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., etc., et al.,

Respondent.

BRIEF OF RESPONDENT ALAMO RENT-A-CAR, INC.

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

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CERTIFICATE OF TYPE STYLE

We certify that we have used 14-point proportionally-spaced Times Roman type in this brief.

INTRODUCTION

We represent the respondent Alamo Rent-A-Car, Inc. Much like the Fifth District Court of Appeal which affirmed a summary judgment in Alamo's favor, we will devote little time to the facts underlying the determination that Julia Stuttard could not have maintained an action or recovered damages for her personal injury had she not died. For the moment it is enough to say that Julia Stuttard, upon whose wrongful death this action is bottomed, was indisputably a co-bailee of an Alamo rental car and the question in the case is one of law – whether Stuttard's survivors can maintain a viable wrongful death action against Alamo, the owner and lessor of the vehicle. The trial court and the Fifth District ruled that no wrongful death action lies. The district court certified that its decision was in conflict with the decision of the Second District in *Enterprise Leasing Co. v. Alley*, 728 So. 2d 272 (Fla. 2d DCA), *review denied*, 741 So. 2d 1135 (Fla. 1999).

STATEMENT OF THE CASE AND FACTS

Ian Stuttard and his wife Julia rented a car from Alamo Rent-A-Car, Inc. on January 5, 1996 (1R169).

[1],

[1] We will refer to the record by clerk's volume and page numbers. Thus, 1R169 means volume 1, page 169.

[2] A few days later, while Ian Stuttard was driving, with Julia and their two children as passengers, they were in an accident, and Julia Stuttard died (1R4). Richard Toombs, as personal representative of Julia Stuttard's estate, brought a wrongful death action against Alamo claiming that, as the owner of the car, Alamo was vicariously liable under the dangerous instrumentality doctrine for the alleged negligence of Ian Stuttard (1R1-11, 6-7). Alamo moved for summary judgment on the ground that Julia Stuttard was a co-bailee of the rented car, and therefore Ian Stuttard's negligence was imputed to her, and since she could not recover from Alamo as a matter of law, neither could her survivors (1R63-64, 2R253-62). Opposing Alamo's motion, Toombs urged the trial court to follow the Second District's decision in *Enterprise Leasing Co. v. Alley*, in which the court, under similar facts, had decided that the survivors of a co-bailee *could* pursue an action against the rental car company (2R263-66). Toombs also argued that whether Julia Stuttard was a co-bailee of the car was a triable issue of fact (2R267-70). The trial court found that Julia Stuttard was undisputedly a co-bailee of the car (2R274, 275-76) and therefore any action by her against Alamo was "precluded under *Raydel, Ltd. v. Medcalfe* (2R274-75)."[3] Since Julia Stuttard's ability to maintain an action and

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[2] We will provide the specific details of the car rental in point II of our argument, in which we respond to Toombs' contention that an issue of fact existed as to whether Julia Stuttard was a co-bailee.

[3] In *Raydel, Ltd. v. Medcalfe*, 178 So. 2d 569 (Fla. 1965), this Court decided that where a car was entrusted jointly to a husband and wife, they could not impute the negligent operation of the automobile by either of them to the owners and recover damages for injuries. *Raydel* thus established the co-bailee exception to the dangerous instrumentality doctrine, which ordinarily imposes liability to third persons on "one who authorizes and permits an instrumentality that is peculiarly dangerous in its operation to be used by another on the public highway." *Ady v. American Honda Fin. Corp.*, 675 So. 2d 577, 580 (Fla. 1996) (quoting *Southern Cotton Oil v. Anderson*, 80 Fla. 441, 468, 86 So. 629, 638 (1920)).

recover damages against Alamo was an essential condition of her survivors' wrongful death action, the trial court entered summary judgment against the survivors (2R228-29).

Toombs appealed to the Fifth District, which affirmed the summary judgment, *Toombs v. Alamo Rent-A-Car*, 762 So. 2d 1040 (Fla. 5th DCA 2000), and certified conflict with *Alley*. That brought the case to this Court.

SUMMARY OF THE ARGUMENT

The purpose of the Wrongful Death Act was to create a cause of action in certain described survivors where negligence resulted in the death of the survivors' decedent. No such cause of action existed at common law, the fact of death immunizing the tortfeasor from civil liability. But the Act, although eliminating death as an impediment to the action, expressly provided that there was to be a cause of action for wrongful death only if "the event would have entitled the person injured to maintain an action and recover damages if death had not ensued." § 768.19, Fla. Stat. (1995).

Fundamental rules of statutory construction require that this unambiguous language be given its plain meaning. Here, since Julia Stuttard, the decedent upon whose injury and death this case is bottomed, would not have been "entitled . . . to maintain an action and recover damages," there could be no cause of action for her wrongful death.

While the reason Julia Stuttard would not have been entitled to maintain an

action and recover damages is that she was a co-bailee of the car rented from and owned by Alamo, and as such under the dangerous instrumentality doctrine could not impute the negligent operation of the car by her co-bailee to the owner, the reason doesn't matter. It does not matter whether the reason is one personal to the injured party or inherent in the tort; it does not matter whether the requirement that Julia Stuttard be entitled to maintain an action and recover damages is a condition precedent to the wrongful death cause of action or an absolute defense to the cause of action. All that matters, so long as the words of the statute are honored, as they must be, is that Julia Stuttard was not entitled to maintain an action and recover damages.

Enterprise Leasing Co. v. Alley is therefore wrongly decided. While *Shiver v. Sessions* and its interspousal immunity progeny are arguably distinguishable, if they are deemed to support the outcome in *Alley*, they too are wrong.

Finally, the district court's determination that Julia Stuttard was undisputedly a co-bailee is fully supported by the record.

ARGUMENT

I.

WHERE A PASSENGER OF A RENTAL CAR IS KILLED IN AN ACCIDENT IN WHICH HER CO-BAILEE WAS THE DRIVER, AND THEREFORE UNDER THE DANGEROUS INSTRUMENTALITY DOCTRINE THE PASSENGER WOULD NOT HAVE BEEN ENTITLED "TO MAINTAIN AN ACTION AND RECOVER DAMAGES" AGAINST THE CAR'S OWNER, THE PASSENGER'S SURVIVORS HAVE NO CAUSE OF ACTION UNDER FLORIDA'S WRONGFUL DEATH ACT

A.

The Intendment of the Wrongful Death Act: Removing the Common-Law Obstacle of Death

At common law, there simply was no such thing as a legal action to recover for the wrongful death of a human being. With the passage of Lord Campbell's Act in England in 1846, there was created a statutory cause of action where none had existed before, and a right of action was given to prescribed surviving members of the family of the victim. In 1883 Florida followed suit with an essentially identical enactment which, pertinent to this case, remains virtually the same to this day.[4]

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[4] The pertinent provision of Lord Campbell's Act states:

> WHEREAS no Action at Law is now maintainable against a Person who by his wrongful Act, Neglect or Default may have caused the Death of another Person, and it is often times right and expedient that the Wrongdoer in such Case should be answerable in Damages for the Injury so caused by him: Be it therefore enacted . . . That whensoever the Death of a Person shall be caused by wrongful Act, Neglect, or Default, and the

The Florida Wrongful Death Act applicable at the time of this accident provides:

768.19 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.

§ 768.19, Fla. Stat. (1995). That Section 768.19 created a *new* or *distinct* action is inarguable and, insofar as any number of this and other Florida courts' decisions have said as much, they state what would seem to be obvious. *See, e.g., Shiver v. Sessions*, 80 So. 2d 905, 907 (Fla. 1955) (Act creates entirely new cause of action); *Rimer v. Safecare Health Corp.*, 591 So. 2d 232, 235 (Fla. 4th DCA 1991) (right to recover for wrongful death is separate and distinct), *approved*, 620 So. 2d 161 (Fla. 1993).

But this new and distinct cause of action, as the very language of the Act tells us,

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> Act, Neglect, or Default is such as would (if Death had not ensued) have entitled the Party injured to maintain an Action and recover Damages in respect thereof, then and in every such Case the Person who would have been liable if Death had not ensued shall be liable to an Action for Damages, notwithstanding the Death of the Person injured, and although the Death shall have been caused under such Circumstances as amount in Law to Felony.

The Act then goes on to name the survivors for whose benefit the action may be brought, and other particulars. 9 & 10 Vict. Ch. XCIII (93) (1846).

was meant to remove only the impediment of death – to create a right in

survivors where the injured party's death had previously immunized the tortfeasor. *Littlewood v. Mayor*, 89 N.Y. 24, 28 (1882) ("the only defense of which the wrongdoer was intended to be deprived [by the Wrongful Death Act], was that afforded him by the death of the party injured"). *Removing the impediment of death* to allow for a negligence action against a tortfeasor is, however, vastly different from removing all other legal impediments to the action simply because death has occurred. Indeed, it is these other legal impediments to the action that are incorporated in the critical proviso of the wrongful death act – "and the event would have entitled the person injured to maintain an action and recover damages if death had not ensued."

To the extent, then, that *Shiver* and other decisions have gone beyond declaring that the action for wrongful death is new or distinct, and have declared that it is also independent of (that is, has no relation to) the personal injury action that could have been brought by the decedent had the decedent lived, these decisions distort the plain meaning of the statute by disregarding entirely this critical proviso. "Although the death statutes create a new cause of action, . . . they . . . are dependent upon the rights of the deceased." Restatement (Second) of Torts § 925 cmt. a.

But fundamental rules of statutory construction require that the proviso be given meaning and require that the plain meaning of its unambiguous words not be disregarded. The proviso, read as the rules require, describes an essential element of

the wrongful death cause of action, a requirement of it. It describes it in no uncertain terms: Julia Stuttard must have been entitled to "maintain an action and recover damages." The term "maintain" does not mean the simple institution of a suit, but rather its progress to completion. *See, e.g.*, *McNayr v. Cranbrook Invs., Inc.*, 146 So. 2d 400, 402 (Fla. 3d DCA 1962). There is "a substantial difference between a litigant's right to bring an action and his right to prevail or even to maintain an action." *Wineholt v. Westinghouse Elec. Corp.*, 476 A.2d 217, 221 (Md. Ct. Spec. App. 1984). Whether Julia Stuttard's inability to maintain an action and recover damages was because there was a defense to the cause of action or a defense to her right of action, whether there was a defense to her action that was inherent in the tort or a defense personal to her, the fact is she could not maintain the suit, and most assuredly could not recover damages. Neither, then, can her survivors.

As Judge Harris's concurring opinion below correctly observes, the Wrongful Death Act provides that "the survivors have a *right of action* for the death of one who could have stated a *cause of action* for his or her injuries had death not occurred. This provision is not ambiguous." *Toombs*, 762 So. 2d at 1043 (emphasis added). Thus, the Fifth District was demonstrably correct in concluding that "an individual's status as a co-bailee of a dangerous instrumentality is [not] a mere disability to sue, but rather, prevents the cause of action [for wrongful death] from wholly existing in such a circumstance," *id.* at 1042, and because the decedent Julia Studdard was a co-bailee, her survivors lost "both the cause of

action and right of action." *Id.* at 1041. Stated in another way, Julia Stuttard's status as a co-bailee would have been a defense personal to her precluding *her suit* under the dangerous instrumentality doctrine, but all that counts in deciding the viability of her *survivors' suit* under the wrongful death act is that Julia Stuttard could not maintain *her* action or recover damages in any suit that might have been brought by her. The reason why she could not maintain her action or recover damages – defenses personal to Julia Stuttard or defenses inherent in the tort itself – doesn't matter.

That said, it must follow that *Enterprise Leasing Co. v. Alley* was wrongly decided. As to the authority upon which *Alley* relied, primarily *Shiver v. Sessions*, 80 So. 2d 905 (Fla. 1955) and its progeny *Dressler v. Tubbs*, 435 So. 2d 792 (Fla. 1983), to the extent that they are read to broadly declare that an injured party's disability to sue does not bar a suit by that party's survivors under the wrongful death act, they too would be wrongly decided. If, however, *Shiver* and *Dressler* (and other interspousal immunity cases) are more narrowly read as deciding only that because one spouse's death destroys the reason for the interspousal immunity, and in some metaphysical way the dead spouse's disability while alive "to maintain an action and recover damages" is thus removed, then *Shiver* and the interspousal immunity cases are distinguishable from the present case, which involves only the disability of a co-bailee, and distinguishable from other Florida cases where disabilities other than interspousal immunity are involved. Where *Shiver* is extended, as in *Alley,* to

the disability of a co-bailee, the result is wrong; where Shiver is not extended, or is not given precedential value, as in *Metropolitan Life Insurance Co. v. McCarson*, 467 So. 2d 277, 279-80 (Fla. 1985) (decedent's status as incidental third-party beneficiary to an insurance contract defeated wrongful death suit by surviving spouse); *Mullarkey v. Florida Feed Mills, Inc.*, 268 So. 2d 363, 364-65 (Fla. 1972) (decedent's status as an employee covered by worker's compensation barred a suit against the employer by the survivors), *appeal dismissed*, 41 U.S. 944 (1973); *Brailsford v. Campbell*, 89 So. 2d 241, 242-43 (Fla. 1956) (decedent's status as guest passenger required survivors suing driver under Wrongful Death Act to establish gross negligence); and *Sanderson v. Freedom Savings & Loan Association.*, 496 So. 2d 954, 955-56 (Fla. 1st DCA 1986) (decedent's status as policemen killed during robbery subject to Fireman's Rule barred suit by survivors), *approved*, 548 So. 2d 221 (Fla. 1989), the result is right, but not because there is a principled distinction between the different personal disabilities, but rather because *Shiver* is wrong in the first place.

B.

The Applicable Rules of Statutory Construction

Toombs' proposed reading of section 768.19 – that because the critical proviso relates only to Julia Stuttard it has nothing to do with the survivors' action – makes superfluous the critical proviso's words "and the event would have entitled the person injured to maintain an action and recover damages if death had not ensued." It is,

however,

> an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute. A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error.

Norman J. Singer, *Sutherland Statutory Construction* § 46.06 (6th ed. 2000) (citation and internal quotations marks omitted). *Accord Cilento v. State*, 377 So. 2d 663, 666 (Fla. 1979); *State v. Rodriguez*, 365 So. 2d 157, 159 (Fla. 1978); *State v. Gale Distribs., Inc.*, 349 So. 2d 150, 153 (Fla. 1977); *Chiapetta v. Jordan*, 153 Fla. 788, 795, 16 So. 2d 641, 644 (1943) (on rehearing).

Florida courts have specifically held that a statute cannot be construed so as to render any provision meaningless. *Weber v. City of Fort Lauderdale*, 675 So. 2d 696, 698 (Fla. 4th DCA 1996) (interpreting statute in manner set forth by circuit court would render phrase meaningless; "it is a fundamental rule of construction that statutory language cannot be construed so as to render it potentially meaningless"); *Anderson v. Department of Health and Rehab. Servs.*, 485 So. 2d 849, 852 (Fla. 1st DCA 1986) (declining proposed reading of statute that would render sentence meaningless); *Regency Towers Owners Ass'n v. Pettigrew*, 436 So. 2d 266, 267-68 (Fla. 1st DCA 1983) (interpretation of term rendered meaningless other terms; "[a]s

a general rule, a court should not construe a statute in a way that makes words or phrases meaningless, redundant or superfluous"); *Florida Coast Bank v. Mayes*, 437 So. 2d 160, 161-62 (Fla. 4th DCA 1983) (construction of statute would render meaningless initial clause of sentence); *Vocelle v. Knight Bros. Paper Co.*, 118 So. 2d 664, 667 (Fla. 1st DCA 1960) (rejecting construction of words in statute that would make first part of sentence meaningless).[5]

As we have said, the right to sue for damages for death by a wrongful act did not exist at common law; it is purely statutory. *Variety Children's Hosp. v. Perkins*, 445 So. 2d 1010, 1012 (Fla. 1983); *Chamberlain v. Florida Power Corp.*, 144 Fla. 719, 722, 198 So. 486, 488 (1940). It is a longstanding and widely acknowledged rule that when a cause of action exists solely by virtue of a statute, compliance with its requirements is essential to maintaining the cause of action. *City of Miami v. Saco*,

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[5] We are, of course, aware of amicus AFTL's notation that the heading imposed on Section 768.19 is "Right of Action." AFTL's brief at 5 n.1. Presumably the intended implication is that this heading is significant. It is not. Even if, for the sake of argument, the heading is to be given meaning, *compare, e.g., Myers v. State*, 426 So. 2d 986, 991 (Fla. 1st DCA 1983) (Smith, Larry G., dissenting) (section heading entitled to "due weight"), with *Merritt Square Corp. v. State Dep't of Revenue*, 354 So. 2d 143, 144 (Fla. 1st DCA 1978) (catchlines of statute section "not part of and do not modify the unambiguous text of the statute"), all that can be said of this heading is that it describes correctly that survivors of a wrongfully killed person are given a *right of action*. It obviously does not purport to describe the *cause of action*, and if the makers of headings were more interested in complete accuracy and less interested in brevity, the heading would likely read "Right of Action of Survivors to Bring Wrongful Death Cause of Action; Wrongful Death Cause of Action Described."

156 Fla. 634, 635, 24 So. 2d 115 (1945) (statutory right or privilege is subject to the limitations, conditions and restrictions imposed by statute that defines and creates the right); *Tigertail Quarries, Inc. v. Ward*, 154 Fla. 122, 127, 16 So. 2d 812, 814-15 (1944) (same); *La Floridienne v. Seaboard Airline Ry.*, 59 Fla. 196, 212, 52 So. 298, 304 (1910) (same). *See Beach v. Great Western Bank*, 670 So. 2d 986, 992 (Fla. 4th DCA 1996) (when a statute creates new liability, the time limit fixed by the statute is an indispensable condition of the liability and the action it permits), *approved*, 692 So. 2d 146 (Fla. 1997). *See also Price v. Price*, 32 So. 2d 124, 125-26 (Miss. 1947) ("where a statute creates a right of action which did not exist at common law and the same statute fixes the conditions upon which the right may be asserted, the conditions are an integral part of the right thus granted -- are substantive conditions, the observance of which is essential to the right"); *Jefferson v. Big Horn County*, 766 P.2d 244, 246 (Mont. 1988) (where right of action and conditions for bringing action are contained within same statute, compliance with those conditions is a condition precedent which must be fulfilled to preserve the right); *County Bd. of Supervisors v. Breese*, 105 N.W.2d 478, 484 (Neb. 1960) (where a right has been created by statute which did not exist in the common law, conditions imposed by legislature qualify and are an integral part of the act and must be fully complied with); *Hughes Drilling Co. v.* Morgan, 648 P.2d 32, 35 (Okla. 1982) (same); *Bullock v. Mel Powers Inv. Builder*, 682 S.W. 2d 400, 402 (Tex. Ct. App. 1984) (where cause of action and remedy for enforcement are derived not from common law but from statute, statutory provisions

are mandatory and exclusive, and must be complied with in all respects or the action is not maintainable); *Moreno v. Board of Educ.*, 926 P.2d 886, 891 (Utah 1996) ("[w]here a cause of action is based upon a statute, full compliance with its requirements is a condition precedent to the right to maintain a suit").

Finally, although the wrongful death statute is remedial in nature and is expressly required to be construed liberally, § 768.17, Fla. Stat. (1995), this Court has nevertheless recognized that it cannot "construe the statutory provisions so 'liberally' as to reach a result contrary to the clear intent of the legislature," or "do by statutory construction that which the legislature has not intended." *Stern v. Miller*, 348 So. 2d 303, 308 (1977). *See also Latimer v. Sears Roebuck & Co.*, 285 F.2d 152, 158 (5th Cir. 1960) (wrongful death statutes should not by judicial construction be extended to include rights of action that are not within the lawmaking intent as shown by the language used). Yet that is exactly what Toombs is asking this court to do when he asks this Court to modify proviso 2.

It is appropriate here to address the cases in which the statute of limitations on the injured party's cause of action has run and is being interposed as a defense to the survivor's wrongful death action. The AFTL's amicus brief correctly points out the incompatibility between this Court's decisions 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) (holding that the statute of limitations applicable to the survivor's wrongful death action began to run with the death of the injured party) and its decision in *Hudson v. Keene Corp.*, 472 So. 2d 1142 (Fla. 1985) (approving a decision of the First District Court of Appeal holding that the statute of limitations applicable to the survivor's wrongful death action began to run with the injury to the survivor's decedent). The amicus urges that *Parker* and *St. Francis* are correct and that they too illustrate that the personal disability of the decedent has no effect upon the survivor's right to independently sue. But while *Parker* and *St. Francis* may very well be correct, their correctness, if such is the case, is nothing more or less than an illustration of an arguably correct liberal reading of proviso 2, applicable only to statute of limitations cases, and not to cases such as this involving the decedent's status as a co-bailee. Here's the reason.

Proviso 2 sets forth, as we have said, the essential condition to any wrongful death action that "the event would have entitled the person injured to maintain an action and recover damages if death had not ensued." Observing the requirement that the statute is to be construed liberally when considering the potential bar of the statute of limitations, the argument would be that the event was such that the person injured, as the statute provides, would have been *entitled* to maintain an action and recover

damages, but simply failed to timely do so, which has nothing whatsoever to do with the statutory language. The argument in opposition (adopted in *Hudson*) is that because the statute of limitations on the personal injury action had run, the decedent would not have been entitled to maintain an action and recover damages, and thus neither could the survivor. The difference between the two positions comes down to the construction of the word "entitled" and whether the initial entitlement or a subsequent disentitlement by the failure to act timely is what matters. So however this debate is resolved, and we think here, given the liberal construction rule, that *Parker* and *St. Francis* are more likely correct, its resolution has no effect on this case.

C.

Parsing Section 768.19 – Two Clauses and a Critical Proviso

Section 768.19 has three essential provisions. Deleting the words not applicable to this case, its provisions are:

> 1) When the death of a person is caused by the . . . negligence . . . of any person,
>
> 2) and the event would have entitled the person injured to maintain an action and recover damages if death had not ensued,
>
> 3) the person . . . 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 . . . .

As we have said, the Wrongful Death Act was designed to create a new legal action when death is wrongfully caused by another; before the Act the fact of death precluded legal action. By the Act's plain language a legal action for a wrongful death is fully created by the simple combination of clauses 1 and 3, which, read together, say all that needs to be said to remove the impediment to the action that death formerly imposed. Together they read:

> 1) When the death of a person is caused by the . . . negligence . . . of any person . . .
>
> 3) the person . . . 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 . . . .

Clearly an action for wrongful death is thus created – negligence causing death.

But what of proviso 2 – "and the event would have entitled the person injured to maintain an action and recover damages if death had not ensued"? It tells us the rest we need to know – that although the impediment of death has been removed by clause 3, other impediments to the action are not removed. Toombs suggests that proviso 2 describes not an impediment inhering in the tort itself but instead an impediment personal to the injured party, and that notwithstanding the clear language of proviso 2, the only possible impediment to a survivor's suit is one inhering in the tort itself.

But courts are duty-bound to give the words of proviso 2 their plain meaning. The requirement it describes is entirely indifferent to the reason the injured party's suit cannot be maintained – that is, whether the reason is inherent in the tort itself or one personal to the injured party. Instead, the requirement is simply that the event would have entitled the person injured "to *maintain an action* and *recover damages*." Thus not only must there be negligence and injury, but, as proviso 2 tells us, the event includes that the person injured must be able to "maintain an action and recover damages." So while Julia Stuttard, alleged to be injured by the negligence of another, arguably would have been authorized by clauses 1 and 3 to bring suit, she would have been unable to maintain the action and recover damages against Alamo by virtue of

proviso 2. That, of course, is so because she was a co-bailee of the vehicle rented from Alamo and could not recover damages from Alamo under the dangerous instrumentality doctrine. *See Raydel, Ltd. v. Medcalfe*, 178 So. 2d 569 (Fla. 1965).

Thus, although Toombs and his supporters have made considerable effort to distinguish between defenses and causes of action, all that matters is that Julia Stuttard could not "maintain an action and recover damages" against Alamo. And it makes no difference whether the defense that she was a co-bailee was unique to co-bailees or there was a defense inherent in the tort. And it makes no difference whether her inability to maintain her personal injury action is a condition precedent to her survivors' wrongful death action or her inability is a defense to her survivors' wrongful death action. It makes no difference whether her potential personal injury action is barred by defenses "personal" to her or that she cannot state a cause of action because it is thought to be "inherent in the tort." All that matters is that her action could not be maintained and she could not recover damages. When, as here, that's the case, her non-bailee survivors cannot do so either.

The AFTL's early promise that the fact that the Stuttard children were not co-bailees of the vehicle is "a point which will make all the difference here" (AFTL's brief at 1) is thus an empty one. Indeed, the fact that the Stuttard children were not co-bailees makes no difference at all. What makes the difference is that although the Stuttard children were survivors given a right of action by the wrongful death statute, they have no cause of action to bring, once meaning is given to proviso 2 – "and the

event would have entitled the person injured [their mother] to maintain an action and recover damages if death had not ensued."

Judge Harris's concurring opinion put it well:

> If we hold that the survivors are not bound by the statutory requirement that the decedent must have been able to state a cause of action against Alamo had she survived in order for their right of action to accrue, then we ignore the clear legislative mandate and substitute this court's will in its stead. Since we do not hesitate to condemn the legislature for encroaching in our backyard, perhaps we should be more cautious in our excursions.

Toombs, 762 So. 2d at 1044 n.2. The mandate to which he refers, of course, is proviso 2 of Section 768.19, which, if treated as anything other than an essential part of the wrongful death action, is to ignore its presence. *See Metropolitan Life Ins. v. McCarson*, 467 So. 2d 277 (Fla. 1985), where this Court, giving full effect to proviso 2, said:

> Florida's Wrongful Death Act . . . requires, as a condition precedent to bringing the action for wrongful death, that the decedent have a cause of action on which she could have brought suit had she survived. Such is not the case here on the facts pleaded. Mr. McCarson's wrongful death claim must be disallowed.

Id. at 280.[6]

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[6] Other jurisdictions have also given meaning to proviso 2 or its equivalent. *See, e.g.*, *Bertelmann v. Taas Assocs.*, 735 P.2d 930, 935 (Haw. 1987) (no wrongful death action for survivors of liquor consumer who died in accident after being served liquor at hotel, where consumer would not have had cause of action against hotel); *Maiuri v. Sinacola Constr. Co.*, 170 N.W.2d 27, 28-30 (Mich. 1969) (no wrongful death action where decedent would have been barred by workers'

II.

THE DISTRICT COURT CORRECTLY AFFIRMED SUMMARY JUDGMENT FOR ALAMO WHERE THE UNDISPUTED EVIDENCE SHOWED THAT JULIA STUTTARD WAS A CO-BAILEE

Toombs argues, in the alternative, that affirmance of summary judgment for Alamo was improper because a triable issue of fact existed on the threshold question of whether Julia Stuttard was a co-bailee of the vehicle rented to the Stuttards. But review of the evidence in the record shows that there was no such triable issue. As the trial court aptly found, "it [wa]s *undisputed* that she was a co-bailee because she [wa]s listed as an additional driver [on the rental agreement] and she accepted the bailment by driving the car" (1R274) (emphasis added). The Fifth District correctly upheld this finding:

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compensation act from an action for injuries); *Emery v. Rochester Tel. Corp.*, 3 N.E.2d 434 (N.Y. 1936) (where child was alleged to have died because of negligent failure of telephone company to complete telephone call to physician, but child would have had no cause of action against telephone company, wrongful death complaint stated no cause of action); *Riley v. Brown & Root, Inc.*, 836 P.2d 1298, 1300-02 (Okla. 1992) (no wrongful death action where decedent, because statute of repose had expired, would not have had a cause of action against manufacturer of "base machine chest" in which decedent died). "As the foundation of the right of action is the original wrongful injury to the decedent, it has been generally held that the new action is a right dependent upon the existence of a right in the decedent immediately before . . . death to have maintained an action for . . . wrongful injury. *Michigan Cent. R.R. Co. v. Vreeland,* 227 U.S. 59 (1913).

> Toombs also claims summary judgment was improper because there was a factual issue as to whether Julia Studdard [sic] was a co-bailee. *The facts establishing a bailment, however, are not in dispute.* Her name and license number were on the rental agreement and she, along with her husband, drove the car.

Toombs, 762 So. 2d at 1041 n.2 (emphasis added).

A bailment is generally defined as an express or implied contractual relationship among parties in which the subject matter of the relationship is delivered temporarily to and accepted by one other than the owner. *S & W Air Vac Sys., Inc. v. Department of Revenue,* 697 So. 2d 1313, 1315 (Fla. 5th DCA 1997); *Monroe Sys. For Business, Inc. v. Intertrans Corp.,* 650 So. 2d 72, 75-76 (Fla. 3d DCA 1994). The business of renting automobiles to customers, who drive them for a period of time pursuant to the terms of a rental agreement and then return them to the owner, is a particular type of bailment, *see Lawrence v. Goddard,* 124 Fla. 250, 253-54, 168 So. 13, 14 (1936), in which the persons entrusted with the rented automobiles are deemed bailees. *Enterprise Leasing Co. v. Almon,* 559 So. 2d 214, 216 (Fla. 1990).

In decisions analyzing the dangerous instrumentality doctrine, Florida courts have consistently found that passengers listed as authorized additional drivers of rented vehicles are co-bailees. *Gonzalez v. Enterprise Leasing Co.,* No. 99-824, 1999 WL 993085, at *1 (Fla. 3d DCA Nov. 3, 1999); *Enterprise Leasing Co. v. Alley,* 728

So. 2d 272, 272 (Fla. 2d DCA 1999); *see also Almon,* 559 So. 2d 214 215-16 (holding that, as a matter of law, passenger in leased car was bailee where original lessee loaned the car to another person, who then allowed the passenger to use the car and the passenger in turn allowed *his* friend to drive the car involved in accident injuring the passenger); *compare Alamo Rent-A-Car, Inc. v. Clay,* 586 So. 2d 394, 395 (Fla. 3d DCA 1991) (upholding trial court's finding that passengers in rented car were *not* jointly entrusted with car where driver was the sole lessee and the only person who operated the car).[7]

Here, the record contains no evidence that would create a genuine issue of material fact as to Julia Stuttard's status as a co-bailee of the rented vehicle. In fact, Ian Stuttard's sworn testimony plainly established that his wife was jointly entrusted with the vehicle and exercised dominion and control over it – her name was listed on

[7] Toombs' reliance on *Brown v. Goldberg, Rubenstein & Buckley,* 455 So. 2d 487 (Fla. 2d DCA 1984), in which the appellate court held that the evidence raised a factual issue as to whether a law firm was a bailee of a leased automobile, is misplaced, as that case is factually distinguishable. The law firm in *Brown* had an *unwritten* agreement with the motor vehicle company under which rental vehicles were provided to the firm's clients and paid for by the firm, and the very nature of the arrangement between the company and the firm gave rise to conflicting inferences. Here, there were no such conflicting inferences regarding the nature of the relationship between the Stuttards and Alamo, which was plainly evidenced by the terms of their *written* rental agreement.

the Alamo rental agreement as an additional driver; her license number appeared on the agreement; she intended to drive the rented vehicle; she in fact drove the vehicle before the accident; and Alamo charged the Stuttards for an additional driver, as provided for in the rental agreement[8] (1R110-12, 122, 169-70). These undisputed facts established, as a matter of law, that Julia Stuttard was a co-bailee of the vehicle that was jointly entrusted to her and her husband. *See Gonzalez,* 1999 WL 993085, at *1; *Alley*, 728 So. 2d at 272; *Almon,* 559 So. 2d at 215-16.

Notwithstanding Toombs' contrary argument, the fact that Julia Stuttard did not sign the rental agreement did not create a triable issue of fact regarding her legal status as a co-bailee. *See Gonzalez,* 1999 WL 993085, at *1 (affirming trial court's finding that passenger listed as additional driver was jointly entrusted with rented vehicle and was thus precluded from suing vehicle owner).[9] And, of course, neither did the fact that she was not driving the vehicle at the time of the accident, *see Almon,* 559 So. 2d at 216 (holding that *passenger* who had been entrusted with rented vehicle was bailee); *Gonzalez,* 1999 WL 993085, at *1 (same); *see also Carter v. Baby Dy-Dee*

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[8] The rental agreement provides that an additional driver is authorized only if an additional driver charge is paid and that person has a valid driver's license and is named on the front of the agreement (1R123).

[9] Alamo's rental agent testified that Alamo has never required additional drivers *to sign* its rental agreements (1R157).

Serv., Inc., 159 Fla. 380, 381, 31 So. 2d 400, 401 (1947) (holding that automobile borrower, who was not driving automobile but was *passenger* at time of accident, was bailee of automobile),[10] nor the fact that Alamo's agent who rented the vehicle to the Stuttards could not specifically recall meeting Julia Stuttard *almost three years earlier*, create a genuine issue of material fact as to her co-bailee status. The agent testified that there was no conceivable way that he could remember the thousands of customers he had serviced (1R159). Notably, he also testified that, based on his training and experience, he understood that he was renting the vehicle to *both* Ian and Julia Stuttard because *both* of their names appeared on the rental contract (1R162-63).

Thus, the Fifth District was absolutely correct to affirm the entry of summary judgment for Alamo because the undisputed evidence in the record established as a matter of law that Julia Stuttard was a co-bailee of the vehicle rented to the Stuttards.

CONCLUSION

For the reasons given, Alamo urges this Court to give Florida's Wrongful Death Act the meaning that the Act's words plainly command, and hold that because Julia Stuttard would not have been entitled to maintain an action and recover damages had death not ensued, her survivors could not sue for her wrongful death. Upon that

[10] Presumably where, as here, there are co-bailees, one of them will not be driving at any given point in time.

holding, this Court should thereafter approve the decision below of the Fifth District Court of Appeal and disapprove the decision of the Second District Court of Appeal in *Enterprise Leasing Co. v. Alley*.

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