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**COMMONWEALTH OF KENTUCKY  
SUPREME COURT  
Case No. 2007-SC-282  
Case No. 2006-SC-701-D  
COURT OF APPEALS No. 2004-CA-2363**

CANDRIA SCOTT and JAMES E. SCOTT, JR. PETITIONERS  
v.  
MOORE PONTIAC, BUICK, GMC, INC. RESPONDENT

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**BRIEF AMICUS CURIAE OF PACIFIC LEGAL  
FOUNDATION IN SUPPORT OF RESPONDENT  
MOORE PONTIAC, BUICK, GMC, INC.**

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I certify that on August 10, 2007, I served a copy of this Brief Amicus Curiae by Federal Express to Samuel Givens, Jr., Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; and via first-class mail to Hon. Steven D. Combs, Pike Circuit Court, Division II, 423 Hall of Justice, 172 Division Street., Pikeville, KY 41501; Gary C. Johnson, Rhonda Mennings Blackburn, Gary C. Johnson P.S.C., P.O. Box 231, Pikeville, KY 41502; Pamela A. Chesnut, Gess, Mattingly & Atchison, 201 W. Short Street, Lexington, KY 40507, counsel for Plaintiffs; and William Baird, IV, William Baird III, Baird & Baird, 162 Second Street, P.O. Box 351, Pikeville, KY 41502; Virginia Hamilton Snell, Deborah H. Patterson, Rania M. Basha, Wyatt, Tarrant & Combs, LLP, 500 W. Jefferson Street, Suite 2800, Louisville KY 40202, counsel for Respondent. I further certify that the record on appeal was not checked out.

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**STATEMENT OF POINTS AND AUTHORITIES**

	<b>Page</b>
INTRODUCTION .....	1
<i>Morgan v. Scott</i> , 2006 WL 2457378 (Ky. Ct. App. Aug. 25, 2006) .....	1
ARGUMENT .....	2
I. THE EXPANSION OF DUTY COMES AT SOCIETAL COST .....	2
<i>Grubbs ex rel. Grubbs v. Barbourville Family Health Center, P.S.C.</i> , 120 S.W.3d 682 (Ky. 2003) .....	2
<i>Burns v. Level</i> , 957 S.W.2d 218 (Ky. 1997) .....	2
<i>Mason v. City of Mt. Sterling</i> , 122 S.W.3d 500 (Ky. 2003) .....	2
<i>Duncan v. Cessna Aircraft Co.</i> , 665 S.W.2d 414 (Tex. 1984) .....	3
<i>BMW of North America, Inc. v. Gore</i> , 517 U.S. 559 (1996) .....	3
Sunstein, Cass R., et al., <i>Assessing Punitive Damages (With Notes on Cognition and Valuation in Law)</i> , 107 Yale L.J. 2071 (1998). ....	3
McQuillan, Lawrence J., et al., <i>Jackpot Justice: The True Cost of America's Tort System</i> (2007), available at <a href="http://www.aamga.org/files/Pcific_Research_Study_Report.pdf">http://www.aamga.org/files/Pcific_Research_Study_Report.pdf</a> (last visited July 11, 2007) .....	3-4
Perlman, Harvey S., <i>Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine</i> , 49 U. Chi. L. Rev. 61 (1982). ....	4
Hayek, Friedrich A., <i>The Constitution of Liberty</i> (1960) .....	4
Bastiat, Frederic, <i>That Which Is Seen, and That Which Is Not Seen</i> (1850), available at <a href="http://bastiat.org/en/twisatwins.html">http://bastiat.org/en/twisatwins.html</a> (last visited July 6, 2007) .....	5
II. VIOLATION OF AN INTERNAL POLICY SHOULD NOT LEAD TO LIABILITY .....	5
A. An Internal Policy Does Not Establish a Duty of Care .....	5

	Page
<i>Rogers v. Wheeler</i> , 864 S.W.2d 892 (Ky. 1993) .....	5-6
<i>Barnett v. Globe Indem. Co.</i> , 557 So.2d 300 (La. Ct. App. 1990) .....	6
<i>Greg Lair, Inc. v. Spring</i> , 23 S.W.3d 443 (Tex. Ct. App. 2000) .....	6
<i>Wayne's Admrx. v. Woods</i> , 275 Ky. 477, 121 S.W.2d 957 (Ky. Ct. App. 1938) .....	6
<i>Wal-Mart Stores, Inc. v. Wright</i> , 774 N.E.2d 891 (Ind. 2002) .....	6-7
<i>Ebenhoh v. Production Credit Ass'n of Southeast Minnesota</i> , 426 N.W.2d 490 (Minn. Ct. App. 1988) .....	7
<i>AmSouth Bank v. Tice</i> , 923 So.2d 1060 (Ala. 2005) .....	7
<i>Angnabooguk v. State</i> , 26 P.3d 447 (Alaska 2001) .....	7
<i>Estate of Day v. Willis</i> , 897 P.2d 78 (Alaska 1995) .....	7
<i>FFE Transp. Servs., Inc. v. Fulgham</i> , 154 S.W.3d 84 (Tex. 2004) .....	8
<i>Titchnell v. United States</i> , 681 F.2d 165 (3d Cir. 1982) .....	8
<i>Branham v. Loews Orpheum Cinemas, Inc.</i> , 31 A.D.3d 319, 819 N.Y.S.2d 250 (N.Y.A.D. 2006) .....	8
<i>South ex rel. South v. McCarter</i> , 280 Kan. 85, 119 P.3d 1 (2005) .....	8-9
Restatement (Second) of Torts § 323 (1964) .....	9
§ 324A (1964) .....	9
<i>Buczowski v. McKay and K Mart Corp.</i> , 490 N.W.2d 330 (Mich. 1992) .....	9
<i>Garofalo v. Lambda Chi Alpha Fraternity</i> , 616 N.W.2d 647 (Iowa 2000) .....	9-10
<i>Killian v. Caza Drilling, Inc.</i> , 131 P.3d 975 (Wyo. 2006) .....	10
<i>Galapo v. City of New York</i> , 95 N.Y.2d 568, 744 N.E.2d 685 (2000) .....	10

	Page
<i>Pollock v. Florida Dep't of Highway Patrol</i> , 882 So.2d 928 (Fla. 2004) .....	10-11
<i>Clark v. District of Columbia</i> , 708 A.2d 632 (D.C. App. 1997) .....	11
<i>Briggs v. Washington Metropolitan Area Transit Authority</i> , 481 F.3d 839 (D.C. Cir. 2007) .....	11
<i>Rhodes v. Illinois Central Gulf R.R.</i> , 172 Ill. 2d 213, 665 N.E.2d 1260 (1996) .....	11
B. An Internal Policy Unknown to the Plaintiff at the Time of Injury Cannot Be the "Cause" of the Injury .....	12
<i>Prince v. New York City Housing Authority</i> , 302 A.D.2d 285, 756 N.Y.S.2d 158 (N.Y.A.D. 2003) .....	12
<i>Zabala Clemente v. United States</i> , 567 F.2d 1140 (1st Cir. 1977), <i>cert. denied</i> , 435 U.S. 1006 (1978) .....	12
<i>USX Corp. v. Barnhart</i> , 395 F.3d 161 (3d Cir. 2004) .....	12
<i>Williford Energy Co. v. Submersible Cable Servs., Inc.</i> , 895 S.W.2d 379 (Tex. Ct. App. 1994) .....	12
<i>Cunningham v. Braum's Ice Cream and Dairy Stores</i> , 276 Kan. 883, 80 P.3d 35 (2003) .....	13
<i>Newsome v. Cservak</i> , 130 A.D.2d 637, 515 N.Y.S.2d 564 (1987) .....	13
CONCLUSION .....	14

## INTRODUCTION

On a rainy October morning, Tim Morgan went to Moore Pontiac to buy a used pick-up truck. After filling out the usual paperwork, he went on a test drive accompanied by the salesman. They noticed the truck was low on gas and returned to the dealership. Gas tank replenished, Morgan set out for a second test drive without the salesman. About four miles away, the truck hydroplaned on a curve, Morgan lost control, crossed three lanes of traffic, and struck a car driven by Candria Scott head-on. *Morgan v. Scott*, 2006 WL 2457378, at \*1 (Ky. Ct. App. Aug. 25, 2006).

Scott and her husband sued Morgan for negligence in causing her injuries and sued Moore Pontiac on the sole theory that it had been negligent in allowing Morgan to test drive the truck unaccompanied by a salesman, where the dealership had an in-house policy of requiring such accompaniment for all test drives. At trial, the jury awarded \$4 million to the Scotts, equally divided between Morgan and Moore Pontiac. *Id.* at \*2. On appeal, the court reversed as to Moore Pontiac, holding that “absent the internal policy Moore Pontiac could have lent its cars to responsible drivers without making itself liable for the damages caused by their negligence. The existence and subsequent non-observance of the in-house rule did nothing to increase this risk. The situation is exactly what it would have been had Moore Pontiac not instituted the policy.” *Id.*

The court below correctly held that the dealership’s internal policy did not establish a duty of care to the general public and, further, that even had a duty existed, the failure to follow the policy did not cause the accident. Courts should hesitate before expanding liability because of the serious economic costs that such liability imposes on the state’s economy. As explained below, many courts around the country have addressed the issue

presented here—whether an internal policy, practice, procedure, regulation, or guideline establishes a standard of care that rises to the level of a legal duty—and all have found that internal policies do *not* create a legal duty. In large part, this is because public policy favors internal policies that exceed the standard of care mandated by law. Finally, when a plaintiff never knew about an internal policy, or otherwise failed to rely on it, the lack of causation is fatal to a negligence claim.

The decision below should be *affirmed*.

## ARGUMENT

### I

#### THE EXPANSION OF DUTY COMES AT SOCIETAL COST

Negligence law seeks to make whole those who have been injured by people who fail to live up to their social and personal responsibilities. *See Grubbs ex rel. Grubbs v. Barbourville Family Health Center, P.S.C.*, 120 S.W.3d 682, 690 (Ky. 2003) (“under traditional tort law defendants are liable for all the reasonably foreseeable results of their negligence”). However, there is always a risk that negligence law could impose responsibilities on parties who should not have to bear them. Imposing a tort duty is essentially to require a specific party to pay the cost of socially desirable activities—a perfectly reasonable enterprise in cases where the burdened party caused the injury to begin with. For example, it is reasonable to require that a defendant who operates a motor vehicle must do so with reasonable care, and be prepared to pay the cost of any damages he may incur by driving negligently. *See, e.g., Burns v. Level*, 957 S.W.2d 218, 220-21 (Ky. 1997). Tort law usually imposes liability so as to deter conduct that creates an unreasonable risk of injury to others. *See, e.g., Mason v. City of Mt. Sterling*, 122 S.W.3d 500, 506 (Ky. 2003);

see also *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 425 (Tex. 1984) (“An ideal tort system should impose responsibility on the parties according to their abilities to prevent the harm.”).

But there is a point at which imposing liability will have negative consequences—at which there is a serious risk of discouraging worthwhile conduct. As Justice Breyer explained, courts must take care to strike an effective balance, because “[s]maller damages would not sufficiently discourage firms from engaging in the harmful conduct, while larger damages would ‘over-deter’ by leading potential defendants to spend more to prevent the activity that causes the economic harm . . . than the cost of the harm itself.” *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 593 (1996).

Overdeterrence is a serious concern. Economically speaking, if a business faces too high a potential tort liability, it will invest too many resources in avoiding that liability, rather than into productive enterprises. This diverts businesses away from satisfying the needs of consumers, and wastes the energy of entrepreneurs which ought to be focused on producing goods and services at low prices. Limitations on tort liability, therefore, serve an important economic purpose:

If [damages] awards are unpredictable, . . . resources are likely to be wasted on that calculation, and as a practical matter, a risk of extremely high awards is likely to produce excessive caution in risk-averse managers and companies. Hence unpredictable awards create both unfairness and (on reasonable assumptions) inefficiency, in a way that may overdeter desirable activity.

Cass R. Sunstein, et al., *Assessing Punitive Damages (With Notes on Cognition and Valuation in Law)*, 107 Yale L.J. 2071, 2077 (1998). See also Lawrence J. McQuillan, et

al., *Jackpot Justice: The True Cost of America's Tort System* 23 (2007)<sup>1</sup> (“[M]isdirected or excessive liability costs cause companies to spend resources on lawsuit settlements, damage awards, insurance, lawyers, and legal-defense costs that would have been spent on product and process improvements. It also causes companies to withdraw or withhold products from the market because of a lack of resources or a fear of lawsuits.”).

The principle that a business should pay for the harms it causes is a necessary, but not a sufficient, principle for the creation of tort liability. In addition to identifying the party that caused the harm, tort law looks to public policy considerations to determine who should bear the cost of the harm. Every act has a potentially infinite number of consequences, so that if a defendant were required to pay for every potential wrong resulting from an action, economic enterprise simply could not go on. “At some point,” therefore, “it is generally agreed that the defendant’s act cannot fairly be singled out from the multitude of other events that combine to cause loss.” Harvey S. Perlman, *Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine*, 49 U. Chi. L. Rev. 61, 70 (1982).

Policy considerations counsel against finding liability in a case like this. As Nobel Laureate Friedrich Hayek noted, liability rules “will normally raise the cost of production, or, what amounts to the same thing, reduce over-all productivity.” Friedrich A. Hayek, *The Constitution of Liberty* 224 (1960). A presumption against imposing liability is justified because the “over-all cost is almost always underestimated.” *Id.* at 225. This underestimation is due to the fact that tort law has the potential of stifling entrepreneurial

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<sup>1</sup> Available at [http://www.aamga.org/files/Pacific\\_Research\\_Study\\_Report.pdf](http://www.aamga.org/files/Pacific_Research_Study_Report.pdf) (last visited July 11, 2007).

activity, driving away investors, and depriving society of jobs, as well as goods and services, that might otherwise have existed. Since these jobs, goods, and services never come into existence once a legal cost is imposed on all businesses, it is easy to overlook their cost to society. *See generally* Frederic Bastiat, *That Which Is Seen, and That Which Is Not Seen* (1850), available at <http://bastiat.org/en/twisatwins.html> (last visited July 6, 2007). This concern is especially acute in a case like this, where the connection between the alleged wrong and the injury suffered is so attenuated. If internal policies, regardless of their purpose or effect, serve as a hook for tort liability, the impact will extend far beyond car dealerships. Most ominously, a holding that internal policies, procedures, practices, rules, or guidelines establish a cause of action will deter companies from establishing such policies, a particularly unfortunate result where such policies promote health and safety. As a result, a ruling for plaintiffs in this case would increase the potential costs of doing business in Kentucky, causing harm to the economy and the state's citizens.

## II

### VIOLATION OF AN INTERNAL POLICY SHOULD NOT LEAD TO LIABILITY

#### A. An Internal Policy Does Not Establish a Duty of Care

Moore Pontiac adopted an internal policy that a sales representative should accompany a customer on a test drive when possible, a policy described by the dealership to this Court as “reasonably prudent.” *See* Response to Motion for Discretionary Review at 4. Moore Pontiac never explicitly states the purpose of the policy, but other sources—and life experience—suggest that the primary reason is to facilitate sale of the vehicle. *See Rogers v. Wheeler*, 864 S.W.2d 892, 896 (Ky. 1993) (test drive of used car permitted by dealer to

allow customer to decide if he wants to purchase it); *Barnett v. Globe Indem. Co.*, 557 So.2d 300, 301 (La. Ct. App. 1990) (salesman permitted test drive “in hopes of selling the car”); *Greg Lair, Inc. v. Spring*, 23 S.W.3d 443, 448 (Tex. Ct. App. 2000) (“The test drive was undertaken as a business enterprise for the sole purpose of making a deal on the vehicle.”). There is no particular safety component to an accompanied test drive, especially where the dealer has, as in this case, obtained assurance that the customer has a valid drivers’ license and thus is presumed competent to drive. *See Rogers*, 864 S.W.2d at 896 (dealer has duty to determine if driver has valid drivers’ license); *Wayne’s Admr. v. Woods*, 275 Ky. 477, 121 S.W.2d 957, 957-58 (Ky. Ct. App. 1938) (rejecting principal-agent and joint enterprise theories of liability of dealership for test driving customer’s negligence in causing an auto accident).

As an internal policy designed primarily to do no more than promote a commercial transaction, Moore Pontiac did not assume a duty to protect third parties from the negligent driving of potential customers who the dealership had every reason to believe are competent. As another example of an internal policy adopted primarily for commercial purposes, consider the policy at issue in *Wal-Mart Stores, Inc. v. Wright*, 774 N.E.2d 891, 894-95 (Ind. 2002), in which the company manual established a policy of mopping up spills within a set period of time. The Indiana Supreme Court held that the manual containing internal policies, practices, and rules represents the defendant company’s “subjective view of the standard of care” and therefore could not form the basis of a jury instruction on the objective duty of care mandated by law. Similar to the commercial basis for the test drive policy in this case, the Indiana court explained, “[r]ules and policies in the [Wal-Mart] Manual may have been established for any number of reasons having nothing to do with safety and ordinary care,

including a desire to appear more clean and neat to attract customers, or a concern that spills may contaminate merchandise.” *Id.* But this case has implications beyond internal policies adopted for commercial reasons, particularly should the court understand the policy to have been adopted, even in part, as a safety measure. In a wide variety of contexts, across the nation, courts refuse to hold that an internal policy, procedure, practice, regulation, or guideline creates a duty of care.

For example, internal policies adopted by financial institutions do not create a duty toward borrowers. In *Ebenhoh v. Production Credit Ass’n of Southeast Minnesota*, 426 N.W.2d 490, 491 (Minn. Ct. App. 1988), the plaintiffs were farmers on whom the defendant credit association foreclosed. The farmers sued, *inter alia*, on the grounds that the association violated its own policies and standards for making sound operating loans. *Id.* Distinguishing the internal policies from legislatively enacted statutes and regulations, the court rejected the plaintiffs’ claim, flatly holding that internal policies create no such standard of care. *See also AmSouth Bank v. Tice*, 923 So.2d 1060, 1067 (Ala. 2005) (Under Florida law, employee manual guidelines for tellers with respect to handling of checks were insufficient to establish any duty of care running from bank to customer separate and distinct from duty of care created under Florida’s version of Uniform Commercial Code.). In *Angnabooguk v. State*, 26 P.3d 447, 452 (Alaska 2001), landowners who suffered fire damage to their homes and property sued the Department of Natural Resources, alleging that its firefighters violated internal rules and regulations and therefore acted negligently. The court rejected this argument, finding no duty of care existed. *Id.* citing *Estate of Day v. Willis*, 897 P.2d 78, 81 n.7 (Alaska 1995) (an internal administrative and training manual used by police did not impose on the police a duty of care towards fleeing suspects)).

Beyond cases that involve damage to property, courts will not rely on internal policies to establish a legal duty of care in cases involving personal injuries. The reason is that public policy *encourages* the creation of internal policies for companies to exercise a degree of care higher than that mandated by law. For example, in *FFE Transp. Servs., Inc. v. Fulgham*, 154 S.W.3d 84, 92-93 (Tex. 2004), the defendant trucking company's self-imposed policy with regard to inspection of its trailers, taken alone, did not establish the standard of care that a reasonably prudent operator would follow. *FFE* adopted the rationale set forth by the Third Circuit in *Titchnell v. United States*, 681 F.2d 165, 173 (3d Cir. 1982):

[I]f a health care facility, in striving to provide optimum care, promulgates guidelines for its own operations which exceed the prevailing standard, it is possible that care rendered at that facility by an individual practitioner on a given occasion may deviate from and fall below the facility's own standard yet exceed the recognized standard of care of the medical profession at the time. A facility's efforts to provide the best care possible should not result in liability because the care provided a patient falls below the facility's usual degree of care, if the care provided nonetheless exceeds the standard of care required of the medical profession at the time. Such a result would unfairly penalize health care providers who strive for excellence in the delivery of health care and benefit those who choose to set their own standard of care no higher than that found as a norm in the same or similar localities at the time.

See also *Branham v. Loews Orpheum Cinemas, Inc.*, 31 A.D.3d 319, 323, 819 N.Y.S.2d 250, 255 (N.Y.A.D. 2006) (theater's policy to check aisles every 15-20 minutes for obstructions or other impediments to movie-goers' enjoyment of the film imposed a higher duty of care than is required under the law and patron who tripped over a child sitting in the aisle could not state a claim based on alleged violation of the policy).

In *South ex rel. South v. McCarter*, 280 Kan. 85, 119 P.3d 1 (2005), Isaac South (a minor) was injured during a physical altercation with Joshua Mills and James McCarter in the mobile home park where South and McCarter lived with their parents. South's parents

sued the mobile home park, arguing in part that the mobile home park owed them a duty and was negligent in rendering the service it recognized as necessary for the protection of the South family under the rental agreement and mobile home community guidelines under both Restatement (Second) of Torts § 323 (1964) and Restatement (Second) of Torts § 324A (1964). *Id.* at 93, 119 P.3d at 8. The Kansas Supreme Court found the rental agreement and community guidelines did not impose a duty on management to provide protection to the tenants. 280 Kan. at 98-99, 119 P.3d at 10-11.

Many businesses have internal policies dealing with alcohol consumption or with the refusal to serve intoxicated customers. Yes these policies do not establish a legal duty of care. For example, the Michigan Supreme Court declined to find a duty based on an internal policy in *Buczowski v. McKay and K Mart Corp.*, 490 N.W.2d 330, 332 (Mich. 1992). In that case, a drunk William McCoy bought shotgun shells from the self-serve shelf at a K Mart store, then drove to the Buczowski home intending to shoot out the rear window of a parked truck, but the ricocheting pellets struck Anthony Buczowski, who was in the backyard. Buczowski sued K Mart, arguing that the store's internal policy of not selling ammunition to intoxicated customers created a duty that K Mart had breached, leading to the injury. *Id.* The court noted that there was no evidence that McCoy had been muttering any threats, or that the sales clerk had any way of recognizing McCoy's dangerousness. *Id.* at 335 n.11. Whether K Mart had a duty to try to anticipate or ascertain possible dangerousness would depend on Michigan law for the sale of ammunition, rather than on an internal store policy. *Id.* at 336. Because K Mart complied with all relevant laws, and there was no other basis for concluding the danger was foreseeable, K Mart was found to have no liability; the appeals court was reversed. *Id.* at 337. *See also Garofalo v. Lambda Chi Alpha Fraternity,*

616 N.W.2d 647, 654 (Iowa 2000) (fraternity's internal policy prohibiting underage drinking did not establish a cause of action when a 19-year-old associate member died of alcohol poisoning at a fraternity event).

In *Killian v. Caza Drilling, Inc.*, 131 P.3d 975, 978 (Wyo. 2006), the owner of a laborer's camp had a "no alcohol" policy that was routinely ignored. Two laborers got drunk after their shift and decided to take a drive. The drunk driver subsequently killed a bicyclist who was riding along the highway. *Id.* The bicyclist's representatives sued, alleging that the "no alcohol" policy created a duty on behalf of the employer and that violation of that policy caused the accident. The Wyoming Supreme Court held that there was no duty (*id.* at 988), but analyzed the issue in the language of causation. The court held that the accident was not a foreseeable result of violation of the policy, in large part because the whole point of the laborers' camp was that the workers should not have to drive at all; their needs were provided for on site. *Id.* at 986. Finally, as a matter of policy, the court explained, "[w]e, however, think it more likely that an imposition of a duty under these circumstances would merely result in an employer forgoing adoption of any safety rules to avoid the risk of liability." As a result, "[a]ny safety benefits derived from enforcing the policy would be lost if the risk of liability is greater than the cost of enforcement and employers simply rescind or refuse to implement safety policies." *Id.* at 987.

Courts refuse to find that internal policies create a duty of care in the public sector as well, even though such policies obviously have a bearing on public safety. *See, e.g., Galapo v. City of New York*, 95 N.Y.2d 568, 574, 744 N.E.2d 685, 688 (2000) ("New York City Police Department Patrol Guide is not part of a duly-enacted body of law or regulation that gives rise to civil liability"); *Pollock v. Florida Dep't of Highway Patrol*, 882 So.2d 928,

936 (Fla. 2004) (Highway Patrol's failure to dispatch assistance to a stalled vehicle blocking the roadway, despite having internal policies requiring such dispatch, did not establish a cause of action on behalf of individuals who crashed into the stalled vehicle, because "in the context of governmental tort litigation, written agency protocols, procedures, and manuals do not create an independent duty of care.").

In *Clark v. District of Columbia*, 708 A.2d 632, 636 (D.C. Ct. App. 1997), the court held that a Suicide Prevention Plan is an unpublished internal agency procedure that cannot embody the standard of care. Again, the rationale is to encourage the creation of internal procedures that encourage employees to go above and beyond the minimum duty established by law. "To hold otherwise," the court noted, "would create the perverse incentive for the District to write its internal operating procedures in such a manner as to impose minimal duties upon itself in order to limit civil liability rather than imposing safety requirements upon its personnel that may far exceed those followed by comparable institutions." *Id.*; *Briggs v. Washington Metropolitan Area Transit Authority*, 481 F.3d 839, 848 (D.C. Cir. 2007) (quoting same).

As the Illinois Supreme Court succinctly stated, "[w]here the law does not impose a duty, one will not generally be created by a defendant's rules or internal guidelines. Rather, it is the law which, in the end, must say what is legally required." *Rhodes v. Illinois Central Gulf R.R.*, 172 Ill. 2d 213, 238, 665 N.E.2d 1260, 1272 (1996). In this case, the internal test drive policy should be disregarded to allow the law of bailment to control.

**B. An Internal Policy Unknown to the Plaintiff at the Time of Injury Cannot Be the “Cause” of the Injury**

This Court can truncate the analysis of this case if it determines that Moore Pontiac owed no duty to plaintiffs, as advocated above. But if the court finds that Moore Pontiac did owe a duty to the general public, then the case still founders on the issue of causation. The necessary element of causation would require that the plaintiffs actually relied on the action of Moore Pontiac permitting Mr. Morgan to take his test drive unaccompanied. As the court below noted—and as many other courts have held—there can be no reliance on an internal policy if the plaintiff does not know about it. *See Prince v. New York City Housing Authority*, 302 A.D.2d 285, 286, 756 N.Y.S.2d 158, 159 (N.Y.A.D. 2003) (“Liability for negligence cannot be based on the violation of an internal rule imposing a higher standard of care than the law, at least where there is no showing of detrimental reliance by the plaintiff on the rule.”); *Zabala Clemente v. United States*, 567 F.2d 1140, 1144 (1st Cir. 1977), *cert. denied*, 435 U.S. 1006 (1978) (guidelines issued by the FAA to its regions prior to the accident concerning containment of terminal instrument procedures create no duty on the government toward the owners and occupants of small general aviation aircraft, because it is an internal memo and generates no justifiable reliance on the part of pilots); *USX Corp. v. Barnhart*, 395 F.3d 161, 170 (3d Cir. 2004) (because Commissioner’s internal Coal Act guidelines lack the force of law, the agency is not bound to follow them and coal operators are not entitled to rely on them); *Williford Energy Co. v. Submersible Cable Servs., Inc.*, 895 S.W.2d 379, 386-87 (Tex. Ct. App. 1994) (holding that, for an undertaking of duty theory, plaintiff cannot rely on internal procedures of company if plaintiff was unaware of and did not rely on these procedures).

For example, in *Cunningham v. Braum's Ice Cream and Dairy Stores*, 276 Kan. 883, 80 P.3d 35 (2003), employees of an ice cream store shooed two customers out of the store and, as it turned out, into the path of a tornado. The customers sued, arguing that the store's internal emergency plan established a duty to protect them. While the holding in the case is couched in terms of duty, *id.* at 896, 80 P.3d at 43, the court emphasized that "there is no evidence that plaintiffs relied upon Braum's emergency action plan. . . . Here Cunningham and Yandell cannot demonstrate that they looked to Braum's for services they now argue Braum's had a legal obligation to provide." *Id.* Finally, "Hindsight is not enough to say that Braum's conduct increased the risk of harm to plaintiffs as a matter of law." *Id.* Similarly, in *Newsome v. Cservak*, 130 A.D.2d 637, 638, 515 N.Y.S.2d 564 (1987), the court held that the defendant's internal policy of sanding and salting the entrance to the parking lot and roads of the mall did not, in itself, create a basis for liability of the defendant to the plaintiff because "there is no basis for the proposition that a party may be held liable for failing to follow a policy which it has adopted voluntarily, and without legal obligation, especially when there is no showing of detrimental reliance by the plaintiffs on the defendants following that policy."

In this case, the Scotts did not know about the test drive policy. Even if, for some reason, they had known of the policy (if, for example, such policies were standard in the used car industry and they were familiar with industry practices), the presence or absence of a salesman touting the car's features and smooth driveability as a means of encouraging the test driver to purchase the vehicle has no bearing whatsoever on the driver's inadequate response to hitting water and hydroplaning. There simply is no connection, and thus no causation. For this additional reason, the plaintiffs' negligence claim must fail.

**CONCLUSION**

For the reasons stated above, the decision of the Court of Appeals should be *affirmed*.

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