IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC00-1755

RICHARD TOOMBS, as Personal Representative
of the Estate of Julia Stuttard,

Petitioner,

vs.

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

AMICUS BRIEF
on behalf of the Florida Defense Lawyers Association

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TABLE OF CONTENTS

CERTIFICATION OF TYPE SIZE AND STYLE

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PRELIMINARY STATEMENT

Amicus curiae, the Florida Defense Lawyers Association ("FDLA"), adopts the Statement of the Case and Facts, and the Argument, set forth in the Respondent's Brief, and submits this Amicus Brief as a supplement thereto.

TABLE OF AUTHORITIES

Cases

Treatises

SUMMARY OF ARGUMENT

This Court, in *Raydel, Ltd. v. Medcalfe*, 178 So. 2d 569 (Fla. 1965), held that the negligence of an automobile bailee is imputed to his co-bailee so as to preclude a personal injury claim by the co-bailee against the automobile lessor under the Dangerous Instrumentality Doctrine. This principle should similarly preclude a claim against the lessor for the death of the co-bailee. The general rule, recognized by this Court and others, is that negligence imputed to a decedent bars a claim for her wrongful death just as it would bar a claim for personal injuries had she lived.

The Second District erred in holding that a decedent's co-bailee "status" is a disability to sue which is personal to the decedent and, therefore, does not bar a claim for wrongful death. Unlike one's familial status, a decedent's co-bailee "status" merely describes her involvement in the operative facts which constitute the cause of action. It is by virtue of this involvement as a co-bailee that no cause of action exists against the lessor. The inability to recover against the lessor is certainly not personal to any particular bailee, as ***no*** bailee has a cause of action against the lessor for the negligence of a co-bailee.

For these reasons, this Court should disapprove the Second District's decision in *Enterprise Leasing Co. v. Alley*, 728 So. 2d 272 (Fla. 2d DCA), *review denied*, 741 So. 2d 1135 (Fla. 1999), and should approve the Fifth District's decision *Toombs v. Alamo Rent-A-Car, Inc.*, 762 So. 2d 1040 (Fla. 5th DCA 2000).

ARGUMENT

WHERE THE PASSENGER OF A RENTAL CAR IS KILLED DUE TO THE NEGLIGENCE OF HER CO-BAILEE-DRIVER, SUCH THAT THE PASSENGER COULD NOT HAVE RECOVERED FOR PERSONAL INJURIES AGAINST THE AUTOMOBILE LESSOR UNDER THE DANGEROUS INSTRUMENTALITY DOCTRINE HAD SHE LIVED, THE PASSENGER'S SURVIVORS LIKEWISE CANNOT RECOVER AGAINST THE LESSOR FOR WRONGFUL DEATH.

In *Raydel, Ltd. v. Medcalfe*, 178 So. 2d 569 (Fla. 1965), this Court held that the bailee-passenger of an automobile injured by the negligence of a co-bailee-driver cannot recover against the automobile owner under the Dangerous Instrumentality Doctrine. The issue in this case is whether the rule set forth in *Raydel* bars a cause of action for the wrongful death of the bailee-passenger.

The Basis of *Raydel, Ltd. v. Medcalfe*

A resolution of the issue in this case requires examining the basis for the *Raydel* decision. In holding that a bailee cannot recover against the automobile owner for the negligence of a co-bailee under the Dangerous Instrumentality Doctrine, *Raydel* reasoned that the bailee is imputed with the negligence of her co-bailee. Thus, to allow a bailee to recover against the vehicle owner based upon the co-bailee's negligence would be tantamount to allowing the bailee to recover based upon her own negligence, which Florida law does not permit. *See id.* at 571-72. *Raydel*'s reasoning was reiterated in *Enterprise Leasing Co. v. Almon*, 559 So. 2d 214 (Fla. 1990), as

follows:

> It is clearly established that an injured bailee of a vehicle cannot recover against the owner of the vehicle for injuries caused by the negligent operation of her own sub-bailee. Raydel . . . . The reason for this rule is fairly simple. To the same extent as the owner, a bailee (or sub-bailee) of a motor vehicle is liable to third persons under the dangerous instrumentality doctrine for the negligence of one to whom he has entrusted it. Thus, if Mr. Clauson had injured a pedestrian or another driver, not only We Try Harder [i.e., the automobile lessor] but Mrs. Clauson (and her employer as well) would be vicariously responsible for his negligence. 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 216 (*quoting State Farm Mutual Automobile Insurance Co. v. Clauson*, 511 So. 2d 1085, 1086 (Fla. 3d DCA 1987)).

Negligence Imputed to the Decedent Bars a Claim for Wrongful Death

With the rationale of *Raydel* in mind, the issue in this case can be resolved by considering whether negligence imputed to a decedent, which would bar a personal injury claim had she lived, similarly bars a claim for her death. The general rule in this respect is that negligence imputed to the decedent will bar a wrongful death claim:

> [A]ny relationship which would have given rise to the imputation of a third person's negligence to the decedent in a personal injury action, will also bar a death action.

Stuart M. Speiser, 1 *Recovery for Wrongful Death* § 5:9 (1975 ed.); *accord* Matthew Bender, 10 *Personal Injury* § 4:01 ("[A]ny relationship that gives rise to imputation

of a third person's negligence to the decedent may also bar a death action.").

This Court has implicitly recognized that negligence imputed to the decedent infects the claim for wrongful death. In *Union Bus Co. v. Smith*, 104 Fla. 569, 140 So. 631 (1932), this Court held that the estate of an automobile passenger could not recover for the passenger's death where the driver and passenger were on a "joint enterprise for their mutual pleasure" such that the driver's contributory negligence was imputed to the passenger. It is implicit in *Union Bus Co.* that the negligence imputed to the passenger was not a disability to sue which was personal to the passenger, as the imputed negligence precluded the wrongful death claim.

Other jurisdictions are in accord. In *Smithson v. Dunham*, 441 P.2d 823 (Kan. 1968), the court held that the driver's contributory negligence, which was imputed to a passenger (by virtue of the passenger allowing the minor driver to drive without a license), precluded a cause of action for the passenger's death.

Similarly, in *Buckley v. Chadwick*, 288 P.2d 12 (Cal. 1955), the court held that a "joint venturer's" negligence, imputed to the decedent, constituted the passenger's own contributory negligence so as to bar a claim for her death.

The principle underlying these cases – namely, that negligence imputed to an individual will preclude a claim for her wrongful death – controls the outcome of this case.

The Inability of a Co-Bailee to Recover against the Automobile Owner is not a

Personal Disability to Sue but is Inherent in the Cause of Action

It is apparent from a reading of *Raydel* that an individual's co-bailee "status" is not a personal disability to sue which eliminates an otherwise viable cause of action, but is a matter which prevents the existence of a cause of action in the first place.

A disability to sue which is personal to the decedent, such as familial status, exists entirely independently of the operative facts of the injury-causing event, but nevertheless serves to eliminate a right of recovery which would be viable but for the disability.

In contrast, to describe an individual as a "co-bailee" simply describes her involvement in the operative facts. It is this involvement in the operative facts that gives rise to the imputation of negligence which precludes the co-bailee from recovering against the automobile lessor. Under *Raydel*, ***no*** bailee has a cause of action against the automobile owner under the Dangerous Instrumentality Doctrine based upon the negligence of a co-bailee. A bailee's inability to recover is certainly not personal to any particular bailee.

Because the decedent's co-bailee "status" merely describes the decedent's involvement in the operative facts, this "status," by definition, inheres in the cause of action so as to bar a claim for wrongful death. *See Shiver v. Sessions*, 80 So. 2d 905, 908 (Fla. 1955)("A right of action is a remedial right affording redress for the infringement of a legal right belonging to some definite person, whereas a cause of

action is the operative facts which give rise to such right of action.").

CONCLUSION

For the foregoing reasons, FDLA respectfully requests that this Court approve the Fifth District's decision in *Toombs v. Alamo Rent-A-Car, Inc.*, 762 So. 2d 1040 (Fla. 5th DCA 2000), and should disapprove the Second District's decision in *Enterprise Leasing Co. v. Alley*, 728 So. 2d 272 (Fla. 2d DCA), *review denied*, 741 So. 2d 1135 (Fla. 1999).

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