extend. Under the dangerous

instrumentality doctrine, liability is artificially tied to beneficial ownership of the automobile. *Aurbach v. Gallina*, 753 So. 2d 60 (Fla. 2000). Under section 390, owners and non-owners alike would be subject to liability based on the broader, more pragmatic test of foreseeability of harm.

Third, tying financial responsibility to fault would further the goal of deterrence. It would encourage individuals like Carla Lewis, the woman who entrusted the rental vehicle to Beauford, to exercise due care to avoid liability. At present, a person in Lewis= position has less of an incentive to exercise due care because the auto owner, who is strictly liable, is the one more likely to get sued. In fact, even auto owners have less of an incentive to exercise due care under the dangerous instrumentality doctrine since no amount of vigilance will enable them to avoid liability if their vehicle is used willfully, wantonly, recklessly, or to commit a criminal act.

Fourth, the adoption of section 390 in lieu of the dangerous instrumentality doctrine would reduce the cost of litigation involving automobile accidents for plaintiffs and defendants alike. Whether an auto owner should have foreseen a permittee=s intentional tort could be decided by courts at the pleadings stage based on whether the owner had actual or constructive knowledge of the specific danger, just as actions against landowners and firearm owners for the criminal acts of third parties are tested. Cases in which a duty is found will settle more quickly, whereas cases in which a duty does not arise can be resolved without the necessity of a trial. Appellate review would be *de novo*,

and would engender greater predictability of outcome as reviewing courts establish the types of circumstances in which foreseeability may be deemed to exist.

Finally, the abolition of the dangerous instrumentality doctrine and the adoption of section 390 in its place will harmonize Florida law with that of its sister jurisdictions.

Virtually every other state in the country has adopted section 390 (*Kitchen*, 697 So. 2d at 1202); no other state has a common law dangerous instrumentality doctrine (*Hertz Corp. v. Jackson*, 617 So. 2d 1051, 1053 (Fla. 1993). Only five states have enacted legislation imposing liability on auto owners for the torts of permitted users; four expressly limit the auto owner=s liability to driver negligence. See Michigan Compiled Laws Annot., '257.401; McKinney=s Cons. Laws of N.Y., '388; Iowa Code Ann., '321.493; Idaho Code, '49-2417.

The dangerous instrumentality doctrine was born in an era when automobiles were Anew inventions applying the forces of nature in previously unknown ways@ and when they shared the public highways with pedestrians and horse-drawn carriages. *Southern Cotton Oil*, 86 So. at 635. The maturity and refinement of the state=s tort jurisprudence over the last 84 years, as well as technological improvements in automobile safety systems and roadway design, have outstripped the doctrine=s utility and justification. The benefits it sought to bestow on the public can now be accomplished better and more efficiently through the tort of negligent entrustment under section 390.

If this Court is not inclined to abandon the doctrine in favor of section 390, then it

should at least articulate a bright-line rule which requires proof of foreseeability of harm (*i.e.* fault-based liability) in cases which seek to charge the owner of an automobile with vicarious liability for the intentional tort of a permitted user. Such a rule would be wholly consistent with the rationale of *Southern Cotton Oil.* It would also obviate the lower courts= erroneous and confusing effort to assess Aforeseeability@ through reference to the different Adegrees@ of a driver=s Asubjective intent.@ Finally, it would ameliorate the disparate standards of liability currently faced by the owners of automobiles, firearms, and real property.

Whichever standard the Court adopts ('390 or a simple foreseeability requirement applicable only to dangerous instrumentality cases involving intentional torts), Beauford=s conduct was not reasonably foreseeable.

When Sun State Ford rented the truck to Lewis, it was reasonable for it to foresee that in its ordinary use, the truck might be used not only by someone other than Lewis, but to transport friends to a tavern or club. Beauford=s use of the truck to chase Miles at speeds approaching 100 miles per hour, causing Miles to turn off his headlights, disregard traffic control devices, and flee out of Afear [for] his health and safety,@ was *not* an ordinary use of the vehicle. Such use was not, in the words of *Susco Car Rental,* for Beauford=s Apleasure, convenience, or business@ or, for that matter, Lewis=. *Susco Car Rental,* 112 So. 2d at 835.

Thus, Beauford=s use was not one of the ordinary or intended uses for which

automobiles were designed, and therefore was not reasonably foreseeable. Moreover, plaintiffs adduced no evidence whatsoever to suggest that Sun State Ford (or Lewis) knew or had reason to know that Beauford would use the truck recklessly or to commit an assault on another driver. The judgment of the District Court should be reversed.

E. Alternatively, this Court should Reverse on the Basis that Beauford Used the Auto in a Weapon-Like Manner as a Matter of Law

Even if the rule of law announced by the District Court is endorsed by this Court, reversal is still required because the record does not present any question of fact for trial. Beauford unquestionably used the truck in a weapon-like manner with the intent to cause physical injury.

With respect to the Aweapon-like use@ prong of the District Court=s test, it is true that Beauford said he initially used the truck merely to Afollow@ Miles. (R. 269-70, 274) But there is a very clear demarcation between Beauford=s initial use of the truck as a conveyance and his subsequent use of the truck to conduct a chase at very high speeds, in the dark, running red lights and making frequent turns, causing Miles to feel threatened and to fear for his health and safety. (R. 69, 280-4, 313, 318)

These circumstances, taken together, plainly denote a weapon-like use of the vehicle, particularly when plaintiffs admit in their pleadings and discovery responses that Miles felt threatened and feared for his well-being. (R. 69, 313, 318) Indeed, plaintiffs= specific description of how the truck was used to instill fear fits squarely within the

statutory definition of a criminal assault. *See* ' 784.011, Fla. Stat. (2004)(Aan intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that violence is imminent@).

With respect to the Aintent to cause physical injury@ prong, it is undisputed that Beauford made a conscious decision to give chase when he became convinced that he had been duped into stopping his truck and getting out so that Miles could get Aa good head start on him@ and Alose him.@ (R. 279) This is what made Beauford Areally mad@ and, in his words, A[t]hat=s what started the sure enough chase then.@ (R. 278, 280)

As this Court made clear in *Spivey v. Battaglia*, 258 So. 2d 815 (Fla. 1972), intent can be legally implied where the danger of an action becomes a substantial certainty. 258 So. 2d at 816-7. It cannot be gainsaid that chasing an auto at high speed through darkened streets and red lights is substantially certain to cause physical injury.

Significantly, neither plaintiffs nor the District Court identified any fact from which a jury could reasonably conclude that Beauford did *not* use the truck in a fashion calculated to cause Miles to fear for his life. If the facts of this case do not establish the weapon-like use of a vehicle with the intent to cause physical injury, then the District Court=s standard for avoiding vicarious liability under the dangerous instrumentality doctrine is an illusory one that is incapable of ever being met.

CONCLUSION

For all of the foregoing reasons, the defendant-petitioner, Sun State Ford, Inc., respectfully requests that this Court quash the decision of the District Court and affirm the summary final judgment entered in its favor by the circuit court.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was served via U.S. Mail this 30th day of July, 2004 upon: Daryl D. Parks, Esq. and Kendra N. Davis, Esq., Parks & Crump, LLC, 240 North Magnolia Drive, Tallahassee, FL, 32301, Tel: (850) 224-6400, *Counsel for Plaintiffs/Respondents*; Warren B. Kwavnick, Esq. and Dennis R. O'Connor, Esq., Cooney Matson Lance Blackburn Richard & O'Connor, P.A., P.O. Box 14546, Fort Lauderdale, FL 33302, Tel: (954) 568-6669, *Counsel for Appellant, Co-Defendant Beauford*; Lucinda A. Hoffman, Holland & Knight, LLP, 701 Brickell Avenue, Suite 3000, Miami, FL 33131, *Counsel for Florida Defense Lawyers Association, for Appellee, Sun State Ford*.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that this initial brief complies with Rule 9.210, Fla.R.App.P., and is typed in Times New Roman 14-point font.

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