O/a 9-11-89

IN THE SUPREME COURT
OF THE
STATE OF FLORIDA

ENTERPRISE LEASING
COMPANY, a corporation,

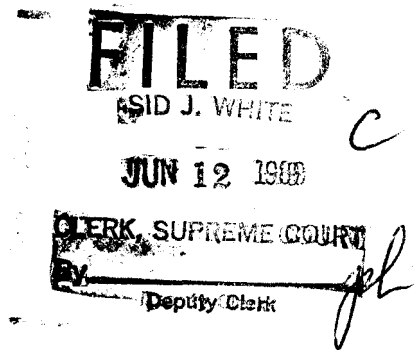
Petitioner,

v.

SHEDRICK ALMON,

Respondent.
_____/

73,651



AMICUS CURIAE BRIEF
OF ALAMO RENT-A-CAR, INC.

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PREFACE

Alamo Rent-A-Car, Inc. (hereinafter "Alamo") is filing this Brief in support of the position of ENTERPRISE LEASING COMPANY and against that of Shedrick Almon (hereinafter **"ALMON"**). Alamo was awarded final summary judgment in Burstyn v. Alamo Rent-A-Car, Inc., Case No. 87-27594-CM, a case still pending as to other defendants before the Seventeenth Judicial Circuit, based on the issue before the Court in this case, i.e., whether an injured bailee of a vehicle may recover against the owner of the vehicle for injuries caused by the negligent operation of a driver to whom the bailee had entrusted the vehicle. The Plaintiff, Burstyn, has filed a Notice of Appeal regarding the granting of the motion for summary judgment.

STATEMENT OF THE CASE AND OF THE FACTS

Alamo incorporates herein by reference the Statement Of The Case and Of The Facts as set forth in ENTERPRISE LEASING COMPANY's Brief.

POINT ON APPEAL

Whether An Injured Bailee Of A Vehicle May Recover Against The Owner Of The Vehicle Pursuant To The Dangerous Instrumentality Doctrine For Injuries Caused By The Negligent Operation Of A Driver To Whom The Bailee Had Entrusted The Vehicle.

SUMMARY OF ARGUMENT

This Court has established that an owner of a vehicle may not be held liable pursuant to the dangerous instrumentality doctrine for injuries suffered by an individual who is himself the bailee of the vehicle and who has entrusted the vehicle to a third person whose negligent operation of the vehicle caused his injuries. Raydel Ltd. v. Medcalfe, **178** So.2d **569, 572** (Fla. **1965).** Under those circumstances, the negligence of the ultimate bailee may not be imputed to the owner of the vehicle; the ultimate bailee's negligence is "stopped on its attempted way up the chain of responsibility before it reaches the owner." State Farm Mutual Automobile Insurance Company v. Clauson, **511** So.2d **1085, 1086** (Fla. 3d DCA **1987).**

In this case, ALMON was the bailee of ENTERPRISE LEASING COMPANY's vehicle; it was in that capacity that he gave the vehicle to Wise to drive. There is no issue of fact which must be resolved in order to determine whether ALMON's status as the bailee of the vehicle had terminated upon his having allowed Wise to drive. ALMON's status when he gave Wise his permission to drive the vehicle is a matter of law for the Court to decide. Either ALMON was a bailee of the vehicle when his brother gave it to him, and, therefore, when he gave it to Wise, in which case Wise's negligence is imputed to him and not to ENTERPRISE LEASING COMPANY, or ALMON was not a bailee of the vehicle when his brother gave it to him, in which case Wise's negligence would be imputed to ENTERPRISE LEASING COMPANY.

That ALMON was a bailee of the vehicle when his brother gave it to him is undisputed. The First District Court of Appeal, however, contends that there is a dispute as to whether ALMON lost that status upon his giving the vehicle to Wise. However, there are no conflicting inferences which must be resolved in order to determine ALMON's status when he gave the vehicle to Wise: he either remained a bailee or he did not. Moreover, ALMON's status after he turned the vehicle over to Wise is irrelevant; what is relevant is the undisputed fact that when ALMON gave the vehicle to Wise, ALMON was the owner's bailee. It is ALMON's status at that moment that precludes him from holding the owner liable for the negligence which resulted from ALMON's having consented to Wise's driving the vehicle which had been entrusted to ALMON.

ARGUMENT

An Injured Bailee Of A Vehicle May Not Recover Against The Owner Of The Vehicle Pursuant To The Dangerous Instrumentality Doctrine For Injuries Caused By The Negligent Operation Of A Driver To Whom The Bailee Had Entrusted The Vehicle.

The only theory pursuant to which ALMON seeks to hold liable ENTERPRISE LEASING CO., the owner of the vehicle involved in the accident at issue, is the dangerous instrumentality doctrine. That rule, which is based on the doctrine of respondeat superior, "ordinarily renders an owner of an automobile or other dangerous instrumentality liable for injuries sustained by third parties resulting from the negligent operation or use of the automobile or other dangerous instrumentality by one to whom it has been entrusted by the owner." Raydel Ltd. v. Medcalfe, 178 So.2d 569, 572 (Fla. 1965).

ALMON, however, was not a "third party" in the sense ordinarily contemplated in the application of the dangerous instrumentality doctrine. This Court established in Raydel that an injured person who is himself the bailee of a vehicle, such as ALMON, cannot impute to the owner of that vehicle its negligent operation by a third person to whom the bailee himself had entrusted it. Id. at 572.

The refusal of the First District Court of Appeal to uphold the trial court's granting of summary judgment for ENTERPRISE LEASING CO. contravenes this Court's holding in Raydel. There Mr. and Mrs. Medcalfe's employer had given a vehicle to them for their personal use. Mrs. Medcalfe was injured while Mr. Medcalfe

was driving the vehicle. This Court concluded that Mrs. Medcalfe could not impute to the owners of the vehicle the negligent operation of it by her husband. Id. at 571. This Court reasoned as follows:

> ... Unless the negligent driving can be imputed in law to an owner there can be no recovery from the owner. Not only was Mrs. Medcalfe jointly entrusted with the car by the owners, but at the time of the accident it is quite apparent that as one so entrusted with the possession of the car she in turn was consenting to its being driven for her personal benefit by her husband. [Authority omitted.]
>
> It is well recognized that an owner of an automobile is not liable under the dangerous instrumentality doctrine for injuries sustained by the driver of the automobile to whom he entrusted it because of the driver's negligent operation of it ....
>
> The same rule applies where a bailee instead of driving the automobile himself permits a third party to drive it for him and is injured by the driver's negligence while a passenger in the car. Mrs. Medcalfe was in this category.

Id. at 572; (emphasis added).

Notice that this Court expressly stated that Mrs. Medcalfe was a passenger in the car. In contrast to the First District Court of Appeal in this case, this Court did not find that there was a question of fact as to Mrs. Medcalfe's status as a bailee versus that of a passenger; this Court accepted the fact that Mrs. Medcalfe, who had been entrusted with the vehicle by its owner, was both a bailee and a passenger. There was no question of fact as to whether, upon becoming a passenger and consenting to her husband driving the vehicle, Mrs. Medcalfe's status as a bailee had terminated. This Court in Raydel distinguished the facts there from those in May v. Palm Beach Chemical Company, 77 So.2d 468, 472 (Fla. 1955), where a vehicle was entrusted only to

a husband and was negligently operated by him resulting in injuries to his wife, a passenger in the car. In May there was no joint bailment. Id. at 572.

Similarly, in this case, there is no question but that the vehicle at issue was bailed to ALMON. The individual who had originally leased the vehicle from ENTERPRISE LEASING COMPANY, Adams, allowed ALMON's brother to use the vehicle, without restriction, who in turn allowed ALMON to use it without restriction. ALMON then became tired and asked an individual named Wise to drive. Subsequently, while Wise was driving and ALMON was a passenger, an accident occurred and ALMON was injured. These facts come directly within this Court's conclusion in Raydel that an owner of an automobile is not liable under the dangerous instrumentality doctrine "where a bailee instead of driving the automobile himself permits a third party to drive it for him and is injured by the driver's negligence while a passenger in the car." Raydel, supra, 178 So.2d at 572. Although ALMON was two bailees removed from the owner of the vehicle, legally there is no distinction between ALMON's status and that of Mrs. Medcalfe. In fact, the court below did not question the fact that when ALMON received the vehicle from his brother he was a bailee of the vehicle. Instead, the court questioned whether, upon becoming a passenger in the vehicle, ALMON's status as a bailee had terminated. This was not an issue for this Court in Raydel.

Other district courts, recognizing the principle this Court established in Raydel, have adhered to that principle under circumstances similar, although not identical, to those at issue in Raydel. For example, in Devlin v. Florida Rent-A-Car, Inc., 454 So.2d 787 (Fla. 5th DCA 1984), James Devlin had rented a vehicle from Florida Rent-A-Car, Inc. Subsequently, he allowed his passenger, Thomas Palmer, to drive the car, and as a result of Palmer's alleged negligence, an accident occurred in which Devlin was injured. Id. at 787-88. Relying on Raydel, the Fifth District Court of Appeal held that Devlin, as the bailee to whom the automobile was entrusted by the owner under the rental agreement, had no cause of action against the owner of the vehicle for injuries caused by the sub-bailee to whom he had entrusted the vehicle. Id. at 789.

Similarly, in State Farm Mutual Automobile Insurance Company v. Clauson, 511 So.2d 1085, 1086 (Fla. 3d DCA 1987), the plaintiff, Mrs. Clauson, had been provided by her employer with an automobile rented from We Try Harder, Inc. for her full-time, unrestricted use. Mrs. Clauson subsequently was injured while riding as a passenger as her husband was driving the vehicle. Id.

The Third District Court of Appeal, relying on Raydel and Devlin, held that Mrs. Clauson had no cause of action against We Try Harder, Inc. and, therefore, no valid claim under the uninsured motorist coverage of her husband's policy. Id. at 1086-87. The court explained that Mrs. Clauson was barred, in effect, from suing We Try Harder for Mr. Clauson's negligence "by

the fact that his negligence is imputed directly to her and is, as it were, stopped on its attempted way up the chain of responsibility before it reaches the owner." Id. at 1086. The court expressly rejected as legally inconsequential the argument that unlike in Raydel and Devlin, the injured bailee in Clauson had obtained the vehicle from an intervening lessee-bailee, her employer, rather than directly from the owner. Id.

The First District Court of Appeal alone has refused to follow Raydel and has insisted instead on fabricating an issue regarding the status of the bailee in order to preclude the granting of summary judgment.[1] Its first renegade decision was Toner v. G & C Ford Company, 249 So.2d 703 (Fla. 1st DCA 1971), cert. dismissed, 263 So.2d 214 (Fla. 1972). There G & C Ford Company loaned its vehicle to Senator Verle Pope for his unrestricted use and the use of the volunteer workers in his campaign. 249 So.2d at 703. One of those workers, David Toner, was using the vehicle for the joint purposes of the campaign and personal pleasure when his friend, McGowan, joined him as a passenger in the vehicle. Shortly thereafter, Toner asked McGowan to drive and while McGowan was driving and Toner was a passenger, an accident occurred resulting in injury to Toner. Id. at 704.

[1] The Second and Fourth District Courts of Appeal have yet to address this issue directly, although the Fourth District will be confronting this issue shortly because the Plaintiff in Burstyn v. Alamo Rent-A-Car, Inc., Case No. 87-27594, now pending as to other defendants before the Seventeenth Judicial Circuit, has appealed the granting of summary judgment in Alamo's favor.

The trial court, correctly relying on Raydel, directed a verdict in favor of G & C Ford Company, the owner of the vehicle. Id. The First District Court of Appeal, however, found that Raydel was not applicable to the facts in Toner. According to the court, Mrs. Medcalfe was a co-bailee of the vehicle, whereas in Toner:

> Senator Pope was the bailee. Toner was the implied bailee of Senator Pope so long as he operated the vehicle. Once McGowan assumed the operation of the vehicle, he became the implied bailee under the 'open bailment' arrangement between Senator Pope and the owner, G & C Ford Company. Immediately prior to and at the time of the accident, Toner's status was solely that of a passenger in defendant G & C Ford Company's automobile. At the very least, Toner's status was one that a jury should have had the opportunity to resolve ....

Id. at 705; emphasis added.

None of the cases the Toner court relied on involved an owner being held liable for injuries sustained by a third party who was the bailee of the vehicle and who had given the vehicle to a sub-bailee. For example, in Susco Car Rental System of Florida v. Leonard, 112 So.2d 832, 835, 837 (Fla. 1959), in which this Court held that the mere fact that there was a provision in the rental contract between the owner and the lessee of the vehicle that no one except the lessee was authorized to operate the automobile did not relieve the owner of liability for the damages resulting from the operation of the vehicle by someone other than the lessee, the injured third party was not the bailee of the vehicle. The same is also true of Heddendorf v. Jovce. 178 So.2d 126 (Fla. 2d DCA 1965) and Hale v. Adams, 117 So.2d 524 (Fla. 1st DCA 1960). In those cases the courts held that owner-

passengers of a vehicle possessed a cause of action for injuries incurred as a result of the negligence of the driver of the vehicle.

That proposition, however, does not support the Toner court's conclusion. It does not address the legal liability of an owner who has surrendered control of his vehicle to a bailee who is injured as a result of the negligence of a sub-bailee to whom the bailee entrusted the vehicle. Where, as here, the owner of the vehicle has bailed it to someone else, the bailee then stands in the place of the owner. There is no argument in this case regarding the right of ALMON as the bailee ("owner") to sue Wise. The argument arises as to whether, when there is an intervening bailee/sub-bailee relationship between passenger and driver, the driver's negligence is "stopped on its attempted way up the chain of responsibility before it reaches the owner." Clauson, supra, 511 So.2d at 1086. The courts in Raydel, Clauson and Devlin all agree that it is a matter of law; the First District Court of Appeal stands alone in concluding that it may not.

The court in Devlin attempted to distinguish Toner on the ground that in Toner, Senator Pope, not Toner, was the bailee, and when Toner allowed McGowan to drive, there was a question of fact as to whether Toner's temporary relationship with the vehicle ended, and McGowan became Pope's implied permittee and thus an implied bailee of G & C Ford and Toner's status reverted to that of a "third party" passenger to whom the owner would be liable. Devlin, supra, 454 So.2d at 789. In Devlin, however,

there was no dispute that the injured passenger was the bailee of the vehicle and it was in his custody and control during its operation. Id. at 789-90.

The court in Clauson also attempted to distinguish Toner on the ground that there the court had found it a jury question as to whether the vehicle was in fact entrusted to the injured passenger or directly to the negligent driver whereas in Clauson it was stipulated that the vehicle was, in fact, "given" to the injured passenger. Id. The court added, however, that if it was wrong about this distinction, it disagreed with Toner. Id. at 1087 m.4.

In Almon once again the First District Court of Appeal has refused to abide by Raydel, insisting instead on setting its own course on this issue. The First District below did recognize this Court's holding in Raydel that "an owner is not liable for injuries to a bailee resulting from the negligent operation of an automobile by a cobailee to whom the vehicle was entrusted by the injured bailee." Almon v. Enterprise Leasing Company, 537 So.2d 1046, 1047 (Fla. 1st DCA 1989). However, preferring instead to rely on its own decision in Toner, the court held that this case involved "a jury question as to whether [ALMON] had terminated his status as a bailee and become solely a passenger." 537 So.2d at 1048.

The First District below rejected the Clauson court's attempt to distinguish Toner on the ground that that case involved an open bailment. Id. Accordingly, if the First District's decisions in Toner and Almon were not premised on the

"open bailment" arrangements in both cases, then that court offers no explanation as to what conflicting inferences regarding ALMON's status as a bailee versus passenger were present in those cases that were not present in Raydel, Devlin and Clauson that would justify its refusal to follow those decisions.[2]

The First District also does not explain in either Toner or Almon what questions of fact a jury must or even could resolve in order to determine whether an injured passenger's status as a bailee of the vehicle had terminated upon his having allowed the sub-bailee to drive. That is not surprising because there is no question of fact which remains for a jury. When ALMON gave his permission to Wise to drive the vehicle which had been entrusted to him, it is a matter of law for the court to decide whether ALMON may claim refuge in his status as a passenger and escape the consequences of his decision, not the owner's, to allow Wise to drive. Under the circumstances of this case, either ALMON was a bailee of the vehicle when his brother gave it to him, in which case the negligence of the driver cannot be imputed to ENTERPRISE LEASING COMPANY or ALMON was not a bailee of the vehicle when his brother gave it to him, in which case Wise's negligence would be imputed to ENTERPRISING LEASING COMPANY; it is a legal determination which does not depend on the resolution of factual issues.

.....

[2] The First District acknowledged Devlin and Clauson but did not address why the result in Almon should differ from the decisions in those cases.

The First District below erroneously relies on Brown v. Goldberg, Rubenstein and Buckley, P.A., 455 So.2d 487 (Fla. 2d DCA 1984), review denied, 461 So.2d 114 (Fla. 1984), in support of its pronouncement that "where conflicting inferences are involved the issue as to one's status as a bailee will ordinarily be a jury question." ALMON, supra, 537 So.2d at 1048. Brown offers no support for the First District's conclusion that there are factual inferences regarding ALMON's status as a bailee. In Brown a law firm had an unwritten agreement with a rental car company pursuant to which rental vehicles were provided to the firm's clients and paid for by the firm. Brown, supra, 455 So.2d at 488. The law firm argued that it never actually had possession of the vehicle and, therefore, could not be deemed a bailee. Id. The court held that there were conflicting inferences concerning the arrangement between the rental car company and the law firm which required that a jury resolve the issue whether the firm was in fact a bailee of the vehicle. Id. Accordingly, in Brown there were factual issues which had to be resolved in order to determine whether the law firm was a bailee.

In Almon, however, there is no factual issue which must be resolved in order to determine whether ALMON was a bailee. It is admitted that ALMON was given the vehicle by his brother who in turn had received it from Adams who in turn had leased it from ENTERPRISE LEASING COMPANY. It is admitted that ALMON had possession of the vehicle. This makes ALMON a bailee as a matter of law. The chain of custody of the vehicle, and, therefore,

responsibility, went from Adams, to ALMON's brother to ALNON to Wise. Each was the bailee of the vehicle when [s]he had possession and control of it.

Moreover, even if the First District is correct in concluding that there is a question of fact as to whether, at the time of the accident, ALMON's status was solely that of a passenger, that question is irrelevant. What is relevant is the undisputed fact that when ALNON gave the vehicle to Wise, ALMON was the owner's bailee, and in effect stood in the owner's shoes. It is ALMON's status at that moment that precludes him from holding the owner liable for the negligence which resulted from ALMON's having consented to Wise's driving the vehicle which had been entrusted to ALMON. Under these circumstances, ALMON "can no more hold the owner liable for his permittee's negligent driving than he could if he, himself, had been driving when the accident occurred." Devlin, supra, 454 So.2d at 790.

CONCLUSION

For the foregoing reasons, Alamo respectfully requests that this Court reverse the Appellate Court's decision reversing the trial court's granting of summary judgment for ENTERPRISE LEASING COMPANY.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a copy of the foregoing BRIEF has been furnished, by U.S. Mail, to: Charles M. Johnston, Esq. and John C. Taylor, Jr., Taylor, Day and Rio, Attorneys for Petitioner ENTERPRISE, 10 S. Newnan Street, Jacksonville FL 32202; William S. Burns, Esq., Co-Counsel for Petitioner ENTERPRISE, 800 S.E. Bank Bldg., 1200 Gulf Life Drive, Jacksonville FL 32207; Robert S. Willis, Esq., and Stephen J. Weinbaum, Esq., Attorneys for ALMON, 503 East Monroe Street, Jacksonville FL 32202; and Jay Stephen O'Hara, Jr., Esq., Attorney for WISE, 1500 American Heritage Life Bldg., Jacksonville, FL 32202, this 9th day of June, 1989.

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