

SUPREME COURT OF KENTUCKY
CASE NOS. 2006-SC-0701-DG, 2007-SC-0282-DG
2006-SC-0693-DG

FILED
AUG 13 2007
CLERK
SUPREME COURT

CANDRIA SCOTT and
JAMES E. SCOTT, JR.

APPELLANTS

V. ON APPEAL FROM COURT OF APPEALS,
NO. 2004-CA-002350-MR
PIKE CIRCUIT COURT, NO. 03-CI-1352

MOORE PONTIAC, BUICK, GMC, INC.

APPELLEE

BRIEF FOR APPELLANTS

----- ***** -----

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned does hereby certify that true and correct copies of the foregoing were served via first class mail, postage prepaid, on this the 9th day of August, 2007, to the following: Susan Stokley Clary, Clerk, Kentucky Supreme Court, 209 Capitol Building, 700 Capital Avenue, Frankfort, KY 40601; Sam Givens, Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Pamela A. Chestnut, McBrayer, McGinnis, Leslie & Kirkland, PLLC, 201 E. Main Street, Suite 1000, Lexington, KY 40507; Virginia Hamilton Snell, Wyatt Tarrant and Combs, LLP, 500 W. Jefferson Street, Suite 2800, Louisville, KY 40202; William Baird III, Baird & Baird P.S.C., P.O. Box 351, Pikeville, KY 41502; and Hon. Steven D. Combs, Judge, Pike Circuit Court, Division II, 423 Hall of Justice, 172 Division Street, Pikeville, KY 41501.



ATTORNEYS FOR APPELLANTS

INTRODUCTION

This is an appeal from a judgment in favor of the Appellants finding Appellee, Moore Pontiac, Buick, GMC, Inc., a car dealership, responsible for its failure to exercise ordinary care in the conduct of its business which resulted in serious injuries to Appellant, Candria Scott. Appellants have appealed to the Supreme Court due to the reversal of their judgment against Appellee at the Court of Appeals level.

STATEMENT CONCERNING ORAL ARGUMENT

Due to the unusual events which occurred at the trial court level, Appellants state that oral argument is necessary to explain the trial proceedings and the court's rulings.

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STATEMENT OF THE CASE

A substantial amount of evidence against Appellee Moore Pontiac, Buick, GMC, Inc. (Moore Pontiac) was presented at a four day trial. To attempt to summarize or describe the atmosphere of the courtroom and the manner in which all of this evidence was presented to the jury is a difficult task. To relay that experience to an Appeals Court on paper understandably dilutes the actual events at trial. The relevant parts are summarized below, but Appellants, Candria Scott and James E. Scott, Jr. (the Scotts), urge this Court to review the entire trial record for a complete understanding of the issues.

This motor vehicle crash occurred on October 10, 2002. It was raining that day. (VR No. 2, 9/28/04, 9:34:47). Appellee Candria Scott (Candria) had been to a meeting in Pikeville regarding her volunteer work with Headstart and was returning home. (VR No.3, 9/29/04, 10:22:48). Suddenly, a black Chevy full size truck, driven by Timothy Morgan (Morgan), crossed three lanes of traffic and struck the front of her car. (VR No. 2, 9/28/04, 11:10:12). She awoke in the hospital in Huntington, WV, seriously and permanently injured. (VR No. 3, 9/29/04, 9:51:18). She remains wheelchair bound as a result of these injuries.

Morgan had obtained the truck from Moore Pontiac for the purpose of a test drive. (VR No. 2, 9/28/04, 9:30:11). When he entered Moore Pontiac's dealership, Morgan was driving an old minivan that he had borrowed from his girlfriend's father. (VR No. 4, 9/30/04, 12:20:16). He didn't know if Moore Pontiac would let him drive the truck. (VR No. 1, 9/27/04, 4:03:59). In fact, he was shocked when he discovered that Moore Pontiac was going to let him test drive it by himself. (VR No. 1, 9/27/04, 4:42:36, see EA 5).

Moore Pontiac salesman Michael Cox (Cox) assisted Morgan at the dealership. The

truck was a full size Chevy K1500 pickup. A new V-8 engine had recently been installed, along with several other repairs necessitated by the truck's poor condition at the time of trade-in. (See Appendix 6, Exhibit 16: Repair Sheet). Morgan was informed of the new engine but not the other repairs and previous problems with the truck. (VR No. 4, 9/30/04, 9:34:15 (see Michael Cox deposition - transcript page 82-84))¹. It is further unclear just how much information was given to Morgan regarding the new engine. (VR No. 1, 9/27/04, 4:08:48, see EA 1).

During one portion of the test drive, the truck began to make a "putting" noise. Morgan returned the truck to the Moore Pontiac dealership and informed Cox of the problem. (VR No. 1, 9/27/04, 4:07:13; VR No. 1, 9/27/04, 4:07:29). Cox put some gas in it and returned the truck to Morgan. (VR No. 1, 9/27/04, 4:07:57). Moore set off again with his girlfriend and small daughter in the front seat. (VR No. 1, 9/27/04, 4:12:06). This wreck happened approximately four miles down the road from the dealership. (VR No. 1, 9/27/04, 4:13:30).

The Scotts alleged negligence against Moore Pontiac for its failure to warn Morgan about the known dangerous condition of this road, especially when it was raining; for its failure to inform Morgan of the parameters of the test drive area; for its failure to inquire as to Morgan's familiarity with the local roadways; for allowing Morgan to test drive this powerful truck alone in heavy rain without fully informing him of the truck's maintenance history; and for failing to accompany a scraggly, 21-year-old Morgan during the test drive.

The testimony was that it was common knowledge to local residents that the area of roadway where the wreck occurred was extremely dangerous when it was raining. Investigating

¹ With regard to any references to the testimony of Michael Cox, the first listed time indicates the beginning of Michael Cox's videotape deposition in the trial record. Reference is made to transcript pages for the specific citations to testimony as the counter on the videotape is not consistent for easy reference.

Officer William Robinette testified that he was aware of several wrecks in this area. (VR No. 2, 9/28/04, 9:33:46, see EA 6-7). Joe Varney, a business owner located adjacent to the wreck scene, testified that it was a "bad curve" which could become "slick as ice" during rainy weather. (VR No. 2, 9/28/04, 11:20:11). Evidence was also presented that Moore Pontiac knew of the dangers of this area of road. Manager Yates testified that he was aware of the dangers present at this curve. (VR No. 3, 9/29/04, 3:04:04, see EA 10-11). Morgan, however, had never been on this roadway prior to the wreck. (VR No. 1, 9/27/04, 4:08:48, see EA 1).

Testimony was presented that the area of road where this wreck occurred was outside of the test drive area. Officer Robinette testified that manager Yates told him Morgan was test driving the vehicle and "shouldn't have been up that far." (VR No. 2, 9/28/04, 9:32:48, see EA 6-7). Morgan, who was unfamiliar with the road, was not warned regarding this dangerous section of road. (VR No. 1, 9/27/04, 4:10:23, see EA 2). Further, there was no testimony that Morgan was ever informed of the parameters of the test drive area.

Testimony was heard regarding the lack of investigation by salesman Cox prior to allowing Morgan to operate the vehicle alone. Cox testified that he did not ask Morgan any questions regarding his ability to drive the truck. (VR No. 4, 9/30/04, 9:34:15 (see Michael Cox deposition - transcript page 104)). He did not ask Morgan about his knowledge of the area and the road conditions. (VR No. 1, 9/27/04, 4:08:48, see EA 1). He did not fully inform Morgan of the truck's troubled maintenance history at the dealership. (VR No. 1, 9/27/04, 4:08:48, see EA 1; VR No. 4, 9/30/04, 9:34:15 (see Michael Cox deposition - transcript page 82-83)).

Salesman Cox testified that he was not sure but he thought he had obtained a copy of Morgan's driver's license and insurance prior to the test drive. (VR No. 4, 9/30/04, 9:34:15 (see

Michael Cox deposition - transcript page 70)). Moore Pontiac contended these copies were lost and they were never produced during discovery or at the trial. The Scotts contended that Cox never obtained a copy of Morgan's drivers license because it could not be produced by Moore Pontiac. These facts were clearly disputed at trial despite the Court of Appeals' assertion to the contrary. Morgan v. Scott, No. 2004-CA-002350-MR, slip op. at 2 (Ky.App. August 25, 2006); see Appendix 1.

Cox admitted that he did not know Morgan. (VR No. 4, 9/30/04, 9:34:15 (see Michael Cox deposition - transcript page 103)). He looked "scraggly." (VR No. 4, 9/30/04, 9:34:15 (see Michael Cox deposition - transcript page 103)). Shane Yates (Yates), acting manager on the day of the wreck, admitted that **someone like Morgan should not be allowed to test drive a vehicle alone.** (VR No. 2, 9/28/04, 3:42:44, see EA 8). Although Cox testified that he accompanied Morgan on a portion of the test drive, Morgan testified unequivocally that Cox was never in the vehicle with him. (VR No. 4, 9/30/04, 9:34:15 (see Michael Cox deposition - transcript page 73); VR No. 4, 9/30/04, 12:18:30).

Evidence was presented that Moore Pontiac had a "standard operating policy" that a salesperson must accompany each test driver. (VR No. 2, 9/28/04, 4:37:19 (see Dan Moore, Sr. deposition - transcript page 18)).² This policy was formalized in a written "sales process," which was laminated and given to its sales employees at the time of hire. (See Appendix 7 - Exhibit No. 9: Sales Process; VR No. 2, 9/28/04, 10:06:33 (see Scott Moore deposition - transcript pages

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With regard to any references to the testimony of Dan Moore, Sr., the first listed time indicates the beginning of Dan Moore, Sr.'s videotape deposition in the trial record. Reference is made to transcript pages for the specific citations to testimony as there is no counter on the videotape.

56-57)³; VR No. 4, 9/30/04, 9:34:15 (see Michael Cox deposition - transcript page 26)). This policy was published to the public in the form of conspicuous signs in each of the Moore's car lots. (See Appendix 8 - Exhibit No. 10: Public Sign; VR No. 4, 9/30/04, 9:34:15 (see Michael Cox deposition - transcript page 123-124)).

During the trial of this action, through the testimony of salesman Cox, Moore Pontiac attempted to insinuate that Morgan took the truck without permission. (VR No. 4, 9/30/04, 9:34:15 (see Michael Cox deposition - transcript page 57)). Morgan would not agree with Moore Pontiac's assertion. (VR No. 1, 9/27/04, 4:11:30, 4:28:38, see EA 3-4). Thereafter, Moore Pontiac altered their position to characterize Morgan's solo test drive as a "misunderstanding" between Morgan and Cox.

Evidence was presented regarding Moore Pontiac's knowledge of the dangers associated with test driving its vehicles and the precautions taken by Moore Pontiac for the safety of its inventory and the general public. Dan Moore, Jr., an owner of Moore Pontiac, admitted that the requirement for a salesperson in the car during test drives is a "national industry standard" used by dealerships in the United States and that this standard has probably been around "since the T Model." Dan Moore, Jr., went further to state that the **main reason for this policy was to make sure the vehicle is driven properly.** (VR No. 2, 9/28/04, 4:16:49 (see Daniel Moore, Jr. deposition - transcript page 29)).⁴ Manager Yates testified that he had accompanied a test driver

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With regard to any references to the testimony of Scott Moore, the first listed time indicates the beginning of Scott Moore's videotape deposition in the trial record. Reference is made to transcript pages for the specific citations to testimony as the counter on the videotape is obscured.

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With regard to any references to the testimony of Daniel Moore, Jr., the first listed time indicates the beginning of Daniel Moore Jr.'s videotape deposition in the trial record. Reference is made to transcript pages for the specific citations to testimony as the counter on the videotape is obscured.

in the same vehicle and that he had to make the person slow down. (VR No. 3, 9/29/04, 3:53:23).

Dan Moore, Sr., another owner of Moore Pontiac, along with corporate designee Scott Moore, manager Yates, and used car manager Charles Ellis all admitted that a “reasonably prudent car dealer” always has a salesperson accompany a test driver. (VR No. 2, 9/28/04, 4:37:19 (see Dan Moore, Sr. deposition - transcript page 52); VR No. 2, 9/28/04, 10:06:33 (see Scott Moore deposition - transcript pages 50-51); VR No. 3, 9/29/04, 3:42:44, see EA 8; VR No. 3, 9/29/04, 2:48:15, see EA 9).

At the conclusion of Plaintiffs’ and Defendants’ proof, the jury deliberated and returned a verdict finding Moore Pontiac fifty percent (50%) at fault for the wreck with the other fifty percent (50%) assessed against Morgan.⁵ A verdict in the amount of \$3,924,539.28 was returned for Candria. Her husband, James Scott, Jr. (James), was awarded damages in the amount of \$100,000.00 for his loss of consortium claim. A judgment was entered against Moore Pontiac and Morgan. (See Appendices 3-5, Judgment; October 11, 2004 Order of Proceedings; and November 1, 2004 Order and Supplemental Judgment).

Both Morgan and Moore Pontiac separately appealed the Judgment. The Court of Appeals rendered its combined opinion on June 9, 2006, affirming the judgment as to Morgan but reversing the judgment as to Moore Pontiac. (See Appendix 2, June 9, 2006 Opinion of the Court of Appeals). In reversing the decision against Moore Pontiac, the Court of Appeals acknowledged that Moore Pontiac would be responsible for its own “independent act[s] of

⁵ A third Defendant, Moore Chevrolet, Inc., was found to be not at fault.

negligence.” Morgan v. Scott, No. 2004-CA-002350-MR, slip op. at 4 (Ky.App. August 25, 2006); see Appendix 1. The Scotts filed a Petition for Rehearing regarding their appeal against Moore Pontiac based upon the contradictory findings of the Court of Appeals. The Scotts also filed a Motion for Extension of Opinion regarding the extent of Morgan’s liability in view of the Court of Appeals’ decision.

By Order issued on August 25, 2006, the Court of Appeals denied the Scott’s Petition regarding Moore Pontiac but granted their Petition regarding Morgan. (See Appendix 1, August 23, 2006 Order and Opinion of the Court of Appeals). Subsequent to said Order, both Morgan and the Scotts filed a Motion for Discretionary Review regarding the Court of Appeals’ decision. The Supreme Court granted both parties’ Motions for Discretionary Review on April 11, 2007. Moore Pontiac filed their Cross Motion for Discretionary Review which was granted on June 13, 2007. In that same Order, the Supreme Court consolidated all appeals related to this wreck.

ARGUMENT

The Scotts contend that the exceptional circumstances of this case clearly require a finding that Moore Pontiac owed (and subsequently breached) a duty of ordinary care towards the Scotts. Further, bailment law is not applicable to the facts of this case.

A. **Moore Pontiac had a Duty to Exercise Ordinary Care to the Scotts.**

The Supreme Court in Grayson Fraternal Order of Eagles, Aerie No. 3738, Inc. v. Claywell, 736 S.W.2d 328, 332 (Ky. 1987), states the well known rule “ that every person owes a duty to every other person to exercise ordinary care in his activities to prevent foreseeable injury.” The Supreme Court went further to rule that no person or entity is immune from a duty of ordinary care, stating:

The concept of liability for negligence expresses a universal duty owed by all to all. The duty to exercise ordinary care commensurate **with the circumstances** is a standard of conduct that **does not turn on and off depending on who is negligent.**

Id. at 330 (citing Gas Service Co. Inc. v. City of London, 687 S.W.2d 144 (Ky. 1985), (emphasis added)).

Contrary to the Court of Appeals’ assertion that the Scotts only sought to hold Moore Pontiac liable on an assumed duty of care, the Scotts, throughout litigation, trial, and appeal have consistently argued that Moore Pontiac owed a duty of ordinary care and breached that duty by committing independent acts of negligence against the Scotts. Prior to trial, Moore Pontiac filed their Motion for Summary Judgment, arguing that Moore Pontiac was not liable based on bailment law. (R. 1429-1478). The Scotts responded to this Motion for Summary Judgment alleging that Moore Pontiac owed a duty of ordinary care based upon current case law or, alternatively, assumed a duty based upon the circumstances of this particular case. (R. 1631-

1661). The record clearly reflects that the Scotts have consistently argued that Moore Pontiac owed the Scotts a duty to exercise ordinary care under these circumstances.

It is immaterial whether or not Moore Pontiac's duty is assumed or by operation of law. For this reason, the Scotts did not object to the trial court's finding of an assumed duty of ordinary care rather than by operation of law. Although agreeing that Moore Pontiac can be liable for its negligence (implying a duty of care), the Court of Appeals reversed the judgment by erroneously finding the duty of ordinary care was somehow different if it was assumed rather than by operation of law. In doing so, the Court of Appeals rejected the jury's findings of fact and substituted its own. The Scotts respectfully request that the jury's findings of fact be recognized and the judgment upheld.

I. Extraordinary Circumstances Exist Sufficient To Hold Moore Pontiac Liable for Its Breach of Ordinary Care to the Scotts.

Case law acknowledges that under certain circumstances, a car dealership can be held responsible to a person injured by a test driver. Prior Kentucky decisions finding no liability were based on the fact that there was not a scintilla of evidence showing independent negligence on the part of the dealership. The Kentucky Supreme Court noted in Wayne's Adm'x v. Woods, 275 Ky. 477, 121 S.W.2d 957, 957 (1938):

It is **not claimed** that the customer was an inexperienced or reckless driver, or that the dealer had knowledge of **any fact militating against the ability** of the customer to handle the car with due regard for the safety of others. **It is sought simply to predicate the liability of the dealer upon a supposed relationship of principal and agent**

(Emphasis added).

In Johnson-Kitchens Ford Corporation v. Shifflett, 462 S.W.2d 430, 433 (Ky. 1971), the

Kentucky Supreme Court noted that mere ownership of a vehicle is insufficient to render an owner liable in the absence of allegations of personal negligence. It has also been found that liability can be imposed under "exceptional circumstances." Farmer v. Stidham, 439 S.W.2d 71, 72 (Ky. 1969). The Scotts contend that the unusual facts of this case are sufficient to create the "exceptional circumstances" anticipated by these cases. Evidence was presented which showed that Moore Pontiac had the opportunity to prevent this tragedy.

First and foremost, Moore Pontiac, through acting manager Shane Yates, **admitted** that Morgan should not have been allowed to test drive the truck alone. (VR No. 2, 9/28/04, 3:42:44, see EA 8). There can be no stronger evidence than such an admission. Whether the jury determined that a salesman should or should not accompany a test driver every single time, it is uncontroverted that Moore Pontiac knew that Morgan should not drive unaccompanied. This statement, combined with the uncontradicted proof that Moore Pontiac knew that a reasonably prudent car dealership should accompany a test driver, is sufficient to support the Scotts' allegations against Moore Pontiac.

Much has been said and written about the test drive policy implemented (and violated) by Moore Pontiac, which set forth guidelines for test driving vehicles, including the requirement that all test drivers be accompanied by a salesperson. (See Appendix 7, Exhibit 9: Sales Process). Testimony was given that all salespeople were given laminated copies of this policy and were instructed to follow its guidelines. (VR No. 2, 9/28/04, 10:06:33 (see Scott Moore deposition - transcript pages 56-57)⁶; VR No. 4, 9/30/04, 9:34:15 (see Michael Cox deposition - transcript

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With regard to any references to the testimony of Scott Moore, the first listed time indicates the beginning of Scott Moore's videotape deposition in the trial record. Reference is made to transcript pages for the specific citations to testimony as the counter on the videotape is obscured.

page 26)). It was considered to be an "industry standard" followed by car dealerships nationwide. (VR No. 2, 9/28/04, 4:16:49 (see Daniel Moore, Jr. deposition - transcript page 29)). This policy was considered so important that it was published throughout the dealership by posting signs in the public areas. (See Appendix 8 - Exhibit No. 10: Public Sign; VR No. 4, 9/30/04, 9:34:15 (see Michael Cox deposition - transcript page 123-124)). The policy is direct and strong proof that Moore Pontiac was aware of the dangers inherent in allowing customers to test drive their vehicles, without supervision. The test drive policy is proof of Moore Pontiac's special knowledge of these dangers and Moore Pontiac's unique position to protect the public from these dangers by simply accompanying test drivers.

Moore Pontiac was aware of previous drivers attempting to speed in this powerful truck with its new engine. Yates testified that he had to make a previous test driver slow down during a test drive in the same truck. (VR No. 3, 9/29/04, 3:53:23). Clearly, Moore Pontiac had sufficient knowledge of the hazards existing on the road and the danger of allowing someone like Morgan in this truck. There was ample proof that Moore Pontiac knowingly sent Morgan on his way without a salesman.

Proof of exceptional circumstances was given in the form of testimony regarding the road upon which this wreck occurred. Eyewitness Joe Varney and Investigating Officer Robinette testified that this particular curve was a dangerous section of road where several wrecks had occurred, especially when it was raining. (VR No. 2, 9/28/04, 11:20:11; VR No. 2, 9/28/04, 9:32:48, see EA 6-7). During discovery, Moore Pontiac took the discovery depositions of Varney and Robinette to develop this particular line of testimony, presumably to divert liability away from Moore Pontiac and onto the roadway conditions. The Scotts called these witnesses

live at trial. Evidence was heard that Moore Pontiac was aware of this dangerous section of road and that this roadway was outside of Moore Pontiac's test drive area. (VR No. 2, 9/28/04, 9:32:48, see EA 6-7). Morgan testified that he was not warned to stay away from this area of roadway. (VR No. 1, 9/27/04, 4:10:23, see EA 2).

Clearly, substantial evidence was presented regarding Moore Pontiac's special knowledge of the dangers surrounding the test driving of their vehicles. Moore Pontiac knew Morgan specifically should not test drive unsupervised. Moore Pontiac knew that this truck was powerful and fast. Moore Pontiac knew that certain road conditions near its dealership were so dangerous that it took steps to remove this area of road from its test drive routes. What is Moore Pontiac's duty of ordinary care based upon this special knowledge? The Scotts contend that at a bare minimum, Moore Pontiac should have instructed Morgan regarding the parameters of the test drive route and advised him of the dangerous road conditions ahead, especially in rainy weather. Instead, Moore Pontiac failed to warn Morgan about the parameters of the test drive area or the location of the dangerous section of road. This wreck and the debilitating injuries suffered by Candria Scott are proof of the consequences of ignoring the known risks associated with letting Morgan test drive this truck alone and uninformed.

With all of these facts, the Court of Appeals concluded that no evidence of negligence was presented against Moore Pontiac. Further, it rendered *de novo* findings of facts and improperly usurped the jury's role as the ultimate finder of fact. The appropriate standard for appellate review of a jury's findings of fact is set forth in Bierman v. Klapheke, 967 S.W.2d 16 (Ky. 1998).

[W]hen an appellate court is reviewing evidence supporting a judgment entered

upon a jury verdict, the role of an appellate court is limited to determining whether the trial court erred in failing to grant the motion for a directed verdict. All evidence which favors the prevailing party must be taken as true and the reviewing court is not at liberty to determine credibility or the weight which should be given to the evidence, these being functions reserved to the trier of fact. The prevailing party is entitled to all reasonable inferences which may be drawn from the evidence. Upon completion of such an evidentiary review, the appellate court must determine whether the verdict rendered is palpably or flagrantly against the evidence so as to indicate that it was reached as the result of passion or prejudice.

Id. at 18. The jury clearly found a breach of Moore Pontiac's duty of ordinary care at trial.

It is clear the jury was not misled or confused regarding its responsibility to determine the facts of the case and assess damages. It is clear that the verdict was not the product of any passion or prejudice on the part of the jury. Substantial deliberation was conducted before the jury reached its decision. The jury was given the case to decide on September 30, 2004, at 4:51:40 after four days of testimony. After close to two (2) hours of deliberation, the jury requested that the jurors be allowed to go home and return the next day to finish deliberations. The jury returned on October 1, 2004, at 9:26:42 and continued to deliberate. The jury's verdict was not returned until 1:57:34 that same day.

A review of the jury verdict form also indicates the care taken by the jury in its findings regarding liability. (See Appendix 9, Jury Verdict Form). At trial, the Scotts alleged claims against a third Defendant, Moore Chevrolet, Inc. (Moore Chevrolet), a related entity to Moore Pontiac. A portion of the trial testimony dealt with the Scotts' claims against Moore Chevrolet. The basis of the Scotts' claims against Moore Chevrolet involved the condition of the truck driven by Morgan at the time of the incident.

Moore Chevrolet owned the truck and had performed all of the mechanical work on the

truck after it was traded in. (VR No. 2, 9/28/04, 3:58:31). Soon after being put on the lot for sale, the engine blew up during a test drive. (VR No. 2, 9/28/04; 4:09:06). The truck was returned to the Moore Chevrolet service department for repairs. A new engine was put in the truck. (VR No. 3, 9/29/04, 2:37:03). Several other repairs were made to the truck due to its poor condition at the time of trade-in. (See Appendix 6, Exhibit 16: Repair Sheet).

Immediately after the wreck, the truck was towed to Moore Pontiac's car lot. (VR No. 2, 9/28/04, 11:12:19). Letters were sent by the Scotts' attorneys to Moore Pontiac's counsel requesting that the truck be preserved for inspection. (See Appendix 10, Attachment to Plaintiff's Motion for Spoilation Instruction, R. 1709, 1716-1721: Documents regarding Spoilation). Despite this request for preservation of the evidence and repeated requests for inspection, the truck was destroyed shortly after the wreck. No evidence was produced and no witness testified on behalf of Moore Pontiac or co-Defendant Moore Chevrolet that they ever performed any inspection after the wreck to determine if a defective part caused this wreck.

Witness Joe Varney, a bodyshop mechanic, testified that he was able to observe the truck after the wreck. Varney had worked as a mechanic for over 30 years. (VR No. 2, 9/28/04, 11:16:20, 11:21:35). He testified that one of the wheels on the truck would not roll and was crooked. (VR No. 2, 9/28/04, 11:13:03, 11:17:43). Varney stated that the wheel could have been faulty or caused by a broken tie rod. (VR No. 2, 9/28/04, 11:18:13). He did not believe that hitting the curb during the wreck could have bent the tire like it was after the wreck. (VR No. 2, 9/28/04, 11:25:18).

The Scotts were denied an opportunity to inspect the truck for mechanical defects prior to the truck's destruction. The trial court granted a spoilation instruction against Moore Chevrolet

and Moore Pontiac, which stated as follows:

The 1998 Chevrolet truck involved in the accident was owned by Moore Chevrolet, Inc., but was in the custody and control of Moore Pontiac, Buick, GMC, Inc., at the time of the October 10, 2002, accident. The truck was not retained by Moore Pontiac, Buick, GMC, Inc., for the Plaintiffs to make a thorough inspection to determine whether the truck had defects prior to the accident. You may, but are not required to, infer that had the truck been preserved for inspection, the results of that inspection would have been unfavorable to Moore Chevrolet, Inc. and/or Moore Pontiac, Buick, GMC, Inc., and would have been favorable to the Plaintiffs.

(See Appendix 9, Jury Verdict Form). The Scotts believe that this is the most favorable instruction that could have been given under the circumstances of the case. Despite this favorable instruction, the jury still determined that Moore Chevrolet was not at fault for the Scotts' damages, clear evidence of the careful deliberation of the jury regarding the liability of all defendants in this case.

This careful deliberation continued in the jury's assessment of damages. Although to a person without knowledge of the devastating injuries sustained by Candria, the verdict may seem large, the evidence presented by the Scotts at trial could have sustained a much larger verdict. In fact, the Scotts requested damages in an amount millions of dollars more than the actual verdict. (See Appendix 9, Jury Verdict Form). Again, the jury carefully weighed the evidence and awarded a verdict substantially less than the requested amount.

The Scotts asked for future medical expenses in the amount of \$4,015,745.00. The figure was derived from the testimony of Dr. Scott Akers, who presented a life care plan listing all of the care, treatment and equipment Candria would need for the rest of her life and the lifetime cost of each. These costs included surgeries, medication, physician visits, and equipment necessary

due to her confinement to a wheelchair. (See Appendix 11 - Exhibit No. 11: Life Care Plan of Dr. Scott Akers). The jury, after deliberation, determined that only \$1,160,200.00 of the future treatment was reasonable and necessary for Candria's condition. The exhibit shows that the jury marked through those expenses that they deemed unnecessary for Candria's future medical care. The fact that the jury's verdict regarding future medical expenses was only approximately one-fourth (1/4) of the damages available proves that the jury carefully weighed each piece of evidence in making their final decisions.

Further, despite the fact that Candria was permanently wheelchair-bound as a result of her injuries, the jury declined to award her any damages for permanent impairment to earn money in the future. Although the jury's reasoning for this denial is unknown, it is reasonable to assume the jury declined to award these damages due to the fact that Candria had not worked for wages outside the home for a number of years. Again, the jury weighed each piece of information carefully before rendering their decision.

Regardless of the Court of Appeals' personal opinion or interpretation of the evidence, the jury who heard the evidence found it sufficient to render Moore Pontiac liable to the Scotts and their decision is entitled to deference and should be upheld.

B. In the alternative, Moore Pontiac Assumed a Duty of Ordinary Care to the Scotts.

Should this Court determine that Moore Pontiac did not owe a duty of care to the Scotts, in the alternative, the evidence presented above regarding the "exceptional circumstances" of Moore Pontiac's special knowledge and actions is sufficient evidence to find that Moore Pontiac assumed a duty of ordinary care toward the Scotts.

Kentucky's highest court has held that "[a] duty voluntarily assumed cannot be carelessly abandoned without incurring liability for injury resulting from the abandonment." Louisville Cooperage Co. v. Lawrence, 313 Ky. 75, 230 S.W.2d 103, 105 (1950). Further, it is well settled in Kentucky case law that "one who volunteers to act, though under no duty to do so, is charged with the duty of acting with due care." Ostendorf v. Clark Equipment Company, 122 S.W.3d 530, 538 (Ky. 2003) (citing Sheehan v. United Services Auto Association, 913 S.W.2d 4, 6 (Ky. App. 1996)).

An assumed duty can be found on the part of Moore Pontiac under an analysis of the parameters of the Restatement (Second) of Torts § 324A as cited in Ostendorf. The Restatement indicates that

[o]ne who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if

- (a) his failure to exercise reasonable care increases the risk of such harm, or
- (b) he has undertaken to perform a duty owed by the other to the third person, or
- (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Restatement (Second) of Torts §324A. The Restatement indicates that one can be liable when they undertake to render services to another "**which he should recognize as necessary for the protection of a third person.**" Restatement (Second) of Torts § 324A (emphasis added). This is the exact situation involved in this case. The public and Candria are protected by Moore

Pontiac's assumption of the duty to supervise the test driver in the operation of the motor vehicle. Moore Pontiac, through its owner, Dan Moore, Jr., specifically testified that the main purpose for enacting the test drive policy was to ensure that its vehicles were driven properly. (VR No. 2, 9/28/04, 4:16:49 (see Daniel Moore, Jr., deposition - transcript page 29)).

The case of Sheehan v. United Services Auto Association, 913 S.W.2d 4, (Ky.App. 1996), is a perfect example of the application of the theories behind the Restatement. In that case, the Plaintiff Sheehan accidentally shot himself with a gun owned by Smith. Sheehan filed suit against Smith's homeowners insurance alleging negligence because the insurance company did not screen their policy holders regarding the care and storage of their weapons. The Court found no evidence that the insurance company had undertaken a duty to perform such screening. However, the Court noted that "[a] duty may arise, however, if the parties have contracted for inspection or the insurer has **voluntarily undertaken it for the insured's benefit.**" Id. (emphasis added). The service was to the insured, Smith, and the liability, if found, would have been to the injured third party, Sheehan.

In this case, the duty that Moore Pontiac assumed was to supervise its customer Morgan. It assumed a duty to ensure that he would drive the vehicle properly. It assumed a duty to limit the roads in which he would travel during his test drive. Additionally, Moore Pontiac assumed a duty to supervise Morgan when it implemented its sales process, which required a salesperson's presence in the car during the test drive. It undertook these services because it recognized the probability that the customer may not be familiar with the vehicle or the roads and may not be able to operate the vehicle safely. It recognized that if the vehicle was not driven properly, then a third person like Candria may be injured as a result. Because it undertook to supervise test

drivers, Moore Pontiac is now liable for the physical harm to the Scotts caused by its failure to use ordinary care in performing this assumed undertaking.

This case clearly meets the threshold requirement under the Restatement (Second) of Torts § 324A. It must next be analyzed as to whether or not the Appellant's adoption of its sales process falls under one of the three requirements set forth in the Restatement. At least two of the three requirements are clearly applicable to the instant case to establish the assumption of a voluntary duty.

Section (a) states a person can be held liable when "his failure to exercise reasonable care increases the risk of such harm." Restatement (Second) of Torts § 324A(a). Moore Pontiac's failure to properly supervise and/or warn Morgan of the dangerous road conditions increased the danger of harm to Candria. Had Moore Pontiac merely taken the time to inform Morgan of their test drive area and warn him to avoid this known, dangerous section of road, this wreck would have been prevented. Had a salesperson been in the vehicle, he would have monitored Morgan's driving and prevented this wreck either by instructing Morgan to slow down and/or to avoid this section of road.

Test drivers are rarely known by the salesperson. Their driving skills are unknown. Their knowledge of the roads in the area is unknown. By supervising test drives, Moore Pontiac can control the speed of the vehicle, the driving manners of the test driver, and the areas where the test drive occurs. By supervising test drivers, Moore Pontiac can deny a test driver the right to drive their car or suspend a test driver's privileges upon observing unsafe driving operations. How can undertaking to supervise and attempting to control these test drives fail to reduce the harm to the general public? Simply telling Morgan where to drive and warning Morgan about

this dangerous area of road would have decreased the risk of harm to Candria.

Both the Restatement (Second) § 324 (c) and Kentucky case law indicate that a voluntary assumption of duty is premised upon reliance. See Ostendorf, 122 S.W.3d at 538. Moore Pontiac asserts that since Candria was unaware of the policy, it cannot be found that she relied upon the policy for her protection. The Scotts contend that the public knows that car dealerships are taking measures and using ordinary care to ensure that their vehicles are being driven safely during test drives. The general public knows that a salesman will accompany the driver on a drive. Candria was relying on Moore Pontiac to use common sense and either warn Morgan about the dangerous conditions or supervise Morgan by accompanying him on the test drive. The element of reliance is present in the instant case sufficient to find a voluntary assumption of duty in compliance with the Restatement.

After hearing all of the evidence, the Court properly found as a matter of law that Moore Pontiac assumed a duty of ordinary care towards the Scotts and the public in general when it adopted policies and procedures requiring a sales person to accompany each test driver, and the jury was instructed accordingly.

III. Moore Pontiac Breached Its Duty of Ordinary Care and Caused the Scotts' Injuries.

Breach of duty is a question of fact for the jury to decide. Pathways, Inc. v. Hammons, 113 S.W.3d 85, 89 (Ky. 2003). Causation, like breach, is also a question for the jury. McCoy v. Carter, 323 S.W.2d 210, 215 (Ky. 1959). The standard for review set forth in section A.I above is also applicable to a jury's finding of breach and causation. See Bierman v. Klapheke, 967 S.W.2d 16, 18 (Ky. 1998). The issue of causation can be withheld from a jury "only if there is no

dispute about essential facts and but one conclusion may reasonably be drawn from the evidence.” McCoy, 323 S.W.2d at 215. The jury must determine if the conduct of the Defendant was a substantial factor in causing the harm to the Plaintiff. Hammons, 113 S.W.3d at 91-92.

The Scotts have not solely relied upon Moore Pontiac’s violation of their sales process to prove liability in this case. Rather, this failure combined with the other actions of Moore Pontiac as set forth herein were presented as evidence in support of the Scotts’ claims regarding liability. The jury rejected Moore Pontiac’s arguments at trial, and said rejection was adequately supported by the facts.

Evidence was given regarding Moore Pontiac’s knowledge as to the existence of this dangerous section of road and their failure to warn Morgan regarding this section or instruct him regarding the proper parameters of the test drive route. It is reasonable for a jury to conclude that had Moore Pontiac exercised ordinary care, this wreck would not have occurred, and the Scotts would not have been irreparably damaged. The jury’s determination of breach and causation against Moore Pontiac should be upheld.

IV. Bailment is inapplicable.

All of the cases decided in Kentucky regarding the liability of a car dealership for the acts of its test driver have been decided in favor of the dealership based upon established bailment law. See, e.g., Wayne’s Adm’x v. Woods, 275 Ky. 477, 121 S.W.2d 957 (1938); Johnson-Kitchens Ford Corporation v. Shifflett, 462 S.W.2d 430, 433 (Ky. 1971); Farmer v. Stidham, 439 S.W.2d 71, 72 (Ky. 1969). In those cases, no evidence was produced by the Plaintiff regarding any acts of negligence on the part of the car dealership. In cases where independent negligence is not alleged against the car dealership, the Scotts agree that liability will not attach

solely on the basis of vicarious liability.

This case is clearly distinguishable in that the Scotts are not attempting to hold Moore Pontiac vicariously liable for the negligent acts of Morgan. This is not a bailment case. From their initial complaint, the Scotts have alleged independent acts of negligence against Moore Pontiac. Vicarious liability was not pled in the Scotts' complaint. (R. 1-11). This is also clearly evidenced in the jury instructions in which the jury was asked to apportion the degree of fault, if any, between the co-Defendants. (See Appendix 9, Jury Verdict Form).

However, Moore Pontiac is asking the Court to find that these bailment cases create a blanket immunity for a car dealership when allowing others to test drive its vehicles, regardless of the circumstances. Moore Pontiac has failed to provide any basis for why car dealerships should enjoy some special immunity from a duty of ordinary care. There is no public policy served by making car dealerships immune from liability when their vehicles seriously injure the public during test driving. Car dealerships allow people to test drive their cars in the hope they will be bought, and the car dealership will make money from the sale. If the car dealership is using the public road for profit, then why should it be immune from a duty to exercise reasonable care under the circumstances? The Kentucky legislature has not enacted any statute to protect car dealerships from the same duties owed by all people and entities to each other. The Scotts contend that it was never the Court's intention to create such an immunity when deciding the prior Kentucky cases dealing with bailment law.

Kentucky law clearly states that a car dealership is vicariously liable for the actions of a test driver if they are accompanied by a salesman. Wayne's Adm'x v. Woods, 275 Ky. 477, 121 S.W.2d 957 (1938) (citing Wilhelmi v. Burns, 274 Ky. 618, 119 S.W.2d 625 (1938)). Common

sense would dictate that a car dealership should not be immune in all circumstances when a person is allowed to test drive a vehicle unsupervised. The Scotts contend that to provide car dealerships with such an immunity will only serve to promote irresponsibility and leave no incentive for a car dealership to exercise ordinary care when allowing cars to be test driven.

B. The Jury Instruction Regarding Moore Pontiac Properly Identified Its Duty of Ordinary Care. In the Alternative, the Proper Remedy for a Faulty Instruction is Remand, Not Reversal.

Prior to the trial of this action and throughout trial, several hearings were held regarding the existence of Moore Pontiac's duty of ordinary care, whether by operation of law or by voluntary assumption of duty. These hearings continued throughout the trial and culminated with a final hearing immediately prior to instructing the jury. The videotapes show that the judge and counsel agreed to hold this discussion in chambers, but unfortunately, a video record was not made of these *in camera* proceedings. While the record clearly shows the trial judge requesting that the video record resume in chambers, this did not occur for reasons unknown to the undersigned. (VR No. 4, 9/30/04, 1:38:10).

As stated above, the Scotts have argued throughout this case that Moore Pontiac owed a duty of ordinary care by operation of law. However, the Scotts had also argued in the alternative that if no duty of ordinary care existed by operation of law, then Moore Pontiac assumed a duty of ordinary care by the implementation of its test drive policy, which required all test drivers to be accompanied by a salesman. At the close of all evidence and prior to the instruction to the jury, the trial judge held an *in camera* hearing and made his final rulings on all Motions for Summary Judgment and the Proposed Jury Instructions.

The trial judge ruled that Moore Pontiac had assumed a duty of ordinary care to the public

through its test drive policy. However, the trial judge did not extend his opinion to create a blanket assumption of duty that a salesperson accompany every test driver. The trial judge left the determination of what constituted a breach of the duty of ordinary care to the jury and drafted an instruction, which stated:

Moore Pontiac, Buick, GMC, Inc., and its employees voluntarily assumed a duty to exercise ordinary care to third parties, including the Plaintiffs, by establishing policies regarding the test driving of vehicles, including the 1998 Chevrolet truck in question.

Do you believe from the evidence that Moore Pontiac, Buick, GMC, Inc., and its employees' failed to comply with this duty and that this failure was a substantial factor in causing the accident and injuries?

(See Appendix 9: Jury Verdict Form).

The jury instruction, at its core, is nothing more than a recitation of the duty of ordinary care owed by Moore Pontiac to the public. The instruction does not dictate that a salesperson must accompany each test driver to fulfill their duty of ordinary care. Whether this duty of ordinary care arose by operation of law or by assumption of duty does not change the general nature of the jury instruction. Any extra language which states that this duty of ordinary care is assumed when in fact the duty already existed by law is harmless and does not change the analysis the jury would have to undergo to reach their verdict. The language of the instruction is not prejudicial and would not tend to make the jury more apt to rule for or against Moore Pontiac. If an error in instructions is not prejudicial, then no grounds for reversal exists.

McKinney v. Heisel, 947 S.W.2d 32, 35 (Ky. 1997.)

As stated above, the jury clearly took its time and exercised great care in rendering its verdict in this case. There is no indication that the jury instructions prejudiced Moore Pontiac in

any way as evidenced by the jury's rejection of liability against its sister corporation, Moore Chevrolet, and its careful calculation of the Scotts' damages.

This careful consideration of all of the evidence is extremely probative to prove the contention that the extra language of the instruction indicating the duty of ordinary care was voluntary rather than by operation of law did nothing to prejudice or otherwise sway the jury's decision in rendering its verdict. For that reason, the jury's findings of fact and verdict regarding the liability of Moore Pontiac should be upheld in favor of the Scotts. In the alternative, should the Court disagree and find that a more general instruction was warranted, the Scotts contend that the proper remedy would be remand of this case for further proceedings.

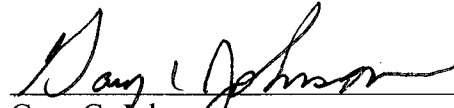
Kentucky case law is clear that remand for a new trial is the proper remedy for an erroneous instruction. See, e.g., McKinney v. Heisel, 947 S.W.2d 32 (Ky. 1997); Drury v. Spalding, 812 S.W.2d 713 (Ky. 1991). The Supreme Court stated in City of Middlesboro v. Brown, 63 S.W.3d 179, 182 (Ky. 2002), that "when the appellate court cannot determine from the record that the verdict was not influenced by the erroneous instruction, the judgment will be reversed." (Citations omitted). In making this finding, the Court in City of Middlesboro remanded the case for another trial with revised instructions. Id.

The Scotts contend that the Court of Appeals' reversal of its judgment with no further proceedings was improper and that the Scotts are entitled to at least retry the case with revised instructions. If this Court decides based upon the record that this instruction was erroneous and prejudicial to Moore Pontiac, then this matter should be remanded for a new trial in accordance with Kentucky law.

C. Conclusion

Based on the foregoing, the Scotts respectfully request that the Court of Appeals' Decision reversing the judgment against Moore Pontiac be reversed and that the jury's verdict and subsequent judgment by the trial court be affirmed. In the alternative, the Scotts request that this case be remanded to the Pike Circuit Court for a new trial with instructions regarding the proper language for informing the jury of Moore Pontiac's duty of ordinary care.

Respectfully Submitted,



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APPENDIX

- A - 1: August 25, 2006 Order and Opinion of the Court of Appeals.
- A - 2: June 9, 2006 Opinion of the Court of Appeals.
- A - 3: Judgment (R. 2078).
- A - 4: October 11, 2004 Order of Proceedings (R. 2080).
- A - 5: November 1, 2004 Order and Supplemental Judgment (R. 2204).
- A - 6: Exhibit 16: Repair Sheet.
- A - 7: Exhibit 9: Sales Process.
- A - 8: Exhibit 10: Public Sign.
- A - 9: Jury Verdict Form.
- A - 10: Attachment to Plaintiff's Motion for Spoilation Instruction, R. 1709, 1716-1721: Documents Regarding Spoilation.
- A - 11: Exhibit 11: Life Care Plan of Dr. Scott Akers.
- A - 12: Evidentiary Appendix.