

SUPREME COURT OF FLORIDA

CASE NO. SC00-1755

L.T. No. 5D99-2043

RICHARD TOOMBS, etc.,

Petitioner,

vs.

ALAMO RENT-A-CAR, INC., et al.,

Respondents.

**PETITIONER RICHARD TOOMBS'
INITIAL BRIEF ON THE MERITS**

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CASE NO. SC00-1755

RICHARD TOOMBS

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ALAMO RENT-A-CAR, INC., et al.,

PETITIONER RICHARD TOOMBS'
INITIAL BRIEF ON THE MERITS

INTRODUCTION

This Initial Brief on the Merits is submitted on behalf of Richard Toombs, as Personal Representative of the Estate of Julia Stuttard (“Toombs”), Plaintiff in the trial court and Petitioner here.

Toombs brought a wrongful death action against Respondent Alamo-Rent-A-Car, Inc. (“Alamo”) and others arising out of an automobile accident which took the life of Julia Stuttard, the mother of minor children Bethan and Sian Stuttard. The trial court entered final summary judgment in favor of Alamo on this wrongful death claim upon its holding that the negligence of Ian Stuttard -- Julia’s husband who was driving Alamo’s vehicle at the time of the fatal collision -- was imputed to her, thus barring the children's recovery under the dangerous instrumentality doctrine.

The Fifth District Court of Appeal affirmed the trial court's ruling, certifying conflict with the Second District Court of Appeal's decision in *Enterprise Leasing Co. v. Alley*, 728 So. 2d 272 (Fla. 2d DCA), *rev. denied*, 741 So. 2d 1135 (Fla. 1999). (App. 1-4).¹ For the reasons discussed below, *Alley* is a well-reasoned decision and properly harmonizes the Florida Wrongful Death Act and Florida's dangerous instrumentality jurisprudence. This Court accordingly should quash the Fifth District's

¹"App" refers to the appendix to this brief which consists of the Fifth District's opinion in this case and the Second District's decision in *Alley*.

decision, approve the decision in *Alley*, and remand the case with directions to reinstate Toombs' wrongful death claim.

STATEMENT OF THE CASE AND FACTS

A. Proceedings in the Trial Court

Ian Stuttard rented an automobile from Alamo on January 5, 1996. Mr. Stuttard was driving the vehicle two days later, when he negligently caused a collision with a taxi cab. At the time of the accident, Mr. Stuttard's wife, Julia, and their two minor children, Bethan and Sian, were passengers in the vehicle driven by Mr. Stuttard. Julia died from the injuries she sustained in the accident; daughter Bethan sustained personal injuries. (R1-11).

Toombs subsequently filed a wrongful death action against Alamo as the owner of the vehicle driven by Ian Stuttard. Toombs' complaint alleged that Mr. Stuttard's negligent operation of the vehicle caused the collision and the death of Julia Stuttard, and seeks damages on behalf of Julia's two surviving minor children under Florida's Wrongful Death Act, sections 768.19, et seq., Fla. Stat. (R1-11).²

Alamo moved for summary judgment on the wrongful death claim (R63-64), asserting that summary dismissal of this claim was warranted on the ground that Julia Stuttard was a co-bailee of Alamo's vehicle. According to Alamo, an owner/lessor of a vehicle is not liable for the injuries sustained by a co-bailee that results from a bailee's (i.e., Ian Stuttard's) negligence, and that Florida's dangerous instrumentality doctrine thus would have prevented Julia from maintaining a personal injury action

²Toombs, as next friend of Bethan, also seeks damages for the personal injuries she sustained in the accident. The summary judgment ruling did not affect this personal injury claim, as both the trial court and the Fifth District expressly recognized. (R228-29; App. 1 n. 1).

against Alamo had she survived the accident. (R63-64; 1T3-25).³

For his part, Toombs contended that summary judgment was foreclosed by the Second District's decision in *Enterprise Leasing Co. v. Alley*, 728 So. 2d 272 (Fla. 2d DCA), *rev. denied*, 741 So. 2d 1135 (Fla. 1999). (1T13-16). In addition, Toombs urged that summary judgment was inappropriate because Alamo had not conclusively shown the absence of a triable issue of fact on the controverted issue of whether Julia Stuttard was a co-bailee of the vehicle her husband was operating at the time of the accident. (1T16-21).⁴

Alamo did not dispute at the hearing held on the summary judgment motion that *Alley* was directly on point. Nor did Alamo dispute that the Second District in *Alley* had carefully considered and rejected the identical argument which Alamo advanced in support of summary judgment; Alamo instead argued that the Second District was simply wrong. (1T5-8). The trial court sided with Alamo, reasoning as follows:

I would conclude then that it is undisputed that she [Julia Stuttard] was a co-bailee because she is listed as an additional driver and she accepted the bailment by driving the car on [on a prior occasion]. As a co-bailee, I would conclude that as a matter of law the action [] against Alamo is precluded under *Raydel vs. Metcalfe* [sic] [178 So. 2d 569 (Fla. 1965)], and this new case of *Enterprise Leasing vs. Alley* has not repudiated that principle. So I'm going to grant summary judgment in favor of Alamo Rent-A-Car. (1T24-25).⁵

³The transcript of the March 12, 1999 hearing on Alamo's motion for summary judgment, found at R250-277, will be referred to as "1T"; the transcript of the June 17, 1999 hearing on Toombs' motion for rehearing, found at R279-303, will be referred to as "2T."

⁴To avoid needless repetition, the facts pertinent to the co-bailee issue will be discussed below in the Argument section of this brief.

⁵All emphasis has been supplied by counsel unless otherwise noted.

The trial court subsequently entered final summary judgment for Alamo on Toombs' claim for the wrongful death of Julia Stuttard. (R228-229).

Toombs timely moved for rehearing. (R195-222, 232-235). The trial court adhered to its summary judgment ruling and denied the motion. (2T23; R246). Toombs' timely appeal to the Fifth District ensued.

B. Proceedings in the Fifth District

The Fifth District affirmed the summary judgment for Alamo and certified that its decision conflicted with the Second District's decision in *Alley*. (App. 1-4).⁶ The Fifth District explained:

The trial judge, relying on *Raydel* [v. *Medcalfe*, 178 So. 2d 569 (Fla. 1965)] concluded that because Julia Stuttard could not recover against Alamo, her minor children were also barred from recovery. In *Raydel*, the supreme court held that the dangerous instrumentality doctrine does not apply "where an automobile is entrusted to a husband and wife jointly and while it is in their dominion and control it is negligently operated by one of them, injuring one or both of them." 178 So. 2d at 572.

The facts in *Alley* are virtually identical to those of the instant case. The second district did not find that *Raydel* barred recovery by the minor children even though it recognized that reconciliation of its decision with *Raydel* and other pertinent cases was "difficult and challenging." *Alley*, 728 So. 2d at 274.

The second district, in finding a cause of action in favor of the survivors, concluded that only the "right of action," for reasons "personal to the decedent" was lost. *Id.* at 276. We are unable to reconcile this case with *Raydel*. A right of action, as explained by the supreme court in *Shiver v.*

⁶The Fifth District's decision is reported at *Toombs v. Alamo Rent-A-Car*, 762 So. 2d 1040 (Fla. 5th DCA 2000).

Sessions, 80 So. 2d 905, 908 (Fla. 1955), is "a remedial right affording redress for the infringement of a legal right belonging to some definite person, whereas a cause of action is the operative facts which give rise to such right of action."

* * *

We do not believe that an individual's status as a co-bailee is a mere disability to sue, but rather, prevents the cause of action from wholly existing in such circumstance. The dangerous instrumentality doctrine, in short, was never intended to apply to the bailee of that instrumentality during the operation of the bailment. *Florida Power & Light Co. v. Price*, 170 So. 2d 293 (Fla. 1964). The co-bailee cannot impute the negligence of the other co-bailee/driver to Alamo. We hold that because no right of action existed at the time of Julia Stuttard's death, no wrongful death cause of action survived the decedent. *Variety Children's Hosp. v. Perkins*, 445 So. 2d 1010 (Fla. 1983).

* * *

We affirm the summary judgment and certify conflict between this case and *Alley*.

(App. 2).

SUMMARY OF ARGUMENT

The Fifth District erred in affirming the summary judgment in favor of Alamo on Toombs' wrongful death claim.

First, summary judgment was improper because Julia Stuttard's "right of action" against Alamo was lost for reasons personal to her and the wrongful death "cause of action" conferred on her surviving minor children by the Wrongful Death Act remains viable. This Court therefore should quash the Fifth District's ruling to the contrary, and should approve the Second District's directly conflicting and well-reasoned decision in *Alley*.

Second, quashal of the Fifth District's decision is warranted on this record even if the Court declines to embrace the holding of *Alley*. Affirmance of the summary

judgment for Alamo was improper because a triable issue of fact exists on the threshold question of whether Julia Stuttard was indeed a co-bailee at the time of the accident which took her life.

ARGUMENT

THE FIFTH DISTRICT ERRED IN AFFIRMING THE SUMMARY JUDGMENT FOR ALAMO ON TOOMBS' WRONGFUL DEATH CLAIM.

The Fifth District concluded that Julia Stuttard's surviving minor children were foreclosed from recovery against vehicle owner Alamo on the ground that Julia's co-bailee status prevented the very existence of a wrongful death cause of action. In so ruling, the Fifth District acknowledged that its decision was directly contrary to *Enterprise Leasing Co. v. Alley*, 728 So. 2d 272 (Fla. 2d DCA), *rev. denied*, 741 So. 2d 1135 (Fla. 1999), a case with facts "virtually identical" to those here. (App. 2). Respectfully, the Fifth District's decision in this case cannot be reconciled with this Court's precedents regarding the dangerous instrumentality doctrine and the Wrongful Death Act; the decision under review accordingly should be quashed, and the Second District's decision and reasoning in *Alley* should be approved.

A. Toombs' Claim Against Alamo Under the Wrongful Death Act is Not Barred Even if Julia Stuttard is Deemed a Co-Bailee of Alamo's Vehicle.

1. Florida's Dangerous Instrumentality Doctrine

This Court adopted the dangerous instrumentality doctrine in 1920. *Southern Cotton Oil Co. v. Anderson*, 86 So. 629 (Fla. 1920). This doctrine "imposes strict vicarious liability upon the owner of a motor vehicle who voluntarily entrusts that motor vehicle to an individual whose negligent operation causes damage to another." *Aurbach v. Gallina*, 753 So. 2d 60, 62 (Fla. 2000). In *Southern Cotton Oil*, the Court said:

[O]ne who authorizes and permits an instrumentality that is

peculiarly dangerous in its operation to be used by another on the public highway is liable in damages for injuries to third persons caused by the negligent operation of such instrumentality on the highway by one authorized by the owner.

86 So. 2d at 838.

More recently, in 1990, this Court "reaffirmed the viability of the dangerous instrumentality doctrine and the important policies that led to its adoption in Florida."

Aurbach, 753 So. 2d at 62.

The dangerous instrumentality doctrine seeks to provide greater financial responsibility to pay for the carnage on our roads. It is premised upon the theory that the one who originates the danger by entrusting the automobile to another is in the best position to make certain that there will be adequate resources with which to pay the damages caused by its negligent operation.

If Florida's traffic problems were sufficient to prompt its adoption in 1920, there is all the more reason for its application to today's high-speed travel upon crowded highways. The dangerous instrumentality doctrine is unique to Florida and has been applied with very few exceptions.

Kraemer v. General Motors Acceptance Corp., 572 So. 2d 1363, 1365 (Fla. 1990) (footnote omitted) (quoted in *Aurbach*, 753 So. 2d at 62).

While "[t]he most common application of the dangerous instrumentality doctrine is where the legal title holder is held vicariously liable for the negligent operation of a motor vehicle," *Aurbach*, 753 So. 2d at 62, the Court has imposed vicarious liability under the doctrine to a vehicle owner acting as a lessor or bailor for the negligent operation of the vehicle by the lessee or bailee. *Susco Car Rental System v. Leonard*, 112 So. 2d 832, 835-36 (Fla. 1959); *Lynch v. Walker*, 31 So. 2d 268, 271 (1947), *overruled in part on other grounds by Meister v. Fisher*, 462 So. 2d 1071 (Fla. 1984). In *Susco Car Rental System*, the Court "extended the owner-lessor's vicarious liability

further to situations where the vehicle was operated by one other than the authorized lessee in violation of the terms of the lease." *Aurbach*, 753 So. 2d at 62; *Susco Car Rental System*, 112 So. 2d at 835-36.

Vicarious liability under the dangerous instrumentality doctrine has not been confined to motor vehicle owners. Indeed, the Court has also recognized the vicarious liability of lessees and bailees of vehicles who allow others to operate the vehicles. *Frankel v. Fleming*, 69 So. 2d 887, 888 (Fla. 1954).

In contrast, in *Raydel, Ltd. v. Medcalfe*, 178 So. 2d 569 (Fla. 1965), the Court held that an owner of a motor vehicle is not vicariously liable under the dangerous instrumentality doctrine for personal injuries sustained by a person to whom the vehicle was entrusted. The Court explained:

an owner, master, employee, principal, or bailor who entrusts his automobile to an agent, servant, employee, bailee or other person is not civilly liable under the dangerous instrumentality doctrine to the person entrusted therewith for injuries sustained personally by that person . . . solely because of the negligent operation thereof by a third person who in turn was entrusted with the automobile by the one initially entrusted with it.

Id. at 215. In that case, Mr. and Mrs. Medcalfe worked for Mr. and Mrs. Soper as domestic employees. "An understanding had been reached [between the Medcalfes and the Sopers] whereby the employees would have the right to use a second car owned by the Sopers for personal transportation" *Raydel*, 178 So. 2d at 570.

The Medcalfes were using the car in question on a Sunday for a personal trip with Mr. Medcalfe driving, when an accident occurred resulting in injuries to Mrs. Medcalfe. Mrs. Medcalfe sued Mrs. Soper based on her ownership of the car. The Court, however, concluded that Mrs. Medcalfe, herself a bailee of the car, could not impute her husband's negligent operation of the car to the owner. His negligence was instead imputed directly to her. The Court reasoned "that as one entrusted with the

possession of the car in turn consented to its being driven for her personal benefit by her husband." *Enterprise Leasing Co. v. Almon*, 559 So. 2d 214, 215 (Fla. 1990) (paraphrasing holding in *Raydel*).

2. Florida's Wrongful Death Act

Florida's Wrongful Death Act provides in pertinent part:

[W]hen the death of a person is caused by the wrongful act, negligence, default, or breach of contract or warranty of any person, including those occurring on navigable waters, and the event would have entitled the person injured to maintain an action and recover damages if death had not ensued, the person or watercraft that would have been liable in damages if death had not ensued shall be liable for damages as specified in this act notwithstanding the death of the person injured, although death was caused under circumstances constituting a felony.

Section 768.19, Fla. Stat. (1995). Over the years, it has repeatedly been held that the act created a new and independent cause of action and a new right of action in the statutory survivors. For example, in *Nissan Motor Co. v. Phlieger*, 508 So. 2d 713, 714 (Fla. 1987), this Court observed:

Florida's Wrongful Death Act does create a right of action in favor of statutory beneficiaries which was not recognized at common law However, this Court has consistently held that the act also creates a new and independent cause of action in the statutorily designated beneficiaries. (citations omitted).

See also Variety Children's Hosp. v. Perkins, 445 So. 2d 1010, 1012 (Fla. 1983) (Ehrlich, J., concurring) (the "wrongful death action is not derivative, but it is remedial and should be construed to fulfill its remedial function"); *Rimer v. Safecare Health Corp.*, 591 So. 2d 232, 255 (Fla. 4th DCA 1991) (Anstead, J.), *approved*, 620 So. 2d 161 (Fla. 1993) ("The right to recover for wrongful death is separate and distinct from, rather than derivative of, the injured person's right while living to recover for personal

injuries Accordingly, the Wrongful Death Act creates an independent cause of action in the statutory beneficiaries");⁷ *City of Pompano Beach v. T.H.E. Ins. Co.*, 709 So. 2d 603, 604 (Fla. 4th DCA 1998) ("[T]he Florida Wrongful Death Act . . . creates claims for the survivors of persons who die as a result of the negligence of others Even though these claims are derivative in the sense that they are dependent upon a wrong committed upon another person, they are separate and independent from the decedent's personal injury, which does not survive They are brought on behalf of the survivors, not to recover for injuries to the deceased, but to recover for statutorily identified losses the survivors have suffered directly as a result of death").

These principles were applied in the landmark case of *Shiver v. Sessions*, 80 So. 2d 905 (Fla. 1955), where the Court interpreted a version of the Wrongful Death Act which had language substantially the same⁸ as that at issue here. There, a wrongful death action was brought by minor children whose stepfather murdered their mother and then committed suicide. The trial court held that the action was barred by the doctrine of interspousal immunity under which the tortfeasor would have been immune from suit by the mother (wife) had she survived. This Court disagreed, discerning a fundamental distinction between the rights conferred on the statutory beneficiaries by the Wrongful Death Act and the right which the decedent might have sued upon had

⁷It is important to note that this Court, in approving the Fourth District's decision in *Rimer*, rejected the defendants' argument that the district court's holding was "based on the false premise that a wrongful death action is a separate and distinct action, rather than derivative of the injured party's right to recover," and stated that the district court's "rationale and holding" were "correct." *Rimer*, 620 So. 2d at 163.

⁸The statute in *Shiver* provided as a condition of suit that the wrongful act or negligence resulting in death was such "as would, if the death had not ensued, have entitled the party injured thereby to maintain an action ***. and to recover damages in respect thereof ***" *Shiver*, 80 So. 2d at 906.

he or she lived:

A workable distinction between these two separate and distinct rights of action, on the one hand, and the "original act of negligence of the tortfeasor [which is] the gist of all actions maintainable either by the decedent in his lifetime or by the personal representative and the widow [or other beneficiary under the Wrongful Death] Act after his death," . . . on the other, was made by the Ohio Supreme Court in *Fiedler*, . . ., in considering the Ohio Wrongful Death Act in a similar context. It was there said that "A right of action is a remedial right affording redress for the infringement of a legal right belonging to some definite person, whereas a cause of action is the operative facts which give rise to such right of action. When a legal right is infringed, there accrues, *ipso facto*, to the injured party a right to pursue the appropriate legal remedy against the wrongdoer. This remedial right is called a right of action." With this distinction in mind, it is clear that the Legislature intended that the right of action created by the Wrongful Death Act in favor of the named beneficiaries must be predicated upon operative facts which would have constituted a tort against their decedent under established legal principles -- in other words, they must state a "cause of action" for tort against the tortfeasor, subject to the defenses of contributory negligence and the like which the tort-feasor could have pleaded in a suit against him by the decedent during his or her lifetime, and this court has so held in many cases. But we think it is unreasonable to imply that the Legislature intended to bar the "right of action" created by the Act on account of a disability to sue which is personal to a party having an entirely separate and distinct "right of action" and which does not inhere in the tort -- or "cause of action" -- upon which each separate right of action is based.

Shiver, 80 So. 2d at 908.

The Court in *Shiver*, in upholding the viability of the minor children's wrongful death claim, went on to say:

Thus, it is settled law in this jurisdiction that the wife's

disability to sue her husband for his tort is personal to her, and does not inhere in the tort itself. The tortious injury to the wife "does not cease to be an unlawful act, though the law exempts the husband from liability for the damage." . . . It is also well settled that our Wrongful Death Act creates in the named beneficiaries "an entirely new cause of action, in an entirely new right, for the recovery of damages suffered by *them*, not the decedent, as a consequence of the wrongful invasion of *their* legal right by the tort-feasor." . . . This right is "separate, distinct and independent" from that which might have been sued upon by the injured person, had he or she lived.

Id. at 907 (citations omitted; emphasis on "them" and "their" by the Court)

The Court's subsequent decision in *Dressler v. Tubbs*, 435 So. 2d 792 (Fla. 1983), confirmed the continued vitality of *Shiver* and its reasoning. In *Dressler*, this Court rejected the argument that *Shiver* had been undermined by intervening decisions from this Court and amendments to the Wrongful Death Act. After quoting with approval a portion of *Shiver* reproduced above, the *Dressler* court concluded:

The changes between the Wrongful Death Act as it existed in 1955 and as it existed in 1977 in no way affect the applicability of *Shiver*. . . . [T]he nature of the action is unchanged and the doctrine of interspousal immunity does not arise.

* * *

Nor does our holding in this case run counter to our decision in *Roberts v. Roberts*, 414 So. 2d 190 (Fla. 1982), *Roberts* involved a wife suing her husband's estate for damages arising from an intentional tort he had committed during the marriage. This is clearly not a wrongful death action and the person bringing the suit is the very person in whom the disability to sue is inherent.

Finding no reason to disregard *Shiver*, we follow it in the case at bar. This action for wrongful death is not barred by the doctrine of interspousal immunity.

Id. at 793-94.

3. The Second District Got it Right in *Alley*; the Fifth District Got it Wrong Here.

As the Fifth District aptly observed in the decision now under review by this Court, the salient facts in *Enterprise Leasing Co. v. Alley*, 728 So. 2d 272 (Fla. 2d DCA), *rev. denied*, 741 So. 2d 1135 (Fla. 1999), "are virtually identical to those of the instant case." (App. 2). The facts in *Alley* are set forth below:

On December 22, 1995, Lenna and James Peoski, husband and wife, rented an automobile in Tampa, Florida from [Enterprise]. Mr. Peoski signed the lease agreement, and Mrs. Peoski was listed as an authorized additional driver Mr. and Mrs. Peoski and their two minor children, Joseph and Karolyn Peoski, traveled in appellant's leased automobile to Lexington, Kentucky. On the December 29, 1995 return trip, Mr. Peoski was driving the automobile south on I-75 near Dalton, Georgia, when he fell asleep at the wheel, causing the automobile to veer off the highway and crash into a guardrail. Mrs. Peoski died as a result of the injuries she sustained in the accident. Mr. Peoski and the two children survived. Appellee, C. Todd Alley, as Personal Representative of the Estate of Lenna Peoski, deceased, filed a wrongful death action against appellant as owner of the vehicle, alleging that Mr. Peoski's negligent operation of the vehicle caused the accident and Mrs. Peoski's resulting death. Judgement was eventually recovered under the Wrongful Death Act on behalf of Mrs. Peoski's estate and each of her two minor children.

Alley, 728 So. 2d at 272-273.

On appeal from the judgment entered against it, Enterprise -- like Alamo here -- contended that it was not responsible for damages sustained by the decedent's surviving children because section 768.19 of the Wrongful Death Act conditions a survivor's cause of action upon the right of the decedent, had he or she lived, to have maintained an action and recovered damages arising out of the event giving rise to suit. *Id.* at 273. Specifically, Enterprise asserted that:

the Dangerous Instrumentality Doctrine would have prevented the decedent from maintaining an action, thus preventing her survivors from recovering [I]t is [Enterprise's] position that, under the Dangerous Instrumentality Doctrine, while an owner/lessor is liable to third persons who are injured as a result of the negligence of a lessee/operator of a leased vehicle [citation omitted], an owner lessor is not liable for the injuries of a co-bailee that result from the bailee's negligent operation of the leased vehicle. *See Raydel, Ltd. v. Medcalfe*, 178 So. 2d 569 (Fla. 1965). As a co-bailee, the decedent could not recover from appellant, thus precluding her children from recovering.

Id.

The Second District rejected Enterprise's argument and further found that Enterprise mistakenly relied upon cases like *Raydel*, which did not involve the interplay between the dangerous instrumentality doctrine and the Wrongful Death Act. The appellate court, in dismissing Enterprise's reading of Florida law, pointed out that it was deciding a question of first impression. The Court explained:

Any attempt to establish a bright line rule or to completely reconcile the circumstances and the language of all the cases bearing upon the issue before us is, to say the least, difficult and challenging. Yet, we conclude that the holdings of the controlling and pertinent cases are not totally irreconcilable. The exact issue presented to us has not been previously expressly ruled upon. We conclude, however, that *Dressler*⁹ and *Shiver*¹⁰ remain the best authority and most nearly on point when considered in light of the purposes of the wrongful death act consistently stated in the later cases.

Id. at 274 (emphasis by the Court).

After acknowledging the authorities holding that the Wrongful Death Act created

⁹*Dressler v. Tubbs*, *supra*, 435 So. 2d 792 (Fla. 1983).

¹⁰*Shiver v. Sessions*, *supra*, 80 So. 2d 905 (Fla. 1955).

"an entirely new and independent cause of action and an entirely new right in the statutory beneficiaries," the Second District in *Alley* stated:

If a wrongful death action is not derivative, what then under the Wrongful Death Act is the nature of a decedent's rights, if the decedent survived, that will either permit or preclude the survivors' action? *Shiver* seems to be the seminal case that provides the best answer to that question. The answer depends on whether, at the time of the decedent's death, there existed, had the decedent survived, either a "cause of action" or a "right of action" that would support an action for damages for the injuries of the decedent that resulted in death. If a cause of action would have existed, even if the right of action were extinguished, the survivors' wrongful death action survives.

Id. at 274. Since, in the Second District's view, Enterprise's "exemption of immunity from suit" under *Raydel* was personal to the decedent in *Alley*, the wrongful death action brought on behalf of the decedent's children was not barred. *Id.* at 275.

In reaching its conclusion in *Alley*, the Second District was not unmindful of this Court's decision in *Variety Children's Hospital v. Perkins*, 445 So. 2d 1010 (Fla. 1983). In *Perkins*, a minor sued a hospital for personal injuries resulting from medical negligence and recovered a \$1,000,000 judgment. The minor's parents also recovered a judgment for \$200,000. After the minor died from his injuries, the parents asserted a wrongful death claim arising from the same incident. The trial court entered summary judgment for the hospital on the wrongful death claim in part because "the cause of action had already been satisfied" 445 So. 2d 1011. On appeal, the Third District reversed upon the holding that the wrongful death claim was separate and independent of the personal injury claim.

On further review, this Court quashed the Third District's ruling, and adopted what the Court referred to as the general rule:

if the injured party sues and recovers damages for his fatal

injuries during his lifetime, the cause of action is thereby satisfied and, in the absence of fraud, duress, inadvertence or mistake, no right of action for death remains for the benefit of the persons named in the wrongful death statute.

This rule is supported by the theory that a cause of action merges into the judgment and, once the judgment is rendered and final, no cause of action exists.

Id. at 1012. The Court then held:

At the moment of his death, the injured minor . . . had no right of action because his cause of action had already been litigated, proved and satisfied. The recovery awarded by the judgment in the previous personal injury action included damages arising from future expenses. Since there was no right of action existing at the time of his death, under the statute no wrongful death cause of action survived the decedent.

Id.

The Second District in *Alley* found that *Perkins* was not controlling because the cause of action there "was barred or had been satisfied or eliminated so that it no longer existed." *Alley*, 728 So. 2d at 274. *Perkins'* holding, that the parents' "rights of action" created by the Wrongful Death Act were extinguished because the underlying "cause of action" giving rise to those rights merged into the final judgment that was entered in the personal injury case -- is consistent with *Shiver*, which held that the "right of action" created by the Wrongful Death Act can be pursued where the underlying "cause of action" still exists.

Unlike the Second District in *Alley*, the Fifth District here concluded that "an individual's status as a co-bailee is [not] a mere disability to sue, but rather, prevents the cause of action from wholly existing in such a circumstance." (App. 2). In support of its holding, the Court cited *Perkins*, 445 So. 2d 1010, for the proposition that "because no right of action existed at the time of Julia Studdard's [sic] death, no

wrongful death action survived the decedent." (App. 2). Respectfully, the Fifth District's decision is based on a misinterpretation of *Shiver* and fails to properly harmonize the Wrongful Death Act and the dangerous instrumentality doctrine.

As the Second District in *Alley* properly concluded, the Wrongful Death Act creates an entirely new "right of action" in Mrs. Stuttard's children, the statutory beneficiaries. This "right of action" is totally independent of the "right of action" which Mrs. Stuttard may have had to recover for her personal injuries had she not been killed in the collision. Mrs. Stuttard's inability to bring a personal injury claim against Alamo is no different than the decedent's inability to sue her husband in *Shiver*, had she not been killed. *Shiver* held that the wrongful death claim there had not been extinguished.

Simply put, Alamo's immunity from suit in an action brought by Mrs. Stuttard for personal injuries is based on her personal status as alleged co-bailee, and not on a defense or exemption from liability which inheres in the tort itself -- i.e., which vitiates the entire "cause of action" from which the separate "rights of action" arise. It thus follows that the "rights of action" conferred by the Wrongful Death Act to enable the statutory beneficiaries to recover their own, different damages remain altogether intact. *Shiver*, 80 So. 2d 905 (Fla. 1955); *Dressler*, 435 So. 2d 792. To hold otherwise would result in the anomalous situation of Alamo being liable for personal injuries sustained in the accident by Mr. Stuttard's children, who undisputedly were not co-bailees of Alamo's vehicle, while being shielded from liability for damages sustained by these same children for the wrongful death of their mother.

Finally, the Fifth District erroneously relied upon this Court's decision in *Perkins* in disallowing the wrongful death action in this case. As explained previously, and as the Second District in *Alley* correctly ruled, *Perkins* does not support exonerating rental car companies from wrongful death liability in cases like this one. In this connection, the Fifth District wholly failed to address this Court's decision in *Nissan Motor Co. v.*

Phlieger, 508 So. 2d 713 (Fla. 1987), where the Court limited *Perkins* and cited *Shiver* with approval:

Nissan maintains that the district court confused the concepts of a "right of action" and a "cause of action." It contends that Florida's Wrongful Death act simply gives the designated beneficiaries a right of action based on the decedent's underlying products liability cause of action. Thus, according to Nissan, because the underlying products liability action is barred by [the product liability statute of repose], Mrs. Phlieger has a right of action but no viable cause of action. Nissan relies heavily on this Court's decisions in *Variety Children's Hospital v. Perkins* [] and *Ash v. Stella*, 457 So. 2d 1377 (Fla. 1984), for the proposition that Florida's Wrongful Death Act does not create a cause of action separate and distinct from that which the decedent could have maintained had he lived. We reject this narrow interpretation of Florida's Wrongful Death Act and agree with the district court that our decisions in *Perkins* and *Ash* actually support Mrs. Phlieger's position".

...

* * *

Florida's Wrongful Death Act does create a right of action in favor of statutory beneficiaries which was not recognized at common law However, this Court has consistently held that the act also creates a new and independent cause of action in the statutorily designated beneficiaries. See, e.g., *Perkins* . . . *Shiver* Neither *Ash* nor *Perkins* should be read to have held to the contrary.

508 So. 2d at 714. (citations and footnotes omitted). Consequently, *Perkins* does not support Alamo's contention, accepted by the Fifth District, that Mrs. Stuttard's personal status as alleged co-bailee of Alamo's vehicle somehow nullifies the wrongful death action brought to compensate her children for their unfortunate and substantial loss.

Toombs submits, respectfully, that the Second District's decision in *Alley* is well-reasoned, consistent with this Court's prior decisions, and therefore should be approved by this Court. Since the underlying cause of action of Julia Stuttard's minor children

is viable, it follows that the Fifth District's conflicting decision here should be quashed.

B. In the Alternative, the Fifth District Erred in Affirming the Summary Judgment for Alamo Where a Triable Issue of Fact Exists on Whether Julia Stuttard was a Co-Bailee at the Time of the Accident.

As shown above, the Fifth District erroneously affirmed the summary judgment for Alamo on Toombs' wrongful death claim where Alamo's co-bailee theory fails as a matter of law. Even if this Court concludes otherwise, the Fifth District's decision nonetheless should be quashed.

Alamo's entire summary judgment argument was premised on Julia Stuttard having been a co-bailee of the vehicle which Alamo rented to her husband. Toombs opposed summary judgment on the ground that Alamo had not carried its summary judgment burden of conclusively showing the absence of a triable issue of fact on this threshold question. (App. 1 n.).

The trial court found that Julia Stuttard was a co-bailee of Alamo's vehicle as a matter of law. The Fifth District affirmed on this issue, disposing of Toombs' argument as follows in a footnote:

FN2. Toombs also claims summary judgment was improper because there was a factual issue as to whether Julia Stuttard was a co-bailee. The facts establishing a bailment, however, are not in dispute. Her name and license number were on the rental agreement and she, along with her husband, drove the car.

(App. 1 n. 2). Toombs submits that the trial court's and Fifth District's holdings cannot be squared with the record on summary judgment.

Under Florida law, "a bailment is a consensual transaction arising out of a contract express or implied; and before there can be any bailment, there must be an acceptance by the bailee of the goods which are the subject of the bailment." *Rudisill v. Taxicabs of Tampa*, 147 So. 2d 180, 183 (Fla. 2d DCA 1962); *see also S&W Air*

Vac v. Dept. of Revenue, 697 So. 2d 1313, 1315 (Fla. 5th DCA 1997). In addition, it has been held that "the law does not thrust upon one the liabilities of a bailee without his knowledge or consent" *Rudisill*, 147 So. 2d at 183 (citation omitted). And whether an entity or individual is a bailee for dangerous instrumentality purposes "may be a fact based inquiry." *Aurbach v. Gallina*, 753 So. 2d 60, 62 (Fla. 2000).

When the record is measured against these principles, the impropriety of the summary judgment ruling on this point is apparent. The only evidence to support Alamo's co-bailee theory are the facts that Julia Stuttard is listed on the rental agreement as an additional driver, her driver's license number appears on the rental agreement, and she drove the vehicle on an unspecified occasion prior to the accident which occurred when her husband was operating it. (R63-64). In contrast, the rental agreement without dispute was signed only by Ian Stuttard; Julia Stuttard did not sign the rental agreement as an additional driver; the rental agreement itself plainly states that the person signing the agreement -- and only that person -- is deemed the renter of the vehicle; and the rental agreement plainly states that the only party to the agreement other than Alamo is the person who signed it. (R201-203; Ex. C; 1T17-21).

In addition, Brian McCarron, the Alamo rental agent who personally rented the vehicle in question to Ian Stuttard, testified on deposition that he had no recollection of having ever met Julia Stuttard, he did not recall her coming to the rental counter, he did not recall whether Ian Stuttard furnished his wife's driver's license and/or number, and he did not know whether any arrangement existed between Julia and Alamo. (R.148-170, 201-203). Furthermore, that Julia may have driven the vehicle on an occasion prior to the accident certainly does not establish her co-bailee status as a matter of law where (1) there is no evidence concerning the circumstances surrounding her use of the vehicle; (2) there is no evidence concerning any arrangement between Alamo and her; and (3) she was not operating the vehicle at the time of the fatal

collision. Under these circumstances, Toombs submits that Alamo did not conclusively show that Julia was in fact a co-bailee of the vehicle at the time of the accident. *See also Brown v. Goldberg, Rubinstein & Buckley*, 455 So. 2d 487, 488 (Fla. 2d DCA 1984) (summary judgment on bailment issue reversed where the evidence concerning the arrangement between the owner of the vehicle involved in accident and the putative bailee gave "rise to conflicting inferences which require resolution by a jury"); *Aurbach*, 753 So. 2d at 62 (citing *Brown* with approval). The Fifth District's decision accordingly should be quashed, even if this Court disapproves the Second District's decision in *Alley*.

CONCLUSION

Based on the facts and authorities discussed above, Petitioner respectfully requests that the Fifth District's decision be quashed, that the Second District's decision in *Alley* be approved, and that the Fifth District be instructed to cause the trial court to reinstate Petitioner's wrongful death claim.¹¹

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 10th day of October 2000, to all counsel on the attached Service List.

Respectfully submitted,

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¹¹Petitioner adopts and incorporates by reference herein the arguments and authorities set forth in the brief as amicus curiae filed by The Academy of Florida Trial Lawyers.

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