O/a 9-11-89

IN THE SUPREME COURT OF FLORIDA

ENTERPRISE LEASING COMPANY,
a corporation,

Petitioner,

vs.

SHEDRICK ALMON,

Respondent.

CASE NO. 73,651

ON PETITION FOR CERTIORARI FROM
THE DISTRICT COURT OF APPEAL, FIRST DISTRICT

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Respondent, Shedrick Almon, agrees with Petitioner's statement of the case, but cannot accept its truncated version of the pertinent facts of the night of the accident, which is somewhat misleading by omission:

> When they left the Riverwalk sometime later that night, Respondent permitted Bill Wise to drive the car. (Deposition of Respondent p. *46).* After visiting two private clubs or nightspots, Bill Wise and Respondent proceeded to return home in the car. (Deposition of Respondent pp. *47-49; 50-54).* Respondent continued to allow Bill Wise to drive the vehicle. (Deposition of Respondent p. *54).* Shortly thereafter, with Wise driving and Respondent in the front passenger seat, a one car accident occurred and Respondent was injured. (Deposition of Respondent pp. *55-58)*

(Petitioner's Initial Brief, page *1.)*

Instead, Respondent offers the following, more specific account of the events in question.

When Respondent asked if he could borrow the car, his brother put the keys in his hand, and gave him no instructions about the vehicle (except, possibly, to bring it back). (Deposition of Respondent, pages *37-38;* Deposition of Steven Almon, page *16.)* Respondent did not say where he was going. He "figured" that the car belonged to Olivia Adams, but had no actual knowledge of the circumstances involved. (Deposition of Respondent, page *37;* Deposition of Steven Almon, page 17.) Like his brother, this was the first and only time Respondent drove the vehicle. (Deposition of Respondent, page *38.)*

Respondent drove the Toyota to his friend Bill Wise's apartment. (Deposition of Respondent, page ***41.)*** Wise suggested they go to the River Rally in downtown Jacksonville. Respondent drove them there in the rental car. (Deposition of Respondent, pages ***41-42.)*** They stayed from about midnight to 2:00 a.m., although they became separated while there. (Deposition of Respondent, pages ***42-45.)***

Respondent bought and drank two Lowenbrau beers at the River Rally. This was the only alcohol he had (anywhere) that night, and he did not use any other intoxicants. (Deposition of Respondent, pages ***42-44, 48-50, 52.)***

They left the River Rally together. Respondent was tired (having worked that night) and ready to go home. (Deposition of Respondent, pages ***46-47.)*** Wise, however, wanted to stay out. Respondent told him that, in that case, he (Wise) could drive. (Deposition of Respondent, page ***47.)***

Wise drove them to a club. Respondent went in, but had no alcohol, and went back to the car and went to sleep. (Deposition of Respondent, pages ***47-49.)*** Eventually, Wise returned, and drove to another club that was open late. (Deposition of Respondent, pages ***48-50.)*** Respondent had already told Wise he wanted to go home. (Deposition of Respondent, pages ***53.)***

Respondent remained asleep in the car, while Wise went inside the club. (Deposition of Respondent, page ***50.)*** "Finally," Wise returned, and got behind the wheel once again. He liked to drive, and Respondent had not had to ask him to continue once he began.

(Deposition of Respondent, pages 50-53.) Though there was little conversation, Respondent was aware (although not of the route) that he was on the way home at last. (Deposition of Respondent, page 54.)

The next thing Respondent knew was that his side hit something in the car. He could not move his arms, and Wis pulled him from the vehicle. He blacked out after telling Wise "Don't slap me," and awoke, a quadriplegic, in the hospital. (Deposition of Respondent, pages 55–59.)

SUMMARY OF THE ARGUMENT

The decision below simply and correctly held that the instant facts did not conclusively establish Respondent's "bailee" status at the time of the accident, *so* that a jury decision was required, not a summary judgment. Petitioner's contention that such decision is irreconcilable with State Farm Mutual Automobile Insurance Company vs. Clauson, 511 So.2d 1085, 1087 (Fla. 3rd DCA 1987 and Raydel, Ltd. vs. Medcalfe, 178 So.2d 569 (Fla. 1965) is demonstrably incorrect.

Respondent has no quarrel with Clauson or Raydel. Both, however, involved indisputable (and, therefore, undisputed) evidence that the plaintiff was the vehicle owner's bailee at the time of the accident. Thus, neither court had occasion to consider whether or when, for purposes of the dangerous instrumentality doctrine, an arguable "bailee" relationship might terminate.

Here, on the other hand, the evidence as to Respondent's status as a bailee at the time of the accident is equivocal at best. Consequently, the First District followed its prior decision in Toner vs. G & C Ford Company, 249 So.2d 703 (Fla. 1st DCA 1971), cert. dismissed, 263 So.2d 214 (Fla. 1972), which involved similar facts, and held that summary judgment was inappropriate.

Although Petitioner and Amicus Curiae assail the Toner decision, it is clear that the First District was (as it is here) entirely faithful to the intent of the dangerous instrumentality

doctrine, and that its holding was not precluded by Raydel or any other case. In fact, although a conflict with Raydel was asserted, this court dismissed certiorari in Toner.

The applicability of the dangerous instrumentality doctrine is a matter of policy, not culpability. The original intent was to insure the public against inevitable injury, *so* any exceptions to an owner's liability should be narrowly drawn. In Clauson and Raydel, for instance, the plaintiffs were not only the owner's bailees, but were the negligent drivers' spouses. Since the dangerous instrumentality doctrine was meant for protection, not unjust enrichment, those decisions are correct as a matter of policy. But Petitioner's argument that, therefore, no "bailee" can ever recover, is not supported by the case law or the underlying policy.

Respondent submits that, under the particular facts of this case surrounding his brief use of the vehicle, he was (at the time of the accident) within that class of persons meant for protection by the dangerous instrumentality doctrine. And, as demonstrated herein, affirmance here would not expose vehicle owners to limitless liability, as Petitioner fears.

Summary judgment is not a substitute for a trial, and should never be granted where there is any doubt as to the existence of a material fact dispute. Fletcher vs. Petman Enterprises, Inc., 324 So.2d 135 (Fla. 3rd DCA 1975). The First District correctly held that, on these facts, a jury should decide whether Respondent was a bailee at the time of his injury. The decision below should be affirmed.

ARGUMENT

I. THE DECISION BELOW CORRECTLY HELD THAT A JURY ISSUE EXISTS AS TO WHETHER RESPONDENT WAS PETITIONER'S BAILEE AT THE TIME OF THE ACCIDENT, SO THERE IS NO CONFLICT WITH CLAUSON OR RAYDEL.

A. State Farm Mutual Automobile Insurance Company vs. Clauson, 511 So.2d 1085, 1087, (Fla. 3rd DCA 1987)

Petitioner depends for jurisdiction on an asserted conflict between the decision below and State Farm Mutual Automobile Insurance company vs. Clauson, 511 So.2d 1085, 1087 (Fla. 3rd DCA 1987). Therefore, the shortest route to the issues here begins with a comparison of the instant case with Clauson. As will become apparent, neither Clauson nor any other case holds that a jury can never decide a bailment issue. On the other hand, Respondent's right to attempt to convince a jury that he should recover is supported by the case law, as well as the policy of the dangerous instrumentality doctrine.

While the following argument is couched in a consideration of conflict jurisdiction, such discussion in this case necessarily includes the merits. That is to say, whether a sufficient conflict exists may depend on whether (as Respondent contends) the facts are sufficient for a jury resolution of the bailment issue. Therefore, Respondent's arguments as to jurisdiction and the merits are interwoven.

The crux of Petitioner's argument is that Clauson and Raydel, Ltd. vs. Medcalfe, 178 So.2d 569 (Fla. 1965), specifically held

that: "a bailee or a sub-bailee of a vehicle who permits a third party to drive the vehicle cannot recover against the owner'' for the driver's negligence. (Petitioner's Initial Brief, pages 3-4.)

That characterization of Clauson and Raydel is correct, but only if the injured Plaintiff was in fact a bailee at the time of the accident, which was assumed in those cases. In neither case were there facts to support any inference that the bailment had terminated, and *so* neither court considered the issue. Recovery was correctly denied as a matter of law. In contrast here, Respondent has actively litigated the issue of his status as a bailee, based on his minimal connection to the vehicle.

Petitioner argues that, "under the undisputed facts of the present case, it is impossible to reconcile the First District's holding in the case below with the Third District's holding in Clauson." (Petitioner's Initial Brief, page *14.)* However, Petitioner's rendition of the "controlling facts," in a chart comparing Clauson (at page 13), recounts only the transfers of the vehicle, and simply ignores the more specific circumstances involved.

A closer look at the facts shows that this case is much more like Toner vs. G & C Ford Company, 249 So.2d 703 (Fla. 1st DCA 1971), cert. dismissed, 263 So.2d 214 (Fla. 1972), than Clauson.

The Toner facts will be discused in detail later. For now, a basic comparison is instructive. Shedrick Almon got the car from his brother, who had gotten it from Olivia Adams. (Deposition of Respondent, pages 37-38.) Thus, his relationship with the

original bailee (Adams) was attenuated from the start, like David Toner's relationship with Senator Pope, and unlike Mrs. Clauson's relationship with her employer. Moreover, in this case Wise, the driver, had been off on a social jaunt of his own, again more like McGowan (the driver in Toner), and unlike the Plaintiff's husband in Clauson. Finally, like David Toner, Respondent Shedrick Almon had surrendered control of the vehicle well before the accident, and was asleep in the car.

These are some of the facts that create a jury issue here where there was none in Clauson, and which Petitioner omits in arguing the similarity of these cases.

Petitioner also maintains that the decision below conflicts with the "chain of command" rationale of Clauson and Raydel (Petitioner's Initial Brief, page 18). Essentially, this theory would prevent liability when the Plaintiff is in the chain of bailment.

Once again, Respondent submits that this assumes the issue of whether the Plaintiff was still a bailee at the time in question. Actually, the First District's decision herein does not tamper with the "chain of command" principle, it simply allows a jury to decide whether, on these facts, Respondent was still in that chain at the time of the accident. And in that respect, it is noteworthy that Petitioner concedes that the First District agreed with the rules of law applied in Clauson and Raydel, but argues

that the different result creates the conflict for this Court's jurisdiction. (Petitioner's Initial Brief, page 19.)

Finally as to Clauson, the First District opinion herein distinguished that case in favor of the Toner precedent:

> In the present case the Court relied on Clauson in granting summary judgment for Appellee. As in Clauson, the Court below noted the open bailment arrangement in Toner. However, we do not deem this single factor to be critical to the Toner decision.

Shedrick Almon vs. Enterprise Leasing, 537 So.2d 1046, *1048* (Fla. 1st DCA 1989).

In support of certiorari, Petitioner cites Hastings vs. Osius, 104 So.2d 21 (Fla. 1958) for the proposition that jurisdiction can arise from conflicting rules of law, or conflicting results (Petitioner's Initial Brief, page 19). However, the Hastings Court also observed that conflict jurisdiction is confined to "cases where there is a real and embarrassing conflict of opinion and authority between decisions." Hastings, supra, 104 So.2d at 22, citing Ansin vs. Thurston, 101 So.2d 808 (Fla. 1958).

Respondent submits that whether a genuine conflict exists here depends on this Court's view of the merits. In that respect, respondent maintains that the facts herein surrounding his use of the vehicle are simply not so clear as to warrant removal of that issue from the jury. If this Court agrees with that position, as the First District did, there is no conflict with either Clauson or Raydel.

B. Raydel, Ltd. vs. Medcalfe, 178 So.2d 569 (Fla. 1965)

Petitioner's entire argument in this case, on jurisdiction as well as the merits, admittedly has its roots in Raydel vs. Medcalfe, 178 So.2d 569 (Fla. 1965):

> The Court's decision in Clauson is grounded upon the law set forth by the Supreme Court of Florida in Raydel. Therefore, not only does the First District's opinion in the Court below conflict with Clauson, the First District's decision also conflicts with Raydel.

(Petitioner's Initial Brief, page 14.) Accordingly, a close examination of Raydel is in order.

At the time Raydel was decided, there were already two recognized exceptions to the application of the dangerous instrumentality doctrine in Florida to automobile cases. The first was that an owner was not liable if a theft or conversion of the automobile had occurred. See Susco Car Rental System of Florida vs. Leonard, 112 So.2d 832 (Fla. 1959); Avis Rent-A-Car Systems, Inc. vs. Garmis, 440 So.2d 1311 (Fla. 3rd DCA 1983). Arguably, however, a theft or conversion situation is not really an exception as such, since an owner's liability is predicated upon his voluntarily relinquishing his automobile to another. See, Susco Car Rental System of Florida vs. Leonard, 112 So.2d 832 (Fla. 1959); Union Air Conditioning, Inc. vs. Troxtell, 445 So.2d 1057, 1058 (Fla. 3rd DCA 1984), review denied, 453 So.2d 45 (Fla. 1984).

That is not to say, however, that an owner is only liable for the negligence of his authorized driver. In Susco vs. Leonard, 112 So.2d 832 (Fla. 1959), this Court held that a car rental contract which specifically prohibited third-party driving would not save an owner from liability in such situations. The Court explained as follows:

> In the final analysis, while the rule governing liability of an owner of a dangerous agency who permits it to be used by another is based on consent, the essential authority or consent is simply consent to the use or operation of such an instrumentality beyond his own immediate control. Only to that limited extent is the issue pertinent when members of the public are injured by its operation, and only in a situation where the vehicle is not in operation pursuant to his authority, or where he has in fact been deprived of the incidents of ownership, can such an owner escape responsibility.

Id. at 837.

In a subsequent case, the Third District made it clear that even a bailee's gross violation of an owner's instructions would not amount to a "theft or conversion'' sufficient to absolve the owner of liability. Avis Rent-A-Car, Inc., vs. Garmis, *440* So.2d 1311, 1313 (Fla. 3rd DCA 1983). Therefore, Petitioner's frequent reference (in its initial brief) to its contractual prohibition of third-party drivers is legally irrelevent.

In any event, the second so-called exception to an owner's liability occurs when an automobile is delivered to a service station for repairs. In those circumstances, it has consistently been held that, unless somehow negligent himself, an owner is not

responsible for the actions of service station employees. See Castillo vs. Bickley, 363 So.2d 792 (Fla. 1978); Petite vs. Welch, 167 So.2d 20 (Fla. 3rd DCA 1964); Fry vs. Robinson Printers, 155 So.2d 645 (Fla. 2nd DCA 1963).

It was in Raydel vs. Medcalfe that this Court addressed the third situation of an automobile owner's non-liability under the dangerous instrumentality doctrine, which might be called "the injured bailee." In that case, Alice Soper personally loaned a car belonging to her own corporation (Raydel) to her household servants, the Medcalfes, for their daily use. The latter took a day off to go fishing, and Mrs. Medcalfe was injured by her husband's negligent driving. She sued her employer as well as Raydel. The trial court granted a summary judgment for the Plaintiff on liability, and the case was tried on damages alone. The Third District affirmed, but this Court took a different view.

After reviewing the facts, the Raydel Court expressed the (third) so-called exception as follows:

> For example, this exception would appear to be supported by the principle of law that the driver of an automobile which was entrusted to him by its owner cannot hold the owner liable for injuries sustained by the driver arising from his own negligent operation of the automobile.

178 So.2d at 572, citing Florida Power and Light Co. vs. Price, 170 So.2d 293, 298 (Fla. 1964). Obviously, this makes perfect sense. If public policy dictates that an owner be held liable for allowing others to operate an automobile, then the party who initially puts it in operation on the public highways clearly

should not be the beneficiary of that principle. The Raydel Court, however, went even further with that exception:

> 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.

Again, Respondent has no quarrel with these principles. It is important to remember that Toner came later, and that certiorari was dismissed therein because of no conflict jurisdiction.

The distinction is that Raydel presented no bailment issue: Mrs. Medcalfe, along with her husband, had personally taken possession of the vehicle directly from her employer. Her status as a bailee was quite clear. Thus the Court had no occasion to discuss whether or when such an issue would be for the jury.

Other courts, considering Raydel and Toner, have observed this distinction, recognizing that liability in these cases may turn on whether a bailee relationship existed at the time of the accident. See Clauson, supra, 511 So.2d 1085, 1087; Devlin vs. Florida Rent-A-Car, *454* So.2d 787 (Fla. 5th DCA 1984); Ray vs. Earl, 277 So.2d 73, 76 (Fla. 2nd DCA 1973), cert. denied 280 So.2d 685 (Fla. 1973).

It is worth noting, also, that the Raydel decision was made even easier by the fact that Mr. Medcalfe's negligence was imputed to the Plaintiff both because they were married and on a joint venture:

> Respondent was not a 'third party' in the sense ordinarily contemplated in the application of the dangerous instrumentality doctrine. She and her husband were co-bailees or joint adventurers, having been entrusted jointly with the possession of the automobile for their personal use. In such status they cannot impute the negligent operation of the automobile by either of them to the Petitioners and recover damages for injuries to either of them arising therefrom.
>
> On the merits, we do not believe the dangerous instrumentality doctrine applies where an automobile is entrusted to a husband and wife jointly and while it is in their personal use and under their dominion and control it is negligently operated by one of them, injuring one or both of them.

Raydel, supra 178 So.2d at 572 (emphasis added). See also, Clauson, supra, 511 So.2d at 1086 (Footnote 1); Standard Civil Jury Instruction 3.3f (joint enterprise).

In fact, the First District in Toner recognized these very differences in distinguishing Raydel. Since Respondent contends that the Toner-Raydel distinction parallels the difference between the instant case and Clauson, it is worthwhile at this point to re-examine Toner.

C. Toner vs. G & C Ford Company, 249 So.2d 703 (Fla. 1st DCA 1971) cert. dismissed, 263 So.2d 214 (Fla. 1972)

As just indicated, it was abundantly clear in Raydel that the facts conclusively showed the Plaintiff to have been the owner's bailee at the time of the accident. Six years later, the First District was confronted with a different (and less clear) set of

facts in Toner vs. G & C Ford Company, 249 So.2d 703 (Fla. 1st DCA 1971), cert. dismissed, 263 So.2d 214 (Fla. 1972).

This time, there was no co-bailee situation, no joint venture, and no marital relationship. Moreover, David Toner apparently did not get possession of the vehicle directly from the owner (G & C Ford) or the bailee (Senator Pope). All these observations apply to the instant case as well.

The Toner facts are as follows. G & C Ford loaned an automobile to Senator Verle Pope, who was campaigning for re-election. It was apparently understood that the car was for the employ of campaign workers, but there were no restrictions placed on its use.

On the night of March 25, 1967, David Toner drove the automobile to a St. Augustine bar "on a combination mission of advancing Senator Pope's campaign and for personal pleasure." Toner, supra, 249 So.2d at 704.

In the bar, Toner ran into his old friend, McGowan. The conversation led to McGowan's offer to "assist in this campaign in his spare time." Id. at 704. Then the two men turned their attention to other matters:

> Shortly thereafter, Toner and McGowan 'picked up' two young ladies who were visiting the bar and ultimately arranged to drive them to their home in Jacksonville. Prior to arriving at their destination, Toner advised his companion, McGowan, that he was tired and sleepy and asked him if he felt like driving. McGowan acceded to Toner's request. After delivering the young ladies to their Jacksonville home, Toner returned to the rear seat of the automobile and McGowan proceeded to drive same in the direction

> of St. Augustine. The accident occurred around 4:00 a.m. while Toner was sleeping in the rear seat. As a result of the accident, one of Toner's legs was amputated two weeks later.

Id. at *704.*

At first glance, the facts are suggestive of the Raydel general rule that a bailee cannot sue the owner who entrusted him the car, either for his own negligence or that of a third party whom he allowed to drive.

The First District, however, in reversing a summary judgment, held that David Toner could sue G & C Ford and allow a jury to determine whether he was a bailee at the time of the accident. In *so* doing, the Toner Court distinguished Raydel as follows:

> We are not unmindful of the following statement in Raydel:
>
> > 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 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.
>
> In the instant cause we are not confronted with co-bailees. Here 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.

Toner, supra, at 249 So.2d at 705 (emphasis added).

Three of the other four districts in this state have recognized the Raydel distinction and the continued vitality of Toner. In Ray vs. Earl, 277 So.2d 73, 76 (Fla. 2nd DCA 1973), cert. denied 280 So.2d 685 (Fla. 1973), the Second District had the following to say about Toner:

> The First District had held that an 'implied bailee' (original permittee) may impute the negligence of his own 'implied bailee' (second permittee) to the owner of the vehicle and to maintain a suit against the bailor/owner for his own injuries sustained while riding as a passenger with his own bailee. . . . Although not expressly stated, it appears that the injured campaign worker was treated by the court as any other injured third party in that, although he was undoubtedly an 'insured' under the bailor's policy while he was driving the car, he became solely a passenger while riding in the vehicle.

Id. 277 So.2d at 76. The Ray facts make that case even more interesting.

Ray lent his car to Earl, who allowed Surratt to drive (with Earl as a passenger). The accident killed Surratt and injured Earl. Thereafter, Earl sued Surratt's estate and won; Ray's insurance company (American Fire and Indemnity), defended the action against Surratt, and paid their policy share of the damages. Then, Ray and his insurance company (Morrison) sued Earl

and his insurance company for indemnity because Earl had allowed Surratt to drive. The trial court granted judgment on the pleadings, in favor of Earl and his insurance company. The Second District affirmed, with the following comment:

> Florida law is clear that the owner of a dangerous instrumentality, such as an automobile, is vicariously liable to persons injured as a result of the negligence of a person operating that instrumentality with the owner's consent . . . That consent may and usually will be implied in cases where no expressed limitation or negation of consent can be found in the facts. . . . This is true even where the original permittee has delegated his right to drive the automobile to a second permittee and, more particularly, in a situation such as we have here where the original permittee is a passenger in the automobile.
> . . .

Id. at 75 (citations omitted and emphasis added).

Obviously, that reaffirmation of the Toner principle is directly on point in this case. Moreover, the end result of the Ray case is pertinent here as well: Ray (the owner) and his insurance company were held responsible for the injuries to Earl (the original bailee) caused by the driving negligence of Surratt (Earl's permittee), while Earl was a passenger.

Perhaps the most succinct discussion of Toner vis-a-vis Raydel appears in Devlin vs. Florida Rent-A-Car, 454 So.2d 787 (Fla. 5th DCA *1984).* In that case, Devlin was the immediate bailee, having personally rented a car from Florida Rent-A-Car. Devlin allowed Palmer to drive, and was injured as a passenger. Devlin sued, but a summary judgment for the vehicle owner was affirmed. The Fifth District's holding was based on Devlin's

clear bailee status, and likened the case before it to Raydel, specifically distinguishing Toner on that very basis. The importance of this point justifies an extended quote:

> At first blush the case of Toner vs. G & C Ford Company, 249 So.2d 703 (Fla. 1st DCA 1971), cert. dismissed, 263 So.2d 214 (Fla. 1972), a case cited by neither party, appears to conflict with Raydel, and with our decision here, but a careful review of the decision shows it to be distinguishable. There, the owner, G & C Ford, loaned the automobile to Senator Pope, who in turn let Toner use it. Pope was not in the automobile when Toner allowed McGowan to drive the car, and when Toner was injured following McGowan's alleged negligence in operating the vehicle. The Court reversed the dismissal of Toner's action against G & C Ford, holding that at the time of the accident, Toner was merely a third party passenger, or at least could be so found by the jury. What distinguishes Toner from this case is that in Toner, Pope was the bailee, not Toner, and when Toner turned over the operation of the vehicle to McGowan, the jury could find that Toner's temporary relationship with the automobile ended, and McGowan became Pope's implied permittee and thus an implied bailee of G & C Ford. If the jury so found, Toner could be a 'third party' passenger, thus entitled to recover from the owner for the bailee's (or permittee's) negligent operation. No such situation exists here. Without dispute, Appellant was the bailee of the automobile and it was in his custody and control during its operation. Appellant 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.

Id., at 789. (Emphasis added.) Thus, Devlin supports Appellant's position here. In fact, as will be shown later, referring to the first underlined sentence in the Devlin quote above, if we substitute Adams for Pope, Respondent Shedrick Almon for Toner,

and driver Wise for McGowan, the observation loses nothing in the translation.

At this point, our consideration of the pivotal Toner decision chronologically returns to Clauson, which also considered Toner. It is important to note Clauson's striking factual similarities to Raydel:

> The Plaintiff, Mrs. Clauson, is an officer of an advertising agency, which, as part of her compensation, provided her an automobile which it had leased from We Try Harder, Inc., for her full-time, unrestricted use. While returning from a social event, she was riding as a passenger in the car which she had allowed her husband to drive. He did ***so*** negligently and she was injured.

Clauson, supra, 511 So.2d at 1086. The Court reversed the plaintiff's summary judgment, and ordered that judgment be entered for the defendant vehicle owner. The opinion includes the "chain of responsibility" language which Petitioner Enterprise Leasing has urged throughout this appeal:

> In the present instance, however, in which the bailee, Mrs. Clauson, has, in effect, sued We Try Harder for Mr. Clauson's negligence, she is barred 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. (See Petitioner's Initial Brief, page 12.) However, in the very next sentence, the Third District focused on the circumstances that invoked Raydel and set apart Toner, (as well as this case) -- clear evidence that Mrs. Clauson was the immediate bailee of the owner:

> Looking at it another way, the husband's negligent driving is imputed to both Plaintiff and the owner/defendant. She is as much -- if not, as the immediate bailee, more -- responsible for his conduct as the 'defendant' We Try Harder. Two Florida cases directly apply these principles and hold, as we do in following them, that the bailee cannot succeed in such a situation. Raydel, Ltd. vs. Medcalfe, 178 So.2d at 572; Devlin vs. Florida Rent-A-Car, Inc., *454* So.2d at 787.

Id. at 1086.

While the Clauson Court reserved the right to disagree with Toner (see footnote *4*, 511 So.2d at 1087) it found the case distinguishable:

> As we understand it, Toner finds it a jury question as to whether the vehicle was in fact entrusted to the injured passenger or directly to the negligent driver. See Devlin, *454* So.2d at 789 (distinguishing Toner). Here, it is stipulated that the vehicle was, in fact, 'given' to the injured Plaintiff who therefore has no valid claim against the owner or, as a result, under UM against State Farm.

Id. at 1087. It would appear, then, that Toner has survived Clauson. And with that, we can summarize the argument as to conflict jurisdiction.

As noted previously, it would appear that whether a sufficient conflict exists here depends largely upon one's view of the merits. Where the slightest doubt remains as to whether a material fact issue exists, summary judgment is inappropriate. Fletcher vs. Petman Interprises, Inc., 324 So.2d 135 (Fla. 3rd DCA 1975). Consequently, Respondent again respectfully submits that if this Court agrees that summary judgment here was inappropriate, then there is no conflict with either Clauson or Raydel.

11. THE DECISION BELOW WAS CORRECT AND IS SUPPORTED BY PUBLIC POLICY

We have already discussed Raydel, Clauson, Toner, and the other cases on point. The rest of Petitioner's argument essentially is that the rationale and policy of the dangerous instrumentality doctrine requires reversal here. Upon closer examination, however, it is clear that that argument relies more on the lure of technical consistency than real-world consequences. Having demonstrated that the ruling below was not a "renegade decision" (Amicus Curiae Brief of Alamo Rent-A-Car, Inc., page 5), Respondent will now show that the First District was entirely faithful to the dangerous instrumentality doctrine.

First of all, it is important to consider this case against the backdrop of a justice system that considers the right to a jury trial one of its cornerstones. Summary judgments are not a substitute for a trial, and are appropriate only where there is no doubt as to the existence of a material fact dispute. See Fletcher vs. Petman Enterprises, Inc., supra, 324 So.2d 135.

While the Toner and Almon decisions by the First District apparently stand alone in considering the precise issue here, this Court and others have reversed summary judgments in favor of jury decisions on a number of automobile negligence issues, including agency-type questions paralleling the bailee (or not) argument here. See Tribitt vs. Crown Contractors, Inc., 513 So.2d 1084 (Fla. 1st DCA 1987) (conversion or theft); American Automobile Association, Inc. vs. Tehrani, 508 So.2d 365 (Fla. 1st DCA 1987)

(agency); Caetano vs. Bridges, 502 So.2d 51 (Fla. 1st DCA 1987) (intent vs. negligence); Bott vs. Pomeroy, 497 So.2d 1275 (Fla. 4th DCA 1986) (Good Samaritan Statute); Brown vs. Goldberg, 455 So.2d 487 (Fla. 2nd DCA 1984) (bailee); Taylor vs. Safeco Insurance Company, 324 So.2d 645 (Fla. 1st DCA 1976), corrected opinion, 361 So.2d 743 (Fla. 1st DCA 1978) (restricted use).

The Brown case may be especially pertinent here. The following passage from that opinion both indicates the facts, and illustrates the triable nature of the bailee question in certain cases:

> We hold that the evidence concerning the arrangement between Ranker [Motors] and the law firm gives rise to conflicting inferences which require that a jury resolve the issue whether the law firm was in fact a bailee of the automobile and thus liable for damages inflicted by the negligent operation of that automobile by one permitted by the firm to use it.

Brown vs. Goldberg, supra, 455 So.2d at 488. See also, Martin vs. Lloyd Motor Company, 119 So.2d 413 (Fla. 1st DCA 1960) (reversing dismissal and remanding on the issue of whether the defendant bailee had control over the vehicle at the time of the accident); Wustrack vs. Builders Supply Company, 404 P.2d 796 (Oregon en banc 1965) (holding that University students who borrowed a truck for a parade were not thereby the owner's bailees); and Krebsbach vs. Miller, 125 N.W.2d 408 (Wisconsin 1963) (reversing a summary judgment on the issue of the owner's implied consent to a third-party driver).

As these cases show, in general, juries are as capable of considering bailment-type issues as courts are in formulating jury instructions. Now we must focus on whether the rationale of the dangerous instrumentality doctrine favors this particular issue being decided by a jury or by a court.

At the heart of Petitioner's argument is the simple notion that, since an owner is liable for allowing another to drive, his bailee should be equally responsible when he does the same:

> When the owner of a car loans it to someone, and that person in turn lets someone else drive the car, if the driver negligently causes an accident injuring a third party, not only is the owner of the vehicle liable but the bailee who exercised dominion and control over the vehicle (and allowed someone else to drive it) is also liable -- the driver's negligence is imputed to the bailee as well as the owner.

(Petitioner's Initial Brief, page 10.)

While that attractive logic may express the general rule correctly, it glosses over some important qualifications.

First of all, the rule that a bailee is responsible (along with the owner) to an injured third party does not involve the same considerations as the bailee's position vis-a-vis the owner. It is important to keep in mind that the dangerous instrumentality doctrine was originally designed to provide protection, not preclude it. As the New Jersey Supreme Court put it, the "policy is that of assuring that all persons wrongfully injured have financially responsible persons to look to for damages". Odolecki vs. Hartford Accident & Indemnity Company, *264* A.2d **38** (N.J. 1970). Considered in that light, it makes no sense to use the

dangerous instrumentality doctrine to deny recovery to one in Respondent's position.

In that regard, it is one thing to hold that society requires that, without exception, businesses that rent automobiles insure the public against the inevitable injuries that result. See Union Air Conditioning, Inc. vs. Troxtell, *445* So.2d *1057, 1058* (Fla. 3rd DCA 1984), review denied, *453* So.2d *45* (Fla. *1984).* It is quite another, Respondent submits, to automatically vest an individual citizen "bailee" with the same status, especially without reference to the specific circumstances of the vehicle's use. Exceptions to a rule designed to protect the public deserve closer analysis.

The next flaw in Petitioner's argument is that it mixes dangerous instrumentality policy with negligence concepts:

> The rationale for holding that the owner is not liable under such circumstances is that the bailee or sub-bailee had possession and control of the vehicle and was in the best position to insure that the vehicle was used a safe manner.

(Petitioner's Initial Brief, page *4.)* The problem with that analysis is that, as shown below, if a rental agency's liability is purely a matter of policy, then a "bailee's'' right to recover is a policy decision too, and should not be based on his theoretical responsibility for the negligent driver.

It is true that some cases speak of the reason for liability being the owner's (or bailee's) obligation "to have the vehicle . . . properly operated when it is by his authority on the public

highway." See Anderson vs. Southern Cotton Oil Company, *73* Fla. *856, 74 So. 975, 978* (Fla. *1917);* (See Petitioner's Initial Brief, page *6.).* Nevertheless, it is clear that the dangerous instrumentality doctrine rests on no such fiction. After all, beyond renting only well-maintained vehicles to licensed drivers, a rental company obviously has no actual authority to affect how they are operated. Nor, for that matter, does a passenger (like Respondent Shedrick Almon) have any realistic control over how the vehicle is operated by the driver. One authority has recognized this fact, albeit in the context of the "joint enterprise" doctrine:

> In the usual case, the passenger has no physical ability to control the operation of the car, and no opportunity to interfere with it; and any attempt on his part to do *so* in fact would be a dangerously distracting piece of backseat driving which might very well amount to negligence itself.

Prosser and Keaton, The Law of Torts, at *522* (5th Ed. *1984).*

Thus, it is clear that the basis for Florida's dangerous instrumentality rule in automobile cases lies in policy, not culpability. See Union Air Conditioning, Inc. vs.Troxtell, *445* So.2d *1057, 1058* (Fla. 3rd DCA 1984), review denied, *453* So.2d *45* (Fla. *1984).* That is why even the violation of a rental contract prohibiting third-party drivers is ineffective in limiting an owner's liability. See Susco vs. Leonard, supra, *103* So.2d *832;* Avis Rent-A-Car Systems, Inc. vs Garmis, supra, *440* So.2d *1311.* And that is why labels like "bailee" should not be applied (especially to preclude recovery) without reference to the

objective of the dangerous instrumentality doctrine and the particular facts.

Petitioner argues, in effect, "once a bailee, always a bailee," in focusing only on Respondent's having received possession of the vehicle initially. By that assertion, however, Petitioner simply refuses to consider whether, for purposes of th dangerous instrumentality doctrine, on these facts, Wise stepped into Respondent's shoes as a sub-bailee of Olivia Adams. Respondent Shedrick Almon had a most fleeting relationship with the vehicle, and none at all with the owner or the original bailee. If he is a bailee, it is only in the most technical sense. And since, as we have seen, negligence is not at issue here, then it must be asked whether denying Respondent a chance at recovery would serve the dangerous instrumentality doctrine's purpose of protecting the public.

At least one commentator has criticized the policy (although in a different context) of reflexively imputing responsibility while losing sight of the purpose of the dangerous instrumentality doctrine:

> Admittedly, the underlying motivation for the application of the dangerous instrumentality rule is to establish the liability of a solvent defendant, not to deny the injured plaintiff a remedy. The need for a financially responsible defendant has anything but diminished since the Southern Cotton Oil Co. cases were decided. Yet, by the perfunctory application of the 'both ways' test, the very objective of the dangerous instrumentality doctrine is thwarted.
>
> Imputation of contributory negligence by the dangerous instrumentality doctrine, which effectively turns it into a defense mechanism,

> should be a highly controversial issue. The imputation of contributory negligence too frequently frustrates humanitarian principles and leaves innocent injured parties without redress. With a greater need today for a theory that will allow recovery to the unfortunate automobile victim, there appears to be little justification for sacrificing justice on the altar of 'formal symmetry' of concepts.

11 U. Fla. L. Rev. 381, 383-384 (1958). (footnotes omitted).

And lest it be thought that the public's need for protection from automobile injuries has subsided, statistics show otherwise. In Southern Cotton Oil Company vs. Anderson, 86 So. 629 (Fla. 1920), it was noted that in 1918, the national death toll from automobile accidents was 7,525. In 1950, the total was estimated at 35,000. See, The Dangerous Instrumentality Doctrine: Unique Automobile Law In Florida, 5 U. Fla. L. Rev. 412 (1952). In 1987, the number of lives lost on the highways was climbing toward 50,000. World Almanac and Book of Facts, at page 808 (Pharos Books 1989). Finally, in 1987 Florida had the third-highest motor vehicle death total in the nation, behind only California and Texas. Id.

All of which is not to urge, however, that an owner's liability under the dangerous instrumentality doctrine be limitless. As noted, Respondent has no quarrel with Raydel or Clauson. In each of those cases, the Plaintiff's close relationship to the driver was such that recovery would have benefited both individuals, including the negligent operator of

the vehicle. Denying recovery in those circumstances does no violence to the dangerous instrumentality doctrine, which was designed to protect, not unjustly enrich, the public.

In contrast, Respondent has found no case on point that involved a so-called "injured bailee" who was as far removed from the original bailment as Respondent Shedrick Almon. Nor, apparently has any previous case but Toner directly confronted a factual scenario even arguably supporting a break in the bailment relationship.

Respondent submits that he is within that class of the public meant for protection by the dangerous instrumentality doctrine. At least, on these facts, he should be allowed to make that argument to a jury. If on the night in question, Respondent had chosen to walk home rather than wait for Bill Wise to finish partying, and was then run over by Wise in the same vehicle, would the "chain of command" principle preclude his recovery? If Wise had been stopped and arrested, would Respondent have been able to assert posessory rights against police impoundment of the vehicle? These scenarios, however hypothetical, illustrate the artificiality of an absolute rule against a "bailee's" recovery based on his theoretical "control" over the use of the vehicle.

Petitioner is no doubt concerned that an affirmance here would open a "Pandora's Box" of litigation. Such fears are unjustified. In the first place the First District did not hold that any driver who becomes a passenger thereby loses his bailee status as a matter of law. It simply held that, on these

particular facts, a jury could find that this Respondent was not a bailee at the time of the accident. Secondly, such a narrow ruling should only mean that an injured (ex-bailee) passenger could recover against the owner, while an injured pedestrian, for instance, could still recover against both of them. Also, Raydel and Clauson are, of course, still good law, and those opinions contain the liability-limiting concepts of "joint venture" and "co-bailees." Finally, to the extent that a "bailee" is somehow responsible for his own injuries, as by allowing an intoxicated person to drive, the doctrine of "negligent entrustment" is available to bar recovery.

In sum, it is critical to keep in mind that the laudable purpose of the dangerous instrumentality doctrine is to compensate the injured, innocent victims of automobile accidents. Petitioner Enterprise Leasing can never be innocent (as a matter of law) or personally injured (as a matter of fact) in these cases. Depending on the circumstances, however, an individual citizen, although arguably a bailee initially, can lose that status and become an innocent, injured victim within the intent of the law's protection. That, quite simply, is what the First District recognized here.

On review of a summary judgment, the facts must be viewed in a light most favorable to the losing party. Robinson vs. City of Miami, 177 So.2d 718 (Fla. 3rd DCA 1965). As noted, it has been held that summary judgment is inappropriate where the slightest doubt remains as to whether a material fact issue exists.

Fletcher vs. Petmen Enterprises, Inc., 324 So.2d 135 (Fla. 3rd DCA 1975).

In this case, Respondent Shedrick Almon did nothing more (and perhaps less) than David Toner did to earn the "bailee" label, especially on a summary judgment. In fact, Respondent here had even less control over the vehicle than did Toner. Respondent's testimony indicates that, by the time of the accident, the driver (Wise) had actually assumed the wheel and had driven himself to several bars while the Respondent, who wanted only to get home (after the first stop) slept from the second location on, unaware of his impending fate. (Deposition of Respondent, pages 46-54.) Moreover, as noted, Respondent Shedrick Almon was in the car only this one time, and had no knowledge of the circumstances of its rental or loan to his brother. (Deposition of Respondent, pages 37-39.)

Based on the above, Respondent submits that there is a material issue here as to whether he was a bailee at the time of the accident for purposes of the dangerous instrumentality doctrine. The trial court's misreading of Toner (as a "co-bailee" case) led it to take that issue from the jury. However, just as the Devlin Court observed about David Toner's situation:

> [T]he jury could find that [Almon's] temporary relationship with the automobile ended, and [Wise] became [Adams'] implied permittee and thus an implied bailee of [Enterprise Leasing].

Devlin, supra, 454 So.2d at 789.

The decision of the First District Court of Appeal should be affirmed.

CONCLUSION

For the reasons expressed, Respondent would respectfully urge this Court to affirm the decision below vacating the Summary Judgment, and remand for a jury trial.

RESPECTFULLY SUBMITTED this 12th day of July, 1989.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Charles M. Johnston, Esquire, 10 South Newnan Street, Jacksonville, Florida, 32202; Alice Tamas, Attorney At Law, 12700 Biscayne Boulevard, Fourth Floor, North Miami, Florida, 33181; and to Fleming, O'Bryan and Fleming, Attorneys At Law, 500 East Broward Boulevard, Post Office Drawer 7028, Fort Lauderdale, Florida, 33338, by mail, this 12th day of July, 1989.

STEPHEN J. WEINBAUM