

## Section III

# Negligent Entrustment and Permissive Use

Craig B. Davis

**PERMISSIVE USE / NEGLIGENT ENTRUSTMENT**

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### I. PERMISSIVE USE

#### A. ORIGINS

Issue arises in cases in which there is an accident where the defendant was driving a vehicle on which someone else was the named insured. Coverage allowed in those cases where it is found that the defendant was using the vehicle with the permission of the named insured (ie: had the “permissive use” of the named insured).

#### B. OMNIBUS CLAUSE

Basis for all permissive use cases is found in the Omnibus Clause, Virginia Code § 38.2-2204 (Exhibit 1). The Omnibus Clause requires that:

[n]o policy or contract of bodily injury or property damage liability insurance, covering liability arising from the ownership, maintenance, or use of any motor vehicle, . . . shall be issued or delivered in this Commonwealth to the owner of such vehicle, . . . **unless the policy contains a provision insuring the named insured, and any other person using or responsible for the use of the motor vehicle, . . . with the expressed or implied consent of the named insured, . . .**

Virginia Code § 38.2-2204(A) (emphasis added).

1. Omnibus Clause requires that every automobile insurance policy provide coverage for the named insured **and** also for any person using a motor vehicle with the express or implied consent of the named insured (ie: a permissive user). See Hartford Fire Ins. Co. v. Davis, 246 Va. 495, 436 S.E.2d 429 (1993).

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2. The Omnibus Clause is mandatory and, by the force of its provisions, is made a part of each automobile liability policy. Nationwide Mut. Ins. Co. v. GEICO, 215 Va. 676, 212 S.E.2d 297 (1975).
3. Every automobile liability insurance policy issued in Virginia will be construed to include coverage for a permissive user, even if not specifically written into the policy language itself. Grange Mut. Cas. Co. v. Criterion Ins. Co., 212 Va. 753, 756, 188 S.E.2d 91 (1972).
4. Subsection D of the Omnibus Clause (§ 38.2-2204(D)) prohibits any exclusions in the insurance policy not expressly permitted by a Virginia statute. United States v. GEICO, 409 F. Supp. 986 (E.D. Va. 1976).
5. As a result, the permissive user is entitled to identical protection in every respect as the named insured, even though the policy purports to restrict the liability coverage available to a permissive user to minimum requirements under the financial responsibility law. Hardware Mut. Cas. Co. v. General Acc. Fire & Life Assur. Corp., 212 Va. 780, 188 S.E.2d 218 (1972).

C. REMEDIAL PURPOSE

1. Omnibus Clause is to be given liberal interpretation to effectuate public policy of affording persons greater protection when injured or killed by an automobile. Utica Mut. Ins. Co. v. Rollason, 246 F.2d 105, 111 (4<sup>th</sup> Cir. 1957).

2. In Utica, court stated,

The spirit, not the letter, should control. Statutes requiring the insertion of the 'Omnibus Clause' in automobile liability policies reflect a clear cut policy to protect the public. They should be construed and applied so as to carry out this policy.

Utica, 246 F.2d at 110.

3. The Omnibus Clause was enacted for the benefit of the innocent party or parties who suffered damages. See Liberty Mut. Ins. Co. v. Venerable, 194 Va. 357, 73 S.E.2d 366 (1956); see also Aetna Casualty and Surety Co. v. Czoka, 200 Va. 385, 105 S.E.2d 869 (1958).
4. One of the principle aims of the Omnibus Clause is "to establish a more comprehensive provision for the public by conferring financial answerability

upon *any* driver.” Burnstein v. Nationwide Mut. Ins. Co., 458 F.2d 506, 508 (4<sup>th</sup> Cir. 1972).

5. Thus, the general public is a third party beneficiary of the automobile insurance contract. Bernstein v. Nationwide Mut. Ins. Co., 458 F.2d 506 (4<sup>th</sup> Cir. 1972)
6. Any language in an automobile insurance policy at variance with the Omnibus Clause is void and will be construed so as to comply with the remedial purposes of §38.2-2204. State Farm Mut. Auto. Ins. Co. v. Drewry, 191 F.Supp. 852 (1960) *aff’d* 316 F.2d 716 (4<sup>th</sup> Cir. 1963)

#### D. GENERAL CONSIDERATIONS

1. Declaratory Judgment Action: Once an insurer has denied coverage based on a lack of permissive use, general course is to file a declaratory judgment action (“dec. action”) pursuant to Va. Code § 8.01-184 et seq. (Exhibit 2)
  - a. There must be a justiciable controversy in order to file a dec. action. Reisen v. Aetna Life & Cas. Co., 225 Va. 327, 302 S.E.2d 529 (1983).
  - b. For a justiciable controversy to exist in the context of a permissive use case, thus allowing the court to hear the issue, all necessary and related parties must be named as defendants, including all insurance companies having coverage at stake, all drivers and all owners of vehicles involved. Erie Ins. Group v. Hughes, 240 Va. 165, 393 S.E.2d 210 (1990).
  - c. Venue for dec. action controlled by venue statutes, Va. Code § 8.01-257 et seq. Thus, look to Category B Permissible Venue to determine most favorable venue.
  - d. Where dec. action involves issues of fact triable by a jury, those issues may be submitted to a jury in the form of interrogatories. Va. Code § 8.01-188.
2. Burden of Proof: Party seeking to bring himself within the Omnibus Clause and thereby establish insurance coverage has the burden of proof. Hartford Fire Ins. Co. v. Davis, 246 Va. at 495, 436 S.E.2d 429 (1993); Hartford Accident & Indem. Co. v. Peach, 193 Va. 260, 264-65, 68 S.E.2d 520 (1952).

- a. Thus, plaintiff must prove that the defendant had the express or implied permission of the named insured to operate the vehicle at the time of the accident.
  - b. The burden of proof must be viewed in light of the fact that Virginia's Omnibus Clause is remedial in nature and is to be liberally construed in order to broaden coverage. Emick v. Dairyland Ins. Co., 519 F.2d 1317, 1121 (4<sup>th</sup> Cir. 1975); State Farm Mut. Auto. Ins. Co. v. Cook, 186 Va. 658, 666, 43 S.E.2d 863 (1947).
  - c. Once an injured party offers proof that the driver operating the vehicle was a permissive user of the named insured, the burden then shifts to the insurer to produce evidence to the contrary. Union Indem. Co. v. Small, 154 Va. 458, 466, 153 S.E. 685 (1931).
  - d. If the insurer cannot establish evidence sufficient to support a finding that there was no permissive use, then the issue is not for the fact finder and may be decided as a matter of law by the Court. Va. Farm Bur. Mut. Ins. Co. v. APCO, 228 Va. 72, 78, 321 S.E.2d 84, 87 (1984).
3. Whether there is permission to use a car is generally a question of fact. Virginia Farm Bureau Mut. Ins. Co. v. APCO, 228 Va. 72, 78, 321 S.E.2d 84 (1984).
  4. The term "consent", as used in statutory Omnibus Clauses, has same meaning as term "permission" generally used in case law. Emick v. Dairyland Ins. Co., 519 F.2d 1317 (4<sup>th</sup> Cir. 1975).
  5. "Use" of vehicle: To determine whether person was "using" insured vehicle within meaning of statute defining "insured" to include permissive user, relevant inquiry is whether there was causal relationship between accident and use of insured vehicle *as vehicle*. Edwards v. GEICO, 256 Va. 128, 500 S.E.2d 819 (1998)

#### E. EXPRESS PERMISSION

1. In order to come within the scope of the Omnibus Clause, a driver must have either the express or implied permission of the named insured to operate the vehicle at the time of the accident. Fidelity and Cas. Co. v. Harlow, 191 Va. 64, 66, 59 S.E.2d 872 (1950).
2. Express permission defined as being "of an affirmative character, directly and distinctly stated, clear and outspoken, and not merely implied or left to inference." Hinton v. Indem. Ins. Co., 175 Va. 205, 8 S.E.2d 279 (1940). Also Aetna v. Czoka, 200 Va. 385, 390-391, 105 S.E.2d 869 (1958).

3. Express permission to use a vehicle for one purpose does not grant or imply permission for all other purposes. Hartford Fire Ins. v. Davis, 246 Va. 495, 498, 436 S.E.2d 429 (1993); State Farm Mut. Auto. Ins. Co. v. Geico Indem. Co., 241 Va. 326, 329-30, 402 S.E.2d 21, 22 (1991); State Farm Mut. Auto. Ins. Co. v. Cook, 186 Va. 658, 665, 43 S.E.2d 863, 866 (1947). See also Sordelett v. Mercer, 185 Va. 823, 40 S.E.2d 289, 294 (1946), (holding that an employee who was given express permission to use a truck in order to get his supper had no permission to use it to find a girl friend for a fellow worker. "Permission to do a specific thing is not permission to do all things.").
4. BUT, where permission to use the vehicle is given generally, as opposed to permission to use the vehicle in a specified manner and a specified purpose, that express permission will cover any future or additional times that the permittee wishes to use the vehicle. Maryland Cas. Co. v. Hoge, 153 Va. 204, 212, 149 S.E. 448, 450 (1920). In Hoge, the Court held that where the wife of the named insured had the **general permission** to operate the vehicle, it was not necessary for her to obtain **specific permission** for each and every trip thereafter. *Id.* at 212, 149 S.E. at 450 (emphasis added).

F. IMPLIED PERMISSION: GENERAL CONCEPTS

1. Because of the remedial purposes of the Omnibus Clause, the Virginia Supreme Court has, in theory, generally attempted to construe the term "implied permission" liberally in interpretation and application. See State Farm Mut. Auto. Ins. Co. v. GEICO Indem. Co., 241 Va. 326, 402 S.E.2d 21 (1991).
2. As applied to permissive use cases under the Omnibus Clause, Virginia has adopted the definition of "implied" found in Webster's New International Dictionary (2d Ed.), as "inferential or tacitly conceded." Hinton v. Indemnity Ins. Co., 175 Va. 205, 213, 214, 8 S.E.2d 279, 283 (1940).
3. It involves an inference arising from a **course of conduct or relationship between the parties**, in which there is mutual acquiescence or lack of objection under circumstances signifying assent. An implied permission is not, therefore, confined alone to affirmative action." Aetna v. Czoka, 200 Va. 385, 390-391, 105 S.E.2d 869 (1958). See also Hartford Fire Ins. Co. v. Davis, 246 Va. 495, 431 436 S.E.2d 429 (1993); Hartford Accident, Etc., Co. v. Peach, 193 Va. 260, 266, 68 S.E.2d 520, 523 (1952); State Farm v. Cook, 186 Va. 658, 667, 43 S.E.2d 863, 867 (1947).
  - a. Or, stated another way by a Federal Court: "Under Virginia law, implied permission arises from either a course of conduct involving a mutual acquiescence in, or a lack of objection to, a continued use of the automobile,

signifying consent." Liberty Mutual Insurance Company v. Mueller, 432 F.Supp. 325, 328 (W.D. Va. 1977) *aff'd*, 570 F.2d 508 (4th Cir. 1978).

- b. Thus, the implied permission can arise either from (1) a prior course of conduct or (2) the relationship of the parties.
4. Implied permission is not confined to affirmative action and may also be premised upon a lack of action by the named insured. Hinton, supra.
5. The Court noted in Hinton, that, in terms of an insurance policy, permission:  

is not necessarily limited to that granted by arrangement between the parties or otherwise in definite express terms. It may arise and be implied from a course of conduct, pursued with knowledge of the facts, for such time and in such manner as to signify, and be compatible only with, an understanding consent amounting to a grant of the privilege involved.
6. In implied permission cases, the term "permission" has a negative rather than an affirmative implication; that is, a permitted act may be one not specifically prohibited as contrasted to an act affirmatively and specifically authorized. Hinton, supra.
  - a. For example, the absence of an explicit restriction on the use of an automobile is a strong indication that such use is permissible. Kemp v. MFA Mut. Ins. Co., 468 S.W.2d 700 (Mo. App. 1971).
7. Primary factors to be considered by the court in determining whether implied permission exists include (1) the practice of the parties over a sufficient period of time prior to the day on which the insured car was being used; (2) lack of objection by the permitor to the use of the vehicle by the permittee; and (3) leaving the keys in or with a vehicle. State Farm Mut. Auto. Ins. Co. v. Allstate Ins. Co., 43 Va. Cir. 419, 425 (Frederick Co. Oct. 3, 1997) (*citing* 7 Am. Jur. 2D Automobile Insurance §252). *See also* 10B Michie's Jurisprudence, *Insurance* §150.

G. IMPLIED PERMISSION: SCOPE OF PERMISSION

1. Permission to use a vehicle is not permission to use it for all purposes. State Farm Mut. Auto. Ins. Co. v. Cook, 186 Va. 658, 666, 43 S.E.2d 863 (1947).
2. However, when express permission to use a vehicle is given generally, as opposed to permission to use the vehicle in a specified manner and a

specified purpose, there is implied permission to use the vehicle for any future or additional times that the permittee wishes to use the vehicle. See Maryland Cas. Co. v. Hoge, 153 Va. 204, 149 S.E. 448 (1920).

- a. When the named insured's wife had the general permission to operate the vehicle, it was not necessary for her to obtain specific permission each time she wanted to sue the vehicle thereafter. Id.
- b. Where the named insured gave express permission to a permittee to operate a motor vehicle without giving any specific limiting instructions, the permittee had implied permission to use the automobile beyond the scope of the express permission. Emick v. Dairyland Ins. Co., 519 F.2d 1317, 1322 (4<sup>th</sup> Cir. 1975).

#### H. IMPLIED PERMISSION: PRIOR COURSE OF CONDUCT

1. Implied permission based on a prior course of conduct refers to conduct, pursued, with knowledge of the facts, for such time and in such manner as to signify, and be compatible only with, an understanding consent amounting to a grant of the privilege involved. Hinton, supra.
2. It is because of a prior course of conduct that a permitted act may be one not specifically prohibited, as contrasted to an act affirmatively and specifically authorized. Liberty Mut. Ins. Co. v. Venable, 194 Va. 357, 73 S.E.2d 366 (1952).
  - a. A lack of objection to a continued use of a vehicle is interpreted as signifying assent such that a permitted act may be one which is not specifically prohibited. Hartford Acc. & Indem. Co. v. Peach 193 Va. 260, 68 S.E.2d 520 (1952)
  - b. As opposed to a one time use of a vehicle, a course of conduct signifies a pattern based on multiple or even ongoing use of a vehicle.
3. Present all facts that establish the prior course of conduct: prior uses of vehicle, manner permission given, vehicle left with keys in it, driver had his own set of keys, driver paid for gas & maintenance, named insured saw defendant driving vehicle beyond any limits imposed, defendant had no other means of transportation, named insured benefited from having driver use vehicle, named insured loaned vehicle to others, nature of permission given to others, etc.

- a. Use the three criteria laid out in State Farm Mut. Auto. Ins. Co. v. Allstate Ins. Co., 43 Va. Cir. 419, 425 (Frederick Co. Oct. 3, 1997) (*citing* 7 Am. Jur. 2D Automobile Insurance §252):
  - i. practice of the parties
  - ii. lack of objection
  - iii. leaving the keys in or with the vehicle
  
4. A driver who in the past had unfettered or exclusive use to a vehicle had the implied permission to use a vehicle at the time of the accident. Liberty Mutual Ins. Co. v. Tiller, 189 Va. 544, 53 S.E.2d 814 (1949).
  - a. Prior personal use of a vehicle with the knowledge of the named insured will support the inference of implied permission to operate the vehicle for personal use at the time of the accident, notwithstanding an express prohibition against such use. City of Norfolk v. Ingram, 235 Va. 433, 436, 367 S.E.2d 725 (1988).
  
5. Lack of objection: Implied permission exists even when the driver is using the vehicle beyond the restrictions the named insured placed on its use and/or has let someone drive who the named insured has specifically forbidden from using the vehicle if the named insured knew of this conduct on prior occasions but did not object or rescind permission for the driver to use the vehicle. See Erie Ins. Group v. Hughes, 240 Va. 165, 393 S.E.2d 210 (1990) (implied permission found even though named insured had expressly forbidden permissive user from allowing grandson to use car where evidence showed named insured did not take car away after he was aware that grandson had used car before on one occasion); Norfolk v. Ingram, supra. (Fact that City knew police officer used vehicle for own purpose despite rule not to do so created implied permission to use vehicle when accident occurred during period of personal use); Va. Farm Bur. Mut. Ins. Co. v. APCO, 228 Va. 72, 78, 321 S.E.2d 84, 87 (1984) (implied permission where father who told son not to let anyone else drive vehicle did not object when he saw son's friend driving vehicle).

#### I. IMPLIED PERMISSION: RELATIONSHIP OF THE PARTIES

1. In addition to a previous course of conduct, implied permission can also be inferred from a specific relationship between the parties. Hinton, supra.
  - a. In deciding whether there is implied permission, the general relationship existing between the named insured and the operator of the vehicle is of paramount importance, and where the parties are related, weaker evidence will support a finding of permissive use than where the parties are only acquaintances or are strangers.

*Hardware Mut. Cas. Co. v. Home Indemnity Co.*, 241 Cal. App.2d 303, 50 Cal. Rptr. 508 (1966).

2. The fact that the wife of a named insured was operating a vehicle provides sufficient evidence upon which to base a finding that the wife had the implied permission to operate the vehicle, absent proof to the contrary. Coureas v. Allstate Inc. Co., 198 Va. 77, 82, 92 S.E.2d 378 (1956).
3. In American Auto. Ins. Co. v. Fulcher, 201 F.2d 751, 756 (4<sup>th</sup> Cir. 1953), a named insured's brother was determined to have had implied permission even though the named insured had no knowledge that his brother was using his vehicle at the time of the accident
4. Same rule applied in other states: American Employers' Ins. Co. v. Cornell, 225 Ind. 559, 76 N.E.2d 562 (1948) (holding that a husband had the implied permission to operate a vehicle owned and insured by his wife); Tisdale v. Nationwide Mut. Ins. Co., 148 Ind. App. 670, 269 N.E.2d 390 (1971) (holding that an insured vehicle in the custody of a family member with the same last name as the named insured was sufficient circumstantial evidence to find implied permission to operate the vehicle); Pennsylvania Thresherman & Farmers' Mut. Cas. Ins. Co. v. Crapet, 199 F.2d 850 (5<sup>th</sup> Cir. 1952) (fact that estranged wife living in another state had complete possession and control even after separation from named insured husband established that the wife had the implied permission to use the vehicle for general and unrestricted use).

J. IMPLIED PERMISSION: BUSINESS VS. SOCIAL USE

1. In cases where an employee uses his employer's vehicle or a business is using a vehicle owned by one of its customers that it has control over, the courts have more narrowly construed the scope of implied permission. E.g. Aetna Cas. Ins. V. Anderson, 200 Va. 385 (1958); Sordelett v. Mercer, 185 Va. 823, 40 S.E.2d 289, 294 (1946); Fidelity and Ca. Co. v. Harlow, 191 Va. 64 (1950); Hartford Accident & Indem. Co. v. Peach, 193 Va. 260, 264-65, 68 S.E.2d 520 (1952).
2. Again, general rule is that permission to do a specific thing is not permission to do all things. Liberty Mut. Ins. Co. v. Venable, 194 Va. 357, 73 S.E.2d 366 (1952); State Farm Mut. Auto. Ins. Co. v. Cook, 186 Va. 658, 666, 43 S.E.2d 863 (1947).
3. However, implied permission is to be more liberally found where there has been some express consent for social as opposed to business purposes. " Liberty Mutual Insurance Company v. Mueller, 432 F.Supp. 325, 328 (W.D. Va. 1977) *aff'd*, 570 F.2d 508 (4th Cir. 1978).

4. Addressing a similar issue, a Federal Court held that general permission, or a comprehensive permission, is much more readily to be assumed (ie: permissive use) where the use of the car is for social or non-business purposes. Emick v. Dairyland Ins. Co., 519 F.2d 1317, 1322 (4<sup>th</sup> Cir. 1975).
  - a. Implied permission to use a vehicle “for a personal errand or other social purposes . . .” can be found simply by the granting of permission to operate a vehicle in a social context without “specific limiting instructions.” Id.

K. IMPLIED PERMISSION: DEVIATIONS FROM PERMISSION

1. Deviations: A substantial deviation by the driver from the express or implied permission granted by the named insured will defeat a finding of permissive use. Aetna Cas. & Sur. Co. v. Anderson, 200 Va. 385, 105 S.E.2d 869 (1958) (holding that where employee was given company vehicle for commercial use and goes off on “independent venture” for private pleasure, totally unrelated to employer’s business, this is outside the scope of his specific permission); Sordelett v. Mercer, 185 Va. 823, 40 S.E.2d 289, 294 (1946); Phoenix Ins. Co. v. Anderson & Powell, 170 Va. 406, 196 S.E. 629 (1938).
2. However, if deviation is slight or is overcome by other factors including social use or relationship of the parties, implied permission still exists. Jones v. New York Cas. Co., 23 F.Supp. 932, 937 (E.D. Va 1938) (holding that son, who made substantial deviation from permission given by father in allowing another to drive his father’s automobile, was still additional insured so as to render insurer liable.); Robinson v. Fidelity & Cas. Co. of New York, 190 Va. 368, 57 S.E.2d 93 (1950) (a slight 2-3 mile deviation from a direct route taken for the driver to perform a personal errand does not as a matter of law prevent a finding of implied permission).

L. IMPLIED PERMISSION: SECOND PERMITEE

1. These are cases where the named insured gives express or implied permission to one person (first permittee) who then gives permission to a second person (second permittee) who is driving the vehicle at the time of the accident.
2. In Virginia, the general rule is that a first permittee with whom the named insured has left a vehicle for his general use, as opposed to restricted or limited use, may permit its use by a second permittee, who is then deemed to have the implied permission to operate the vehicle from the named insured. Virginia Farm Bur. Ins. Co. v. APCO, 228 Va. 72, 77, 321 S.E.2d 84, 87 (1984); Robinson v. Fidelity & Cas. Co. of New York, 190 Va. 368, 372, 57 S.E.2d 93, 94 (1950). See also Wood v. Kok, 58 Wash. 2d 12, 360 P2d 576

(1961); State Farm Mut. Auto. Ins. Co. v. Foley, 624 S.W.2d 853 (Mo. App. 1981).

- a. Stated differently, a named insured who grants a first permittee broad and unfettered dominion over the insured vehicle, also impliedly authorizes the first permittee to allow a third person to operate the vehicle, thus rendering the latter an additional insured. See Farm Bur. Ins. Co. v. Allied Mut. Ins. Co., 180 Neb. 555, 143 N.W.2d 923 (1966); Krebsbach v. Miller, 22 Wis.2d 171, 125 N.W.2d 408 (1963).
3. The first permittee who has a vehicle for their own general use “stands in the shoes” of the named insured, and, thus, has the ability to grant permission to a second permittee. Robinson, supra.
    - a. A permittee with “general authority” over the vehicle can allow others to use that vehicle. Id.
  4. Robinson, supra is primary Virginia case on this issue. (Attached as Exhibit 3)
    - a. **FACTS:** The merchant seaman (named insured) left his vehicle with a woman whom he referred to as his wife, but who was actually his girlfriend (first permittee). The only restriction placed on the girlfriend’s use of the vehicle was the seaman’s statement that he did not want to find it wrecked when he returned. While the named insured was away, the girlfriend became romantically involved with another man (second permittee), who, with her permission, was driving the car when it was involved in an accident.
    - b. **HOLDING:** The fact that the girlfriend was in actual possession of the vehicle while the named insured was away at sea was sufficient proof of the fact that the vehicle had been turned over to her for her “general use” during the named insured’s absence.
    - c. **HOLDING:** Until the seaman returned, the girlfriend “stood in the shoes” of the named insured.
    - d. **HOLDING:** Because the second permittee (boyfriend) had express permission to operate the vehicle from the first permittee (girlfriend), he also had the implied permission of the named insured (seaman) at the time of the accident.
  5. Emergency Exception: As a general rule, if the named insured expressly prohibits anyone other than the first permittee from using the car, the consent of the named insured would not extend beyond the first permittee. However, exception under emergency circumstances. State Farm Mut. Auto. Ins. Co. v.

GEICO, 241 Va. 326, 331, 402 S.E.2d 21, 23 (1991)(Justice Lacy's opinion).

- a. To fall under exception, must show (1) an unforeseen incapacity necessitating a change of drivers; (2) whether the substituted driver acted reasonably under the circumstances; and (3) the exception only lasts as long as the incapacity. Id.
  - b. In State Farm, evidence that permitted driver was ill and requested passenger to drive was sufficient to establish prima facie case under emergency circumstances exception. Id.
6. Other Virginia "second permittee" cases
- a. Va. Farm Bur. Mut. Ins. Co. v. APCO, 228 Va. 72, 78, 321 S.E.2d 84, 87 (1984) (a person given "general use" of a vehicle by a named insured can then give permission to others to drive the vehicle).
  - b. Indiana Lumberman's Mut. Ins. Co. v. Janes, 230 F.2d 500 (5<sup>th</sup> Cir. 1956) (Mississippi Federal Court applied Virginia law to find that implied permission existed where named insured provided his brother with free use of his vehicle and allowed him to take it out of state to a Marine base)
  - c. Liberty Mutual Insurance Company v. Mueller, 432 F.Supp. 325, 328 (W.D. Va. 1977) *aff'd*, 570 F.2d 508 (4<sup>th</sup> Cir. 1978) (because rental care lessee violated rental contract by allowing friend to drive rental car, friend was not driving with the implied permission of the owner)
  - d. USAA v. Nationwide, 41 Va. Cir. 370 (Fairfax Cir. 1997) (because son had asked for specific permission each of few previous times he had driven vehicle, no basis to find his friend driving at the time of the accident had his father's implied permission).
7. Other states vary greatly on this issue. See "Omnibus Clause as extending automobile liability coverage to third person using car with consent of permittee of named insured," 21 A.L.R. 4<sup>th</sup> 1146.

## II. NEGLIGENCE ENTRUSTMENT

### A. GENERAL RULE/ELEMENTS OF PROOF

1. The principle of negligent entrustment has been stated as follows:

One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.

Restatement (Second) of Torts § 390 (1965)

2. With regard to motor vehicle cases, the test of liability in Virginia is whether the owner of the vehicle knew, or had reasonable cause to know, that he was entrusting his vehicle to an unfit driver, likely to cause injury to others. McNeil v. Spindler, 191 Va. 685, 690, 62 S.E.2d 13 (1950).
  - a. Same rule also applies to other instrumentalities negligently “entrusted” to a third person. E.g., Kingrey v. Hill, 245 Va. 76, 425 S.E.2d 798 (1993) (rifle alleged to have been “entrusted” by wife to husband).
3. Intoxication cases: In motor vehicle cases involving the intoxication of the defendant driver, the plaintiff must prove that the owner knew or had reason to know that the person to whom the vehicle was entrusted was addicted to the use of intoxicants, or has the habit of drinking. McNeil v. Spindler, 191 Va. 685, 62 S.E.2d 13 (1950).
  - a. The owner of the vehicle must know, or be chargeable with knowledge, that the driver’s habits are such that he is likely to drive while he is intoxicated. Id.; Crowell v. Duncan, 145 Va. 489, 134 S.E. 576 (1926).
4. Imputed knowledge: The test allows for liability based on both actual and imputed knowledge (“had reasonable cause to know”). Naturally, however, most of the reported cases deal with imputed or constructive knowledge.

### B. METHODS OF PROOF

1. Liability may be predicated upon evidence of:

- (1) Express permission
- (2) A pattern of conduct (ie: habit) supporting implied permission
- (3) Knowledge that the automobile will be used despite explicit instructions to the contrary.

Denby v. Davis, 212 Va. 836, 838, 188 S.E.2d 226, 229 (1972); Kingrey v. Hill, 245 Va. 76, 425 S.E.2d 798 (1993).

### C. HABIT EVIDENCE

1. The plaintiff can establish the imputed knowledge by demonstrating a pattern of conduct sufficient to show that the owner had reasonable cause to know that he was entrusting his vehicle or other instrumentality to a person likely to cause injury to others. McNeil v. Spindler, 191 Va. 685, 62 S.E.2d 13 (1950).
2. Evidence of habit
  - a. Crowell v. Duncan, 145 Va. 489, 134 S.E. 576 (1926): son had *reputation in community for being addicted to alcohol and his drinking habits were known to father*; Court found liability on both respondeat superior and negligent entrustment grounds
    - i. Because of son's reputation and well-known drinking habits, *including being arrested for transporting alcohol*, father was put on notice that it was likely son would drink and drive. Though witnesses testified that son was good and careful driver, Court imposed affirmative duty on father to take active steps to prevent his son from driving because of his *predisposition for drinking and presumed addiction to alcohol*. Because of son's intemperate habits, he was deemed "incompetent" to operate car. Id.
  - b. Denby v. Davis, 212 Va. 836, 188 S.E.2d 226 (1972): evidence that driver with congenital eye defect so severe that he could not obtain a license had driven owner's vehicle twenty times previously with owner's permission and had been warned by boy's father not to allow him to drive established necessary imputable knowledge.
3. No evidence of habit
  - a. Laughlin v. Rose, 200 Va. 127, 104 S.E.2d 782 (1958). Driver, Shankle, was entrusted with vehicle by owner, Laughlin. Shankle subsequently drank enough alcohol to have a BAC of .13 at the time of the accident. There was no evidence that Shankle was an

alcoholic, in the habit of drinking or likely to drive while intoxicated and no knowledge on the part of Laughlin as to her drinking habits or reputation or even that she had anything to drink on the day he entrusted the car to her.

- b. Hack v. Nester, 241 Va. 499, 503, 404 S.E.2d 42 (1991). Knowledge that person entrusted with vehicle “occasionally” drank enough alcohol to affect him, “occasionally” drove after he had been drinking and had 2 DUI convictions and had lost his license as a consequence, insufficient evidence of habit such that he was likely to drive while intoxicated.
- c. McNeil v. Spindler, 191 Va. 685, 62 S.E.2d 13 (1950). Employee, injured 3<sup>rd</sup> party while driving truck owned by principals of mill business. Employee was intoxicated at time of accident. Although employee was known by employer to take a drink “most any time” he could get it, he was found not to have a reputation as a drinking man or addicted to alcohol; he had never been in an accident in the 9 years working for the employer; he had never been seen or charged with drinking while driving. Based on these facts, the Court concluded that the owners did not know or have reason to know that employee was likely to be drive while intoxicated.
- d. Kingrey v. Hill, 245 Va. 76, 425 S.E.2d 798 (1993). Wife failed to keep her rifle under lock and key. Husband took possession of it and wounded driver of a vehicle. Court found no “entrustment” of rifle, since was no express permission and no pattern of conduct sufficient to show implied permission. One incident a decade ago involving husband’s use of firearm insufficient evidence.

D. NEGLIGENCE PER SE:

1. If the entrustment violates a statute, then the entrustment may be negligence per se. Hack v. Nester, 241 Va. 499, 503, 404 S.E.2d 42 (1991).
2. Unlicensed driver: Furnishing one’s vehicle to an unlicensed driver constitutes negligence per se. Hack v. Nester, 241 Va. 499, 503, 404 S.E.2d 42 (1991).
  - a. Va. Code §46.2-349: “No person shall authorize or knowingly permit a motor vehicle owned by him or under his control to be driven by any person who has no legal right to do so or in violation of any of the provisions of this chapter.”.

E. PROXIMATE CAUSE

1. Even with a showing of negligent entrustment through negligence per se or through habit evidence, the plaintiff must establish that the negligent entrustment was a proximate cause of the plaintiff's injuries. Turner v. Lotts, 244 Va. 554, 422 S.E.2d 765 (1992).
2. In a case where the defendant did not have a license, the plaintiff must establish a causal nexus between the loss of license and the collision at issue. Hack, supra. Absent a showing of proximate cause, the plaintiff cannot recover against the owner. Id.
  - a. If the defendant was eligible to get his license reinstated and was physically qualified to drive, no proximate cause exists. Id.
  - b. If the driver was physically unable to hold a license because of some physical defect such that the disqualification to hold a license was a cause of the injury, the owner may be held liable. Denby v. Davis, 212 Va. 836, 188 S.E.2d 226 (1972) (see below).
3. Evidence of Proximate Cause: Denby v. Davis, 212 Va. 836, 188 S.E.2d 226 (1972).
  - a. **FACTS:** Driver suffered from nystagmus, a congenital eye defect impairing his vision and disqualifying him from receiving a driver's vision. Eye disorder was well-known to owner of vehicle, Denby, who periodically paid driver to wash his car. While Denby did not grant express permission to the driver to drive his vehicle, he gave keys to the driver to move his car from the garage to the driveway to be washed and had been warned by the driver's father not to permit the boy to operate any motor vehicle because of his impaired vision and lack of license.
  - b. **HOLDING:** Affirmed jury verdict holding Denby liable for negligent entrustment. Driver's deteriorating eye disorder was a contributing proximate cause in addition to speeding.
4. Lack of Proximate Cause
  - a. Turner v. Lott, 244 Va. 554, 422 S.E.2d 765 (1992). Mr. and Mrs. Lott knew that son had received 3 tickets and been involved in 2 auto accidents, such that Lotts set up different auto insurance policy for son. However, evidence or allegation that son was mentally or physically impaired; that son under the influence of alcohol, that car was defective; that license had been revoked or suspended; or that son was negligent in previous auto accidents.

- i. HOLDING: Court affirmed summary judgment for parents because, plaintiff had not even alleged conduct sufficient to raise issue of negligence per se and there was no showing that past conduct was a proximate cause of this accident.
  - ii. In dicta, Justice Hassell discussed instances where negligence prong of prima facie case would likely be shown – e.g. knowingly entrusting vehicle to one (1) who suffers from mental or physical infirmity; (2) is under the influence of alcohol (or is habitually drunk), (3) when the vehicle is defective; or (4) after minor had negligently caused series of auto accidents.
  - iii. However, the Virginia Supreme Court in Turner refused to extend liability to an otherwise licensed driver who has a traffic record, absent other evidence of negligence or unfitness by the minor.
- b. Hack v. Nester, 241 Va. 499, 503, 404 S.E.2d 42 (1991)(attached as Exhibit 4) The owner, Weaver, entrusted her car to Hack with whom she cohabitated knowing that he had no driver’s license. Owner was also aware that Hack’s driver’s license had been suspended in 1978 and again in 1984 for separate DUI convictions. Hack consumed a pitcher of beer prior to the accident..
- i. HOLDING: While knowingly giving one’s car to someone without a license is negligence per se, Hack’s lack of license had no causal connection with collision because he was eligible and physically qualified to have license restored. No negligent entrustment was shown despite evidence that owner knew Hack “occasionally” drank enough alcohol to affect him, “occasionally” drove after he had been drinking in addition to her knowledge that Hack had 2 DUI convictions and had lost his license as a consequence. The Court held, however, that this was insufficient evidence to establish that the owner knew Hack was “likely to drive while he was intoxicated.”
- c. Laughlin v. Rose, 200 Va. 127, 104 S.E.2d 782 (1958). Finding that while it was negligence per se for owner, Laughlin, to knowingly permit unlicensed driver, to use his vehicle, lack of license was not proximate cause of collision. There was no evidence that the driver lost her license because of incompetency. Moreover, while the driver had been drinking and had a BAC of .13 at the time of the accident, this evidence was excluded from the jury’s consideration. Regardless, the Court held that any negligence by Laughlin in entrusting his vehicle to the driver “must be determined by what he knew or should have known at the time he entrusted the car to her” and there was no evidence that the driver was an alcoholic or in the habit of drinking or likely to drive while intoxicated.

- d. White v. Edwards Chevrolet Co., 186 Va. 669, 672, 43 S.E.2d 870, 871 (1947). An otherwise competent driver who's failure to renew his driver's permit was a statutory violation, was not proximate cause of accident.
- e. Southern Railway Co. v. Vaughn's Adm'r, 118 Va. 692, 704, 88 S.E. 305, 308 (1916) Failure of competent driver to obtain chauffeur's license was not a proximate cause of accident.

F. NEGLIGENT ENTRUSTMENT v. PARENTAL NEGLECT

- 1. In cases dealing with parents, negligent entrustment is to be distinguished from parental neglect.
- 2. In Virginia, the well-established rule is that the mere fact of paternity, in the absence of a master-servant or principal-agent relationship, does not compel liability on parents for the torts of their minor child. Bell v. Hudgins, 232 Va. 491, 493, 352 S.E.2d 332 (1987) (citing Hackley v. Robey, 170 Va. 55, 65, 195 S.E. 689, 693 (1938)).
- 3. Likewise, the Virginia Supreme Court has refused to impose civil liability on parents who fail to control their minor child's criminal behavior. Bell supra.
  - a. In Bell the Court relied upon the rationale in Williamson v. The Old Brogue, Inc., 232 Va. 350, 350 S.E.2d 621 (1986) (declining to create a cause of action for dram shop liability) to hold that because of the many societal and public policy considerations involved, such a decision is more properly addressed by the legislature. See also Kelley v. Doremus, 38 Va. Cir. 44 (Fairfax Cir. 1995) (dismissing case against a social host for injuries caused by an underage driver intoxicated from alcohol provided at the host's party).
  - b. The Court in Bell also noted that the General Assembly had enacted a statute, Va. Code §8.01-44, which imposes vicarious liability on parents for the willful or malicious destruction of property by minors.
    - i. The last sentence of §8.01-44 states that "[t]he provisions of this statute shall be in addition to, and not in lieu of, any other law imposing upon a parent liability for the acts of the minor child." The Court stated in dicta that this is a vicarious liability statute without determination of the parents' independent negligence.
    - ii. The "additional" law mentioned in the last sentence of §8.01-44 refers to existing law based on vicarious liability, such as

liability of a parent engaged in a principal-agent relationship with his or minor child.

4. In Crowell v. Duncan, 145 Va. 489, 134 S.E. 576 (1926), the Court upheld a jury verdict holding father liable for injuries caused by son, who was intoxicated and recklessly driving father's car at time of accident.
  - a. Son had general reputation in community as a drinking man, son's drinking habits were known by father and father also knew son had license revoked for alcohol abuse.
  - b. Liability was based on negligent entrustment and respondeat superior principles because the vehicle driven by the son at the time of the accident was also used as a taxi, and the son acted within scope of his authority as employee/servant of father.

**§ 38.2-2204. Liability insurance on motor vehicles, aircraft and watercraft; standard provisions; "omnibus clause." —**

A. No policy or contract of bodily injury or property damage liability insurance, covering liability arising from the ownership, maintenance, or use of any motor vehicle, aircraft, or private pleasure watercraft, shall be issued or delivered in this Commonwealth to the owner of such vehicle, aircraft or watercraft, or shall be issued or delivered by any insurer licensed in this Commonwealth upon any motor vehicle, aircraft, or private pleasure watercraft that is principally garaged, docked, or used in this Commonwealth, unless the policy contains a provision insuring the named insured, and any other person using or responsible for the use of the motor vehicle, aircraft, or private pleasure watercraft with the expressed or implied consent of the named insured, against liability for death or injury sustained, or loss or damage incurred within the coverage of the policy or contract as a result of negligence in the operation or use of such vehicle, aircraft, or watercraft by the named insured or by any such person; however, nothing contained in this section shall be deemed to prohibit an insurer from limiting its liability under any one policy for bodily injury or property damage resulting from any one accident or occurrence to the liability limits for such coverage set forth in the policy for any such accident or occurrence regardless of the number of insureds under that policy. Each such policy or contract of liability insurance, or endorsement to the policy or contract, insuring private passenger automobiles, aircraft, or private pleasure watercraft principally garaged, docked, or used in this Commonwealth, that has as the named insured an individual or husband and wife and that includes, with respect to any liability insurance provided by the policy, contract or endorsement for use of a nonowned automobile, aircraft or private pleasure watercraft, any provision requiring permission or consent of the owner of such automobile, aircraft, or private pleasure watercraft for the insurance to apply, shall be construed to include permission or consent of the custodian in the provision requiring permission or consent of the owner.

B. For aircraft liability insurance, such policy or contract may contain the exclusions listed in § 38.2-2227. Notwithstanding the provisions of this section or any other provisions of law, no policy or contract shall require pilot experience greater than that prescribed by the Federal Aviation Administration, except for pilots operating air taxis, or pilots operating aircraft applying chemicals, seed, or fertilizer.

C. No policy or contract of bodily injury or property damage liability insurance relating to the ownership, maintenance, or use of a motor vehicle shall be issued or delivered in this Commonwealth to the owner of such vehicle or shall be issued or delivered by an insurer licensed in this Commonwealth upon any motor vehicle principally garaged or used in this Commonwealth without an endorsement or provision insuring the named insured, and any other person using or responsible for the use of the motor vehicle with the expressed or implied consent of the named insured, against liability for death or injury sustained, or loss or damage incurred within the coverage of the policy or contract as a result of negligence in the operation or use of the motor vehicle by the named insured or by any other such person; however, nothing contained in this section shall be deemed to prohibit an insurer from limiting its liability under any one policy for bodily injury or property damage resulting from any one accident or occurrence to the liability limits for such coverage set forth in the policy for any such accident or occurrence regardless of the number of insureds under that policy. This provision shall apply notwithstanding the failure or refusal of the named insured or such other person to cooperate with the insurer under the terms of the policy. If the failure or refusal to cooperate prejudices the insurer in the defense of an action for damages arising from the operation or use of such insured motor vehicle, then



the endorsement or provision shall be void. If an insurer has actual notice of a motion for judgment or complaint having been served on an insured, the mere failure of the insured to turn the motion or complaint over to the insurer shall not be a defense to the insurer, nor void the endorsement or provision, nor in any way relieve the insurer of its obligations to the insured, provided the insured otherwise cooperates and in no way prejudices the insurer.

Where the insurer has elected to provide a defense to its insured under such circumstances and files responsive pleadings in the name of its insured, the insured shall not be subject to sanctions for failure to comply with discovery pursuant to Part Four of the Rules of the Supreme Court of Virginia unless it can be shown that the suit papers actually reached the insured, and that the insurer has failed after exercising due diligence to locate its insured, and as long as the insurer provides such information in response to discovery as it can without the assistance of the insured.

D. Any endorsement, provision or rider attached to or included in any such policy of insurance which purports or seeks to limit or reduce the coverage afforded by the provisions required by this section shall be void, except an insurer may exclude such coverage as is afforded by this section, where such coverage would inure to the benefit of the United States Government or any agency or subdivision thereof under the provisions of the Federal Tort Claims Act, the Federal Drivers Act and Public Law 86-654 District of Columbia Employee Non-Liability Act, or to the benefit of the Commonwealth under the provisions of the Virginia Tort Claims Act (§ 8.01-195.1 et seq.) and the self-insurance plan established by the Department of General Services pursuant to § 2.2-1837 for any state employee who, in the regular course of his employment, transports patients in his own personal vehicle. (Code 1950, § 38-238; 1952, c. 317, § 38.1-381; 1958, c. 282; 1959, Ex. Sess., cc. 42, 70; 1970, c. 462; 1962, c. 457; 1964, c. 477; 1966, cc. 182, 459; 1968, cc. 199, 721; 1970, c. 494; 1971, Ex. Sess., c. 216; 1973, cc. 225, 390; 1974, c. 87; 1976, cc. 121, 122; 1977, c. 78; 1979, c. 113; 1980, cc. 326, 331; 1981, Sp. Sess., c. 6; 1982, cc. 638, 642; 1984, c. 541; 1985, cc. 39, 325; 1986, cc. 544, 562; 1992, c. 140; 1995, c. 652; 1999, c. 4.)

**The 1999 amendments**, at the end of the first sentence in subsections A and C, inserted “however, nothing contained in this section shall be deemed to prohibit an insurer from limiting its liability under any one policy for bodily injury or property damage resulting from any one accident or occurrence to the liability limits for such coverage set forth in the policy for any such accident or occurrence regardless of the number of insureds under that policy.”

**The 1995 amendments** *added* language in subsection D as follows:

D. Any endorsement, provision or rider attached to or included in any such policy of insurance which purports or seeks to limit or reduce the coverage afforded by the provisions required by this section shall be void, except an insurer may exclude such coverage as is afforded by this section, where such coverage would inure to the benefit of the United States Government or any agency or subdivision thereof under the provisions of the Federal Tort Claims Act, the Federal Drivers Act and Public Law 86-654 District of Columbia Employee Non-Liability Act, *or to the benefit of the Commonwealth under the provisions of the Virginia Tort Claims Act (§ 8.01-195.1 et seq.) and the self-insurance plan established by the Department of General Services pursuant to § 2.1-526.8 for any state employee who, in the regular course of his employment, transports patients in his own personal vehicle.*

V I R G I N I A:

IN THE CIRCUIT COURT FOR THE COUNTY OF HENRICO

DONALD LEWIS SCRUGGS,  
Plaintiff,

v.

Case No.: \_\_\_\_\_

STATE FARM MUTUAL AUTOMOBILE  
INSURANCE COMPANY, JOHN HARRIS,  
AND JOHN HUFFSTEDLER

BILL OF COMPLAINT FOR DECLARATORY JUDGMENT

COMES NOW the Plaintiff, Donald Lewis Scruggs, by counsel, and for his Bill of Complaint for Declaratory Judgment, states as follows:

1. This is an action for Declaratory Judgment brought pursuant to Virginia Code Ann. § 8.01-184 et seq. for the determination of the rights and liabilities of the parties hereto with regard to a certain automobile insurance policy issued by State Farm Mutual Automobile Insurance Company ("State Farm") to John W. Harris, Policy Number: 373 3296-46B, Claim Number 46-3886-884.

2. The plaintiff, Donald L. Scruggs ("Scruggs"), is a resident of the County of Henrico, Virginia.

3. Defendant State Farm is an Illinois corporation, registered and qualified to do business in the Commonwealth of Virginia. State Farm transacts business, maintains offices and has a registered agent in the Commonwealth of Virginia.

4. Defendant John W. Harris ("Harris") is a resident of the County of Henrico, Virginia.



5. On or about February 22, 1997, Scruggs was a passenger in a motor vehicle operated by Defendant, John Hufstedler ("Hufstedler") that was traveling south on Virginia State Route 156/Cold Harbor Road in Hanover County, Virginia.

6. At the time and place aforesaid, Hufstedler did negligently, and with conscious disregard for the safety of Scruggs and other, cause his vehicle to crash into a utility pole and then into an embankment.

7. As a direct and proximate result of Hufstedler's negligence, Scruggs suffered severe and permanent injuries and to date has incurred medical expenses in excess of \$30,000.00.

8. At the time of the accident, Hufstedler was operating a 1973 Ford pick-up truck ("the vehicle"), Virginia license plate ZVS-2343, owned by Harris and insured by State Farm under Policy Number: 373 3296-46B.

9. Hufstedler was operating the vehicle with the express and implied permission of Harris.

10. Pursuant to the provisions of Virginia's Omnibus Clause, Va. Code Ann. § 38.2-2204, State Farm is required to extend coverage to anyone operating the vehicle with the express or implied permission of Harris.

11. At the time and place aforesaid, Hufstedler was an insured under said policy issued by State Farm.

12. The subject accident was reported to State Farm in accordance with the automobile policy issued to Harris.

13. Demand has been made upon State Farm and John Harris to

make payment under said policy for the injuries and expenses incurred by Scruggs.

14. State Farm has failed to comply with the contractual provisions of said policy.

15. State Farm and John harris have refused to make payments for any damages arising out of the motor vehicle accident of February 22, 1997.

16. There now exists an actual and justiciable controversy and dispute between the parties, involving the obligations of State Farm to provide insurance coverage to Scruggs under the policy issued to Harris for damages which resulted from the accident of February 22, 1997.

17. This Court has jurisdiction to issue a Declaratory Judgment pursuant to the Virginia Declaratory Judgment Act, Va. Code Ann. § 8.01-184 et seq.

WHEREFORE the plaintiff, Donald L. Scruggs, prays that the Court take jurisdiction of these proceedings, that the Court review such evidence as the parties submit; that the Court determine that Hufstedler shall be provided coverage under the automobile policy issued by State Farm to Harris; and that the Court shall determine that State Farm shall provide coverage to Scruggs for damages incurred in the accident of February 22, 1997.

DONALD LEWIS SCRUGGS

By: \_\_\_\_\_  
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Counsel for Plaintiff

In the Supreme Court of Virginia  
Richmond

**RUBY ROBINSON**  
v.  
**FIDELITY AND CASUALTY COMPANY OF NEW YORK.**

Decided: January 16, 1950.  
Record No. 3564.

Present, All the Justices.

(1) Appeal and Error — Proceedings on Review — Consideration of Evidence — Rule Applicable on Demurrer to Evidence Applied Where Plaintiff's Evidence Struck by Trial Court.

(2) Automobiles — Liability Insurance — Evidence Sufficient to Prove Insured Authorized General Use of Automobile by Third Party.

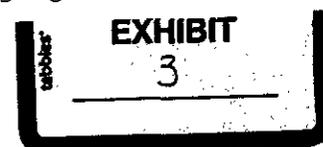
(3) Automobiles — Liability Insurance — Evidence Sufficient to Prove Party Operated Automobile with Implied Permission of Insured.

(4) Automobiles — Liability Insurance — Whether Driver's Deviation from Route Revoked Authority to Drive a Jury Question.

1. Where a motion to strike plaintiff's evidence and enter judgment for defendant is made and sustained when plaintiff rests, such evidence on appeal must be considered under a rigid application of the rule which would have been applied if there had been a demurrer to the evidence, although the case was heard by the trial judge as a jury, for the case is withdrawn from consideration of the judge as a jury when such a motion is sustained.

2. Defendant's insured told a girl with whom he had been on intimate terms that he was leaving his car with her when he went to sea, "but did not want to come back and find it wrecked". She took possession of and used the car. Defendant argued that the fact that insured told the girl he was leaving the car with her was not direct evidence that he actually did so, but considered in connection with the fact that after he had gone she was in actual possession of it, it was sufficient proof of the fact that he turned it over to her for her own general use, and until his return, therefore, she stood in insured's shoes. [Page 369]

3. Under the facts of headnote 2, on the day of the accident out of which plaintiff's action grew, a man with whom the girl began to go steadily after insured's departure was driving the car for her, accompanied by her, and left it at a garage for repair, taking her home in another car. He returned to the garage for insured's car on her instructions, and a short time thereafter, while he was driving it, the accident occurred. Defendant contended that, even if insured turned the car over to the girl, she was a mere bailee and not clothed with authority to permit its operation by her friend. But considering the relationship between insured and the girl, she cannot be said to have been a mere bailee, but was vested with general authority over the use and operation of the car and could permit its use by others under appropriate circumstances. The action of the friend in driving the car from the garage was an



accommodation to and for the benefit of the girl, and under these circumstances, he must be considered as operating the car with the implied permission of insured.

4. Under the facts of headnotes 2 and 3, the driver of the car testified that before returning with it from the garage he made a call on business of his own and that the route he followed was farther than if he had gone straight to the girl's home. Defendant argued that, although the girl might have authorized his use of the car, the driver was using the car at the time of the accident for his own ends and not pursuant to such authority. But the call made by the driver did not, as a matter of law, revoke his authority to drive. There was no evidence that the girl gave him any instructions as to his line of travel or forbade his attending to such personal affairs as might be consistent with driving the car home. Such a slight deviation from that route was too unimportant to have attached to it the import of annulling the protective features of the insurance policy as a matter of law. Whether the driver had implied authority to use the car for the purpose of making his own call was a jury question.

Error to a judgment of the Circuit Court of the city of Norfolk. Hon. O. L. Shackelford, judge presiding.

*Reversed and remanded.*

The opinion states the case.

T. Helm Jones and William C. Worthington, for the plaintiff in error.

Williams, Cocke & Tunstall, for the defendant in error.

STAPLES, J., delivered the opinion of the court. [Page 370]

The question here is whether the driver of the automobile, through whose negligence the plaintiff suffered personal injuries, was operating it with the implied permission of the insured, its owner. Previous to the institution of this action the plaintiff had recovered a judgment against the driver, Will D. Beasley, for \$ 1,200 damages but, being unable to collect it from him, she sued the defendant insurance company on a policy of automobile liability insurance covering the car and issued to its owner William R. Willis.

[1] When the plaintiff rested, the trial court sustained a motion of the defendant to strike out her evidence and enter final judgment in its favor. The plaintiff's evidence must therefore be considered under a rigid application of the rule which would have been applicable if there had been a demurrer to the evidence. *Jones v. Hanbury*, 158 Va. 842, 164 S.E. 545.

The defendant insists that this rule is not applicable here because, by agreement, the case was heard by the trial judge as a jury. *State Farm Mut. Ins. Co. v. Cook*, 186 Va. 658, 43 S.E. (2d) 863, is relied upon in support of this position. In that case, however, the judge passed upon the merits and considered the evidence of both plaintiff and defendant. There was no motion to strike. Here the effect of such motion was to reserve to the defendant the right to introduce additional evidence if it should be denied. Since it was sustained it withdrew the case from consideration by the judge *as a jury*.

Considering the evidence, therefore, from the standpoint most favorable to the plaintiff, it may be said that the following facts are established:

The insured, Wills, the owner of the automobile, was in the Merchant Marine, and in the early part of February, 1948, he boarded a ship and went to sea. Prior to his departure, he had been keeping steady company with a girl who was generally known by the name of Jean Wills and who was registered under the name of "Mrs. Jean Wills" at the DeLuxe Cabins where she lived. There was no evidence, [Page 371] however, that she was actually married to Wills, or that he lived with her as man and wife. She was working as a waitress at a restaurant known as the Blue Bird Inn on the Virginia Beach Boulevard. Beasley, who was driving the Wills car when the accident occurred, also was working there and frequently saw the insured and the girl Jean together in the restaurant. On the night before Wills shipped out, he told Jean that "he was leaving the car with her, but he did not want to come back and find it wrecked." Beasley had become well acquainted with Wills and had many times ridden in the car with him and Jean before he went to sea. After Wills left, Beasley started going with Jean, who had taken possession of the car and was using it while Wills was gone. On the day of the accident Beasley had been driving the car for Jean. After they had stopped at a hotel on Main Street in the city of Norfolk, they found the car would not start. Thereupon Beasley phoned his brother, who ran a garage, and he towed the car to his garage on Brambleton Avenue. It was estimated that it would require about two hours to fix the car, so Beasley's brother allowed them to use his car to take Jean out to her home at the DeLuxe Cabins. Later Beasley returned to the garage, left his brother's car, and drove off in the insured's car which Jean was using. This was in accordance with Jean's instructions. A short time thereafter, while Beasley was driving the car over the Campostella bridge, the collision occurred which resulted in the plaintiff's injuries.

[2] The defendant argues that the fact that Wills told Jean he was leaving the car with her is not direct evidence that he actually did so. But considered in connection with the fact that after he had gone she was in actual possession of the car, it is sufficient proof of the fact that he turned the car over to her for her own general use during his absence. Therefore, until his return, she stood in the shoes of the owner. *Liberty Mut. Ins. Co. v. Tiller*, 189 Va. 544, 53 S.E. (2d) 814; *Employers' Liability Assur. Corp. v. Carroll* (C. C. A., 4th Cir.), 139 F. (2d) 427. [Page 372]

[3] The defendant also contends that, even if the insured, Wills, did turn the car over to Jean, she was a mere bailee and was not clothed with authority to permit its operation by Beasley. We think, however, under the circumstances of this case, considering the relationship between the insured and the girl Jean, she cannot be said to have been a mere bailee but was vested with general authority over the use and operation of the car and could permit its use by others under appropriate circumstances.

The facts in this case do not show, however, that she loaned the car to Beasley for his general personal use. At the time the car was taken to the garage Jean was an occupant and Beasley was driving it at her request. When Beasley's brother loaned them his car to take Jean to the DeLuxe Cabins, where she was living, it was understood that he would return his brother's car and at the same time drive the Wills car back to the cabins. It appears, therefore, that the action of Beasley in driving the car was an accommodation to and for the benefit of Jean. Her authority to thus avail herself of the help of Beasley in connection with the repair of the car is amply sustained by the evidence. Under these circumstances, Beasley must be considered as operating the car with the implied permission of the insured.

[4] The defendant further takes the position that, notwithstanding this authority, at the time of the accident Beasley was actually using the car for his own purpose and not pursuant to the permission given him by Jean. Beasley testified that before returning to the DeLuxe Cabins he had to go over to his brother's home in Berkley, and that this route of returning to the cabins was two or three miles further than if he had gone straight down Princess Anne Road. The accident occurred while he was traveling the longer route. Did this circumstance, as a matter of law, revoke Beasley's authority to drive the car? We

think not. There is no evidence that Jean gave him any instructions as to his line of travel or forbade his attending to such personal [Page 373] affairs as might be reasonably consistent with driving the car to her home. The evidence is that Beasley was going with the girl and it indicates a very close relationship between them had existed for some months. It is within the province of a jury to determine whether, while he was doing her the favor of bringing her car to her, she would object to his going two or three miles out of the direct route to attend to a personal errand. We think such a slight deviation from that route was "too unimportant to have attached to (it) the import of annulling the protective features of the insurance policy" as a matter of law. See *State Farm Mut. Ins. Co. v. Cook*, 186 Va. 658, 43 S.E. (2d) 863; *Hinton v. Indemnity Ins. Co.*, 175 Va. 205, 8 S.E. (2d) 279.

In the final analysis, whether, under the circumstances, Beasley had implied authority to use the car for the purpose of going by his brother's home is a jury question. *Hinton v. Indemnity Ins. Co.*, *supra*. It follows that it was error for the trial court to strike out the plaintiff's evidence and the case must be reversed and remanded for a new trial.

*Reversed and remanded.*

*Hack v. Nester*, 241 Va. 499, 404 S.E.2d 42 (1991)

IN THE SUPREME COURT OF VIRGINIA

**ROBERT W. HACK**

v.

**JAMES E. NESTER, JR., ADMINISTRATOR, ETC.**

Record No. 891494

**KATHRYN WEAVER**

v.

**JAMES E. NESTER, JR., ADMINISTRATOR, ETC.**

Record No. 891505

November 9, 1990

Present: Carrico, C.J., Compton, Stephenson, Russell, Whiting, and  
Lacy, JJ., and Cochran, Retired Justice

**KATHRYN WEAVER**

v.

**JAMES E. NESTER, JR., ADMINISTRATOR, ETC.**

Record No. 891505

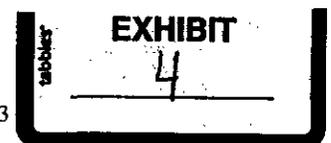
Decided: April 19, 1991

Present: Carrico, C.J., Compton, Stephenson, Russell, Whiting, and  
Lacy, JJ., and Cochran, Retired Justice

On appeal, the Court held that since the evidence was insufficient to show that the owner of a vehicle negligently entrusted her vehicle to the driver, the trial court erred in submitting that issue to the jury and the judgment against the owner was reversed. Although the defendant driver's negligence caused the death of another driver, it did not rise to the level of wantonness necessary to permit an award of punitive damages. Therefore, the trial court erred in submitting that issue to the jury and in entering judgment on the jury's verdict. The part of the judgment awarding punitive damages is reversed. On rehearing, the Court found that the evidence was sufficient to raise a jury question whether the lack of a left headlight was a proximate cause of the collision and, therefore, that the trial court properly permitted the jury to consider that ground for negligent entrustment. Since dispositive issues were erroneously submitted to the jury and the basis for the verdict cannot be determined, the error cannot be said to be harmless and the question of negligent entrustment is remanded for further proceedings. [Page 500]:

**Torts — Negligent Entrustment — Damages — Compensatory — Punitive — Practice and Procedure — Jury Instructions — Proximate Causes — Criminal Law — Involuntary Manslaughter**

The defendant driver received permission from his female companion to drive her motor vehicle from their rural home to a nearby town, While in the town, he consumed nearly a pitcher of beer before he



began the drive back after nightfall. On a curve, he crossed over into the lane for traffic going in the opposite direction and struck an approaching automobile. The driver of that automobile was killed as a result of the collision. The plaintiff widower brought a wrongful death action to recover compensatory and punitive damages from the driver and compensatory damages from the owner of the vehicle. The driver admitted that his negligence caused the death of plaintiff's decedent. Issues of the owner's liability and the amount of damages to be assessed against each party were submitted to the jury. The jury returned verdicts of compensatory damages against both parties and a punitive damage award against the driver. Both defendants appeal and their appeals are consolidated.

1. Under certain circumstances, an owner who entrusts his vehicle to another person may be liable to a third party who is injured because of the negligence of the driver.
2. The correct test of liability is whether the owner knew, or had reasonable cause to know, that he was entrusting his car to an unfit driver likely to cause injury to others.
3. Although it is negligence per se to entrust a motor vehicle to an unlicensed driver, Code § 46.1-386, there can be no recovery for negligent entrustment unless the reason for the driver's disqualification from securing a driver's license was a proximate cause of the collision.
4. Here there was no showing that the driver's lack of a license had any causal connection to the collision, and thus the lack of a driver's license provides no basis for recovery against the owner of the vehicle.
5. The evidence was insufficient to show that the owner of the vehicle knew, or should have known, that the driver was an unfit driver because of any alleged visual impairment at night.
6. An owner is negligent if he entrusts his vehicle to another person when the owner knows, or reasonably should know, that the vehicle's condition makes its normal operation unsafe, but the plaintiff must show that the unsafe condition was a proximate cause of the collision and the issue cannot be left to conjecture, guess or random judgment.
7. Here the administrator failed to meet the burden of proving that the lack of a left headlight on the vehicle was a proximate cause of the collision. The jury could only speculate that the deceased might have had sufficient time and opportunity to turn away from the approaching vehicle had it had both headlights and a verdict based on speculative evidence cannot be sustained. [Page 501]
8. In the case of negligent entrustment based on intoxication, there must be knowledge, or imputable knowledge, that the person to whom the vehicle is entrusted is addicted to the use of intoxicants, or has the habit of drinking and the owner must know that he is likely to drive while he is intoxicated.
9. Based upon their cohabitation of several months and her testimony that she knew that the driver occasionally drove after he had been drinking, and that he occasionally drank enough alcohol to affect him, the evidence is insufficient to establish that his habits were such that he was likely to drive while intoxicated.
10. The evidence is insufficient to support the jury's finding of negligent entrustment and, therefore, the trial court erred in submitting that issue to the jury. The judgment against the vehicle owner is reversed and final judgment entered for her.

11. The administrator bases his claim for punitive damages against the driver upon the combination of factors: his two prior DUI convictions, his operation at night of a vehicle on the wrong side of the highway without a left headlight, and his alleged night blindness, none of which is sufficient standing alone but which, together, he argues, rise to the necessary level of wantonness to sustain punitive damages.
12. Although the driver's negligence certainly caused the death of the other driver, it cannot be said to have shown the conscious disregard for her safety necessary to sustain an award of punitive damages. Therefore, the trial court erred in submitting that issue to the jury and in entering judgment on the jury's verdict awarding such damages.
13. Because the defendant driver did not state his present objection that a jury instruction might influence the compensatory damage award or timely tender an instruction containing the precautionary language he had suggested before the jury was impanelled, his objection cannot be considered on appeal. Rule 5:25.

*Upon Rehearing*

Rehearing was necessary because of an erroneous conclusion about what the evidence showed concerning the position of the vehicle driven by the deceased.

14. The jury could have inferred from the evidence of the position of the car driven by the deceased that she had turned away from the defendant's approaching vehicle prior to the collision and that she might have turned even farther away if she had realized that the approaching vehicle was a car with only its right headlight burning.
15. Thus, the evidence was sufficient to raise a jury question whether the lack of a left headlight was a proximate cause of the collision and the trial court properly permitted the jury to consider this ground of negligent entrustment.
16. However, the jury might also have found the car owner liable upon any one of the other theories of negligent entrustment advanced by the administrator, and, if dispositive issues are erroneously submitted to a jury and the Court cannot determine the basis for the verdict from the record, it cannot [Page 502] be said that the error is harmless. There will be a new trial in the case against the owner of the car.

Appeals from the Circuit Court of Louisa County. Hon. F. Ward Harkrader, Jr., judge presiding.

Record No. 891494 — *Affirmed in part, reversed in part and final judgment*  
Record No. 891505 — *Reversed and final judgment*

UPON REHEARING

Appeal from a judgment of the Circuit Court of Louisa County. Hon. F. Ward Harkrader, Jr., judge presiding.

Record No. 891505 — *Reversed and remanded.*

Frank Walker Somerville (Somerville, Moore & Somerville, on brief), for appellant. (Record No. 891494)

Charles F. Purcell (Purcell & Purcell, on brief), for appellee. (Record No. 891494)

John W. Zunka (Richard H. Milnor; Taylor & Zunka, on brief), for appellant. (Record No. 891505)

Charles F. Purcell (Purcell & Purcell, on brief), for appellee. (Record No. 891505)

JUSTICE WHITING delivered the opinion of the Court.

In this appeal of a motor vehicle collision case, we deal with the dispositive issues of negligent entrustment and punitive damages.

Approximately 5:45 p.m. on January 21, 1988, Robert Wayne Hack received Kathryn Marie Golden Weaver's permission to drive her Chevrolet Suburban<sup>1</sup> to Louisa. After arriving in Louisa, Hack consumed most of a pitcher of beer. About 7:15 p.m., while proceeding in an easterly direction on Route 33, Hack rounded a curve and drove into the westbound lane, where he struck an approaching [Page 503] Nissan car<sup>2</sup> driven by Lisa Hicks Nester. Nester was killed as a result of the collision.

James E. Nester, Jr., Administrator of Nester's estate (the administrator), brought this wrongful death action to recover compensatory and punitive damages from Hack and compensatory damages from Weaver. Hack admitted that his negligence caused Nester's death; however, the issues of Weaver's liability and the amount of damages to be assessed against each party were submitted to a jury.

On May 12, 1989, a jury returned verdicts of \$280,000 in compensatory damages against Hack and Weaver, and \$50,000 in punitive damages against Hack. On September 11, 1989, judgment was entered on the verdicts.

Hack and Weaver appeal. Because the administrator prevailed in the trial court, consonant with familiar appellate principles, we view the evidence in the light most favorable to him.

#### NEGLIGENT ENTRUSTMENT

[1-3] The administrator claims that Weaver is liable for Nester's death because Weaver negligently entrusted her vehicle to Hack. An owner (entrustor) who entrusts his motor vehicle to another person (trustee) may be liable in some circumstances to a third party who is injured because of the trustee's negligence. As we said in *Denby v. Davis*, 212 Va. 836, 838, 188 S.E.2d 226, 229 (1972), "[t]he correct test of liability is whether the owner knew, or had reasonable cause to know, that he was entrusting his car to an unfit driver likely to cause injury to others." The administrator bases his negligent entrustment claim upon the following four factors.

First, Weaver knew that Hack had no driver's license when she entrusted her car to him. Hack's driver's license had been suspended in 1978 and again in 1984 for separate driving under the influence (DUI) convictions. Despite Weaver's denial of knowledge of these DUI convictions, there was sufficient conflicting evidence to support a jury finding that she knew of them.

[3-4] Although it is negligence per se to entrust a motor vehicle to an unlicensed driver, Code § 46.1-386, there can be no recovery for negligent entrustment unless the reason for the trustee's

disqualification from securing a license was a proximate cause of [Page 504] the collision. See *Laughlin v. Rose*, 200 Va. 127, 132 -33, 104 S.E.2d 782, 786 (1958); cf. *Denby* (entrustor liable where reason for trustee's disqualification for driver's license caused plaintiff's injury). Hack's last suspension expired several months before the collision. Therefore, Hack was eligible for reinstatement of his driver's license upon proof of financial responsibility and payment of a reinstatement fee. Code § 46.1-438(B) and (C). Here, as in *Laughlin*, there was no showing that the trustee's lack of a license had any causal connection to the collision. Thus, Hack's lack of a driver's license provides no basis for recovery against Weaver.

Second, the administrator contends that Weaver allowed Hack to take her vehicle when she knew that he had experienced night blindness and would have to drive at night in returning to Weaver's home. In support, the administrator cites *Denby*, where the trustee was physically disqualified from obtaining a driver's license because of a visual defect. *Denby*, 212 Va. at 837-38, 188 S.E.2d at 228. In contrast to *Denby*, the evidence showed that Hack was physically qualified for a driver's license, even without glasses.

[5] Furthermore, the entrustor in *Denby* knew of the trustee's disability. Hack testified that he had experienced "a kind of night blindness," in that "[it] gets blurry" when "bright lights are on," and that his glasses overcame the problem. Weaver testified that she knew only that Hack wore glasses because he was nearsighted. This evidence is insufficient to show that Weaver knew, or should have known, that Hack was an unfit driver because of any alleged<sup>3</sup> visual impairment at night.

Third, the administrator maintains that Weaver let Hack drive her vehicle at night without a left headlight. Weaver and Hack testified that the left headlight had been damaged some time before the accident and that it had not been replaced.

[6] An owner is negligent if he entrusts his vehicle to another person when the owner knows, or reasonably should know, that the vehicle's condition makes its normal operation unsafe. See *Smith v. Mooers*, 206 Va. 307, 310, 142 S.E.2d 473, 475 (1965). The plaintiff, however, must show that the vehicle's unsafe condition was a proximate cause of the collision. *Id.* at 310, 142 S.E.2d [Page 505] at 475. As we said in an earlier negligence action, "the plaintiff who alleges negligence [must] show why and how the accident happened, and if that is left to conjecture, guess or random judgment, he cannot recover." *Weddle v. Draper*, 204 Va. 319, 322, 130 S.E.2d 462, 465 (1963).

[7] Thus, the administrator had the burden of proving that the lack of a left headlight on Weaver's vehicle was a proximate cause of the collision. He has failed to meet this burden.

There was no evidence that Hack's ability to see Nester's approaching car was reduced because there was no left headlight, or that the lack of a left headlight caused him to drive into Nester's lane of travel. On the contrary, Hack testified without contradiction that the accident occurred because he was blinded by Nester's headlights.

The administrator argues that the lack of a headlight may have confused Nester; therefore, it kept her from driving farther to the right in order to avoid Weaver's vehicle as it approached in Nester's lane of travel. The evidence, however, does not indicate that Nester had attempted to turn away from Hack's vehicle prior to the collision. In fact, the evidence indicated that her left front wheel was only three to four inches on her side of the center line of the highway. Photographs of the scene disclose that the collision occurred a short distance from a sharp curve, with a slope and brush obscuring Nester's view around the curve. Thus, the jury could only speculate that Nester might have had sufficient time and

opportunity to turn away from Weaver's approaching vehicle. However, a verdict based on speculative evidence cannot be sustained. *Lawson v. Doe*, 239 Va. 477, 482, 391 S.E.2d 333, 335 (1990).

Fourth, the administrator argues that Weaver entrusted her vehicle to Hack when she knew that he had "the habit of drinking and driving."

The test of liability under the doctrine of entrustment is whether the owner knew, or had reasonable cause to know, that he was entrusting his motor vehicle to an unfit driver likely to cause injury to others. In the case of intoxication, there must be knowledge, or imputable knowledge, that the person to whom the vehicle is entrusted is addicted to the use of intoxicants, or has the habit of drinking. The owner must know, or be chargeable with knowledge, that the driver's [Page 506] habits are such that he is likely to drive while he is intoxicated.

*Laughlin*, 200 Va. at 134, 104 S.E.2d at 787 (quoting *McNeill v. Spindler*, 191 Va. 685, 690 -91, 62 S.E.2d 13, 16 (1950)).

[8-10] Weaver, who had lived with Hack for several months prior to the collision, testified that Hack *occasionally* drove after he had been drinking, and that he *occasionally* drank enough alcohol to "affect" him. Based on this testimony and Weaver's knowledge of the record of Hack's 1978 and 1984 DUI convictions, the administrator claims that the jury could find a negligent entrustment upon this ground. We disagree. This evidence is insufficient to establish that Hack's habits were such that he was likely to drive while he was intoxicated.

In sum, we are of opinion that the evidence is insufficient to support the jury's finding of negligent entrustment. Therefore, the trial court erred in submitting this issue to the jury. Accordingly, we will reverse the judgment against Weaver and enter final judgment for her.

#### PUNITIVE DAMAGES

[11] The administrator bases his claim for punitive damages upon the evidence of: (1) Hack's DUI convictions in 1978 and 1984; (2) his drinking on the day of the collision; and (3) his operation of the vehicle at night on the left side of the highway, without a left headlight, while allegedly suffering from night blindness.

The administrator concedes that none of these acts, standing alone, is sufficiently egregious to warrant an award of punitive damages. He argues, however, that in combination, they supply the requisite "showing of willful or wanton conduct which evinces a conscious disregard of the rights of others." *Booth v. Robertson*, 236 Va. 269, 272, 374 S.E.2d 1, 2 (1988).

The administrator correctly points out that *Booth* rejected the notion that malice must be shown in order to recover punitive damages. Nevertheless, the negligence required to sustain a punitive damage award must rise "to the necessary level of wantonness." *Id.* at 273, 374 S.E.2d at 3.

The *Booth* defendant had a blood alcohol content of 0.22 percent; Hack's blood alcohol content was an indeterminate amount, [Page 507] somewhere between 0.09 percent and 0.114 percent. <sup>4</sup> Furthermore, immediately before colliding head-on with the plaintiff, the *Booth* defendant drove his vehicle approximately four-tenths of a mile down the wrong lane of an interstate highway, almost striking an approaching tractor-trailer, whose driver blinked his lights, blew a constant blast on his air horns, and turned to his right and then to his left to avoid striking the defendant. *Id.* at 270-71, 374

S.E.2d at 1. Even though this accident produced a more tragic result, the evidence here does not present the "egregious set of facts" presented in *Booth*. *Id.* at 273, 374 S.E.2d at 3.

[12] Although Hack's negligence certainly caused Nester's death, we cannot say that it showed the conscious disregard for Nester's safety necessary to sustain an award of punitive damages. Therefore, the trial court erred in submitting this issue to the jury and in entering judgment on the jury's verdict awarding such damages. Accordingly, we will reverse that part of the judgment awarding punitive damages and enter final judgment for Hack on that issue.

#### INSTRUCTION ON THE ELEMENTS OF MANSLAUGHTER

Hack contends that Instruction 26, which explained the elements of the crime of involuntary manslaughter and the degree of proof required for a conviction, should not have been granted because it may have influenced the award of compensatory damages.

Before the jury was empanelled, Hack admitted liability for compensatory damages and asked the court to tell the jury that in fixing its award of compensatory damages, it should not be influenced by the evidence of his negligence, which would be introduced to support the punitive damage claim. The court told him to "[t]ake that up with the instructions." Hack failed to do so.

[13] When the instructions were argued, Hack's grounds of objection to the granting of Instruction 26 were (1) that the instruction should not define the elements of the crime of manslaughter because the indictment was not in evidence, and (2) that the instruction effectively directed a verdict for punitive damages. Because Hack did not state his present objection that Instruction 26 [Page 508] might influence the compensatory damage award or tender an instruction containing the precautionary language he suggested before the jury was empanelled, we cannot consider the objection on appeal. Rule 5:25.

Accordingly, we will reverse Weaver's case and enter final judgment in her favor. We will reverse the award of punitive damages against Hack, and affirm the award of compensatory damages.

Record No. 891494 — *Affirmed in part, reversed in part, and final judgment.*

Record No. 891505 — *Reversed and final judgment.*

CHIEF JUSTICE CARRICO, with whom JUSTICE RUSSELL joins, dissenting in Record No. 891505.

UPON REHEARING

KATHRYN WEAVER

v.

JAMES E. NESTER, JR., ADMINISTRATOR, ETC.

April 19, 1991

Record No. 891505

Present: Carrico, C.J., Compton, Stephenson, Russell, Whiting, and  
Lacy, JJ., and Poff, Senior Justice

Appeal from a judgment of the Circuit Court of Louisa County. Hon. Ward Harkrader, Jr. judge presiding.

Record No. 891505 — *Reversed and remanded.*

JUSTICE WHITING delivered the opinion of the Court.

In this case, we granted a rehearing to the administrator limited to the "question of negligent entrustment for turning the vehicle over to Hack with a defective headlight." This rehearing was necessary because we had erroneously concluded that the evidence [Page 509] showed that Nester's "left front wheel was only three to four inches on her side of the *center* line of the highway." (Emphasis added.)

Larry Lam, a State Trooper who investigated the accident, made a number of measurements at the scene. Lam testified that the left side of Nester's car was about 48 inches from the center line of the highway, thus placing the right side of Nester's car "approximately 3 to 4 inches to the right of the inside portion of the white line of her travel lane" at the time of collision.

[14-15] The jury could have inferred from this evidence that Nester *had* turned away from Weaver's approaching vehicle prior to the collision and might have turned farther away if she had realized that the approaching vehicle was a car with only its right headlight burning. Even though the evidence indicates that Weaver's left parking light was burning, the jury reasonably could have found that the brightness of the right headlight prevented Nester from seeing the dimmer parking lights in the short time available to her before the collision. Thus, the evidence was sufficient to raise a jury question whether the lack of a left headlight was a proximate cause of the collision. *See Smith v. Mooers*, 206 Va. 307, 310, 142 S.E.2d 473, 475 (1965). Therefore, the trial court properly permitted the jury to consider this ground of negligent entrustment.

[16] However, the jury might also have found Weaver liable upon any one of the other theories of negligent entrustment advanced by the administrator. And, if dispositive issues are erroneously submitted to a jury and we cannot determine the basis for the verdict from the record, we cannot say that the error is harmless. *Ring v. Poelman*, 240 Va. 323, 328, 397 S.E.2d 824, 827 (1990). Accordingly, we will reverse the judgment against Weaver and remand this part of the case for further proceedings consistent with this opinion.<sup>5</sup>

Record No. 891505 — *Reversed and remanded.* [Page 510]

CHIEF JUSTICE CARRICO, with whom JUSTICE RUSSELL and SENIOR JUSTICE POFF join, concurring in part and dissenting in part.

I agree with the majority that the trial court properly permitted the jury to consider the fourth ground of the administrator's claim for negligent entrustment, relating to the defective headlight. I also agree that the trial court erroneously permitted the jury to consider Hack's alleged night blindness. But I do not agree with the majority that it was error for the trial court to permit the jury to consider the administrator's first ground, relating to Hack's lack of a driver's license, and his third ground, relating to Hack's use of alcohol.

Hence, while I agree that there must be a new trial, I would permit the jury on retrial to consider not only the evidence concerning the defective headlight but also the evidence relating to Hack's lack of a license and his use of alcohol.

Concerning Hack's use of alcohol, the majority is correct in stating that "[t]he test of liability under the doctrine of entrustment is whether the owner knew, *or had reasonable cause to know* . . . that the person to whom the vehicle is entrusted . . . is *likely to drive while he is intoxicated*." (Emphasis added.)

The majority states that "Weaver, who had lived with Hack for several months prior to the collision, testified that Hack *occasionally* drove after he had been drinking, and that he *occasionally* drank enough alcohol to 'affect' him." (Emphasis in original.) The majority also notes Hack's record of two convictions for driving drunk and states that Weaver knew of the convictions.

Thus, there was evidence that Weaver knew Hack occasionally drove after he had been drinking, knew he occasionally drank enough alcohol to affect him, and knew he had been twice convicted previously of driving under the influence. This is sufficient, in my opinion, for the jury to find that Weaver had reasonable cause to know Hack was likely to drive while intoxicated at the time she entrusted him with her vehicle on the fatal night in question.

With respect to the license question, the majority correctly notes that "it is negligence per se to entrust a motor vehicle to an unlicensed driver" but that the reason for the lack of a license must have a causal connection to the collision. The majority then holds that the reason Hack did not have a license was his mere [Page 511] failure to prove financial responsibility and pay a reinstatement fee and that this was not a proximate cause of the collision.

In reality, the reason Hack did not have a license was that he had lost it for driving drunk, and no amount of sophistry can alter that fact. As indicated above, Weaver knew about Hack's prior convictions for driving drunk, and it was this knowledge, coupled with what she learned about his drinking habits from her own observation, that gave her reasonable cause to know he was likely to engage in the same type of misconduct when she entrusted him with her vehicle on the night in question. Hence, there was a sufficient evidentiary connection between the reason for Hack's lack of a license and the fatal collision.

#### FOOTNOTES

<sup>1</sup> The Suburban was a truck-type of station wagon which weighed 4,940 pounds.

<sup>2</sup> The Nissan was a small car weighing 1,916 pounds.

<sup>3</sup> There was no medical evidence that Hack's night vision was impaired. The only medical expert who testified, Hack's optometrist, said that he prescribed glasses to correct Hack's nearsightedness, but did not check Hack for night blindness.

<sup>4</sup> The record discloses no explanation of the inconsistency between the blood test results of 0.09 percent two hours after the collision and a reading of 0.114 percent almost four hours thereafter.

<sup>5</sup> (Editor's Note: This footnote appears with an asterisk in the published volume.) Because there will be a new trial in the case against Weaver, we need not respond to her claim that her defense was prejudiced by the opening statement of Hack's counsel that Hack could have had a driver's license at the time of the collision if he had purchased insurance. On remand, this issue will not arise again because Hack's lack of a driver's license will not be an issue.