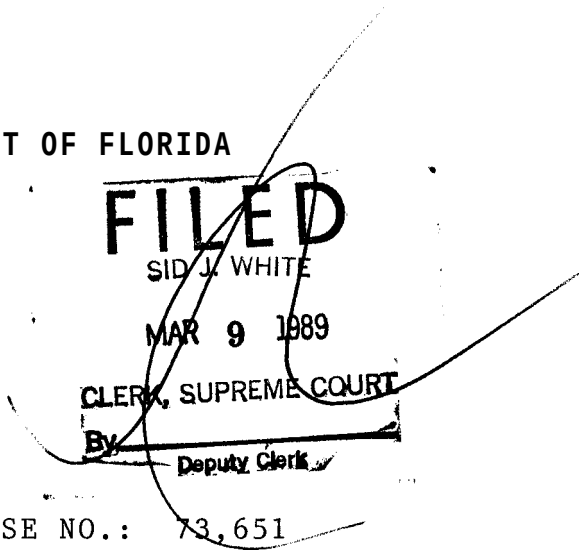
IN THE SUPREME COURT OF FLORIDA



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 BRIEF ON JURISDICTION

WILLIS AND WEINBAUM

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STATEMENT OF THE CASE AND FACTS

Respondent finds a critical inaccuracy in the following portion of Petitioner's Statement: "During the course of the night, Respondent became tired and asked Wise to drive. After departing one of the clubs in the early morning hours, with Wise driving and Respondent in the front passenger seat, an accident occurred and Respondent was injured." (Petitioner's Brief on Jurisdiction, Page 1.)

This implies that the Respondent, Shedrick Almon, was participating in Wise's club-hopping just before the accident, which is clearly not true. As the Court below noted:

> Appellee leased a vehicle to Olivia Adams, pursuant to a contract which contained a provision that no one else should use the vehicle without appellee's consent. Without obtaining such consent Adams allowed appellant's brother to use the vehicle. Adams did not expressly restrict the scope of this use and later that evening appellant's brother allowed appellant to use the vehicle, also without restriction. Appellant drove the car to the residence of an individual named Bill Wise, and appellant and Wise then used the vehicle to visit several clubs. During the course of the night appellant became tired and asked Wise to drive. Appellant indicated that at times during the night he remained in the car sleeping while Wise was within various business establishments. After departing one of the clubs in the early morning hours, with Wise driving and appellant in the front passenger seat, an accident occurred and appellant was severely injured.

(Opinion of the First District Court of Appeal, at page 2. See Appendix.)

It was precisely these circumstances that led the First District Court of Appeal to hold that a jury should decide whether Respondent's bailee status had terminated.

SUMMARY OF ARGUMENT

The decision below does not conflict with State Farm Mutual Auto Insurance Company vs. Clauson, 311 So.2d 1085 (Fla. 3rd DCA 1987). Petitioner incorrectly contends that the issue in both cases was whether a bailee can recover against an owner for the negligence of his own chosen driver. Mrs. Clauson apparently did not litigate her status as a bailee, and the Third District did not consider that an issue. Indeed, there were no facts in Clauson to support any inference that the bailment had terminated. Summary judgment was appropriate.

Respondent has no quarrel with Petitioner's summary of the law concerning circumstances that preclude recovery by a bailee. However, Petitioner's argument here presupposes that Respondent was, beyond dispute, still a bailee at the time of the accident. Unlike Mrs. Clauson, Respondent has actively litigated the issue of his status as a bailee. And this case, like Toner vs. G & C Ford Company, 249 So.2d 703 (Fla. 1st DCA 1971), cert. dismissed, 263 So.2d 214 (Fla. 1972), turns on disputed inferences as to whether Respondent Shedrick Almon's bailee status had terminated at the time of the accident.

That is what the First District Court of Appeal correctly recognized, in holding that the circumstances presented a jury question on this point. Since Clauson did not address the issue of when a bailee's status as such may terminate for purposes of the dangerous instrumentality doctrine, there is no conflict sufficient to invoke this Court's jurisdiction.

ARGUMENT

WHETHER THIS COURT'S JURISDICTION IS PROPERLY INVOKED PURSUANT TO ARTICLE V, SECTION 3(b)(3), FLORIDA CONSTITUTION, WHEN THE DECISION BELOW WAS BASED ON A MATERIAL ISSUE NOT INVOLVED IN STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. VS. CLAUSON, 511 So.2d 1085 (Fla. 3rd DCA 1987)

Petitioner begins by arguing that Clauson involved the issue of whether an injured bailee of a vehicle who permitted another to drive could recover against the owner. That characterization of the Clauson issue is correct, but only if the injured plaintiff was in fact a bailee at the time of the accident, which was assumed in Clauson. Petitioner next quotes the Clauson opinion to the effect that the Plaintiff could not recover because she had been "given" the vehicle. (Brief of Petitioner on Jurisdiction, page *4.)* Obviously, in the context of a non-issue, this is simply another way of saying that Mrs. Clauson was, concededly, a bailee at the time of the accident.

Petitioner's next argument is at the heart of this case, and is demonstrably incorrect. It urges that:

> With one exception, the undisputed facts in the present case are not materially different from the facts in Clauson: The vehicle was 'given' to Respondent to use, he took possession and control of the vehicle, he turned the car over to another party, and he was injured while a passenger due to the negligence of the very person he allowed to drive the car.

(Brief of Petitioner on Jurisdiction, page *4.)* The single distinction offered, in footnote *4*, is that the original bailee (Olivia Adams) signed a rental contract which prohibited third party drivers.

In the first place, it has been held that such a contractual provision is ineffective to insulate the owner from liability. See Susco vs. Leonard, 112 So.2d 832 (Fla. 1959). Second and more important, that is clearly not the only difference between this case and Clauson. Respondent's Statement of Facts need not be repeated. Shedrick Almon got the car from his brother. Thus, his relationship with the original bailee (Olivia Adams) was attenuated from the start, like David Toner's relationship with Senator Pope [in Toner vs. G & C Ford Company, 249 So.2d 703 (Fla. 1st DCA 1971), cert. dismissed, 263 So.2d 214 (Fla. 1972)], and unlike Mrs. Clauson's relationship with her employer. Moreover, in this case Wise, the driver, was 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.

These are the essential facts that create a jury issue here where there was none in Clauson, and which are omitted from Petitioner's somewhat simplistic chart (at page 5) purporting to compare the two cases.

Petitioner's next argument (at page 5) is that the decision below conflicts with the "chain of command" (between the owner and the injured plaintiff) rationale of Clauson. 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. In other words, the Court of Appeal's decision herein did not tamper with the "chain of command" principle, it simply left it to a jury as to whether Respondent was still in that "chain of command" at the time of the accident, based on the different facts herein.

Next, Petitioner argues the significance of the Clauson Court's observation of a potential disagreement with the First District's decision in Toner, supra, which provided the precedent followed herein. In fact, the Clauson Court itself offered a distinction. As noted in Petitioner's brief (at page 7), the Clauson Court read Toner to turn on "a jury question as to whether the vehicle was in fact entrusted to the injured passenger or directly to the negligent driver." Clauson, supra, 711 So.2d at 1087, note 4. Here again, the conflict is only ostensible. Remembering that the plaintiff's status as a bailee was a non-issue in Clauson, the distinction offered by the Clauson Court was essentially correct, although not succinctly stated. If David Toner's status had changed (like, arguably, Shedrick Almon's), because of the circumstances under which McGowan drove the vehicle, then in effect the bailment ran from the owner "directly to the negligent driver." In any event, the Clauson-Toner distinction notwithstanding, the actual difference between Clauson and this case is apparent. Once again, the real distinction lies, just as in Toner, in the circumstances surrounding the driver's use of the vehicle at the time in question.

At page 7 of its brief, Petitioner argues that, while the facts in Toner "arguably" created a jury question as to Toner's bailee status, there are "no similar facts" here. However, Petitioner's concentration on the "open bailment" concept omits the truly essential facts in Toner. It is clear that, at the time of the accident, McGowan was not on any business related to Senator Pope, and that his status as a bailee depended as much upon the circumstances of his taking control of the vehicle from the sleeping driver, David Toner. Without undue repetition, it has been demonstrated herein that the circumstances of Respondent's relinquishment of control of the vehicle (which did not occur in Clauson) are quite enough like those in Toner to justify a jury resolution of the "bailee" issue. Petitioner's contention has already been answered by the Court of Appeal herein:

> 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.

(Opinion of the First District Court of Appeal, at page 4. See Appendix.)

Finally, Petitioner argues that this Court should accept jurisdiction because of the potential for this issue to effect the rights of other individuals. First, it is apparent that the precedential effect of this case depends largely upon the final

result, once a jury has considered the issues. Second and last, it is clear that the decision below does nothing more than reaffirm the:

> general principle that where conflicting inferences are involved the issue as to one's status as a bailee will ordinarily be a jury question. See e.g., Brown vs. Goldberg, Rubenstein and Buckley, P.A., *455* So.2d *487* (Fla. 2nd DCA 1984), review denied, *461* So.2d *114* (Fla. *1984).*

(Opinion of the First District Court of Appeal, at pages *4-5.* See Appendix.)

The decision of the Court of Appeal was correct. Review should be denied, in favor of a jury resolution of the essential issues involved.

CONCLUSION

Based on the foregoing authorities and arguments, Respondent respectfully requests this Court to decline to exercise jurisdiction herein.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Charles M. Johnston, Esquire, Attorney for Petitioner, 121 West Forsyth Street, Tenth Floor, Jacksonville, Florida, 32202, by mail, this 8th day of March, 1989.

Stephen J. Weinbaum

STEPHEN J. WEINBAUM