ORIGINAL

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, etc, et al.,

Respondent.

_____/

ON CERTIFIED CONFLICT FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, FIFTH DISTRICT

BRIEF OF AMICUS CURIAE, THE ACADEMY OF FLORIDA TRIAL LAWYERS, IN SUPPORT OF POSITION OF PETITIONER

PODHURST, ORSECK, JOSEFSBERG, EATON, MEADOW, OLIN & PERWIN, P.A.
25 West Flagler Street, Suite 800
Miami, Florida 33130
(305) 358-2800 / Fax (305) 358-2382

Attorneys for Amicus Curiae AFTL

By: JOEL D. EATON
Fla. Bar No. 203513

TABLE OF CONTENTS

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

TABLE OF CASES

Page

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

TABLE OF CASES

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

TABLE OF CASES

Page

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

TABLE OF CASES

Page

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

TABLE OF CASES

Page

AUTHORITIES

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

CERTIFICATE OF TYPE STYLE

The type style utilized in this brief is 14 point Times New Roman proportionally spaced.

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

I.
STATEMENT OF THE CASE AND FACTS

This brief is filed on behalf of the Academy of Florida Trial Lawyers, in support of the position of the petitioner. We will rely upon the parties to state the case and facts. We emphasize simply that, although Mr. and Mrs. Stuttard were co-bailees of the vehicle owned by Alamo, their children plainly were *not* -- a point which will make all the difference here.

II.
ISSUE PRESENTED ON REVIEW

We state the relatively complex issue before the Court as follows:

> WHERE A DECEDENT/WIFE/MOTHER IS A CO-BAILEE OF A RENTAL VEHICLE WITH HER HUSBAND, AND BECAUSE OF THAT PERSONAL STATUS WOULD HAVE NO "RIGHT OF ACTION" AGAINST THE VEHICLE'S OWNER UNDER THE DANGEROUS INSTRUMENTALITY DOCTRINE FOR PERSONAL INJURIES CAUSED BY HER CO-BAILEE HUSBAND, CAN THE CHILDREN OF THE DECEDENT ENFORCE THE SEPARATE "RIGHT OF ACTION" GRANTED TO THEM FOR THEIR OWN DAMAGES BY FLORIDA'S WRONGFUL DEATH ACT AGAINST THE VEHICLE'S OWNER UNDER THE DANGEROUS INSTRUMENTALITY DOCTRINE?

The Second District answered this question in the affirmative in *Enterprise Leasing Co. v. Alley*, 728 So.2d 272 (Fla. 2d DCA), *review denied*, 741 So.2d 1135 (Fla. 1999). The Fifth District answered the question in the negative in the decision under review. The facts in the two cases are essentially identical, and the conflict is therefore squarely drawn. We believe that the Second District correctly resolved the

issue. And in support of that position, we will provide the Court with the essentials of the argument that undersigned counsel presented to the Second District in his brief in the *Alley* case. The subject is arguably a complex one with a long (and somewhat confused) history, so our brief will be longer than we would have liked -- but the case presents the Court with an opportunity to clarify an oft-misunderstood area of the law, and we think the Court deserves to be *fully* informed on the subject before reaching its decision.

III.
SUMMARY OF THE ARGUMENT

Because our argument will require an extensive survey of several decades of decisional law, it cannot easily be summarized here. Suffice it to say at this point that the language in the Wrongful Death Act upon which Alamo will rely -- "and the event would have entitled the person injured to maintain an action and recover damages if death had not ensued" -- has a far more subtle and considerably different meaning than the meaning that will be attributed to it in Alamo's brief. As we will demonstrate, the Wrongful Death Act creates an entirely new "right of action" in the statutory beneficiaries, independent of any "right of action" which Mrs. Stuttard might have had for personal injuries had she survived.

According to a long line of authority, defenses which inhere in the tort itself -- i. e., defenses which can be asserted against the entire "cause of action" from which the two separate "rights of action" arise (like comparative negligence) -- can be asserted against statutory beneficiaries of the Wrongful Death Act. But defenses which do not inhere in the tort itself because they arise solely from the personal status

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

of the decedent (like the status of spouse or co-bailee), although they might bar the decedent's "right of action" for personal injury, do not bar the separate "rights of action" created by the Wrongful Death Act to enable the statutory beneficiaries to recover their own, different damages.

The decisions upon which Alamo will rely involve defenses which can be asserted against the entire "cause of action," and they are therefore plainly inapposite here. The defense at issue in this case is a personal, purely status-related defense. Although it would have barred Mrs. Stuttard's "right of action" for personal injury had she survived, it does not inhere in the tort or "cause of action" -- and it therefore does not bar the separate "rights of action" granted by the Wrongful Death Act to her children, who were *not* co-bailees of the vehicle. That is the teaching of *Shiver v. Sessions*, 80 So.2d 905 (Fla. 1955), and *Dressler v. Tubbs*, 435 So.2d 792 (Fla. 1983), and a number of other decisions upon which we will rely, and we think the Fifth District erred in concluding otherwise.

IV.
ARGUMENT

MRS. STUTTARD'S PERSONAL STATUS AS CO-BAILEE OF THE VEHICLE OWNED BY ALAMO IS NOT A BAR TO ENFORCEMENT OF THE SEPARATE "RIGHTS OF ACTION" GRANTED TO HER CHILDREN FOR THEIR OWN DAMAGES BY FLORIDA'S WRONGFUL DEATH ACT.

Reduced to its essentials, Alamo's position is this: because Mrs. Stuttard's personal status as co-bailee of the vehicle owned by Alamo would have prevented her from utilizing Florida's Dangerous Instrumentality Doctrine to sue Alamo for

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

personal injuries negligently inflicted on her by her co-bailee husband, her children, although they were *not* co-bailees of the vehicle, are barred from enforcing the separate "rights of action" granted to them by Florida's Wrongful Death Act to recover their own damages from Alamo. As did the Second District, we disagree with this position.

As we will demonstrate, the Wrongful Death Act creates an entirely new "right of action" in the statutory beneficiaries, independent of any "right of action" which Mrs. Stuttard might have had for personal injuries had she survived. According to a long line of authority, defenses which inhere in the tort itself -- i. e., defenses which can be asserted against the entire "cause of action" from which the two separate "rights of action" arise (like comparative negligence) -- can be asserted against statutory beneficiaries of the Wrongful Death Act. But defenses which do not inhere in the tort itself because they arise solely from the personal status of the decedent (like the status of spouse or co-bailee), although they might bar the decedent's "right of action" for personal injury, do not bar the separate "right of action" created by the Wrongful Death Act to enable the statutory beneficiaries to recover their own, different damages.

A. Our position.

Although the subject is arguably complex and its history therefore not without some occasional confusion (as is often the case where there are numerous cooks in the kitchen, not to mention the frequent turnover of the cooks themselves), our position has abundant support in Florida's jurisprudence. We begin with this Court's thoughtful analysis of a similar question in the leading decision on the point: *Shiver*

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

v. Sessions, 80 So.2d 905 (Fla. 1955). In that case, the stepfather of the minor plaintiffs shot and killed his wife (the mother of the minor plaintiffs) and then killed himself. The children of the deceased wife brought a wrongful death action against the estate of their stepfather pursuant to former §768.01-02, Fla. Stat. Relying upon language in the Wrongful Death Act identical in substance to the language upon which Alamo will rely here -- "and the event would have entitled the person injured to maintain an action and recover damages if death had not ensued" -- the defendant urged that the children could not maintain a wrongful death action against the husband's estate because his wife could not have brought a personal injury action against him had she lived, since such a suit would have been barred by the defense of interspousal immunity. The trial court agreed and dismissed the complaint.

This Court reversed. It held, in essence, that the defense of interspousal immunity was not inherent in the wrongful act or "cause of action" itself (like contributory negligence or assumption of the risk), but was merely a personal defense which would have prevented the deceased wife from maintaining the "right of action" which she would otherwise have had. The "cause of action," it held, still existed. The Court then noted that the Wrongful Death Act creates an entirely new "right of action" in favor of the statutory beneficiaries,[1/] and held that the personal, status-related defense which the defendant had to a suit by his deceased wife did not bar an action by the statutory beneficiaries arising out of his wrongful act.

In language peculiarly appropriate here, the Court said:

[1/] Note that §768.19, Fla. Stat., enacted in 1972 -- which creates the wrongful death action in issue here -- is entitled "Right of action."

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

> Thus, it is settled law in this jurisdiction that the wife's disability to sue her husband for his tort is personal to her, and does not inhere in the tort itself. The tortious injury to the wife "'does not cease to be an unlawful act, though the law exempts the husband from liability for the damage.'" [citations omitted]. It is also well settled that our Wrongful Death Act creates in the named beneficiaries "an entirely new cause of action, in an entirely new right, for the recovery of damages suffered by *them*, not the decedent, as a consequence of the wrongful invasion of *their* legal right by the tort-feasor." [citation omitted]. This right is "separate, distinct and independent" from that which might have been sued upon by the injured person, had he or she lived. [citation omitted].

80 So.2d at 907 (emphasis in original).

The Court then distinguished the two separate "rights of action" (one for the injured person during his lifetime, the other for the survivors after death) from the "cause of action" (or the wrong committed against the person of the deceased), as follows:

> A workable distinction between these two separate and distinct rights of action, on the one hand, and the "original act of negligence of the tortfeasor [which is] the gist of all actions maintainable either by the decedent in his lifetime or by the personal representative and the widow [or other beneficiary under the Wrongful Death Act] after his death," . . . on the other, was made by the Ohio Supreme Court. . . . It was there said that "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. When a legal right is infringed, there accrues, *ipso facto*, to the injured party a right to pursue the appropriate legal remedy against the wrongdoer. This remedial right is called a right of action." With this distinction in mind, it is clear that the Legislature intended that the right of

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

> action created by the Wrongful Death Act in favor of the named beneficiaries must be predicated upon operative facts which would have constituted a tort against their decedent under established legal principles -- in other words, they must state a "cause of action" for tort against the tortfeasor, subject to the defenses of contributory negligence and the like which the tort-feasor could have pleaded in a suit against him by the decedent during his or her lifetime, and this Court has so held in many cases. But *we think it is unreasonable to imply that the Legislature intended to bar the "right of action" created by the Act on account of a disability to sue which is personal to a party having an entirely separate and distinct "right of action" and which does not inhere in the tort -- or "cause of action" -- upon which each separate right of action is based.*

80 So.2d at 907-08 (emphasis supplied).

Shiver is not an isolated case. The distinction drawn in that case between "cause of action" and the separate and independent "right of action" created by the Wrongful Death Act has been utilized and explained in numerous Florida cases.[2/] In

---

[2/] Because of the multiplicity of the cooks in the kitchen, not all of the decisions maintain the linguistic purity of the distinction between "right of action" and "cause of action" drawn in *Shiver*. In *Shearn v. Orlando Funeral Home, Inc.*, 88 So.2d 591 (Fla. 1956), for example, this Court described the separate "right of action" created by the Wrongful Death Act as a "new cause of action," and defined "cause of action" as "the right which a party has to institute a judicial proceeding." 88 So.2d at 593. Whether the concept be described as separate "rights of action" based upon a common "cause of action," or separate "causes of action" based upon the same wrongful act, however, the concept is the same in substance. The different nomenclature is merely a matter of semantics. To avoid confusion, we will adopt the nomenclature of *Shiver*, and we shall utilize the phrase "rights of action" to refer to the separate actions given an injured person and a deceased person's statutory beneficiaries, arising out of the same wrongful act. We shall refer to the wrongful act, or the tort itself, as the "cause of action."

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

Florida East Coast Ry. Co. v. McRoberts, 111 Fla. 278, 149 So. 631, 633 (1933), for example, this Court noted:

> . . . [T]he Florida death by wrongful act statutes, do not purport to transfer to the statutory representatives of a person killed by another's wrongful act the right of action which the injured party might have maintained for his injury had he lived, but those [statutes] give to such statutory representatives, subject to the terms, conditions, and limitations of the statute, a totally new right of action for the wrongful death, and that on different principles. . . .

Ake v. Birnbaum, 156 Fla. 735, 25 So.2d 213, 220-21 (1946) (on rehearing), is to the same effect:

> When physical injury has been done a person by the tortious acts of another person and the injury ultimately causes death two rights have been violated. One is the common-law right of the injured person to be secure in his person and his property -- a right which has been invaded by compelling such person to endure pain and suffering and to submit to loss of earnings and other pecuniary losses. The other right violated is the right which the family of the deceased had to the companionship, services, or support of the decedent, coupled with the expectancy of a participation in the estate which such person might have accumulated had his life not been brought to an untimely end by the infliction of the injury. Two separate and distinct rights or interests have thus been infringed upon by the act of the tort-feasor, resulting in damage to such separate rights and interests . . . .
>
> . . . .
>
> It will be observed that the statute gives the right of action to certain statutory beneficiaries for the recovery of damages suffered *by them by reason of the death* of the party killed; but it makes no provision for the recovery of the damages suffered *by the injured person by reason of*

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

> *the injury inflicted upon him.* Nor was the death by wrongful act statute ever intended to afford such remedy. It was not the purpose of the statute to preserve the right of action which the deceased had and might have maintained had he simply been injured and lived; but to create in the expressly enumerated beneficiaries an entirely new cause of action in an entirely new right; for the recovery of damages suffered by *them*, not the decedent, as a consequence of the wrongful invasion of *their* legal right by the tort-feasor. . . .

(Emphasis in original).

In *Moragne v. State Marine Lines, Inc.*, 211 So.2d 161 (Fla. 1968), this Court held that the Florida Wrongful Death Act did not create a cause of action under principles of maritime law for the wrongful death of a longshoreman caused by the unseaworthiness of a vessel on the navigable waters of the State. The Court's determination was bottomed in part upon the doctrine of *Shiver*, which was explained as follows:

> It is . . . well settled that the Florida [Wrongful Death] Act does not preserve the right of action which the deceased, had he lived, could have prosecuted, but creates in behalf of the statutory beneficiaries a totally new right of action for the wrongful death, on different principles. *See Florida East Coast Ry. Co. v. McRoberts*, 111 Fla. 278, 149 So. 631 (1933); *Shiver v. Sessions, supra*, 80 So.2d 905; *Parker v. City of Jacksonville*, 82 So.2d 131 (Fla. 1955). . . .
>
> . . . .
>
> Further illustrating the distinction between the two rights of action -- that of the deceased, had he lived, and that of the statutory beneficiaries under the Wrongful Death Act -- it was held in each of the other two cases cited above

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

> that the statutory beneficiaries could recover the damages sustained by them, even though their decedent's suit, had he lived, would have been barred. *Shiver v. Sessions, supra*, 80 So.2d 905; *Parker v. City of Jacksonville, supra*, 82 So.2d 131.

211 So.2d at 164.[3/] *See also Epps v. Railway Express Agency*, 40 So.2d 131 (Fla. 1949).

The doctrine of *Shiver* was applied in *Parker v. City of Jacksonville*, 82 So.2d 131 (Fla. 1955). In that case, this Court held that a statute providing for a 12-month limitation period upon actions brought against cities -- which would have been a bar to a personal injury action brought by the deceased -- did not bar a wrongful death action brought by the deceased's statutory beneficiaries. The statutory defense was a procedural defense -- not a defense which inhered in the tort. The Court predicated its conclusion on the same rule of law announced in *Shiver*:

> . . . The plaintiff's person was not injured nor her property damaged when her decedent was fatally injured. Her right of action under the Wrongful Death Act was based on the violation of "the right which the family of the deceased

---

[3/] *Moragne* was decided by this Court on a certified question from the United States Court of Appeals, Fifth Circuit. Thereafter, the Court of Appeals affirmed a District Court's dismissal of the "unseaworthiness" count under Florida's Wrongful Death Act, based upon the Court's response to the certified question. *Moragne v. State Marine Lines, Inc.*, 409 F.2d 32 (5th Cir. 1969). However, the United States Supreme Court reversed, holding that since the wrongful death occurred on navigable waters -- notwithstanding that the navigable waters were within the territorial waters of Florida -- the admiralty or maritime law within the jurisdiction of the United States courts would permit an admiralty cause of action for a wrongful death even absent a statute. *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 90 S. Ct. 1772, 26 L. Ed.2d 339 (1970). The subsequent history of *Moragne*, as sketched above, did not change this Court's interpretation of the Wrongful Death Act as creating a new, independent "right of action" in the beneficiaries.

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

> had to the companionship, services or support of the decedent, coupled with the expectancy of a participation in the estate which such person might have accumulated had his life not been brought to an untimely end by the infliction of the injury." [citation omitted]. Her suit was not for the injury sustained by her decedent, but for the death resulting from the injury, which is an independent and distinct grievance, created by statute. [citation omitted].

82 So.2d at 132-33. *Accord Marsh v. City of Miami*, 119 Fla. 123, 160 So. 893 (1935).

To the same effect is *St. Francis Hospital, Inc. v. Thompson*, 159 Fla. 453, 31 So.2d 710 (1947). In that case, an action for wrongful death was brought within two years from the date of death, but well after two years from the date the wrongful act occurred. Section 95.11, Fla. Stat., provided for a two-year statute of limitations. The defendant urged that the statute had run on the wrongful death claim. This Court held that the statute of limitations began to run at the time of the death and not at the time of the act causing the death. In reaching this determination, it noted:

> It will not be deemed necessary to cite the holdings of this Court to the effect that the foregoing provisions of statute have been held to create a *new* cause of action.
>
> . . . Plaintiff's cause of action did not accrue by reason of the wrongful act alone. It took a wrongful act and death to give plaintiff a cause. . . .

31 So.2d at 711 (emphasis in original).

Thus, if a statute of limitations runs on a personal injury claim during the lifetime of the injured person, that defense (which would have been available to the defendant had the person lived and sued after the statute ran) is not available to bar

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

a subsequent wrongful death claim which is brought by the statutory beneficiaries in their own right, if brought within two years from the date of death. *Accord Walker v. Beech Aircraft Corp.*, 320 So.2d 418 (Fla. 3d DCA 1975), *cert. dismissed*, 338 So.2d 843 (Fla. 1976); *Gaboury v. Flagler Hospital, Inc.*, 316 So.2d 642 (Fla. 4th DCA 1975). Like the personal defense in *Shiver*, the procedural defense embodied in the statute of limitations is not a defense which inheres in the tort.[4/]

Shiver, Parker, and *St. Francis Hospital* each recognize that the Wrongful Death Act creates an entirely new and distinct "right of action" in the statutory beneficiaries for the *death* of a person, a separate "right of action" which is totally independent of any "right of action" which that person had for his injury while he survived. A wrongful death action is for the benefit of altogether different parties than the deceased, and allows recovery of damages to which the injured person would not be entitled in an action for personal injury. Each of these three decisions specifically holds that a personal or procedural defense which does not inhere in the tort itself does not bar an action for wrongful death, even though the defense would have barred an action by the deceased for personal injuries if brought within the person's lifetime.

There is considerably more. Although the Wrongful Death Act has changed

---

[4/] This statement requires a qualification, because it may no longer be true in at least some limited contexts. We consider the development both quite accidental and highly anomalous -- a result of some questionable scholarship on the part of at least two courts -- and it will need to be discussed at some point in this brief. For the moment, however, we prefer to stick to our position and the decisional law upon which it is constructed. We will address the anomalous development when we distinguish the decisions upon which Alamo will rely.

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

from time to time, its core language (including the language upon which Alamo will rely here) has remained essentially the same -- and the distinction drawn in *Shiver* and like cases has continued to inform more contemporary constructions of the present version of Florida's Wrongful Death Act.[5/] In *Dressler v. Tubbs*, 435 So.2d 792 (Fla. 1983), for example, this Court was confronted with a case similar to *Shiver*, in which a husband and wife were killed in the crash of a private airplane being piloted by the husband. The couple was survived by four children. The personal representative of the wife's estate brought a wrongful death action against the husband's estate (and his liability insurer) for the benefit of the children. Making essentially the same argument that Alamo will make in this case, the husband's estate obtained a dismissal of the suit on the ground that, because the wife could not have sued her husband's estate for personal injuries had she survived, the wrongful death action could not be maintained.

This Court disagreed:

> [Defendants] and the district court of appeal focused on the language "the event would have entitled the person injured to maintain an action and recover damages if death had not ensued" and grafted the doctrine of interspousal immunity onto the Wrongful Death Act . . . .

[5/] In this connection, it should be noted that the present version of the Wrongful Death Act contains the following statement of "Legislative intent":

> It is the public policy of the state to shift the losses resulting when wrongful death occurs from the survivors of the decedent to the wrongdoer. Sections 768.16-768.27 are remedial and shall be liberally construed.

Section 768.17, Fla. Stat. In our judgment, this provision strongly argues in favor of the construction of the Act given in *Shiver* (and like cases) -- and it ought to require resolution of any doubts on the point in favor of Mrs. Stuttard's children here.

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

In so doing, the district court declined to consider the significance of *Shiver v. Sessions*, 80 So.2d 905 (Fla. 1955). Because the facts of *Shiver* are analogous to those before us, it controls our decision here.

Shiver involved a wrongful death action brought on behalf of minor children whose stepfather murdered their mother, then committed suicide. In determining that the doctrine of interspousal immunity did not bar the action, this Court reasoned:

> We think that the previous discussions of this court respecting the force and effect of the common-law rule of marital immunity in other situations, as well as our previous interpretations of our Wrongful Death Act, lead inevitably to the conclusion that the rule of marital immunity has no application in this case and will not bar the suit.
>
> Thus, it is settled law in this jurisdiction that the wife's disability to sue her husband for his tort is personal to her, and does not inhere in the tort itself . . . . It is also well settled that our Wrongful Death Act creates in the named beneficiaries "an entirely new cause of action, in an entirely new right, for the recovery of damages suffered by *them*, not the decedent, as a consequence of the wrongful invasion of *their* legal right by the tortfeasor." This right is "separate, distinct and independent" from that which might have been sued upon by the injured person, had he or she lived.

Id. at 907 (citations omitted) (emphasis in original).

[Defendant] advances the argument that *Shiver* is no longer applicable because the Wrongful Death Act has been amended since *Shiver* was decided . . . . The changes

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

> between the Wrongful Death Act as it existed in 1955 and as it existed in 1977 in no way affect the applicability of *Shiver*. . . .

435 So.2d at 793-94 (footnote omitted). The Court then distinguished *Roberts v. Roberts*, 414 So.2d 190 (Fla. 1982), in which a surviving wife sued her deceased husband's estate, noting that it was a *personal injury* action in which "the person bringing the suit is the very person in whom the disability to sue is inherent." 435 So.2d at 794. And it concluded: "Finding no reason to disregard *Shiver*, we follow it in the case at bar. This action for wrongful death is not barred by the doctrine of interspousal immunity." *Id.*[6/]

More recently, the Fourth District was confronted with the question of whether a settlement recovered by the plaintiff in a personal injury action against a physician could be set off against a recovery from the physician's employer for a separate act of negligence causing the plaintiff's death. Relying upon the principle of *Shiver*, the Court (per then Judge, now Justice, Anstead) held that it could not:

> . . . The right to recover for wrongful death is separate and distinct from, rather than derivative of, the injured person's right while living to recover for personal injuries. The latter is that of the injured person to be secure in his person or property, while the former is the right of the family of the deceased to the companionship and support of the decedent, coupled with the expectancy of a participation in

---

[6/] As a point of historical clarification, we should note that the doctrine of interspousal immunity was recently abolished altogether in *Waite v. Waite*, 618 So.2d 1360 (Fla. 1993). The particular question presented in *Shiver* and *Dressler* will therefore not arise in the future. The underlying principle of those (and like) cases nevertheless plainly remains viable where other personal, status-related immunities -- like the bailee immunity at issue here -- are asserted as defenses to wrongful death actions.

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

> the estate which the decedent might have accumulated but for his untimely death. Accordingly, the Wrongful Death Act creates an independent cause of action in the statutory beneficiaries, and any recovery obtained therein cannot properly be set off by the decedent's settlement of a personal injury claim against a separate tortfeasor.

Rimer v. Safecare Health Corp., 591 So.2d 232, 235 (Fla. 4th DCA 1991), *approved*, 620 So.2d 161 (Fla. 1993).

This Court approved the decision. It rejected the defendant's contention that "the district court's holding is based on the false premise that a wrongful death action is a separate and distinct action, rather than derivative of the injured party's right to recover," and it declared "the district court's rationale and holding correct." *Safecare Health Corp. v. Rimer*, 620 So.2d 161, 163 (Fla. 1993).[7] *Cf. City of Pompano Beach v. T.H.E. Ins. Co.*, 709 So.2d 603 (Fla. 4th DCA 1998) (insurance policy coverage exclusion for claims made by employees of insured did not exclude coverage for separate and distinct wrongful death claim brought by decedent-employee's widow).

With respect to the factual circumstances presented in the instant case, the sum and substance of these decisions is this: the Wrongful Death Act creates an entirely new "right of action" in Mrs. Stuttard's children, independent of any "right of action" which Mrs. Stuttard might have had for personal injuries had she survived. Because the defense which Alamo is attempting to assert against her children arises solely from her personal status as a co-bailee of the vehicle and is not inherent in the

---

[7] In its brief below, Alamo argued over and over again that the Wrongful Death Act did *not* create a separate and distinct action, but rather created an action that was *derivative* of the decedent's right to recover. Given *Safecare Health Corp.*, this argument was undeniably wrong; and if it is raised again here, it will be wrong again.

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

wrongful act or the "cause of action" itself, it is simply not available as a defense to the entirely separate and independent "rights of action" which the children have for their own, different damages under the Wrongful Death Act.

Neither, we would add (simply for good measure, since Alamo will not contend otherwise), can *Mr. Stuttard's* status as co-bailee of the vehicle be asserted as a defense to the separate "rights of action" which the children have under the Wrongful Death Act, for essentially the same reason -- and for the additional reason that §768.20 makes the *separateness* of the various "rights of action" granted to the statutory beneficiaries explicit: "A defense that would bar or reduce a survivor's recovery if he were plaintiff may be asserted against him, but shall not affect the recovery of any other survivor." *See Singletary v. National Railroad Passenger Corp.*, 376 So.2d 1191 (Fla. 2d DCA 1979) (each survivor has a separate "right of action"; negligence cannot be imputed from one survivor to another); *Ding v. Jones*, 667 So.2d 894 (Fla. 2d DCA 1996) (parsing Wrongful Death Act; noting that the independent "right of action" given to a statutory beneficiary is "personal" to him and that a defense available against one survivor cannot be asserted against another); *Hudson v. Moss*, 653 So.2d 1071 (Fla. 3d DCA 1995) (apportionment defense available for assertion against surviving father cannot be asserted against surviving mother in action for wrongful death of child), *review denied*, 673 So.2d 29 (Fla. 1996); *Pearson v. DeLamerens*, 656 So.2d 217 (Fla. 3d DCA 1995) (each statutory beneficiary has a separate "right of action" which can be separately settled with the defendant).

B. Alamo's position.

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

We turn now to the arguments advanced by Alamo below. We will concentrate on its attempt to force upon Mrs. Stuttard's *children* the personal, status-related defense which it would have had to a personal injury action brought by Mrs. Stuttard had she survived -- children who were *not* co-bailees of the vehicle, and against whom Alamo would otherwise have no defense. Actually, we have already disposed of Alamo's principal argument -- that the phrase "and the event would have entitled the person injured to maintain an action and recover damages if death had not ensued" bars all wrongful death actions in which the decedent could not have maintained a personal injury action had he or she survived. If that contention were correct, then *Shiver, Dressler*, and all of the other decisions upon which we have relied above were wrongly decided. Those decisions are not wrong, however. Alamo's argument is wrong; it is wrong because it ignores the distinction drawn in those decisions between a defense which is inherent in the tort, or "cause of action," and a defense which is merely status-related and personal to any "right of action" which the decedent might have had in an action for personal injuries.

The language upon which Alamo relies must be read in its entire context, with emphasis on the word "event":

> **Right of action.** -- When the death of a person is caused by the *wrongful act, negligence, default, or breach of contract or warranty* of any person, including those occurring on navigable waters, and the *event* would have entitled the person injured to maintain an action and recover damages if death had not ensued, the person or watercraft that would have been liable in damages if death had not ensued shall be liable for damages as specified in this act notwithstanding the death of the person injured, although death was caused under circumstances constituting a felony.

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

In other words, if the "event" (i. e., the "wrongful act, negligence, default," etc.) were such as to give rise to a "cause of action" in the person wronged, then that "cause of action" vests in the statutory beneficiaries upon the death of the wronged person. This reading of §768.19 squares precisely with *Shiver, Dressler*, and the other decisions upon which we have relied. These decisions place one refining gloss on the language of the statute. If the "event" gives rise to a "cause of action" which does not contain an inherent defense which would bar recovery, then that "event" ("cause of action") vests in the statutory beneficiaries upon that person's death, whether the wronged person had a "right of action" or not. A status-related, personal defense which would bar the injured person's "right of action" during his or her lifetime, but which is not inherent in the "event," does not bar the separate and independent "rights of action" vested in the statutory beneficiaries by the Wrongful Death Act. That is the teaching of *Shiver, Dressler,* and the other decisions upon which we have relied; that is the law; and that conclusion also explains the decisions erroneously relied upon by Alamo below.

In *Variety Children's Hospital v. Perkins*, 445 So.2d 1010 (Fla. 1983), for example (and upon which the Fifth District relied below), a child sued a hospital for personal injuries suffered as a result of its malpractice and recovered a judgment for $1,000,000.00. His parents also recovered a judgment for $200,000.00. The child then died from his injuries, and his parents brought a wrongful death action for the same incident. The hospital obtained a summary judgment on the grounds "that the cause of action had already been satisfied and that the statute of limitations had run, measured from the time of the incident." 445 So.2d at 1011. The Third District

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

reversed, holding that the wrongful death action was separate and independent of the personal injury action, and that the statute of limitations began to run at the time of the death, not at the time of the incident.

This Court did not address the second holding. It quashed the first, however, and adopted the majority rule, which it stated as follows:

> The general rule is that, if the injured party sues and recovers damages for his fatal injuries during his lifetime, the *cause of action* is thereby satisfied and, in the absence of fraud, duress, inadvertence or mistake, no right of action for death remains for the benefit of the persons named in the wrongful death statute.
>
> This rule is supported by the theory that a *cause of action* merges into the judgment and, once the judgment is rendered and final, no *cause of action* exists.
>
> . . . .
>
> At the moment of his death, the injured minor . . . had no right of action against the tortfeasor because his *cause of action* had already been litigated, proved and satisfied. The recovery awarded by the judgment in the previous personal injury action included damages arising from future expenses. Since there was no right of action existing at the time of death, under the statute no wrongful death *cause of action* survived the decedent. *See Collins v. Hall*, 117 Fla. 282, 157 So. 646 (1934). . . .

445 So.2d at 1012 (emphasis supplied).

This holding is *not* inconsistent with *Shiver, Dressler*, and the other decisions upon which we have relied. It is perfectly consistent with them, because it bars the separate "rights of action" created by the Wrongful Death Act only because the

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

underlying "*cause of action*" from which those rights arose was extinguished by its merger into the final judgment recovered in the personal injury action. As *Shiver* explains, the "rights of action" granted by the Wrongful Death Act can be pursued only where the underlying "cause of action" still exists; where, as in *Perkins*, the underlying "cause of action" no longer exists, no wrongful death action can be maintained -- and that is essentially all that *Perkins* holds.

This point is reinforced by the *Perkins* Court's reliance upon *Collins v. Hall*, 117 Fla. 282, 157 So. 646 (1934), for its conclusion. In that case, the question presented was whether a wrongful death action could be maintained by the widow of the deceased, where the deceased had prosecuted a personal injury action during his lifetime which resulted in a judgment for the defendant. This Court noted that this issue went "to the existence of the *cause of action* against the defendant," 157 So. at 647, and held that since it had been determined that the deceased had *no* "cause of action" (i. e., that the defendant had not committed an actionable tort), there was no "cause of action" upon which to bottom the widow's "right of action." The widow therefore could not take a second shot against the defendant on the already-decided question of its non-liability.

Collins is also perfectly consistent with *Shiver, Dressler*, and the other decisions upon which we have relied. *Shiver* says that the statutory beneficiaries have a separate "right of action" which is bottomed on the event -- the "cause of action." If it has been determined that the event does not give rise to liability, then the statutory beneficiaries are barred because there is no "cause of action" upon which to sue. A finding of "no liability" is synonymous with *Shiver's* concept of a "defense

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

inherent in the tort." Either results in defeat of the "cause of action." Where there is no "cause of action," the beneficiary's "right of action" has nothing upon which to operate. There is nothing in *Collins* or *Perkins* which even hints that a purely status-related defense personal to the decedent (which does not extinguish the "cause of action") bars the separate and distinct "rights of action" vested in the statutory beneficiaries by the Wrongful Death Act.

And if there were any ambiguity in that regard in *Perkins*, it was put to rest by this Court in *Nissan Motor Co., Ltd. v. Phlieger*, 508 So.2d 713, 714-15 (Fla. 1987):

> Florida's Wrongful Death Act does create a right of action in favor of statutory beneficiaries which was not recognized at common law. . . . However, this Court has consistently held that the act also creates a new and independent cause of action in the statutorily designated beneficiaries. . . . *Shiver v. Sessions*, 80 So.2d 905 (Fla. 1955). . . Neither *Ash* nor *Perkins* should be read to have held to the contrary.
>
> . . . .
>
> Neither does this Court's decision in *Perkins* support the position urged by *Nissan*. In *Perkins*, we held, in accord with the majority of other courts which have addressed the issue, that a wrongful death action is barred where the decedent, during his lifetime, had filed a personal injury action against the tortfeasor and had fully recovered. Our holding was based on the fact that "*[a]t the moment of his death* [the injured party] had no right of action against the tortfeasor because his *cause of action* had already been litigated, proved and satisfied . . . . Since there was no right of action existing *at the time of death*, under the statute no wrongful death *cause of action* survived the decedent." 445 So.2d at 1012 (emphasis added). As noted by the district court below, at the moment of Jay Phlieger's death, the 12 years had not yet run. Therefore, unlike the

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

> decedent in *Perkins*, Mr. Phlieger had a right to maintain an action against Nissan at the time of his death; and thus, Mrs. Phlieger, acting as his personal representative, had a statutory right to bring an action based on injuries suffered by Mr. Phlieger's survivors as a result of his death. *See Ake v. Birnbaum*, 156 Fla. 735, 25 So.2d 213. . . .

(Emphasis partially supplied). In short, *Perkins* is not inconsistent with *Shiver, Dressler*, and the other decisions upon which we have relied -- and it therefore provides no support for Alamo's position here that Mrs. Stuttard's personal status as co-bailee of the vehicle bars the wrongful death action brought for the benefit of her children, who were not co-bailees of the vehicle.

McCoy v. Hollywood Quarries, Inc., 544 So.2d 274 (Fla. 4th DCA), *review denied*, 553 So.2d 1165 (Fla. 1989), is also illustrative of the distinction we have drawn here. In that case, the Fourth District held that a decedent's failure to wear a seat belt was a defense which could legitimately be asserted against his statutory beneficiaries in a wrongful death action. Of course, the failure to wear a seat belt gives rise to the defense of comparative negligence. *See Ridley v. Safety Kleen Corp.*, 693 So.2d 934, 944 (Fla. 1996) (". . . we have concluded that the failure to wear a seat belt may be considered as evidence of comparative negligence"). The defense of comparative negligence is a defense which inheres in the tort, or "cause of action"; it is not a status-related defense personal to the decedent, like the status of spouse or co-bailee. *McCoy* is therefore perfectly consistent with *Shiver, Dressler*, and the other decisions upon which we have relied -- and it adds nothing to Alamo's position here.

Alamo's reliance below upon *Kirchner v. Aviall, Inc.*, 513 So.2d 1273 (Fla. 1st

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

DCA), *review dismissed*, 519 So.2d 987 (Fla. 1987), was also misplaced. Although the explanation for the decision is somewhat convoluted, *Kirchner* contains a simple holding: where the 12-year statute of repose on products liability actions runs before the product causes a death, the "cause of action" has been extinguished and the "right of action" granted by the Wrongful Death Act therefore cannot be maintained. This, incidentally, was the conclusion reached by this Court shortly thereafter in *Pait v. Ford Motor Co.*, 515 So.2d 1278 (Fla. 1987), upon which Alamo also relied below. But this conclusion is not inconsistent with *Shiver, Dressler*, and the other decisions upon which we have relied because this Court has also made it clear that the statute of repose grants a product manufacturer the substantive right not to be sued after its product is 12 years old -- i. e., that the statute of repose operates to bar the entire "cause of action" (and therefore all "rights of action" which may depend upon its existence). *See, e. g., Clausell v. Hobart Corp.*, 515 So.2d 1275 (Fla. 1987), *appeal dismissed, cert. denied*, 485 U.S. 1000, 108 S. Ct. 1459, 99 L. Ed.2d 690 (1988); *Melendez v. Dreis & Krump Mfg. Co.*, 515 So.2d 735 (Fla. 1987); *Firestone Tire & Rubber Co. v. Acosta*, 612 So.2d 1361 (Fla. 1992). The products liability statute of repose is therefore a defense which inheres in the "cause of action"; it is not a status-related defense personal to the decedent, like the status of spouse or co-bailee. *Kirchner* and *Pait* are therefore perfectly consistent with *Shiver, Dressler* and the other decisions upon which we have relied -- and they add nothing to Alamo's position here.[8/]

[8/] While we are on this subject, we are compelled to announce our frustration with this Court's inexplicable inconsistency in this area. A mere six months prior to its decision in *Pait*, the Court announced that the products liability statute of repose

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

There is at least one fly in the ointment -- and although Alamo did not rely upon it below, it deserves to be addressed here: *Hudson v. Keene Corp.*, 445 So.2d 1151 (Fla. 1st DCA 1984), *approved*, 472 So.2d 1142 (Fla. 1985). The decision requires some introductory background and a somewhat elaborate discussion. As noted previously, relying upon *Shiver* and like cases, this Court held in *Parker v. City of Jacksonville*, 82 So.2d 131 (Fla. 1955), and *St. Francis Hospital, Inc. v. Thompson*, 159 Fla. 453, 31 So.2d 710 (1947), that the statute of limitations on wrongful death actions begins to run at the time of the death, and the fact that the statute of limitations on the decedent's personal injury action may have run before he died is irrelevant. However, the language of the medical malpractice statute of limitations was subsequently changed. The new language, adopted in 1975, explicitly states that the statute of limitations begins to run in medical malpractice cases on *both* personal injury and wrongful death claims from the date of the "incident." *See Estate of James v. Martin Memorial Hospital*, 422 So.2d 1043 (Fla. 4th DCA 1982). It was because of this change in the language of the medical malpractice statute of limitations, and for no other reason, that this Court eventually held in *Ash v. Stella*, 457 So.2d 1377 (Fla. 1984), that the general rule of *Parker* and *St. Francis Hospital* was different in

---

applied only to personal injury actions, and "by its very language . . . does not apply to [wrongful death actions]. . . . Therefore, we conclude that the legislature did not intend that section 95.031(2) operate as a bar to wrongful death actions brought more than twelve years after the original purchase of the product allegedly causing death." *Nissan Motor Co. Ltd. v. Phlieger*, 508 So.2d 713, 715 (Fla. 1987) (brackets in original). Although *Phlieger* was distinguished on its facts in *Pait*, this aspect of *Phlieger* (which required exactly the opposite result in *Pait*) was not even mentioned. This anomalous result is not a case of too many cooks in the kitchen; it is a case of the regular cooks spoiling the broth by inattention. The same inconsistency and inattention is at the heart of the next decision which we will discuss.

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

medical malpractice cases.

This Court subsequently made it clear in *Nissan Motor Co., Ltd. v. Phlieger*, 508 So.2d 713, 715 (Fla. 1987), that the result in *Ash* was dictated solely by the language of the medical malpractice statute of limitations, and that *Parker* remained the law in all other contexts:

> We agree with the district court that "by its very language section 95.031(2) does not apply [to wrongful death actions]." . . . *Compare Ash* (wrongful death action based on medical malpractice barred where medical malpractice statute of limitations specifically defined an action for medical malpractice as including a claim for damages because of death) *with Parker v. City of Jacksonville*, 82 So.2d 131 (Fla. 1955) (wrongful death action was not barred by statute of limitations pertaining to actions against city for any negligence or wrongful injury or damage to person or property where statute did not expressly refer to death actions.). . . .

The Court was also careful to note that *Shiver* and the other decisions upon which we have relied here were still the law, and that "[n]either *Ash* nor *Perkins* should be read to have held to the contrary." 508 So.2d at 714.

Nevertheless, after *Perkins* but prior to *Ash*, the First District held in *Hudson v. Keene Corp., supra*, that a statutory beneficiary could not maintain a wrongful death action for products liability (asbestosis), where the statute of limitations had run on the decedent's personal injury claim during his lifetime. The court did not acknowledge the existence of *Parker* or *St. Francis Hospital*, nor did it acknowledge the existence of *Shiver, Dressler*, or any of the other decisions upon which we have relied here. Neither did it make any effort to distinguish between a defense which inheres in the "cause of action" and a defense personal to the decedent which would

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

only have barred his "right of action." It relied instead, and exclusively, upon this Court's decision in *Perkins*. Since *Perkins* dealt with the extinguishment of a "cause of action" by its merger into a final judgment, a defense which inheres in the "cause of action," and because both *Parker* and *St. Francis Hospital* were still good law at the time, a decent argument could be made that *Hudson* was wrongly decided by the First District.[9/]

As noted previously, however, whenever there are numerous cooks in the kitchen -- and especially when they are much too busy and sometimes poorly informed by the lawyers proposing the recipes -- the broth is bound to be spoiled from time to time. This Court accepted review of the First District's decision, then decided *Ash*, and then approved the decision with the following, single paragraph:

> We approve the decision in *Hudson v. Keene Corp.*, 445 So.2d 1151 (Fla. 1st DCA 1984), affirming the summary judgment in favor of respondents in this personal injury action on the authority of *Ash v. Stella*, 457 So.2d 1377 (Fla. 1984).

Hudson v. Keene Corp., 472 So.2d 1142, 1142 (Fla. 1985).

With all due respect to the Court, this disposition made no sense at all. The result in *Ash* was different than the result in *Parker* and *St. Francis Hospital only* because the explicit language of the medical malpractice statute of limitations

---

[9/] The *Hudson* Court also misread *Perkins* in another manner, concluding that this Court had disagreed with *both* of the Third District's holdings in the case. This was incorrect. As noted at pages 19-20, *supra*, this Court did *not* address the Third District's holding that the wrongful death statute of limitations began to run only at the time of death and not at the time of the decedent's injury, and it did not need to do so because of its quashal of the other holding.

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

required a contrary result. The products liability statute of limitations contained no such language, as this Court subsequently made clear in *Phlieger*. *Ash* was therefore no authority at all for approval of the First District's decision in *Hudson* -- and both *Parker* and *St. Francis Hospital* plainly required the opposite result. *Hudson* is an anomaly, probably accidental, which simply does not square with anything this Court has said before or since, and we therefore respectfully submit that, if relied upon, it would be very shaky authority for Alamo's position here.

More importantly, and in any event, the very most that *Hudson* can stand for here is the proposition that *Parker* and *St. Francis Hospital* have been implicitly overruled on their facts, and that the statute of limitations on a decedent's personal injury claim is now a defense to the entire "cause of action" and therefore bars all "rights of action" which might depend upon it. However, *Hudson* cannot fairly be read as implicitly overruling *Shiver, Dressler*, and all of the other decisions upon which we have relied here, where a purely personal, status-related defense like spouse or co-bailee is being asserted against the separate and independent "rights of action" granted to the statutory beneficiaries of the Wrongful Death Act. That simply has to be the case, we submit, since *Phlieger* endorses *Shiver* and like cases, and says that "[n]either *Ash* nor *Perkins* should be read to have held to the contrary" -- and especially since the principle of *Shiver* and like cases was fully endorsed, much more recently, in *Rimer v. Safecare Health Corp.*, 591 So.2d 232 (Fla. 4th DCA 1991), *approved*, 620 So.2d 161 (Fla. 1993).

Hudson may well complicate our position here, but in the final analysis it adds little but a confusing distraction to Alamo's position -- and we respectfully submit

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

that it is no authority at all for a conclusion that Mrs. Stuttard's personal status as co-bailee of the vehicle bars the separate, independent "rights of action" granted by the Wrongful Death Act to her children, who were not co-bailees of the vehicle. As the Second District recognized in *Alley*, *that* issue is controlled by *Shiver, Dressler*, and the other decisions upon which we have relied here, and we respectfully submit that its conclusion in that regard was eminently correct.[10/]

C. The Fifth District's decision.

In addition to the decisions already discussed, Alamo relied below on *Raydel, Ltd. v. Medcalfe*, 178 So.2d 569 (Fla. 1965), and its progeny. It argued that, in *Alley*, the Second District had erroneously relied upon some "unfortunate dicta" in *Shiver v. Sessions, supra*; that *Alley* was in conflict with *Raydel*; and that *Raydel* required a different result. The same argument was made to this Court in Enterprise Leasing's jurisdictional brief in the *Alley* case. The Court found no conflict between the Second District's decision and *Raydel* and it denied review. The fact that this Court had already considered and rejected the argument made by Alamo was brought to the Fifth District's attention below; the court bought the argument nevertheless. We respectfully submit that the Fifth District misunderstood the difference between "cause of action" and "right of action," and that it erred in its analysis and resolution of the issue.

Raydel and its progeny hold that, had either Mr. Stuttard or Mrs. Stuttard

---

[10/] For what it may be worth, we note that the Fourth District recently cited *Alley* and its general analysis with approval (in a different context) in *Nationwide Mutual Fire Ins. Co. v. Mazzarino*, 25 Fla. L. Weekly D2069 (Fla. 4th DCA Aug. 30, 2000).

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

suffered personal *injuries* in the accident, their personal status as co-bailees of the vehicle would have prevented them from suing Alamo under the dangerous instrumentality doctrine. But that is all that these decisions say. They do not address the separate and distinct, independent "rights of action" given to the Stuttards' children by the Wrongful Death Act.

And whether those separate "rights of action" are enforceable despite the Stuttards' status as co-bailees would appear to be settled by another line of authority which holds that, had the Stuttards' *children* suffered personal injuries in the accident, their parents' status as family members and co-bailees of the vehicle would *not* have prevented them from suing Alamo under the dangerous instrumentality doctrine. *See May v. Palm Beach Chemical Co.*, 77 So.2d 468 (Fla. 1955) (dangerous instrumentality doctrine permits suit against owner of vehicle notwithstanding that suit against negligent driver would be barred by doctrine of interspousal immunity). In fact, that point is settled by the very decision upon which the Fifth District relied in rejecting the Second District's analysis and resolution of the issue: *Raydel, Ltd. v. Medcalfe, supra* (although co-bailees cannot sue owner of vehicle for injuries negligently inflicted upon each by the other, recognizing continuing viability of *May* where injured family member is not a co-bailee of the vehicle).[11/]

These decisions also do not address the separate "rights of action" given to the

---

[11/] *See also Smith v. Thrifty Rent-A-Car System, Inc.*, 599 So.2d 689 (Fla. 1st DCA 1992); *Lambert v. Indian River Electric, Inc.*, 551 So.2d 518 (Fla. 4th DCA 1989), *review denied*, 563 So.2d 632 (Fla. 1990); *Reid v. Associated Engineering of Osceola, Inc.*, 295 So.2d 125 (Fla. 4th DCA 1974).

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

Stuttards' children by the Wrongful Death Act. A similar rule exists in that context, however. *See Orefice v. Albert*, 237 So.2d 142 (Fla. 1970) (dangerous instrumentality doctrine permits wrongful death action against co-owner of aircraft notwithstanding that suit against negligent pilot would be barred by doctrine of interfamily immunity). And at the least, this line of authority demonstrates that the status of "co-bailee" is a personal, status-related defense that does not taint the separate "rights of action" possessed by those who are not co-bailees, and that it is therefore not a defense that "inheres in the tort."

Without reference to *May* and its progeny, however, the Fifth District concluded that Mrs. Stuttard's status as co-bailee did not merely deprive her of her "right of action" for personal injuries, but "prevent[ed] the cause of action from wholly existing . . . ." *Toombs v. Alamo Rent-A-Car*, 762 So.2d 1040, 1042 (Fla. 5th DCA 2000). Most respectfully, if *Shiver, Dressler* and the other decisions upon which we have relied are correct, this conclusion simply cannot be correct. The "cause of action" is the tort itself. It consists of four settled elements: duty, breach, proximate causation, and damages. Whether or not Mrs. Stuttard was listed as an "additional driver" on the rental agreement is simply an irrelevant question where proof of those four elements of the tort are concerned. And the fact that she was listed on the form as an additional driver did no more than confer the personal status of co-bailee upon her.

Under *Raydel* and its progeny, Mrs. Stuttard may very well have lost her "right of action" for personal injuries against Alamo as a result -- but her children were *not*

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

listed as additional drivers on the form; they were *not* co-bailees of the vehicle; and they therefore retained the separate "rights of action" (or, in the words of *Shiver*, their "entirely new cause of action, in an entirely new right, for the recovery of damages suffered by *them*") given to them by the Wrongful Death Act, for the tort that was undeniably committed upon their mother. Under the dangerous instrumentality doctrine, Alamo remains financially responsible for the consequences of that tort.

V.
CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the decision under review should be quashed, and that the Second District's resolution of the issue in *Enterprise Leasing Co. v. Alley, supra*, should be approved.

VI.
CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 10th day of October, 2000, to: Walter A. Ketcham, Jr., Esq., Grower Ketcham More Rutherford, 390 North Orange Avenue, Suite 1900, Orlando, FL 32853-8065; John S. McEwan, II, Esq., Sanders McEwan Martinez, P.O. Box 753, Orlando, FL 32802; Keith M. Carter, Esq., Shackleford Farrior Stallings & Evans, P.A., P.O. Box 3324, Tampa, FL 33601; Eugene K. Pettis, Esq., Haliczer Pettis & White, P.A., 101 N.E. Third Avenue, 6th Floor, Ft. Lauderdale, FL 33301; William L. Petros, P.A., 2937 S.W. 27th Avenue, Grove Forest Plaza, Suite 106, Miami, FL 33133; and to Ralph O. Anderson, Esq., Hicks, Anderson & Kneale, P.A., New World Tower, Suite 2402, 100 North Biscayne Blvd., Miami, FL 33132.

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

Respectfully submitted,

PODHURST, ORSECK, JOSEFSBERG,
EATON, MEADOW, OLIN & PERWIN,
P.A.
25 West Flagler Street, Suite 800
Miami, Florida 33130
(305) 358-2800 / Fax (305) 358-2382

Attorneys for Amicus Curiae, AFTL

By: _____
JOEL D. EATON