

IN THE SUPREME COURT OF FLORIDA

CASE NO. 70,499

JUNIE HORNE,

Petitioner, JUN 6 1987

vs. THE

VIC POTAMKIN CHEVROLET, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI FROM THE
DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

PETITIONER'S BRIEF ON THE MERITS

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INTRODUCTION

Vic Potamkin Chevrolet, Inc. appealed from a final judgment rendered pursuant to a jury verdict that found it liable for negligently entrusting an automobile to a person whom it knew was incompetent to drive. A panel of the District Court of Appeal, Third District, affirmed this final judgment holding that under the limited circumstances of this case -- an automobile dealer having actual knowledge that the purchaser planning to drive the vehicle is incompetent to do so -- a dealer has a duty to refrain from selling a car and is liable for damages proximately caused by the breach of that duty.

The Third District, on its own motion, granted rehearing en banc on the ground that the case was of exceptional importance. (R.126-127).¹ On rehearing en banc, the panel's opinion was withdrawn and the court instead held that the law of negligent entrustment does not include a negligent sale. However, recognizing the issue to be a question of great public importance, it certified it to this Court.

STATEMENT OF THE CASE AND FACTS

a. The selection of the car

Nora Newry was the maid of Mrs. Potamkin and her brother-in-law, Morty. (T.19,23). Newry told Morty that she wanted

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Unless otherwise indicated, all emphasis is supplied. "R" refers to the record on appeal other than the trial transcript. "T" refers to the trial transcript.

to buy a car and asked about financing it with the family corporation, Vic Potamkin Chevrolet, Inc. Morty said that he would look into it and get back to her. (T.24). He then told her to go to the Potamkin lots and see someone in particular there who would know that she worked for the Potamkins and would help her find a car she liked. (T.25,26). Newry visited the Potamkin lot on 7th Avenue and the one on Alton Road in Miami Beach. (T.25,27).

At the Miami Beach lot, Newry was assisted by Oscar Irigary, a Potamkin salesman who knew that Newry worked for the Potamkins. (T.52,53). Irigary also knew that Newry was buying the car for herself and that she not only intended to drive it but that she would be the principal driver.(T.64). With Irigary's help, Newry found a car that she liked. (T.53,27).

b. The test drive

Newry agreed to the suggestion that she test drive the car and, in response to Irigary's request, presented a valid, but restricted, driver's license. (T.55). The license was restricted because she had failed the driving portion of the licensing examination. Irigary copied down the license number on the buyer's order form but he did not notice that it was a restricted license because he never checks such things. (T.55-56). In fact, Irigary did not know what a restricted license meant -- he thought it only applied to minors under 18 and that an adult with such a license could drive by herself. He had never been given any training or even a memo on the subject by Potamkin. (T.57-58).

After Irigary looked at the license, he and Newry got in the car for a test drive. Irigary drove the car off the lot and then parked it in order to let Newry drive. Newry's part of the test drive lasted only a few minutes -- that was more than enough for Irigary since he testified that as soon as Newry began driving he realized that she "could not drive". (T.61). As soon as her part of the test drive began she ran into problems. She headed toward a line of parked cars rather than going around them to the left. It wasn't until Irigary pointed this out that she corrected her direction. Then, she almost hit a bus -- she was approaching it from the rear without reducing her speed. Irigary had to wrest the steering wheel from her in order to avoid an accident. (T.60-61). Additionally, Newry was not even able to stay in her own lane of traffic, she would start to veer over to one side or the other. (T.61).

All in all, Irigary testified that he had never been in a car with anyone whose driving was as frightening as Newry's. (T.62). In fact, when they got back to the car lot, Irigary told another Potamkin employee that there was no way Newry would get one block from the dealership before she had a crash. (T.62-63).

c. The purchase of the car

Notwithstanding his knowledge of Newry's inability to drive and her intent to do just that, Irigary said nothing about this problem to Newry or the Potamkins, except to tell Newry to

bring somebody with her to pick up the car. (T.64,67).² He did not elaborate on this statement. Later that afternoon, one of the employees at the car lot called Newry at the Potamkins to tell her that the car was ready. (T.29). Morty and his wife drove her to the Beach lot. (T.33). Newry and Irigary finished the transaction and Irigary gave Newry the keys. (T.35,68). He never inquired whether Morty or his wife were going to drive Newry home or told them of Newry's inability to drive. (T.66-68).

d. The accident

While Newry was at the Potamkin lot she ran into a friend of hers, Junie Horne, who was also looking for a new car. This meeting was simply a coincidence. (T.36,75-76). Since the two had not seen each other in a while, Newry waited for Horne to finish her business. (T.77,38). The two then talked for a while and decided to continue their visit at Newry's house. (T.78). Newry offered to drive Horne there. Horne had never driven with Newry before, so she agreed. (T.81,38,40). They went out to Newry's car which was parked in front. Newry got in the driver's seat and began to drive. (T.42).

At first everything seemed normal, then, while traveling west on McArthur Causeway, Newry started drifting to the right. Horne told her she was too close to the side, so Newry

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Irigary testified about this statement for the very first time at trial. He had not mentioned it during his earlier deposition or interview with Horne's representative. (T.64-66).

slowed down and then began to pull back up on the road. However, a few seconds later, Newry turned the wheel to the left and hit the gas. She went across her lane of traffic, the other two west-bound lanes of traffic, the median, the three east-bound lanes of traffic, and hit a tree. (T.81, 43-44). Horne was severely injured: she fractured her right ankle and left arm and hit her head. (T.92). This accident happened approximately one mile from the Potamkin car lot.

e. The proceedings below

Horne sued Newry, Irigary and Potamkin for damages to compensate her for these injuries. (R.43-44). Only the case against Potamkin went to the jury. (T.181, 194). The theory against it was that it was negligent in selling the car to Newry for her to drive with actual knowledge that she was incompetent to do so and that such negligence was a proximate cause of Horne's injuries. (R.43-44). The jury found in favor of Horne and awarded her \$195,000 in compensatory damages. (T.266). Judgment was entered in accordance with this verdict and all post trial motions were denied. (R.117,118,119,125).

Potamkin appealed on the grounds that it was either entitled to a directed verdict or the court erred in instructing the jury on negligent entrustment. The basis of both arguments was that Florida does not recognize this cause of action and, thus, the only permissible theory of recovery was the dangerous instrumentality doctrine which would absolve it of liability.

A majority of the Third District panel disagreed with Potamkin and affirmed the final judgment. It held that Potamkin's obligation in this cause was defined by the theory of negligent entrustment as set forth in the Restatement (Second) of Torts §390. The panel limited its decision by holding that in order for liability to be imposed on a seller of a motor vehicle the seller must have actual knowledge of the buyer's lack of driving skills and, that, in the absence of such knowledge, the seller has no legal duty or obligation to inquire. It went on to hold that here Potamkin had such actual knowledge of Newry's poor driving skills; that this knowledge imposed on it a duty to refrain from selling her a car it knew she intended to drive; and, that its breach of that duty rendered it liable for the injuries sustained by Horne.

After this opinion was issued, the Third District, on its own motion, granted rehearing en banc on the ground that the case was of exceptional importance. (R.126-127). The court then reversed the judgment under review holding that it declined to extend the law of negligent entrustment to sales. (R.127). However, the court also certified the following question to this Court as one of great public importance:

SHOULD FLORIDA ADOPT SECTION 390 OF THE RESTATEMENT (SECOND) OF THE LAW OF TORTS, AND, IF SO, SHOULD THE SECTION BE CONSTRUED SO AS TO EXTEND LIABILITY TO A SELLER OF A CHATTEL AS WELL? (emphasis in original).

(R.131). The dissent also suggested that this case be certified to this Court as one of great public importance. However, it

limited the question it would certify to the facts of this case:

IS A SELLER OF AN AUTOMOBILE NEGLIGENT UNDER SECTION 390 OF RESTATEMENT (SECOND) OF TORTS (1966) WHEN IT KNOWINGLY SELLS A CAR TO A DRIVER WHO, AFTER DEMONSTRATING DRIVING INCOMPETENCE, NEVERTHELESS INTENDS TO DRIVE THE VEHICLE?

(R.135).

Horne timely invoked this Court's discretionary jurisdiction and this Court accepted jurisdiction.

ISSUE ON APPEAL

The Third District Court of Appeal sitting en banc certified the following question to this Court for resolution:

SHOULD FLORIDA ADOPT SECTION 390 OF THE RESTATEMENT (SECOND) OF THE LAW OF TORTS, AND, IF SO, SHOULD THE SECTION BE CONSTRUED SO AS TO EXTEND LIABILITY TO A SELLER OF A CHATTEL AS WELL? (emphasis in original).

However, where a cause is properly before this Court for review the Court can consider any point. Lawrence v. Florida East Coast Ry. Co., 346 So.2d 1014 (Fla. 1977). See also Life Insurance Co. of Georgia v. Lopez, 443 So.2d 947 (Fla. 1983). Therefore, petitioner Horne suggests that the question actually presented by this cause is much more narrow:

WHETHER AN AUTOMOBILE DEALER WHO SELLS A CAR TO A DRIVER WITH ACTUAL KNOWLEDGE THAT THE DRIVER IS INCOMPETENT TO DRIVE THE VEHICLE BUT INTENDS TO DO SO IS LIABLE TO ONE IMMEDIATELY INJURED AS A RESULT OF THE DRIVER'S INCOMPETENCE?

SUMMARY OF ARGUMENT

Vic Potamkin Chevrolet, Inc. knew that Nora Newry was unable to safely drive a car. Notwithstanding this knowledge, Potamkin sold her a car for her to drive. Less than one hour after Newry took possession of this vehicle and after she had driven it one mile, Newry, due to her incompetency as a driver, crashed the car and severely injured Junie Horne. A jury found that Potamkin was negligent in entrusting the car to Newry and that this negligence was a proximate cause of Horne's injuries.

It is clear that under §390 of the Restatement (Second) of Torts, negligent entrustment applies to sellers of automobiles. The doctrine does not require that one be the owner of the car at the time of the accident. The sole question is whether one gave possession and control of an instrumentality to another known to be incompetent to safely use that instrumentality. That is exactly what the evidence showed happened in this cause and what the jury found.

This is also the import of Florida law. Actual knowledge that injury will result from the sale of a product to a specific person gives rise to a duty not to sell. Thus, a fire-arms dealer has a duty not to sell a gun to one who it knows is incompetent to use it; and, here, Potamkin, had a duty not to sell a car to Newry, who it knew was incompetent to drive, and yet intended to do so. Potamkin's actual knowledge renders it liable for the injuries to Horne which were proximately caused by Newry's incompetency. This liability was incurred within one

