O/A 9-11-89

IN THE SUPREME COURT OF FLORIDA

CASE NUMBER 73,651

ENTERPRISE LEASING COMPANY,
a corporation,

Petitioner,

vs.

SHEDRICK ALMON,

Respondent.

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

PETITIONER'S REPLY BRIEF ON THE MERITS

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ARGUMENT

A SUB-BAILEE, WHO HAS BEEN GIVEN POSSESSION AND CONTROL OF A VEHICLE AND WHO IN TURN ENTRUSTS THE VEHICLE TO ANOTHER, CANNOT RECOVER AGAINST THE OWNER FOR INJURIES SUSTAINED AS A PASSENGER DUE TO THE NEGLIGENT DRIVING OF THE VERY PERSON HE PLACED IN CONTROL OF THE VEHICLE.

In reviewing Respondent's answer brief, and in reexamining the first district's opinion in the court below, it is clear that the resolution of this case depends upon a clear explication of the rationale underlying Ravdel and Clauson considered in light of the undisputed facts set forth in the first district's opinion. The basis in the first place for owner liability to innocent third parties--responsibility for placing the automobile in operation--is the same basis that excludes owner liability to a bailee or sub-bailee injured as a driver or passenger:

> 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.
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> * * *
>
> (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.

Ravdel, Ltd. v. Medcalfe, 178 So.2d 569, 572 (Fla. 1965).

Contrary to Respondent's argument, it is not the bailment relationship that creates liability on the one hand and excludes it on the other, but the owner's or bailee's act of putting the automobile into operation on the streets and highways. In Susco Car Rental System of Florida v. Leonard, 112 So.2d 832 (Fla.

1959), the Florida Supreme Court held that where an automobile owner rents an automobile to a party under a rental contract that prohibits third parties from operating the automobile, such contract does not relieve the owner of responsibility for damages to third parties resulting from the negligent operation of the automobile by someone other than the person to whom it was rented. The court based its decision on the underlying premise at work in Raydel:

> 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.

Id. at 837 (emphasis supplied). Owner liability was imposed by the court notwithstanding the terms of the bailment: "Certainly the terms of a bailment, either restricted or general, can have no bearing upon that issue." Id. at 837.

While it is true, therefore, that a "bailee" or "sub-bailee" cannot recover from the owner when the bailee or sub-bailee is injured while a passenger by the very person he or she placed in control of the automobile, the reason for this result is not the bailment contract itself, either oral or written, but whether the person had custody and control of the automobile and turned it over to the very person who caused the injury; or, to use the court's words in Susco: whether the person "consent(ed) to the use or operation of such an instrumentality beyond his own immediate control." Id. at 837. As argued in Petitioner's

initial brief on the merits, focus on the bailor/bailee relationship misses the mark. Respondent's hypothetical, and analysis thereto, concerning who would have control of the disposition of the car following Wise's hypothetical arrest for DWI is therefore irrelevant. It is not the bailment contract itself that creates liability, but the underlying responsibility for placing the automobile in operation.

In a similar fashion, the first district court in reaching its conclusion in the opinion below subtly shifts the analysis from who was responsible for putting the car into operation on the public streets on the night of the accident to a focus on the bailment relationship itself. The first district phrased the inquiry as follows:

> Like Toner, the present case involves conflicting inferences and the circumstances present a jury question as to whether appellant had terminated his status as a bailee and become solely a passenger.

Almon v. Enterprise Leasing Co., 537 So.2d 1046, 1048 (Fla. 1st DCA 1989). Instead of asking whether Respondent had terminated his status as a bailee, the court should have asked the question whether the undisputed facts demonstrated that Respondent had possession and control of the car and then turned the car over to the very person (Wise) who caused the accident.[1]

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[1] Implicit, if not explicit, in the court's decision, as demonstrated by the language quoted above, is the court's conclusion that Respondent was in fact a bailee when he borrowed the car from his brother and took it out onto the public streets on the night of the accident since the court asks the question whether Respondent had "terminated his status as a bailee."

In arguing that there are material facts that remain for the jury to decide, Respondent continues to shift the focus toward the bailment relationship and away from the inescapable fact that Wise would not have been driving the car that night if it had not been for Respondent. Respondent recites additional facts at pages 1 and 2 of his answer brief in support of his argument that there remains a jury question. These additional facts, however, have no legal significance with respect to the conclusion that Respondent borrowed the car from his brother and then allowed Wise to drive it on the night of the accident.

The first district in its opinion below recited the transfer of control of the car to Respondent and the fact that Respondent placed Wise in control of the car. Respondent affirmatively acknowledged the series of transfers in Respondent's reply to Petitioner's affirmative defenses:

> Ms. Adams leased the vehicle and thereafter allowed Steve Almon, the plaintiff's brother, to operate it; in turn, Steve Almon allowed the plaintiff to operate it and, plaintiff allowed Mr. Bill Wise to operate the vehicle at the time of the accident.

(Paragraph 4 of Respondent's reply to Petitioner's affirmative defenses, R-Vol. 1, pp. 9-10) (emphasis supplied).

Respondent's possession and control of the car on the night of the accident, his responsibility for placing the car in operation on the public streets, and his act of turning the car over to the very person who caused the accident are all well documented in the record. Respondent's brother loaned the car to Respondent:

Q. Did he (Respondent) say anything to you about holding the car?

A. (By Steve Almon) Yeah. He say, "Can I use the car, man?" I say, "Yeah."

Q. You gave him the keys?

A. Yeah.

(Deposition of Steve Almon at p. 16). Respondent's brother loaned Respondent the car upon the condition that he return it:

Q. You just let him use the car?

A. (By Steve Almon) Uh huh. As long as he bring it back.

Q. Well, did you tell him to bring it back?

A. Yeah.

(Deposition of Steve Almon at p. 16). Respondent did not dispute the fact that his brother loaned the car to him and him alone. He asked to use the car and his brother consented:

Q. And you were about to tell me how you got that car. You asked your brother for it?

A. (By Respondent) Right.

Q. What did he say?

A. He say okay.

Q. Do you remember exactly what you said to him?

A. I said--first I asked him to go out. Then I said--well, since you wasn't going to go out with me, I said, "Could I hold your car and go out?" He said, "Yeah, you can." So I got in the car and went over to my friend Bill's house.

Q. Then did he give you the keys?

A. Right.

Q. When you said could you hold the car, did you mean could you use the car?

A. Right.

Q. Did you know whose car it was?

A. I am pretty sure it was Olivia Adams' car.

* * *

Q. But you asked Steve for the car and he gave you the keys?

A. Right.

(Deposition of Respondent at pp. 36-37). Later that night, after picking up Bill Wise and after visiting Jacksonville's Riverwalk, Respondent permitted Bill Wise to drive the car:

Q. Where did you go after you left River Rally?

A. (By Respondent) Then I asked Bill, I said, "Bill, why don't you drive?" And then he took us to a place called--what is the name of that place--it's on Soutel Drive. I'm trying to think of it. Back then--I think they're closed down now.

(Deposition of Respondent at pp. 46-47). In fact, Wise stated that he wanted to continue to visit clubs following River Rally so Respondent affirmatively turned over the control of the car to Wise for that purpose:

Q. Why did you ask Bill to drive?

A. (By Respondent) Cause really I was ready to go home, because I was--it was 2:00 in the morning and I had to work that night. See, but he still wanted--he was wanting to go out. I said, "Well, you can drive then." So he drove us up to Soutel, I forgot the name of the club.

(Deposition of Respondent at p. 47). Subsequently, the two visited two private clubs or night spots with Respondent's full knowledge and consent. After making the last stop prior to the accident, Respondent continued to allow Wise to drive:

> Q. But when he left this little place on 21st Street he came out and got in the car and you were aware that he got in the car?
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> A. (By Respondent) I was aware he got in the car.
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> * * *
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> Q. But at that point you allowed him to drive the car too?
>
> A. Right.
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> Q. You didn't have any objection to him driving?
>
> A. No objection.

(Deposition of Respondent at pp. 53-54).

In spite of the facts set forth in the record, and, more importantly, in spite of the facts set forth in its opinion, the first district concluded, and Respondent argues, that a jury question was created as to Respondent's status at the time of the accident. In the first place, Petitioner believes the undisputed facts establish that Respondent was a sub-bailee as a matter of law. Secondly, as argued above, setting aside efforts to place a label on Respondent, the undisputed facts establish that Respondent was responsible for putting the car into operation that night and allowing Wise to drive it. Under either approach, the first district's opinion provides absolutely no guidance as

to what inferences could possibly provide the basis for a jury question. Respondent, in his answer brief, sets forth four facts or inferences that he believes create a jury question: Respondent's relationship to the original bailee (Olivia Adams) was attenuated from the start: the night of the accident was the only time Respondent drove the car: Bill Wise, the driver, was off on a social jaunt of his own: and Respondent had surrendered control of the vehicle well before the accident occurred.

The facts recited by Respondent have no legal significance whatsoever if Clauson and Ravdel are followed. Clauson rejected the argument that the "attenuated nature" of the relationship between the sub-bailee and the owner made a difference: "Finally, we reject the plaintiff's argument that this rule does not apply because, unlike Ravdel and Devlin, the injured bailee secured the car from an intervening lessee-bailee, her employer, rather than directly from the owner. Applying the principles discussed already, this fact cannot make any legal difference." State Farm Mutual Automobile Ins. Co. v. Clauson, **511** So.2d **1085, 1087** (Fla. 3d DCA **1987).** The fact that Bill Wise may have been off on a social jaunt of his own also does not change the result: Wise told Respondent why he wanted to continue to stay out that night, Respondent consented and affirmatively turned the car over to him and, subsequently, Respondent continued to ride with Wise and continued to allow Wise to drive. The fact that Respondent may have had only a vague concept that the car was one leased by Olivia Adams has more to do with the original bailment contract

and makes no difference with respect to possession and control of the automobile. Finally, the accident occurred on the same night Respondent borrowed the car and drove it out for a night on the town with his friend Bill Wise. He was to return the car to his brother after using it. Prior to returning the car to his brother, Respondent consented to the use or operation of the automobile beyond his immediate control by allowing Bill Wise to drive the car, and Respondent continued to ride with Wise up until the time of the accident.

In summary, Respondent was clearly within that group of people prohibited from recovering from the owner under the circumstances: his brother loaned the car to him (and him alone); Respondent got in the car and drove it out of the safe harbor of the driveway and into the public streets: Respondent was the one responsible for putting this "dangerous instrumentality" out into the public that night: Respondent turned the car over to Wise (Respondent's brother did not, Enterprise Leasing did not, Adams did not); Respondent continued to allow Wise to drive knowing that Wise was driving from one club or nightspot to the other.

Respondent and the first district rely upon Ray v. Earl, 277 So.2d 73 (Fla. 2d DCA 1973), and Brown v. Goldbers, Rubinstein and Buckley, 455 So.2d 487 (Fla. 2d DCA 1984), for the proposition that Respondent's status as a sub-bailee should have been left to the trier-of-fact. The trial court in Brown entered summary judgement in favor of the defendant law firm because the

trial court concluded the law firm was not a bailee of the automobile in question. In reversing the trial court, the facts in Brown were stated by the appellate court as follows:

> Dennis C. Brown, appellant, was severely injured when he was struck by an automobile. The vehicle which struck appellant, a pedestrian, was a rental car driven by Michael Edwards, a client of appellee Goldberg, Rubinstein and Buckley, P.A. (the law firm) . . . Michael Edwards was driving a car rented from Ranker Motors, which had an unwritten agreement with the law firm under which rental vehicles were provided to the firm's clients and paid for by the firm.

Id. at 488. The appellate court concluded that the evidence concerning the arrangement between Ranker and the law firm created a jury issue as to whether the law firm was in fact a bailee and thus liable for damages inflicted by the negligent operation of that automobile by one permitted by the firm to use it. Id. at 488. There is no such dispute under the facts presently before the Court: Enterprise Leasing leased the motor vehicle to Olivia Adams who in turn loaned it to Steve Almon; Steve Almon loaned it to Respondent who became a sub-bailee of the vehicle and allowed Wise to drive it.

Respondent misreads the case of Ray v. Earl, 277 So.2d 73 (Fla. 2d DCA 1973), in arguing that Ray supports Respondent's position before this Court. In Ray, Ray, the owner of the vehicle, loaned his car to Earl who in turn allowed Surratt to drive the car with Earl as a passenger. Earl was then injured due to Surratt's negligent driving. Since Surratt was killed in the accident, Earl brought suit against Surratt's estate for

injuries Earl sustained due to Surratt's negligent driving. Earl recovered from Surratt, the negligent driver. Similarly, Respondent, a sub-bailee and passenger, has sued Bill Wise, the person Respondent permitted to drive the vehicle, for Bill Wise's negligent operation of the motor vehicle. The lawsuit is still pending against Bill Wise, and, presumably, if Respondent can establish that Bill Wise's negligence proximately caused his injuries, Respondent will recover from him. In Ray, Earl, the injured passenger bailee, did not sue Ray the owner of the car. Similarly, Respondent as bailee cannot recover from Enterprise Leasing, the owner. The analogy between the two cases breaks down at this point, however, because Ray involved a subsequent lawsuit between the insurance companies arguing over the right of indemnity of one against the other. There is no such insurance dispute pending before this Court. The discussion in Ray quoted by Respondent at page 18 of his answer brief is, at best, dictum because the court's holding was based upon the terms of the Morrison insurance policy.[2] Moreover, the court in Ray actually

[2]Pursuant to the terms of the insurance policy, Morrison Assurance Company, Ray's insurer, defended Earl's action against Surratt's estate and ultimately paid the judgment. Morrison then subrogated against Earl's insurer, American Fire and Indemnity Company. The question before the appellate court was whether Earl had the status of an "insured" under the Morrison policy. Id. at 76. If Earl fell within the definition of an insured, then the action by Morrison could not be maintained because an insurer may not maintain a subrogation suit against its own insured. The policy defined insured, inter alia, as including "any person while using the automobile and any person or organization legally responsible for the use thereof, provided, the actual use of the automobile is by the named insured or such spouse or with the permission of either." Id. at 75-76. The court concluded that, "Earl was 'using' Ray's vehicle under the

misstates the law when it says that an owner of an automobile is vicariously liable "to persons injured as a result of the negligence of a person operating (the car) with the owner's consent . . . even where the original permittee has delegated his right to drive . . . to a second permittee" if that statement is meant to impose liability on the owner for injuries sustained by the first permittee riding as a passenger. Ravdel has clearly held this is not so.

Although it is difficult to reconcile Toner v. G & C Ford Co., 249 So.2d 703 (Fla. 1st DCA 1981), cert dismissed, 263 So.2d 214 (Fla. 1972), with Clauson and Ravdel, there are distinguishing facts in Toner to at least make a colorable distinction. Toner involved a bailment wherein the car was loaned by G & C Ford to Senator Pope "and whoever needed it." When Toner met McGowan on the night of the accident, McGowan agreed to assist in the campaign in his spare time. Later that night McGowan took over the control of the automobile. Under the circumstances, it is arguable that a jury question was created as to whether McGowan, because he agreed to help in the campaign, came into possession and control of the car just as if he had

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terms of Morrison's policy while he was a (bailee) passenger and was, therefore, an 'insured' under its terms." Id. at 77. The appellate court, therefore, affirmed the trial court's judgment upon the pleadings in favor of American Fire since Earl was an insured under the Morrison policy, and, Morrison, therefore was not legally allowed to subrogate against its own insured.

received the car from Senator Pope.[3] There are no similar conflicting inferences that can be drawn from the facts of the instant case: Steve Almon loaned the car to Respondent (and Respondent alone) and Respondent allowed Wise to drive it.

Finally, Respondent makes a "public policy" argument that effectively expands the "dangerous instrumentality" doctrine in automobile cases:

> (T)he "policy is that of assuring that all persons wrongfully injured have financially responsible persons to look to for damages." . . . Considered in that light, it makes no sense to use the dangerous instrumentality doctrine to deny recovery to one in Respondent's position.
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> 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. . . . 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.
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> * * *
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> (I)f 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 this theoretical responsibility for the negligent driver.

(Brief of Respondent at pp. 24-25) (emphasis supplied).

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[3]It is also arguable that the distinction of Toner set forth herein does not explain the court's decision in a manner consistent with Ravdel. To the extent this Court is unable to reconcile Toner with Ravdel and Clauson, Petitioner urges this Court to not only find that the first district's decision in the court below conflicts with Ravdel and Clauson but that Toner also conflicts with these decisions.

What Respondent is asking the Court to do, particularly when the above emphasized language is read in conjunction with what precedes it, is to remove "responsibility" from the liability equation--responsibility for putting the automobile into operation--and to place the financial burden for automobile accidents on the owners of automobiles regardless of the circumstances. In Florida the judicial application of the dangerous instrumentality doctrine to include automobiles was based upon the concept of responsibility--"the obligation of the owner (of the automobile) to have the vehicle . . . properly operated when it is by his authority on the public highway." Anderson v. Southern Cotton Oil Co., 73 Fla. 432, 74 So. 975, 978 (Fla. 1917). This underlying rationale has continued as Florida courts have created exceptions to owner liability in automobile cases through the Supreme Court of Florida's decision in Ravdel, Ltd. v. Medcalfe, 178 So.2d 569 (Fla. 1965), and up to and including State Farm Mutual Automobile Ins. Co. v. Clauson, 511 So.2d 1085 (Fla. 3d DCA 1987). In making his policy argument, Respondent is forgetting that under the current state of the law the owner of the automobile remains liable to innocent third parties who are injured. It would run counter to the very rationale that created owner liability in the first place to make owners the absolute insurers even in cases where a non-owner who has been given possession and control of an automobile is injured due the negligence of the very person the non-owner placed in

control of the car. In such situations, the injured non-owner passenger cannot be said to be an innocent third party.

Respondent argues that his right to a jury trial should not be usurped through the mechanism of summary judgment. However, summary judgment is an appropriate means of resolving disputes when, under the undisputed materials facts, the only question that remains is a question of law. In the instant case, there are simply no material facts that remain for resolution. Respondent should either be entitled to recover from Petitioner or Respondent should be prohibited from recovering from Petitioner. This is a question of law for the Court to decide, and, under the clear rationale of Raydel and Clauson, Respondent is not entitled to recover from Petitioner. A litigant's right to a jury trial, however fundamental, should not be used to elevate form over substance to defeat Petitioner's right to have the legal issues in this case decided by the court.

CONCLUSION

Petitioner urges this Court to quash the decision below and remand this cause with instructions to reinstate the summary judgment entered in favor of Petitioner.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Robert S. Willis, Esquire, 503 East Monroe Street, Jacksonville, Florida 32202, by U.S. mail, this 7th day of August, 1989.

Attorney