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NOS. 2006-SC-000701 and
2007-SC-000282

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

BRIEF FOR APPELLEE/CROSS-APPELLANT
MOORE PONTIAC, BUICK, GMC, INC.

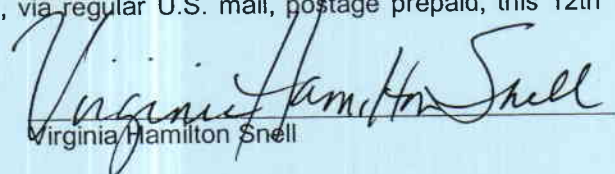
William Baird, IV
William J. Baird, III
Baird & Baird, P.S.C.,
Attorneys at Law
162 Second Street
P.O. Box 351
Pikeville, KY 41502
606.437.6276

Virginia Hamilton Snell
Deborah H. Patterson
Rania M. Basha
Wyatt, Tarrant & Combs, LLP
500 W. Jefferson Street, Suite 2800
Louisville, KY 40202
502.589.5235

Counsel for Moore Pontiac, Buick,
GMC, Inc.

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; 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 12th day of October, 2007.


Virginia Hamilton Snell

STATEMENT CONCERNING ORAL ARGUMENT

Moore Pontiac respectfully the opportunity to address any question the Court may have about the issues and the importance of adhering to the bailment principles long applicable to dealerships throughout Kentucky.

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May It Please The Court:

INTRODUCTION

When a dealership loans a vehicle to a competent driver for a test drive in a sale context, it has no liability for injuries to third parties caused by the driver. **“[T]he authorities are unanimous, ... in holding that a dealer is not responsible, in the absence of a statute to the contrary, for injuries received by third persons where an automobile is loaned to a prospective purchaser, who is a competent driver, for trial.”**¹ Moore Pontiac loaned a truck to Timothy Morgan, a customer, for a test drive. Morgan, a mechanic, was a competent, experienced driver. Under “unanimous” authorities, Moore Pontiac has no liability to a third party, Candria Scott, for injuries caused by Morgan when the truck hydroplaned.

Appellants’ reliance on “ordinary care” is nothing short of asking this Court to abandon the bailment doctrine that governs the dealership/customer relationship. Doing so could expose dealerships to lawsuits every time an accident occurs during a test drive, which has never been the law. Likewise, endorsing Appellants’ “assumption of duty” argument would not only ignore the precise requirements for assumption of duty, but would also, ironically, encourage dealerships to have no internal policies above what the law dictates. For any number of reasons, this Court should affirm the unanimous Court of Appeals’ Opinion.

¹ *Johnson-Kitchens Ford Corp. v. Shifflett*, 462 S.W.2d 430, 432 (Ky. 1970) (dealership held not liable under bailment law) (quoting *Wayne’s Adm’x v. Woods*, 275 Ky. 477, 121 S.W.2d 957 (1938)) (emphasis added).

Counter-Statement of the Case

The only relevant facts are few and undisputed: Morgan was competent to drive, and there was nothing wrong with the truck. There is **no** evidence to the contrary. Appellant Plaintiffs' characterization of the facts is long on rhetoric, but short on accuracy and record citation.

Morgan Was Competent To Drive. On October 10, 2002, Defendant Timothy Morgan was driving through Pike County with his wife and two-year-old daughter (Tape No. 1, 9/27/04; 04:05:07; see Evidentiary Appendix ("EA") - 2 hereto), when he spotted a 1998 black Silverado truck for sale at the Moore, Pontiac, Buick, GMC, dealership in South Williamson. That day, Shane Yates was the assistant sales manager and Michael Cox, an experienced salesman, was on the lot to help customers (Tape No. 2, 9/28/04; 03:42:23).

Cox recalls that Morgan and his family arrived at the dealership around 11:00 a.m. (Tape No. 4, 9/30/04; 12:34:02).² Cox introduced himself and reviewed the truck's features with Morgan for fifteen to twenty minutes (Tape No. 4, 9/30/04; 12:43:30; see EA-8). Cox was familiar with the pickup; he had driven it several times and thought it was in "excellent" condition (Tape No. 4, 9/30/04; 12:32:50, 12:33:44; see EA-7). Confident that Morgan was going to buy the truck (Tape No. 4, 9/30/04; 12:44:34; 1:05:05), Cox copied Morgan's driver's license, which was valid, and completed a test drive form that sets forth basic information

² Michael Cox's video deposition was introduced at trial by the Judge at Tape No. 4, 9/30/04; 09:33:55.

about the license and the customer's insurance (Tape No. 1, 9/27/04; 04:32:36, Tape No. 4, 9/30/04; 12:28:58; see EA-4).

Plaintiffs insinuate that Morgan was not a qualified driver. All the evidence is to the contrary. Both Morgan and his father had owned trucks like the Silverado. Morgan had driven similar trucks on many occasions (Tape No. 1, 9/27/04; 04:32:44; see EA-5). He was an experienced pickup truck driver. Morgan also had done mechanic work "all his life" – since he was six-years-old – and was currently employed at Wal-Mart's Tire and Lube Express in Logan (Tape No. 1, 9/27/04; 04:04:43; 04:33:48, 04:38:49 - 04:39:46; see EA-2).

Plaintiffs devote several pages to a discussion of the truck – sinister innuendo to the effect that Morgan was not "informed" of "previous problems" with the Silverado, it is "unclear just how much information was given to Morgan about the truck," and "one of the wheels on the truck would not roll" (Brief for Appellants/Cross-Appellees Candria Scott and James E. Scott, Jr. (hereinafter "Brief"), pgs. 2, 13-15). This is inexplicable and irrelevant. The jury found that the dealership had exercised ordinary care in inspecting and repairing the truck (See Answer to Instruction No. 7, Brief, App. 9). There was nothing wrong with the truck.

Plaintiffs vaguely refer to so-called "testimony heard regarding the lack of investigation by salesman Cox prior to allowing Morgan to operate the vehicle alone," a failure to ask Morgan "any questions about his ability to drive," or tell him about the truck's "troubled maintenance history" (Brief, p. 3). But even wrongly assuming the truth of such innuendo, despite all evidence against it, it is

irrelevant. There is no evidence whatsoever to controvert Morgan's testimony about his familiarity with this truck in particular, his driving history, his mechanic expertise, the fact that he had a valid driver's license, and the absence of deficiency in the truck.

In a similar vein, Plaintiffs offer a paragraph on "paperwork" speculation about whether Cox was "sure" he obtained a copy of Morgan's driver's license and proof of insurance because "copies were lost" or "never produced" (Brief, pgs. 3-4). This, they say, despite Cox's testimony, was "clearly disputed" at trial. But copies are immaterial, leaving this nonexistent "dispute" immaterial. Plaintiffs produced no evidence whatsoever to suggest that Morgan lacked a valid license to drive or proof of insurance. They could not do so because the undisputed truth is he had a license. If any state records revealed otherwise, Plaintiffs surely would have trumpeted them at trial. Cox testified that he copied the driver's license, but even if he did not, the only relevant fact remains: Morgan was competent to drive.

For this same reason, Plaintiffs' "scraggly, 21-year-old" portrayal of Morgan is irrelevant. Appearance has nothing to do with a person's ability to pass the driver's test and obtain a license. KRS Chapter 186 sets forth the requirements for driving a vehicle in Kentucky. Even a 16-year-old is qualified in the eyes of the law, regardless of how he or she appears. And, this particular 21-year-old was a mechanic, then working at Wal-Mart's Tire and Lube Express. A mechanic might appear scraggly after work, but nevertheless be a better driver

than the norm as a result of his or her work and driving experience. Again, the undisputed truth: Morgan was competent to drive.

The Test Drive. Shortly after Cox and Morgan started on the test drive, Cox realized that the truck was low on gas. Cox then took the truck by himself to fill the tank (Tape No. 4, 9/30/04; 12:36:09, 12:36:25, 12:37:34, 12:37:25) and drove it around to make sure it was running well (Tape No. 4, 9/30/04; 12:59:46-1:01:28, 12:59:52; see EA-9). Plaintiffs' reference to a mysterious "putting noise" is again mere rhetoric because the jury found no fault with the truck.

When Cox returned, Morgan got into the driver's seat, and his wife sat on the passenger side with their two-year-old daughter in the middle. Cox recalls that he asked Morgan to wait while he reported to his manager, and then they would "take this thing for another drive" (Tape No. 4, 9/30/04; 12:39:20). Cox took his paperwork on Morgan to Yates and asked him to check Morgan's credit. When Cox returned, the truck was gone (Tape No. 4, 9/30/04; 12:39:55).

Yates was not concerned because customers had driven off the lot before and returned (Tape No. 3, 9/29/04; 02:52:27). Likewise, Cox noticed that Morgan's van was still parked on the lot and concluded that Morgan either did not hear him or simply decided to test drive the truck with his wife and child (Tape No. 4, 9/30/04; 12:40:20; 01:12:39). If Cox had accompanied him, Morgan's wife and child would have had to stay behind because the truck did not have room for four (Tape No. 1, 9/27/04; 04:11:42).

Morgan does not recall Cox asking him to wait perhaps because, as Cox concluded, Morgan did not hear him. Morgan fastened his daughter into the seat

as his wife was getting into the truck (Tape No. 1, 9/27/04; 04:11:20). Plaintiffs cite their “allegations” that Moore Pontiac “failed to warn” Morgan about the **obvious** weather conditions. But even though he had no duty to warn, the evidence proves that Cox told Morgan to be careful because it was raining (Tape No. 1, 9/27/04; 04:10:16).

The Accident. Morgan pulled out of the dealership onto a four-lane highway, U.S. 119, heading south (Tape No. 1, 9/27/04; 04:12:07). It was “misting rain” (Tape No. 2, 9/28/04; 11:30:01). He stayed on U.S. 119, and about four miles down the highway (Tape No. 1, 9/27/04; 04:13:50), he approached a curve. He was within a test drive area, which can go beyond five miles from the dealership (Tape No. 3, 9/29/04; 02:57:38, 02:57:38, 02:57:56, 03:03:30). There is no evidence that Morgan was speeding or otherwise operating the pickup in an unsafe manner. The speed limit was 55 mph and Morgan was traveling at 45 mph; cars were passing him (Tape No. 1, 9/27/04; 04:14:00 – 04:14:24; see EA-3). Morgan drove more carefully with his wife and little girl than he would have driven with only Cox along on the test drive (Tape No. 1, 9/27/04; 04:32:20; see EA-4). He was not changing lanes (Tape No. 1, 9/27/04; 04:14:53 – 04:15:01; see *id.*); and he noticed nothing amiss with the truck (Tape No. 1, 9/27/04; 04:16:46, 04:33:05 – 04:33:20; see EA-5).

Yet, at the curve, Morgan suddenly lost control; the truck hydroplaned across three lanes into oncoming traffic and crashed into the car that Candria Scott was driving (Tape No. 1, 9/27/04; 04:36:00 – 04:36:59). In his words, it “felt like somebody just picked up the truck and threw it” (Tape No. 1, 9/27/04;

04:15:19). It is undisputed that hydroplaning occurs “in the bat of an eye,” and no one can take action to stop it during a test drive (Tape No. 3, 9/29/04; 03:06:15 – 03:06:34). Morgan admitted at trial that the accident was his fault (Tape No. 1, 9/27/04; 03:59:53 – 04:00:04, see EA-1).

Scott sustained two serious knee injuries and a left femur fracture (Tape No. 3, 9/29/04; 03:32:08 – 03:33:29). While her injuries were certainly serious and most unfortunate, there is no evidence – and Plaintiffs cite to none – that Ms. Scott is “permanently wheelchair bound.” The doctor who performed surgery on her knees testified that, approximately eight weeks after the accident, her motion was “pretty good” (Tape No. 3, 9/29/04; 03:40:39). She was walking with a walker during the year after surgery and putting weight on her leg. Because Ms. Scott was “massively obese” – 140 pounds over what her weight should be – her left femur did not heal as it should (Tape No. 3, 9/29/04; 03:36:20 – 03:38:50). Ms. Scott also smoked cigarettes and the “biggest risk factor for a fracture not healing is tobacco use” (Tape No. 3, 9/29/04; 03:47:30). Her doctor advised her to lose weight and stop smoking, but Ms. Scott did neither (Tape No. 3, 9/29/04; 03:46:53 – 03:48:22, 03:52:32). She also did not use the prescribed bone stimulator as often as she needed to advance the healing process (Tape No. 3, 9/29/04; 03:46:09 – 03:46:24).

Trial Court Proceedings. In September 2003, Ms. Scott and her husband sued Morgan and Moore Pontiac to recover for her injuries and on his loss of consortium claim. They alleged that Morgan negligently operated the truck [Complaint, Record on Appeal (“R”) 3, ¶11]. They sued Moore Pontiac on

the theory that it was “responsible for ensuring the safe operation of the truck on public roadway” [R. 3, ¶10]. The Scotts later amended their Complaint to add a sister dealership, Moore Chevrolet, Inc., which held title to the Silverado, on the theory that it failed to adequately maintain and repair the truck [First Amended Complaint, R. 1092].

The defendant dealerships moved the trial court for summary judgment under Kentucky bailment law and the failure of proof on causation [R. 1429-1478]. Plaintiffs argued that the dealerships were liable to third parties based on a policy of generally requiring salesmen to accompany customers on test drives. The policy was solely internal and unbeknownst to Morgan and Plaintiffs. Although “lots of dealerships out there let customers drive alone on test drives” (Tape No. 4, 9/30/04; 12:31:21), Dan Moore, Sr., chairman of the Moore Auto Group, believes that it is reasonably prudent for a salesperson to ride along with a customer on a test drive “when possible” (Tape No. 2, 9/28/04).³ The test drive policy is not a “hard and fast” rule because situations arise when a sales person is unable to go with a customer (Tape No. 3, 9/29/04; 02:43:05). And, the store manager has the discretion to let a customer test drive without a sales person (Tape No. 4, 9/30/04; 12:31:42).

Although Plaintiffs contended that the test drive policy served to educate drivers,⁴ Morgan was an experienced mechanic who had owned and driven other

³ Dan Moore, Sr.’s, video deposition was introduced at Tape No. 2, 9/28/04; 04:36:58. There is no time counter on this video (or trial tape).

⁴ Plaintiffs’ Response to Moore’s Motion for Summary Judgment [R. 1542].

trucks like this 1998 Silverado. Plus, Cox spent about twenty minutes showing Morgan the truck's features. Plaintiffs also insisted that the policy gives a salesman the opportunity to assess the condition of the truck. Here, Cox was unquestionably familiar with the truck; he had driven it and planned to recommend it to his brother-in-law (Tape No. 4, 9/30/04; 12:43:41 – 12:44:04). Finally, Plaintiffs theorized that the test drive policy gave salesmen the chance to observe customers driving a vehicle. But Cox observed Morgan during the ride before they noticed it was low on gas. And, even if Cox had been in the passenger seat when the accident happened, he would have been powerless to prevent hydroplaning. The trial court nevertheless denied the motions for summary judgment.

During closing argument, Plaintiffs' counsel improperly advised the jury that an award against Morgan, who admitted causing the accident, would leave the Plaintiffs with nothing [Tape No. 4, 9/30/04; 04:34:10; See EA-12]. Then, over the Defendants' objection, the trial court directed a verdict on Ms. Scott's past medical expenses of \$274,339.28 [Order of Proceedings, R. 2081]. Likewise, disregarding bailment law and the specific prerequisites for assumption of duty, the trial court essentially directed a verdict in Instruction No. 4 on whether the dealerships had "voluntarily assumed" a duty toward the Scotts:

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.

Given evidence that no salesman accompanied Morgan and his family on the test drive, the jury answered "yes" to whether Moore Pontiac "failed to comply with this duty."

The trial court also instructed the jury that Moore Chevrolet had a duty "to exercise ordinary care in inspecting and maintaining its truck." Despite the Scotts' contention throughout the trial that the truck had a deficiency that caused the accident, the jury answered "no" to whether Moore Chevrolet breached its duty and therefore necessarily concluded that nothing was wrong with the truck. Plaintiffs never filed a cross-appeal on this part of the verdict and therefore have no grounds to be complaining about the truck.

Morgan conceded full liability at trial. When asked to apportion liability, however, the jury found Morgan and Moore Pontiac equally responsible, awarding \$1,962,269.64 against Moore Pontiac and the same amount against Morgan, for a total of nearly \$4 million. The trial court denied Defendants' motion for directed verdict and for judgment notwithstanding the verdict [Judgment, R. 2204-2205]. Morgan and Moore Pontiac filed separate appeals.

Appellate Proceedings. The Court of Appeals reversed the judgment against Moore Pontiac and affirmed the judgment against Morgan. Based on the undisputed evidence, the Court saw "no proof at trial that Moore was negligent in entrusting the truck to Morgan." It correctly observed that "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" (Court of Appeals' Opinion

(hereinafter "Opinion") Brief, App. 1, p. 4). The Court carefully examined each requirement for assumption of duty endorsed by this Court (Opinion, p. 5).

It found as a matter of law that Moore Pontiac assumed no duty above and beyond its bailment responsibility for three reasons:

1. "No one relied on Moore Pontiac's policy. Indeed Scott was unaware it even existed;"
2. "Moore Pontiac was not undertaking a duty owed by someone else," and
3. "The failure to observe the in-house policy did not increase the risk of harm to Scott"

(Opinion, pgs. 5-6).

As to this last conclusion, the Court of Appeals acknowledged the irrationality in Plaintiffs' position against Moore Pontiac:

As noted, 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 or 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**

(Opinion, p. 5) (emphasis added).

Plaintiffs sought discretionary review, which this Court granted. Moore Pontiac filed a cross-motion for discretionary review raising other grounds for reversal, which the Court of Appeals did not reach. "Having held that Moore Pontiac's adoption of the internal policy in issue here does not expose it to liability to Scott, it is not necessary to address other issues raised by Moore Pontiac" (Opinion, p. 6). These alternate grounds primarily concern the absence of any evidence on causation and substantially prejudicial errors at trial. For any

number of reasons, this Court should affirm the Court of Appeals' Opinion reversing the judgment against Moore Pontiac.

ARGUMENT

This appeal presents a classic case of suing a company on the belief that it has a deep pocket, not because it acted improperly under the law. This strategy is obvious from Plaintiffs' counsel's closing argument when he told the jury that Plaintiffs would "not get a dime" if it apportioned 100% of the verdict against Morgan in answering the "most important" apportionment instruction (Tape No. 4, 9/30/04; 4:34:08-29; see EA-12).⁵ This highly inflammatory closing plea was compounded by the trial court's instruction that Moore Pontiac assumed a duty to Plaintiffs as a matter of law, based on its internal test drive policy, without considering all the mandatory elements for any assumption of duty in the Restatement (Second) of Torts, §324A, that this Court has adopted.⁶ Plaintiffs cannot establish the section 324A requirements as a matter of law for the reasons in the Court of Appeals' Opinion. Presumably, the insufficiency led Plaintiffs to switch gears on appeal, placing its trial strategy in the back seat and "ordinary care" in the driver's seat, a ploy that, if accepted, will abolish over a century of bailment law applicable to dealerships.

Plaintiffs told the Court of Appeals that "[t]he existence of a duty is an issue of law, and a court, when making the determination of such existence,

⁵ Defense counsel immediately objected but was overruled.

⁶ *Ostendorf v. Clark Equip. Co.*, 122 S.W.3d 530, 538 (Ky. 2003).

engages in what is essentially a policy determination.” *Sheehan v. United States Automobile Ass’n*, 913 S.W.2d 4, 6 (Ky. App. 1996) (Brief, p. 11). The “policy” they demand is a bad one, however. Under bailment principles, dealerships have a duty to place a vehicle in the hands of a competent driver. KRS Chapter 186 establishes the qualifications for a license to drive. Dealerships are entitled to rely on a customer’s valid license and, if a customer appears competent, to assume that he or she understands how to drive in misting rain on a highway. If a customer could not handle this routine driving experience, he or she could not possibly have qualified for a driver’s license. There is no evidence whatsoever even to suggest that Morgan was anything other than a capable driver. We respectfully urge the Court to uphold bailment doctrine and affirm.

I. UNDER ESTABLISHED BAILMENT LAW, MOORE PONTIAC IS NOT LIABLE FOR MORGAN’S OPERATION OF A TEST-DRIVE VEHICLE.⁷

The law is settled that mere ownership of an automobile is insufficient to render the owner liable for an accident negligently caused by another who had the owner’s consent to operate the automobile. *Johnson-Kitchens Ford Corp. v. Shifflet*, 462 S.W.2d 430, 433 (Ky. 1970); *Farmer v. Stidham*, 439 S.W.2d 71, 72 (Ky. 1969). A bailment arises when personalty, like an automobile, is delivered to another for some particular purpose with an express or implied contract to

⁷ Moore Pontiac preserved this issue on appeal by moving for directed verdict at the end of Plaintiffs’ proof (Tape No. 3, 9/29/04; 01:21:09, 01:21:31) and at the end of all proof (Tape No. 4, 9/30/04; 01:32:10), by objecting to the court’s jury instructions (Tape No. 4, 9/30/04; 02:36:22), and by its post-trial motions [R. 2110-2113, 2121-2133].

redeliver the personalty when the purpose has been fulfilled. 8A AM. JUR. 2D *Bailments* §1 (1997).

In *Johnson-Kitchens*, the dealership loaned a car to a candidate “for use in a forthcoming election.” Several days later, a political worker, Townshend, picked up the car at the dealership’s lot and “used it on a number of occasions” taking another worker, Kees, with him. Quite obviously, the dealership had no knowledge or control over where Townshend drove the car. On one occasion when Kees was driving the car – without a license – and Townshend was asleep in the front seat, the car careened into the plaintiff, who was standing near a parked vehicle and was seriously injured. *Id.* at 431-432. The evidence revealed Kees was not only unlicensed but also intoxicated. The jury returned a verdict against the dealership and Townshend.

On appeal, the Court affirmed as to Townshend and, like the Court of Appeals here, reversed the judgment against the dealership. Citing *Wayne’s Adm’x v. Woods*, 275 Ky. 477, 121 S.W.2d 957 (1938), the Court held that a dealership is not liable “for injuries received by third persons where an automobile is loaned to a prospective purchaser, who is a competent driver, for trial.” *Johnson-Kitchens*, 439 S.W.2d at 432.

In *Wayne* the dealer had permitted a prospective customer to have the use of the car to determine whether the customer was interested in purchasing it. The opinion said that . . . the transaction here presented was nothing more nor less than a bailment . . . We see no distinction between the situation whereby the dealer seeks to enhance its good will by permitting others **whom it has no reason to believe are incompetent drivers** to use a vehicle and permitting a prospective customer to do so.

Id. (emphasis added).

As a matter of law, when a car dealership loans a vehicle to a competent prospective purchaser for a test drive, a bailment relationship arises in which the car dealership is the bailor and the customer is the bailee. If the bailee negligently operates the automobile and as a result causes injury to a third party, then the bailee, **not** the bailor, is liable.

Because Moore Pontiac allowed Morgan to test drive a truck for the limited purpose of determining whether he wanted to purchase it, a bailment relationship arose. While the trial testimony varies as to whether Moore Pontiac consented to Morgan driving the truck without a salesman in it (Tape No. 1, 9/27/04; 04:11:31 – 04:11:40; Tape No. 4, 9/30/04; 12:39:20), this dispute is irrelevant. In *Johnson-Kitchens*, there was no evidence that the dealership knew one way or another who would be driving the car. It loaned the car, as bailor, to a political candidate for use, presumably by anyone, during the campaign. Similarly, Plaintiffs' rhetoric about the "test drive area" is immaterial. Again, in *Johnson-Kitchens*, the dealership had no idea or control over where the car would be driven. All that matters for principles of bailment law in this case is whether the customer is competent to drive. If so, "the transaction was one of bailment and . . . the dealer is absolved from liability." *Id.*

Wayne's Adm'x explains the rationale for this result: The customer, Morgan, is not engaged in the dealership's business:

Clearly, the customer was acting for the dealer only in a restricted sense. **It was not the purpose of the transaction to affect the dealer's relationship with third persons. Such benefit as might accrue to the dealer**

arose from the reactions of the customer himself, and not from dealings between the customer and third persons.

Id. at 957 (emphasis added).

This reasoning plainly holds firm here. The only benefit to Moore Pontiac was “the reaction of Morgan himself.” Moore had no knowledge of dealings between the customer (Morgan) and third parties (Candria Scott).” Plaintiffs argue that this bailment rule is “blanket immunity.” They are wrong. Bailment law imposes a duty – to place the vehicle an able driver’s hands. Moore Pontiac complied.

II. MOORE PONTIAC DID NOT BREACH SOME VAGUE DUTY OF ORDINARY CARE.⁸

Plaintiffs recognized below that bailment law absolves Moore Pontiac.⁹ But to try to keep this dealership’s pocketbook before the jury, Plaintiffs devised an argument that Moore Pontiac itself was negligent by violating some ordinary duty to Plaintiffs when it allowed Morgan, an experienced pickup driver with a valid license, to drive the Silverado. Their theory fails as a matter of law.

Plaintiffs confuse the standard of care applicable to dealerships with erroneous statements, like it “is immaterial whether or not Moore Pontiac’s duty is assumed or by operation of law” (Brief, p. 9). The difference between

⁸ Moore Pontiac preserved this issue on appeal by moving for directed verdict at the end of Plaintiffs’ proof (Tape No. 3, 9/29/04; 01:21:09) and at the end of all proof (Tape No. 4, 9/30/04; 01:32:10), by objecting to the court’s jury instructions (Tape No. 4, 9/30/04; 02:36:22), and by its post-trial motions [R. 2110-2113, 2121-2133].

⁹ Plaintiffs’ Response to Moore’s Motion for Summary Judgment [R. 1544].

“operation of law” and “assumed” duty is striking, each having its own particular requirements. In leading with their “duty to exercise ordinary care” argument, Plaintiffs disregard that bailment law has always defined “ordinary care” for dealerships in contexts specifically involving dealerships and accidents occurring on a test drive. We are aware of no case holding that a dealership has a duty to require a salesman to accompany a qualified driver on a test drive or a duty to “warn” a qualified driver how to drive on a highway or to handle a curve when it is “misting rain.”

Plaintiffs invoke the mantra: “[T]he rule is that every person owes a duty to every other person to exercise ordinary care in his activities to prevent foreseeable injury.” *Grayson Fraternal Order of Eagles v. Claywell*, 736 S.W.2d 328, 332 (Ky. 1987).¹⁰ But *Grayson* does not address a dealership’s duty of care. And, a number of subsequent cases have questioned the weight of *Grayson*’s generalization: “*Grayson* is cited often by parties advocating a theory of liability or a cause of action where none previously existed and legal authority is otherwise lacking.” *James v. Wilson*, 95 S.W.3d 875, 891 (Ky. App. 2002). This observation applies here: No cause of action exists.

Bailment law is settled: Moore Pontiac cannot be held liable for Morgan’s alleged negligence simply because it allowed a competent customer to test drive the truck. The General Assembly has decreed that, so long as a driver has a valid operator’s license, whether from Kentucky or another state, he or she is

¹⁰ Superseded by statute, on other grounds, as stated in *Dubord v. GMRI, Inc.*, 52 F. Supp. 2d 779 (W.D. Ky. 1999).

presumptively competent to drive in Kentucky. KRS §§186.430 and 186.620. Thus, when an owner allows someone to drive a car after ensuring that that person has a valid driver's license and is not otherwise incapable of driving, that owner has satisfied any duty of "ordinary care" to third parties on Kentucky's roadways. See, e.g., *Owensboro Undertaking & Livery Ass'n v. Henderson*, 273 Ky. 112, 115 S.W.2d 563, 564 (1938). Otherwise, bailment rules would be pointless.

Moore Pontiac satisfied that duty to Ms. Scott when it ensured that Morgan was a competent driver before placing him in its truck. Before test driving the truck, Morgan provided Moore Pontiac with a valid driver's license and he completed a test drive form that set forth basic information about his license and insurance (Tape No. 1, 9/27/04; 04:32:36; Tape No. 2, 9/28/04; 03:56:08; see EA-4). Most importantly, Morgan was sober and fully able to drive (Tape No. 4, 9/30/04; 01:28:00 – 01:28:48; see EA-10). Plaintiffs had the gall, with no citation to the record, to insinuate otherwise before the Court of Appeals in suggesting that he "was not tested for alcohol." Obviously, the officer on the scene, Deputy Robinette, did not test Morgan because he knew Morgan was sober. Robinette did not charge him with any offense; Morgan was driving safely and the truck, sadly, hydroplaned.

Cox, the salesman who dealt with him, testified that Morgan appeared kind of "scraggly" but also pointed out that no one can judge a person based on looks, and 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). Moore Pontiac did not

breach any duty to third parties on the roadways because it entrusted the truck to a competent driver. Plus, while irrelevant to the claim against Moore Pontiac, there is no evidence that Morgan was driving the truck with his wife and two-year-old daughter in excess of the speed limit or otherwise improperly. The truck hydroplaned out of his control, a circumstance that could happen to any driver.

Plaintiffs suggest an “exceptional circumstances” exception to the bailment doctrine. The very case they quote, *Wayne’s Adm’x v. Woods*, 275 Ky. 477, 121 S.W.2d 957, 957 (1938), sets forth the basis for independent negligence outside the bailment doctrine and it has no application to Moore Pontiac: “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.” Again, Plaintiffs’ rhetoric notwithstanding, Morgan’s competence to drive is undisputed. There is no evidence whatsoever to suggest that Moore Pontiac “had any knowledge of any fact militating against the ability” of Morgan to handle the car. Moreover, while not relevant to Moore Pontiac’s duty, the record proves that Morgan was not driving in an unsafe manner.

Plaintiffs apparently think it is “exceptional” that (i) Moore Pontiac had an internal test drive policy requiring salesmen to accompany customers on a test drive and (ii) Moore Pontiac’s purportedly “admitted” that, under this policy, Morgan should not have been allowed to drive alone with his wife and two-year-old (Brief, pgs. 10-11). This reasoning fails on several grounds.

First, Plaintiffs point to no case anywhere in the country that requires a dealership to have this internal policy. Nothing in bailment law suggests it. To the contrary, at least one case held a dealership responsible only because the salesman did go with the customer on the test drive. A dealer only has a duty to entrust the vehicle to a qualified, competent driver.

Second, even assuming that the internal policy relates to safety, it, if anything, is a step above and beyond what the law requires, a goal to be praised, not a basis for a lawsuit. As the Brief Amicus Curiae of Pacific Legal Foundation explains, many cases hold that an internal standard stronger than the law cannot and should not be a basis for dealership liability for the glaring reason that imposing liability discourages companies from doing more than the law requires. "The expansion of duty comes at societal cost" (Amicus Brief, pgs. 2-5, filed in August 2007), and "violation of an internal policy should not lead to liability," as many cases have recognized (See cases discussed in Amicus Brief, pgs. 5-13).

Third, there is no evidence at all that having Cox in the truck with Morgan would have or could have prevented the truck from hydroplaning. As the Court of Appeals held: "The existence or nonexistence of the in-house rule did nothing to increase the risk. The situation is exactly what it would have been had Moore Pontiac not instituted the policy" (Opinion, p. 6). Plaintiffs say the policy is "direct and strong proof that Moore Pontiac was aware of the dangers inherent in allowing customers to test drive vehicles" (Brief, p. 11). But there is no evidence that the policy was created to address any "dangers." Plaintiffs themselves told the Court of Appeals: "It is customary ... for a car dealership to allow customers

to test drive its vehicles” for the sole purpose of “persuading the customer to buy the car from the dealership” (Appellees’ Court of Appeals’ Brief, p. 12).

Fourth, Plaintiffs’ repeated assertion that the facts of this case involve some sort of extraordinary danger is sheer hyperbolic story telling. The truck was simply a truck with a V-8 engine, like any other heavy pick-up truck, not some monster machine at a fairground. And, Morgan was familiar with the Silverado, an undisputed fact that Plaintiffs never mention. That was precisely why he stopped at the dealership. He and his father had owned similar trucks, and Morgan had driven similar pick-ups on many occasions [Tape No. 1, 9/27/04; 04:04:43; 04:33:48; 04:38:49 – 04:39:46; see EA-2]. Likewise, while Plaintiffs seem to insinuate a tsunami, there was nothing unusual about the weather. When Morgan pulled out of the dealership, it was “misting rain” (Tape No. 2, 2/28/04; 11:30:01).

In the same vein, Plaintiffs suggest the road conditions were “dangerous.” But there was no construction or other unusual hazardous condition. The accident occurred on a four-lane U.S. highway. True, Deputy Robinette testified that other accidents had occurred over the years **on the side of the highway opposite from where Morgan was driving** [Tape No. 2, 9/28/04; 9:38:52]. But there is no evidence that this curve on a U.S. highway is different from any other curve, no evidence that Morgan was unfamiliar with curves, and no evidence that he was driving improperly. It is undisputed that Morgan was driving 45 m.p.h., 10 miles under the 55 m.p.h. speed limit established by the government for this “dangerous” curve, and other vehicles were passing him. Plaintiffs may say, as

they have previously, that Deputy Robinette – who did **not** charge Morgan with any offense – would have taken the curve more slowly. But Robinette is not an accident reconstructionist. He did not even give Morgan a ticket for speeding, recklessness or anything else. And, Deputy Robinette admitted that he “really couldn’t tell you” what speed he would have driven [Tape No. 2, 9/28/04; 09:36:22, 09:41:19].

Plaintiffs attempt to spin straw into gold with the so-called test drive area. But the evidence on the test drive area is at best vague and, at worst, irrelevant. It is undisputed that Morgan was within a test drive area, which can go beyond five miles from the dealership [Tape No. 3, 9/29/04; 02:53:38; 02:57:56; 03:03:30]. There is no evidence whatsoever (and Plaintiffs cite to none) that Moore Pontiac “excluded” U.S. highway 119 south from any test drive area because it was “dangerous” or that it “excluded” U.S. 119 for any reason at all.

Most important, dealerships have no duty to restrict customers from driving on a four-lane U.S. Highway. Most roads have curves. This case does not involve any extraordinary condition, like one-lane highway repair or washed out gravel drives that a customer may not expect. But even in that context, a dealership should be entitled to rely on the customer’s competence to drive. That entitlement lies at the heart of bailment law. Courts have held that dealers are not responsible even when the vehicle loan is overnight and the bailee can drive anywhere he or she desires. *See, e.g. Johnson-Kitchens Ford Corp. v. Shifflet*, 462 S.W.2d 430 (Ky. 1970).

In sum, the very suggestion that Moore Pontiac can be liable after entrusting the truck to a competent driver leads us to a topsy turvey world. Under *Wayne's*, a dealership can be liable when the salesman is in the vehicle, but not when the customer is alone. Under Plaintiffs' theory, Moore Pontiac can be liable when the customer is alone, but not when a salesman is with him. It is terrible that Ms. Scott was injured by a hydroplaning truck. But it is also terribly unjust to hold Moore Pontiac responsible when it fully complied with long-standing bailment law.

III. NO EVIDENCE TO ESTABLISH ASSUMPTION OF DUTY.

Plaintiffs' central argument at trial was their claim that Moore Pontiac **voluntarily assumed** a duty through its internal test drive policy. Moore Pontiac in no way obligated itself to have a salesman accompany Morgan on the test drive, however. The policy was not adopted for the benefit of third-party drivers like Ms. Scott.

Although Moore Pontiac has an internal guideline that salespeople should accompany customers on test drives,¹¹ this policy is not a "hard and fast" rule because situations arise when a salesman is unable to go on a test drive with a customer (Tape No. 3, 9/29/04; 02:43:05). The trial court nevertheless instructed the jury that Moore Pontiac: "voluntarily assumed a duty to exercise ordinary care to third parties, including the Plaintiff, by establishing policies regarding the

¹¹ This written guideline is located on a sign in Moore Pontiac's showroom and in an employee handbook.

test driving of vehicles including the 1998 Chevrolet truck in question.” The trial court erred.

As the Court of Appeals recognized, Kentucky adheres to the standard set forth in §324A of the Second Restatement of Torts, which establishes the elements necessary to hold a party liable for breaching the voluntary assumption of a duty. *Ostendorf v. Clark Equip. Co.*, 122 S.W.3d 530, 538 (Ky. 2003).

Section 324A provides:

One 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.

Plaintiffs cannot satisfy any of these elements, as the Court of Appeals correctly held.

A. Plaintiffs Are Not the Intended Beneficiaries of the Policy.

The threshold issue in §324A analysis is whether the defendant undertook to render services to the plaintiff. *See, e.g., Good v. Ohio Edison Co.*, 149 F.3d 413, 420 (6th Cir. 1998). In other words, did Moore Pontiac undertake a duty to render services to Ms. Scott when it adopted an internal policy that salespeople should accompany customers on test drives? *See Sheehan v. United States Automobile Ass’n*, 913 S.W.2d 4, 5 (Ky. App. 1996). The answer is

unequivocally no because Moore Pontiac's internal test-drive policy was not in place for the benefit of Ms. Scott and other drivers on the road.

To say that it is reasonably prudent for a salesperson to ride along with a customer on a test drive "when possible" (Tape No. 2, 9/28/04),¹² is not to say that it is prudent for the benefit of third parties. Indeed, the evidence established that going with a customer gives salesmen a chance to show the customer the vehicle's features and "how easy it is for the driver to use them" (Tape No. 4, 9/30/04; 12:19:54). The policy provides a way to sell the vehicle while ensuring it is not stolen or damaged. It is not an insurance policy for other drivers on the road. Moreover, Morgan was thoroughly familiar with the Silverado and nothing in the record even suggests that there was some aspect of the truck unknown to him that would prevent the pickup from hydroplaning.

A similar issue arose in *Murphy v. Second Street Corporation*, 48 S.W.3d 571 (Ky. App. 2001). When an unknown assailant attacked Ms. Murphy at the defendant's bar, the defendant had its security guard escort the assailant out and requested an emergency medical technician to examine Ms. Murphy. *Id.* at 572. Contrary to its internal guidelines and procedures, the defendant corporation did not detain and identify the assailant. Ms. Murphy sued, alleging that the corporation breached both its duty to protect her and the duty allegedly created by its internal guidelines. *Id.* at 572-73. Like the Scotts, Ms. Murphy sought to conjure duty from an internal corporate policy. The defendant moved for

¹² Dan Moore, Sr.'s, video deposition was introduced at Tape No. 2, 9/28/04; 04:36:58. There is no time counter on this video (or trial tape).

summary judgment, arguing that it did not owe a duty to Ms. Murphy beyond protecting her from the attacker once the harm became foreseeable. The trial court agreed.

On appeal, Ms. Murphy renewed the theory that the corporation had a duty based on its internal policy, which called for its security team to fill out an incident report in situations such as hers. *Id.* at 575 n.3. Because the corporation had this procedure in place, she insisted that it voluntarily assumed a duty to her to fill out an incident report and its failure to do so was negligent. *Id.* at 575. The Court disagreed: “[T]he fact that the Corporation failed to fill out an internal incident report did not create a new duty or constitute an assumption of a duty that it otherwise did not have.” *Id.* at 575 n.16. Rather, the corporation’s duty was only to protect Ms. Murphy and prevent the unknown assailant from harming her further, which it fulfilled. *Id.* at 575.

Like *Murphy*, other cases hold that the mere adoption of internal guidelines and policies alone do not give rise to a voluntarily assumed duty as contemplated in §324A. In *Angnabooguk v. State, Department of Natural Resources, Division of Forestry*, for example, plaintiffs sought damages for injuries sustained from a large forest fire that destroyed 500 homes and 37,000 acres. 26 P.3d 447 (Alaska 2001). The defendant, Division of Forestry, responded to the fire suppression effort and, in violation of its internal policy, sent away local fire department personnel. *Id.* at 449. Plaintiffs alleged that the Division acted negligently in its fire suppression efforts by not following internal rules and guidelines. *Id.* The Alaska Supreme Court held that the “Forestry’s

internal rules and guidelines do not create a duty of care for Forestry.” *Id.* at 452. It is only when Forestry **chose to take over** the firefighting operations that it assumed a duty to conduct those operations with due care. *Id.* at 453; see also *Honeycutt v. City of Wichita*, 836 P.2d 1128 (Kan. 1992).

Like the corporation in *Murphy* and the Division of Forestry in *Angnabooguk*, Moore Pontiac had an internal guideline on how it should operate its business. But the mere existence of that guideline did not, however, *ipso facto* give rise to a voluntarily assumed duty to unknown third-party Ms. Scott to have a salesman accompany Morgan – a licensed and competent driver – on his test drive.

B. The Evidence Fails to Show Increased Harm to or Reliance by Plaintiffs.

Plaintiffs were by no means the intended beneficiaries of Moore Pontiac’s test drive policy. Their “voluntary assumption” theory therefore fails the very threshold test of §324A of the Restatement. It fails to satisfy all additional criteria as well.

As the Court of Appeals reasoned, liability under §324A does **not** automatically arise when a party that voluntarily assumes a duty fails to act upon that duty. *Estep v. B.F. Saul Real Estate Inv. Trust*, 843 S.W.2d 911, 914 (Ky. App. 1992) (citing *Louisville Cooperage Co. v. Lawrence*, 313 Ky. 75, 230 S.W.2d 103, 105 (1950)). Rather, a plaintiff must go one step further and show that the party negligently undertook the duty it voluntarily assumed. In doing so, the plaintiff must “demonstrate that one of three alternative bases for the

imposition of a duty also existed.” *Myers v. U.S.*, 17 F.3d 890, 902 (6th Cir. 1994).

Those equally required alternative bases are:

- (a) that the negligent performance of the undertaking increased the plaintiff’s risk of harm;
- (b) the party undertook a duty owed to the plaintiff by another; or
- (c) the plaintiff suffered harm because of detrimental reliance of the other or the third person upon the undertaking.

§324A(a-c). Plaintiffs cannot possibly establish any of these elements.

No Increased Risk. First, there was no increased risk of harm. Under §324A(a), one who voluntarily assumes a duty may be liable for a third party’s physical injuries that result from the negligent undertaking of that duty when the “failure to exercise reasonable care increases the risk of such harm” The test for liability under this section “is not whether the risk was increased over what it would have been if the defendant had not been negligent. Rather, a duty is imposed only if the risk is increased over what it would have been had the defendant not engaged in the undertaking at all.” *Myers v. U.S.*, 17 F.3d 890, 903 (6th Cir. 1994). In other words, “the defendant’s negligent performance must somehow put the plaintiff in a worse situation than if the defendant had never begun the performance.” *Turbe v. Gov’t of the Virgin Islands*, 938 F.2d 427, 432 (3d Cir. 1991).

Kentucky recognized this principle in *Ostendorf*. In that case, a forklift manufacturer initiated a voluntary retrofit campaign so that safety updates could

be made on older forklift models. 122 S.W.3d at 537. Plaintiff operated one of the older, un-retrofitted models and was severely injured when it tipped over. *Id.* at 532. He then sued the forklift manufacturer, alleging among other things that under the common-law principle of voluntary assumption of a duty, the manufacturer negligently conducted its retrofit campaign. *Id.*

For support, the plaintiff rested on the settled principle that "one who volunteers to act, though under no duty to do so, is charged with the duty of acting with due care." *Id.* at 538 (citation omitted). But the Court applied §324A analysis and found no evidence that the manufacturer's allegedly negligent performance of its retrofit campaign increased the risk of harm to plaintiff. *Id.* In so holding, the Court implicitly recognized that liability cannot attach under §324A(a) if a defendant's negligent undertaking of a service for the plaintiff's benefit does not put the plaintiff in a worse situation than if the defendant had never undertaken the service at all. In other words, the forklift manufacturer's failure to complete its retrofit campaign did not increase the risk of harm to plaintiff that would have occurred if the manufacturer had never started the campaign in the first place.

Similarly, in *Foley v. Michel Tire Company*, 183 F. Supp. 2d 934 (W.D. Ky. 2002), a patron sued a store for injuries he allegedly sustained when he tripped over a jack handle protruding from under his car that was being serviced. One of the plaintiff's theories of liability was voluntary assumption of a duty. Specifically, the plaintiff argued that by posting a sign inside the store, which prohibited customers from entering the work areas, the defendant voluntarily assumed a

duty to warn the plaintiff of the protruding jack handle. *Id.* The Court disagreed and held that the sign did not make the jack less obvious nor did it increase the likelihood that plaintiff would be injured by the jack. *Id.* at 936 (citing *PNC Bank, Ky., Inc. v. Green*, 30 S.W.3d 185, 188 (Ky. 2000)). “[I]t is against public policy, and even common sense, to impose liability on those who take reasonable precautions if such does not escalate or conceal the nature of the hazard, while absolving those who take no action whatsoever.” *Id.*

In this case, Moore Pontiac had an internal policy that salespeople should accompany customers on test drives. As in *Foley*, this policy was posted on a sign in Moore Pontiac’s showroom. Morgan was not accompanied by a salesman when he test drove the truck that collided with Plaintiff’s vehicle. Nevertheless, Moore Pontiac cannot be liable under §324A(a) because there is no evidence that Moore Pontiac’s failure to have a salesman in the truck with Morgan placed Ms. Scott in a worse position than she would be if Moore Pontiac did not have the policy at all, as is the situation with most car dealerships. As a result, Moore Pontiac cannot be liable under §324A(a).¹³

No Reliance. Second, there was no reliance by Ms. Scott. “[T]raditionally, the purpose of imposing liability upon a party who has assumed a duty to act is premised upon reliance.” *Ostendorf*, 122 S.W.3d at 538 (quoting *Louisville Cooperage Co. v. Lawrence*, 230 S.W.2d 103, 105 (Ky. 1950)). This

¹³ There can also be no liability under §324A(b), which requires that a defendant assume a duty that is owed by another to a third person. See *Myers*, 17 F.3d at 903. Plaintiffs have never suggested that Moore Pontiac assumed Morgan’s duty to them to operate the truck he was driving with due care.

principle is recognized in §324A(c), which provides that one who voluntarily assumes a duty is liable for a third party's physical injuries that result from the negligent undertaking of that duty when the "the harm is suffered because of reliance of the other or the third person upon the undertaking." The comments to that section make clear that the reliance must induce the injured plaintiff or another "to forgo other remedies or precautions against such a risk. . . ." §324A(c) cmt. e.

Without reliance, there can be no liability. Accordingly, courts have long required proof of reliance before imposing liability under the voluntary assumption of duty framework. In *Louisville Cooperage Company*, for example, Kentucky's highest court held that it was inappropriate for the trial court to grant the defendant a directed verdict when there was a question of fact as to whether it was reasonable for the plaintiff to rely upon an undertaking voluntarily assumed by the defendant. 230 S.W.2d at 105 (Ky. 1950).

Here, however, there was no question of fact because there was no evidence whatsoever of reliance by Ms. Scott. Plaintiffs presented no proof that they in any way relied upon Moore Pontiac's internal policy that salesmen should accompany customers on test drives. Ms. Scott was not even aware of the policy – until this litigation. But even if they somehow knew about the posted sign, it cannot seriously be argued that Ms. Scott drove differently relying on the fact that Moore Pontiac would put a salesman in each car it provided to already competent drivers, like Morgan. Without demonstrating the necessary reliance,

Plaintiffs cannot hold Moore Pontiac liable for the injuries sustained as a result of Ms. Scott's accident.

IV. MOORE PONTIAC'S ACTIONS DID NOT CAUSE THE ACCIDENT BETWEEN MORGAN AND PLAINTIFF.¹⁴

Moore Pontiac had no legal duty – assumed or otherwise – to Plaintiffs to send salesmen on all its test drives, nor in particular to put a salesman in the truck with Defendant Timothy Morgan on his October 10, 2002 test drive. But even if the law was remarkably otherwise, and a deviation from an in-house policy equates to some kind of negligence *per se*, Moore Pontiac is still not liable because its actions or inactions were not the proximate cause of Plaintiffs' injuries.

A. Moore Pontiac Was Entitled to Judgment as a Matter of Law.

Causation is the linchpin to liability based on negligence: "It is superfluous to say there can be no recovery on account of negligence of another which was not the proximate cause of the injury complained of." *Cain v. Stevens*, 274 S.W.2d 480, 483 (Ky. 1955) (citations omitted).

To be the proximate cause under Kentucky law, "it is not enough that the harm would not have occurred had the actor not been negligent. [T]his is necessary, but it is not of itself sufficient. The negligence must also be a **substantial factor** in bringing about the plaintiff's harm." *Deutsch v. Shein*, 597

¹⁴ Moore Pontiac preserved this issue on appeal by moving for directed verdict at the end of Plaintiffs' proof (Tape No. 3, 9/29/04; 01:21:09) and at the end of all proof (Tape No. 4, 9/30/04; 01:32:10), by objecting to the court's jury instructions (Tape No. 4, 9/30/04; 02:36:22), and by its post-trial motions [R. 2110 – 2113, 2121 – 2133].

S.W.2d 141, 144 (Ky. 1980) (emphasis added and brackets in original) (adopting and quoting from §431 of the Restatement (Second) of Torts)). Further, it is the duty of the court to grant a defense judgment where the evidence does not reasonably support a conclusion that the conduct of the defendant was a substantial factor in causing the plaintiff's injuries. *Pathways, Inc. v. Hammons*, 113 S.W.3d 85, 92 (Ky. 2003).¹⁵ Plaintiffs had no evidence showing that the presence or absence of a salesman had any effect – much less a substantial one – on their injuries. They may say, for example, that a salesman could have stopped Morgan from speeding, but there is **no evidence that he was** speeding; he was driving 10 m.p.h. below the 55 m.p.h. limit.

Morgan admits the accident was his fault. Accordingly, his actions were the sole proximate cause for any of Ms. Scott's injuries arising out of the accident.¹⁶ It is not the least bit reasonable to conclude that the accident would not have occurred with Cox in the passenger seat rather than Morgan's wife and child. Indeed, the evidence and common sense compel the opposite – that Morgan would be more careful with his loved ones beside him. Morgan testified

¹⁵ See also *Bruck v. Thompson*, 131 S.W.3d 764, 766 n.3 (Ky. App. 2004), in which this Court quoted *McCoy v. Carter*, 323 S.W.2d 210, 215 (Ky. 1959), for the rule that “**proximate causation presents a question of law and should be withheld from the jury** when ‘there is no dispute about the essential facts and [only] one conclusion may reasonably be drawn from the evidence’” (emphasis added).

¹⁶ The record confirms that Ms. Scott failed to mitigate her accident-related injuries by refusing to follow her doctor's orders to lose weight and quit smoking. The trial court erred in refusing to send this issue to the jury. This issue on appeal was preserved in Moore Pontiac's proposed jury instructions [R. 2026-2042] and in its post-trial motions [R. 2110 – 2113, 2121 – 2133].

he would not have driven as carefully with Cox alone (Tape No. 1, 9/27/04; 04:32:20; see EA-4).

Further, there is no evidence of any reckless driving that Cox could or would have prevented even if he was in the car. Morgan was traveling 10 mph under the speed limit. He was not changing lanes or otherwise driving in an unsafe manner. The collision with Ms. Scott's car occurred when Morgan suddenly and uncontrollably hydroplaned into oncoming traffic. There was no dispute at trial that hydroplaning happens "in the bat of any eye" and that no one – including a wife or a salesman in the passenger seat – can do anything to stop it (Tape No. 3, 9/20/04; 04:06:15 – 03:06:34).

The trial court virtually ignored this dearth of causation evidence. Instead, the trial court allowed this negligence action to go forward against Moore Pontiac solely on proof that the dealership deviated from an internal policy by allowing an unaccompanied test drive. Its refusal to direct a verdict seems to rely on the fallacy *post hoc, ergo propter hoc*, the radically mistaken belief that if event B happened after event A, then event A caused event B. It disregards completely the only reasonable conclusion in this case that event B (Plaintiffs' car wreck injuries) would have occurred with or without event A (salesman's presence in car).

Kentucky courts have repeatedly rejected similar attempts to bootstrap liability to violations of not just voluntary internal policies, but criminal and civil statutes. The analysis is consistent and undeniably applicable here:

Where the facts of an accident do not show any causal connection between the violation of a statute and the injury

suffered, then such violation is irrelevant and plays no part in the determination of liability.

Rentschler v. Lewis, 33 S.W.3d 518, 520 (Ky. 2000) (quoting *Ross v. Jones*, 316 S.W.2d 845, 847 (Ky. 1958)).

Rentschler is one of the many, but more recent, pronouncements on the subject. There, this Court held that evidence showing that the defendant was in violation of Kentucky statutes requiring drivers to be licensed was not just insufficient to prove, but wholly irrelevant to, the defendant's fault in an automobile accident. This Court quoted from Massachusetts case law in finding plaintiff's theory to the contrary "a cruel and almost savage doctrine." *Id.* at 519-20. A statutory violation is only relevant when it can be shown to be a proximate cause of the accident. This Court recognized further:

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.

Id. (quoting *Falvey v. Hamelburg*, 198 N.E.2d 400, 403 (Mass. 1964)).

The same can be said here, though in stronger terms, and indeed should have been said by the trial court to support a directed verdict for Moore Pontiac. There is no reason to believe, and certainly no evidence to support, that the Morgan/Scott accident would not have occurred if a salesman had been in the car in conformity with Moore Pontiac's internal policy. Moore Pontiac did not cause Plaintiffs' injuries, in the legal or any other sense. The question was one of law that should have been withheld from the jury. *Bruck*, 131 S.W.3d at 766

(quoting *McCoy*, 323 S.W.2d at 215). Absence of causation presents a separate ground for affirmance.

B. The Jury's \$2 Million Award Against Moore Pontiac Was Based on Pure Speculation.

The trial court should have directed a verdict for Moore Pontiac on the legal question of causation but it did not. The result was a \$2 million jury award that necessarily rests on pure speculation. The jury heard no evidence of any conduct or acts by Moore Pontiac to support a conclusion that the dealership caused Ms. Scott's injuries. It heard that Moore had an internal policy to send sales personnel on test drives and that no salesman accompanied Morgan on his October 10, 2002 test drive, rather he was joined by his wife and infant daughter. From that and that alone, the jury found Moore Pontiac 50% liable for Morgan's 100% admitted fault in driving the vehicle that uncontrollably hydroplaned into Ms. Scott's car.

To find as it did, the jury would have to speculate about some possible way Moore Pontiac could have prevented the accident. As a matter of law, of course, that is not the test for proximate causation and is why the trial court should have granted a directed verdict. That aside, a jury simply cannot speculate, especially as to causation. "[N]o recovery is allowed when resort to speculation or conjecture is necessary to determine whether the damage resulted from the unlawful act of which complaint is made or from other sources." *Roadway Express, Inc. v. Don Stohlman & Assocs., Inc.*, 436 S.W.2d 63, 65 (Ky. 1968); see also *Texaco, Inc. v. Standard*, 536 S.W.2d 136, 138 (Ky. App. 1975) ("A mere possibility of such causation is not enough. . . ."); *Michals v. William T.*

Watkins Mem'l. United Methodist Church, 873 S.W.2d 217, 220 (Ky. App. 1994)

("... award of damages based on speculation is not permitted.").

Instruction Number 4 to the jury states:

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:

The jury answered "yes" and awarded a total of \$2 million against Moore Pontiac.

The verdict represents the ultimate level of reversible speculation.

V. PLAINTIFFS' COUNSEL'S IMPROPER CLOSING ARGUMENT CONSTITUTES REVERSIBLE ERROR.¹⁷

The jury heard no evidence whatsoever to support its \$2 million award against Moore Pontiac. It did, however, hear improper and prejudicial comments from Plaintiffs' counsel regarding both Moore Pontiac's financial condition that no doubt set this jury on its path of impassioned speculation. The trial court's refusal to foreclose counsel's impermissible closing statements entitles Moore Pontiac to a new trial.¹⁸

¹⁷ This error was preserved for appellate review by defense counsel's objection (Tape No. 4, 9/30/04; 04:34:40) and Defendant's post trial motions [R. 2110-2113, 2121-2133].

¹⁸ Moore Pontiac is also entitled to a new trial based on the trial court's refusal to instruct the jury on Plaintiff's failure to mitigate her damages. See *supra*, n.16. It is entitled to a new trial based on Plaintiffs' improper replay of edited video deposition testimony at trial and edited video trial testimony during closing. Lastly, Moore Pontiac is entitled to a new trial because the jury's \$2 million award against this dealership is insupportable under the facts and law governing this case, is wildly excessive and could only be the result of passion and prejudice.
(continued...)

Plaintiffs' counsel exploited closing argument to inflame the jury when he implored that Morgan was financially unable of adequately compensating Ms. Scott for her injuries. Early in his comments, counsel rhetorically asked the jury why Moore Pontiac had not sued Morgan for damage to the truck. He promptly answered his own question: Moore probably knew it would not "get a dime out" of Morgan (Tape No. 4, 9/30/04; 4:15:25; see EA-11).

Later in his closing, on the apportionment instruction, Plaintiffs' counsel declared, again improperly and prejudicially, that it was the most important "because this is the ultimate instruction that determines whether or not Candy really gets anything" (Tape No. 4, 9/30/04; 4:34:08; see EA-12). He then stated: "If you put 100% on Timothy Morgan we got the same case against him and judgment against him that [Moore] would have had had they filed suit against him for the truck" (Tape No. 4, 9/30/04; 4:34:29; see EA-12). In other words, "not a dime." Defense counsel objected and was overruled.

These closing statements caused the jury to award damages against Moore Pontiac because Morgan was not able to "pay a dime." Although Plaintiffs' counsel told the trial court that his argument relating to the financial condition of parties is proper – specifically noting that he says this "all the time" and further stating that "they say you're supposed to" use this type of argument –

(...continued)

Moore Pontiac preserved this error for appeal by its post-judgment motions [R. 2110-2113, 2121-2133] and hereby joins in and incorporates Appellant Morgan's argument requesting a new trial. See Morgan's Court of Appeals Brief at 15-17.

the law clearly provides that such argument is highly inflammatory and impermissible (Tape No. 4, 9/30/04; 4:36:35).

There is no law applicable to the poor that is not likewise applicable to the rich, nor is any law applicable to the rich that is not likewise applicable to the poor, and **an endeavor on the part of an attorney or litigant to inflame the minds of the jury by referring to the financial status of either of the parties is improper.**

Walden v. Jones, 289 Ky. 395, 158 S.W.2d 609, 612 (1942) (emphasis added); see also *Murphy v. Cordle*, 303 Ky. 229, 197 S.W. 2d 242, 243 (1946); *Southern-Harlan Coal Co. v. Gallaier*, 240 Ky. 106, 41 S.W.2d 661, 663 (1931).

Furthermore, the comments by Plaintiffs' counsel may have caused the jury to make impermissible inferences regarding the availability of insurance. The jury could have inferred from his closing about apportionment that Moore Pontiac had a larger insurance policy than Morgan in violation of the rule: "[G]enerally, proof that a party is wholly or partially indemnified by insurance is neither relevant nor material to any issue in the case." *Triplett v. Napier*, 286 S.W.2d 87, 88 (Ky. 1956). Any reference to liability insurance is an attempt to bias the minds of the jury. *Finch v. Conely*, 422 S.W.2d 128, 130 (Ky. 1967).

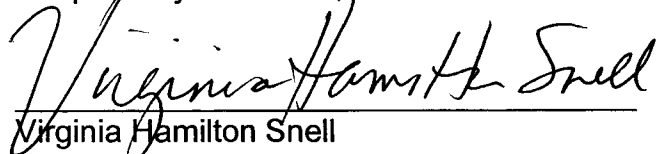
The prejudicial impact of Plaintiffs' closing argument is plain. The jury apportioned 50% of the award to Moore Pontiac, despite the absence of evidence of both liability and causation and Morgan's admission that he was solely responsible. No reasonable juror could have found that Moore's liability in this action was equivalent to that of Morgan's. See *id.* at 130 ("In light of the amount of the verdict and the serious dispute concerning the extent of the

injuries, it would be speculative to say that the insurance factor failed to prejudice the rights of the appellants.”).

CONCLUSION

No precedent in Kentucky law even hints of support for a \$2 million verdict against a car dealership for injuries caused solely by a competent and fully licensed customer on a test drive. The trial court expunged bailment law from the books when it sent Plaintiffs' claims against Moore Pontiac to the jury. The jury, then, without adequate instruction and contrary to all relevant, undisputed evidence, imposed 50% of the damages against Moore Pontiac in the face of Morgan's admission of 100% liability. The Court of Appeals correctly reversed. Bailment law has passed repeated consideration by Kentucky courts and has always compelled dealerships to loan a vehicle to a competent driver, **not** to insure the customer for injury to third parties admittedly caused solely by the driver. We respectfully ask this Court to affirm the Court of Appeals' Opinion reversing the judgment against Moore Pontiac.

Respectfully submitted,



Virginia Hamilton Snell
Deborah H. Patterson
Rania M. Basha
Wyatt, Tarrant & Combs, LLP
500 W. Jefferson Street, Suite 2800
Louisville, KY 40202

William Baird, IV
William J. Baird, III
Baird & Baird, P.S.C., Attorneys at Law
162 Second Street
P.O. Box 351
Pikeville, KY 41502

Counsel for Appellant Moore Pontiac, Buick,
GMC, Inc.

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