

COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
NOS. 2006-SC-000701 and
2007-SC-000282

FILED

DEC 28 2007

CLERK
SUPREME COURT

CANDRIA SCOTT and
JAMES E. SCOTT, JR.

APPELLANTS/CROSS-APPELLEES

v.

MOORE PONTIAC, BUICK, GMC, INC.

APPELLEE/CROSS-APPELLANT

APPEAL FROM
KENTUCKY COURT OF APPEALS
NO.: 2004-CA-002363

REPLY BRIEF FOR APPELLEE/CROSS-APPELLANT
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of this Brief were served upon Samuel Givens, Jr., Clerk, Kentucky Court of Appeals, 360 Democrat Dr., Frankfort, KY 40601; Gary C. Johnson, Esq., Gary C. Johnson, P.S.C., P.O. Box 231, Pikeville, KY 41502; David C. Stratton, Stephen L. Hogg, Stratton, Hogg & Maddox, P.S.C., 111 Pike Street, P.O. Box 1530, Pikeville, KY 41502; Pamela A. Chestnut, McBrayer, McGinnis, Leslie & Kirkland, PLLC, 201 E. Main Street, Suite 1000, Lexington, KY 40507; and the Hon. Steven D. Combs, Pike Circuit Court, Division II, 423 Hall of Justice, 172 Division St., Pikeville, KY 41501, via regular U.S. mail, postage prepaid, this 27th day of December, 2007.


Deborah H. Patterson

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MAY IT PLEASE THE COURT:

Appellants' purported clarification as to what this case is and is not "about" directly conflicts with the record and the very jury finding that they themselves requested and received at trial. Appellants' cause against Moore Pontiac has never been about "ordinary care" or the "independent acts of negligence" they conjured for appeal. To the contrary, from day one this case has been all about Appellants' attempts to sidestep established bailment law and hold a deep-pocket car dealership responsible for injuries caused solely and admittedly by a competent and licensed customer on a routine test drive.

Absent assumption of duty, Appellants conceded at trial that bailment law absolved Moore Pontiac (Appellants/Cross-Appellees' Response to Motion for Summary Judgment, R. 1544). They therefore pitched their tent under the dealership's internal policy on having a salesman accompany test drivers and obtained an assumption of duty instruction from the trial court, over Moore Pontiac's objection.¹ As the Court of Appeals expressly observed, "Scott premised her claim on Moore's failure to follow its in-house policy requiring a salesman to accompany every customer taking a test drive" (Opinion at 4). The Court then correctly overturned the jury's one and only finding of liability against Moore Pontiac, holding that "Moore Pontiac's adoption of the internal policy in issue here does not expose it to liability to Scott." (*Id.* at 6).

¹ The trial court's assumption of duty instruction for Appellants essentially directed the jury to render a verdict against Moore Pontiac, because it was undisputed that Mr. Morgan drove the truck with his wife and child, without a salesman. *See* the October 11, 2004 Order of Proceedings, R. 2080, Appellant/Cross-Appellee's Initial Brief at Appendix 4.

It is incorrect, inconsistent, and truly telling for Appellants now to downplay their assumption of duty argument and frame the issue for **this** Court as whether “there was evidence upon which a jury could find Moore Pontiac breached its duty of ordinary care. . .” (Appellants/Cross-Appellees’ Reply Brief at 1). The jury was never presented with the question and certainly never found that Moore Pontiac breached some general duty of ordinary care² or that Moore Pontiac committed some “independent acts of negligence.”

In short, by Appellants’ own recent clarification, the whole crux of their appeal is to urge this Court to affirm a finding that the jury never made, or could have made under the evidence. In the same breath of that remarkable assertion, Appellants say that any talk of bailment is “simply irrelevant” to this case (*Id.*). But Appellants themselves talk quite a bit about bailment, especially when they devise a “special circumstance” exception to eliminate longstanding bailment law protection for bailors whenever, for instance, it might be misting rain at the time of the bailment.

What is truly irrelevant is Appellants’ preferred label for this case – however boldly stated. As this Court has aptly noted:

A bear well painted and drawn to the life is yet the picture of a bear, although the painter may omit to write over it, “this is the bear.”

*By parity of reasoning, the bear does not lose its basic characteristics if the artist dubs it a horse.*³

Call it a bear or call it a horse, this case is all about bailment.

² There was an “ordinary care” instruction for a sister company, Moore Chevrolet, regarding truck maintenance and the jury found no liability. There was **no** such instruction regarding Moore Pontiac, which did not maintain the truck, but simply owned it.

³ *First Nat’l Bank of Mayfield v. Gardner*, 376 S.W.2d 311, 314 (Ky. 1964).

I. THIS MOST CERTAINLY IS A BAILMENT CASE.

There is simply no precedent for a \$2 million verdict against a car dealership for injuries caused solely by a competent and fully licensed driver on a test drive; Appellants cite none. A unanimous Court of Appeals reversed the judgment on the ground that the existence and non-observance of a voluntary in-house rule does not make the dealership any more liable than it would be without having instituted the rule to begin with. Though it was implied, the Court could have also reversed on the specific ground that a finding of liability based on a posted sign violates established bailment law.

Appellants argue, for the first time to this Court that, in addition to their posted-sign circumstance rejected by the Court of Appeals, there are seemingly many exceptions to bailment law that would hold a bailor responsible for injuries caused by a bailee. They have no case law to support their direct attack on existing law, which holds that when an owner allows someone to drive his car after ensuring that person has a valid driver's license and is not otherwise incapable of driving, the owner has satisfied any duty of ordinary care to third parties.⁴ And, contrary to Appellants' misstatement at page 3 of their Reply Brief, Moore Pontiac has never asserted that its only duty as a bailor is to require a valid drivers' license. A dealership may have a duty to provide a properly maintained vehicle. And, the jury here received such an instruction against Moore Chevrolet, a sister company, and it found nothing wrong with the truck. A dealership also must place the vehicle in the hands of a competent driver. Thus, even if the

⁴ See, e.g., *Owensboro Undertaking & Livery Ass'n v. Henderson*, 273 Ky. 112, 115 S.W.2d 563, 564 (Ky. 1938).

customer had a valid license, but appeared unable to drive as the result of a physical or mental impairment, bailment law would not protect the dealership.

Here, there is no dispute that, before driving the truck, Mr. Morgan gave Moore Pontiac his valid driver's license **and** completed a required test drive form that sets forth basic information about his license and insurance (Tape No. 1; 9/27/04; 04:32:36; Tape No. 2; 9/28/04; Appellee/Cross-Appellant's Initial Brief at EA-4). Further, Morgan was sober and fully competent to drive (Tape No. 4; 9/30/04; 01:28:00 – 01:28:48; Appellee/Cross-Appellant's Initial Brief at EA-10). Appellants' flippant statement that "[m]ost drunk drivers possess a valid driver's license" is therefore irrelevant because it is undisputed that Mr. Morgan was sober.

Though labeling their exceptions as independent acts of negligence by Moore Pontiac, the net effect of Appellants' new theory is to severely restrict, if not obliterate, bailment and certainly to make a dealership – or **any** bailor – unable to rely on the law's protection. Appellants say that Moore Pontiac is responsible for the "unavoidable" wreck caused by Mr. Morgan's hydroplaning because of the following very pointless facts.⁵

1. "*Moore Pontiac knew it was raining.*" First, there is no evidence of any downpour or dangerous weather conditions; to the contrary, the record shows it was "misting." That aside, are Appellants saying that a bailment relationship is suspended when there is rain? How much rain? What about snow flurries, a little wind? What if it starts raining after the bailment begins? Bailment means nothing if bailors of automobiles are not entitled to rely on a licensed driver's competence to drive in the rain and the law's protection is not suspended simply because the sun is not out. Ms. Scott

⁵ See Appellants/Cross-Appellees' Reply Brief at 4.

surely knew it was raining when she took off in her car; it could be no more negligent for Moore Pontiac to allow a test drive in the rain than for Ms. Scott to drive in the rain.

2. *“Moore Pontiac knew of the dangerous curve where this wreck occurred and had taken it out of its test drive area.”* Appellants make much of the so-called dangerous curve where the wreck occurred but they fail to explain, if the curve was so notoriously deadly, why Ms. Scott herself was driving on the curve. Certainly Moore Pontiac cannot be liable for \$2 million for failing to prevent a test driver from driving on the same road Appellant deemed safe enough to travel. Further, Appellants shamelessly misstate the record in saying that the area was specifically taken out of Moore Pontiac’s test drive route because it was dangerous. No one testified to that effect because it did not happen.

3. *“Moore Pontiac knew of the troubled engine.”* This statement is false. There is no evidence whatsoever that the truck was defective or unsafe or that the condition of the truck caused the accident. To the contrary, the jury found that Moore Chevrolet fulfilled its duty of ordinary care in inspecting and repairing the truck, and Appellants have not appealed that finding. The only knowledge attributable to Moore Pontiac is that the truck’s engine had been properly repaired and inspected.

4. *“Moore Pontiac knew the truck was fast.”* This purported exceptional circumstance highlights the absurdity of Appellants’ attempt to hold Moore Pontiac liable for their injuries. Most cars and trucks can be quite fast; there is no evidence that Moore Pontiac told Mr. Morgan, an experienced truck driver and a mechanic knowledgeable of engines, to drive fast. The fact is that Mr. Morgan, with his wife and two-year-old daughter sitting next to him, was driving this “fast” truck 10 miles **below** the speed limit when the wreck occurred.

5. *“Moore Pontiac knew Morgan was 22 years old. Moore Pontiac saw his old van.”* If Appellants are saying that 22 year-olds with old vans should not be allowed to test drive, they should take their cause up with the Kentucky Legislature.

6. *“Moore Pontiac knew he was scraggly.”* Appellants enjoy repeating the salesman’s description of Mr. Morgan as scraggly but always forget to add the additional testimony that you cannot judge a person based on looks and that looks have nothing to do with someone’s competence to drive a vehicle (Tape No. 4; 9/30/04; 01:26:21 – 01:27:24). As a matter of law, it is not negligent, nor does it defeat the bailment relationship, to entrust a car to a “scraggly” person who is sober, fully licensed, and otherwise competent to drive.

7. *“Moore Pontiac knew that Morgan was not local. Moore Pontiac did not even ask Morgan if he knew how to handle the truck.”* What Moore Pontiac did or did not ask Morgan about his truck driving experience is irrelevant, given that it is undisputed that Morgan, a mechanic, was very familiar with trucks and with the particular model he test drove because his father owned one.

Appellants do not state whether each of the foregoing provides an independent exception to the bailment relationship or whether it would require a combination of one or more to hold a bailor dealership liable for injuries caused by competent, licensed test drivers. Either way, these alleged, newly raised, independent acts do not begin to support a claim of negligence against Moore Pontiac. Moore Pontiac is not required to ensure perfect driving conditions before entrusting a car to a competent test driver, any more than you or I – or Ms. Scott – is required to wait for a sunny day and avoid certain roads before running errands. Based on established bailment law, the Court of Appeals’

reversal of the \$2 million judgment against Moore Pontiac is correct and should be affirmed.

II. TOTAL ABSENCE OF CAUSATION EVIDENCE IS AN INDEPENDENT GROUND FOR REVERSAL OF JUDGMENT AGAINST MOORE PONTIAC.

Appellants make no attempt whatsoever to establish an essential element to their purported claims of negligence against Moore Pontiac – namely, proximate cause. In the face of some six pages of law presented by Moore Pontiac requiring that the conduct of a defendant must be a substantial factor in causing Plaintiff's injuries, Appellants simply state that "Moore Pontiac had the clear ability to prevent this wreck as Moore Pontiac had control of the car." (Appellants/Cross-Appellees' Reply at 5; see Appellee/Cross-Appellant's Initial Brief at 32-37).

But the fact that Moore Pontiac allowed Mr. Morgan to test drive the truck without a salesman and purportedly contrary to its voluntary policy does not automatically mean that Moore Pontiac caused the accident. This Court has been clear where plaintiffs try to pin liability on defendants for violation of a statute:

Of course, it might be argued that but for the violation of law the car would not have been on the road and hence would not have been involved in the accident. But that can hardly be treated as a cause in the legal sense. The accident could have just as well have happened had the car been legally registered.⁶

Likewise, the accident causing Ms. Scott's injuries "could have just as well have happened" had a salesman been in the car. The undisputed testimony was that no one could have prevented Mr. Morgan's truck from hydroplaning and he was driving

⁶ *Rentschler v. Lewis*, 33 S.W.3d 518, 520 (Ky. 2000) (quoting *Falvey v. Hamelburg*, 198 N.E.2d 400, 403 (Mass. 1964)).

properly. Further, Mr. Morgan testified that he was driving more carefully with his wife and child in the truck than he would have driven if the salesman had been with him (Appellee/Cross-Appellant's Initial Brief at EA-4). Assumption of duty cannot apply unless its specific elements are satisfied. The critical facts here cannot credibly be disputed (Appellee/Cross-Appellant's Initial Brief at 23-32).

III. ALTERNATIVELY, MOORE PONTIAC IS ENTITLED TO A NEW TRIAL.

Improper, Prejudicial Closing Argument. Appellants spend several pages trying to talk their way out of a clearly improper and prejudicial closing argument by their counsel. They attempt to justify counsel's impermissible references to the availability of insurance and greater financial ability of Moore Pontiac by chanting that Moore Pontiac essentially "asked for it" by improperly inserting the issue of insurance at trial. Appellants say that "[t]hree times during his testimony, Cox made reference to Morgan having insurance," but fail to mention that Cox was only responding to direct questions by Appellants' counsel.

To further justify such closing statements that Moore Pontiac did not sue Morgan because it knew it would not "get a dime" out of him, Appellants spin a sinister, undocumented "collusion" tale regarding Defendants at trial. The tale includes no citation and should be stricken for many reasons. At bottom, Appellants complain that Mr. Morgan truthfully admitted fault regarding the accident. Their attack on Mr. Morgan boils down to an insistence that a responsible party should lie and in no way absolves Appellants' counsel for a knowingly improper and prejudicial closing.

Excessive Damages. The controlling standard is familiar: "[T]he 'first blush' rule used by the courts as it relates to excessive damages simply means that the judicial

mind immediately is shocked and surprised at the great disproportion of the size of the verdict to that which evidence in the case would authorize.”⁷ Given that the Court of Appeals found no proof of wrongdoing by Moore Pontiac with respect to entrusting the truck to Mr. Morgan, it is no stretch to say that the jury’s \$2 million verdict against the dealership is both shocking and surprising to the judicial mind.

Equally important, apportioning 50% of the total liability to Moore Pontiac is plainly excessive and the result of passion and prejudice. In all likelihood, the apportionment was the result of Appellants’ counsel’s improper closing argument urging the jury to impose liability on Moore Pontiac because Mr. Morgan was **uninsured** and had no assets. There was nothing mechanically wrong with the truck, as the jury held. The evidence showed that Mr. Morgan had a valid license and was otherwise competent. Moore Pontiac had no reason to believe that he would not drive the truck, with his wife and child as passengers, in a safe and prudent manner.

All Moore Pontiac did, under the best scenario for Appellants, is not have a salesman in the car with Mr. Morgan during the test drive. As the Court of Appeals correctly held, the dealership had no duty as a matter of law to Appellants and therefore breached no duty. But even if one were to assume that Moore Pontiac did have a duty to put a salesman in the truck that day, one can only speculate as to whether actually having a person in the truck would have prevented Mr. Morgan’s collision with Ms. Scott. Such speculation is impermissible. The \$2 million verdict against the dealership was outlandish.

⁷ *Wilson v. Redkin Labs*, 562 S.W.2d 633, 636 (Ky. 1976).

CONCLUSION

The Court of Appeals' reversal of the Judgment against Moore Pontiac should be affirmed. Alternatively, Moore Pontiac is entitled to a new trial.

Respectfully submitted,



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