

No. 24123 - Roger L. Clark, Jr., Individually, and Charlotte Clark, Individually and as Guardian and Next Friend of Roger L. Clark, Jr., Plaintiffs Below, Appellants v. Eugene Shores d/b/a Quality Auto Sales of Martinsburg, A Sole Proprietorship, and West Virginia Department of Motor Vehicles, a department of the State of West Virginia,  
Defendants Below; and Eugene Shores d/b/a Quality Auto Sales of Martinsburg, A Sole Proprietorship, Defendant Below, Appellee

Maynard, Justice, dissenting:

Roger Clark takes a car from Quality Auto Sales to test drive. Roger was then sixteen years old, had a valid West Virginia driver's license and was not intoxicated or impaired in any way. Also, the car had no defects and was completely safe and roadworthy. These facts are all undisputed.

Roger drives off and later wrecks the car. It was a single car accident caused entirely by Roger's negligence. Now Roger wants Quality to pay him for giving him the car that he wrecked to test drive!

The trial court properly granted summary judgment in favor of Quality. Now this Court has reversed the trial court's wise and appropriate dismissal and sent the case back for trial.

In footnote 7, the majority opinion states that summary judgment, which was granted to Quality by the circuit court, was not based on the negligent entrustment issue because that issue was not presented to the trial court. The majority goes on to state that this Court generally does not consider on appeal issues that were not decided at the trial court level. In fact, the majority specifically states, “We decline to address the issue [of negligent entrustment] in this appeal.” Nonetheless, I believe they have included in the opinion two syllabus points, Syllabus Point 4 and Syllabus Point 5, which directly concern negligent entrustment. And the decision in the case really turns on the issue of negligent entrustment.

I believe there are no factual issues in dispute regarding whether Roger Clark was “an inexperienced, incompetent or reckless driver” and whether the car lot should have known. The majority admits Roger had a valid driver’s license and was in no way disqualified from driving at the time of this accident. The majority also admits there was absolutely no evidence presented to show Roger was in any way intoxicated or impaired at the time. Nevertheless, the majority goes on to conclude there are conflicting statements regarding factual issues. The opinion does not outline what these conflicting statements might be.

I believe the facts in their present posture were sufficient for the trial court to properly enter summary judgment in favor of Quality. I also find it suspicious that even though affidavits were included from Roger and Charles Willard as to whether Roger's father accompanied Roger to the car lot, there is no affidavit from Roger's father stating whether or not he was there.

Injured third parties properly have a cause of action against an owner for negligent entrustment. But with this decision, an entrustee can now sue and recover from an entrustor in West Virginia. In plain language, this young man is saying, "I'm reckless; you should have known I'm reckless and you should not have let me drive your car, but because you didn't know I was reckless, West Virginia will allow me to sue you." If this Court is going to allow such a cause of action, I believe the majority should also state that "one who accepts and uses a chattel knowing that he is incompetent to use it safely will usually be in such contributory fault as to bar recovery." Ward Miller, J.D., Annotation, *Negligent Entrustment: Bailor's Liability to Bailee Injured Through His Own Negligence or Incompetence*, 12 A.L.R.4th 1062 (1982).

What is really absurd about this case is that it allows someone to profit from his own wrong. That is simply not fair and it violates the old equity

maxim which has been fundamental in law since Roman times. *Nemo ex proprio dolo consequitur actionem*. “No one maintains an action arising out of his own wrong.” Except in West Virginia. For that reason, I respectfully dissent.