SUPREME COURT OF FLORIDA

CASE NO. SC00-1755

L.T. No. 5D99-2043

RICHARD TOOMBS, etc.,

Petitioner,

vs.

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

Respondents.

PETITIONER RICHARD TOOMBS' REPLY BRIEF

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CERTIFICATE OF COMPLIANCE

This brief complies with the Court's Administrative Order dated July 13, 1998. It is typed in 14 point proportionately spaced Times New Roman font.

INTRODUCTION

Petitioner Richard Toombs, as Personal Representative of the Estate of Julia Stuttard ("Toombs"), submits this brief in reply to the answer brief filed by Respondent Alamo Rent-A-Car, Inc. ("Alamo").

Alamo prefaces its entire argument by asking this Court to incorrectly presume that the decedent, Julia Stuttard, was "indisputedly a co-bailee" of the Alamo rental car involved in this action. (A.B. p. 1).[1] Because the trial court never made a specific finding that at the time of the accident Ms. Toombs had agreed to accept possession of the automobile, her status remains an issue of fact which must be resolved by a jury. To avoid needless repetition of facts, Toombs' response to this and other factual representations will be addressed in the Reply to Argument section of this brief.

Alamo further contends that the Second District in *Enterprise Leasing Co. v. Alley*, 728 So. 2d 272 (Fla. 2d DCA 1999), and this Court in *Shiver v. Sessions*, 80 So. 2d 905 (Fla. 1955), have wrongfully interpreted Florida's Wrongful Death Act to permit claims where any alleged disability to sue was personal to the decedent and does not inhere in the tort itself. As shown, Alamo's arguments on both points are without merit. This Court accordingly should quash the opinion of the Fifth District so that the summary judgment for Alamo on Toombs' wrongful death claim can be reversed.

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[1] "A.B." refers to the Respondent's Answer Brief.

REPLY TO ARGUMENT

THE FIFTH DISTRICT ERRED IN AFFIRMING THE SUMMARY JUDGMENT FOR ALAMO ON TOOMBS' WRONGFUL DEATH CLAIM.

A. Toombs' Claim Against Alamo Under The Wrongful Death Act is Not Barred Even if Julia Stuttard is Deemed a Co-Bailee of Alamo's Vehicle.

Alamos' characterization of the Wrongful Death Act as intended to do nothing more than remove the impediment of death (A.B. pp . 6-7) is contradicted by the remedies afforded by the statute itself. The intent of the Act is to provide a remedy for the *survivors*. Section 768.21 (**Damages**) provides compensation for losses suffered by the *survivors*, such as lost support and services, loss of companionship and protection, and mental pain and suffering of the survivors. The Act does not provide compensation for the pain and suffering of the decedent. Thus, contrary to Alamo's theory and as this Court held in *Shiver v. Sessions*, 80 So. 2d 905 (Fla. 1955), the 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'." *Id.* at 907.

As much as Alamo trumpets the statutory "proviso" which declares that the Act applies if the event would have entitled the person injured to maintain an action and recover damages if death had not ensued, it ignores the fact that the legislature has

never intended the remedies provided under the Act to parallel those available to people who survive their injuries. As an example, although a person who is injured as a result of medical malpractice has a right of action against her negligent medical providers, the legislature has chosen to render this right of action virtually nonexistent for adult children of people who die as a result of medical malpractice.

In the same vein, the legislature has specifically permitted Wrongful Death damages to exceed those which would have been available had the decedent survived. Section 768.20, Fla. Stat., provides that "[a] defense that would bar or reduce a survivor's recovery if he were the plaintiff may be asserted against him, but shall not affect the recovery of any other survivor." Thus, although a comparatively negligent decedent would have had his damages proportionately reduced had he survived, in the event of his death his estate is entitled to the full damages, with no reduction for his comparative fault. *See* § 768.20, Fla. Stat.; *Hudson v. Moss*, 653 So. 2d 1071 (Fla. 3d DCA 1995); *Gurney v. Cain*, 588 So. 2d 244 (Fla. 4th DCA 1991).

Although Toombs does not disagree with Alamo's contention that rules of statutory construction dictate that provisions be given meaning, Alamo's interpretation of the Wrongful Death Act is not only unsupported but is contradicted by the case law. (A.B. p. 7). The word "maintain" as used in the statute does not mean that the decedent must have been able to progress the suit to completion had she survived, as Alamo asserts, and the cases that Alamo cites in support of this argument, neither of

which even involved wrongful death actions, fail to support this incorrect argument. In fact, in *McNayr v. Cranbrook Investments, Inc.*, 146 So. 2d 400 (Fla. 3d DCA 1962), cited by Alamo, the Third District specifically noted that the word "maintain" has a number of potential meanings when applied to actions, including: "[T]o commence; to begin; to bring; to institute." *Id.* at 402 n.3, *citing* 54 C.J.S. *Maintain* p. 902. Given the fact that recoveries under the Wrongful Death Act do not parallel those available to plaintiffs who survive their injuries, there can be no implied legislative intent to only permit those damages that would have been recovered had the decedent survived and maintained his action to completion.

Although Alamo earnestly endorses Judge Harris' concurring opinion below and his attempt to distinguish causes and rights of action (A.B. p. 8), the concurrence never quite articulates how the decedent's disability to sue in the instant case is any different from the decedent's disability in *Shiver*. As this Court held in *Shiver*, the decedent's disability to sue arose not out of the tort, but out of her status as the tortfeasor's spouse. Similarly, Julia Stuttard's alleged disability to sue arises not out of the tort, but out of her alleged status as a co-bailee. As in *Shiver*, Ms. Stuttard's alleged disability was personal to her and, as the action has been brought for the benefit of a third person, may not be imputed to that third person.

Although Alamo contends that the alleged reason for why Ms. Stuttard could not bring her action or recover damages does not matter (A.B. pp. 8-9), this is simply

not the case. As this Court has long stated, and the *Alley* court correctly held, there is a critical difference between disabilities which inhere in the tort itself and disabilities which are personal to the decedent. *See Shiver*, 80 So. 2d at 908; *Alley*, 728 So. 2d at 274-75. In fact, despite Alamo's best attempts to distinguish the facts of *Shiver* from those in this case and *Alley*, its difficulties in doing so are evidenced in its continuous plea to this Court to abrogate nearly fifty years of precedent by declaring *Shiver* invalid. (A.B. pp. 4, 7, 9-10).

Furthermore, the interpretation of the Act that has been endorsed by Toombs and in *Alley*, *Shiver* and its progeny does not render any portion of the Wrongful Death statute meaningless. In stating that the event causing the death must have entitled the person injured to maintain an action and recover damages if death had not ensued, the legislature has provided the very important mandate that the injured person must have had a cause of action against the tortfeasor had she survived. Thus, where there was never a duty breached which was owed to the decedent, or where the personal representative fails to file suit within the statute of limitations or repose, this provision of the Wrongful Death Act prevents the creation of a new cause of action where one never existed, or where there is a defense inherent in the cause of action itself.

In fact, the legislature has endorsed the *Shiver* Court's interpretation of the Act by making no attempt to change the law after *Shiver*, even though there have been

numerous revisions to the Wrongful Death Act. *See White v. Johnson*, 59 So. 2d 532, 533 (Fla. 1952) ("Since that date there have been numerous sessions of the legislature, including the one existing on that date, and at no one of such sessions has the legislature seen fit to change in any material manner the language in the body of the statute. This fact may be taken as an indication that the legislature approved or accepted the construction placed upon Section 222.11 . . . by the effect of the three to three decision of this Court in the case of Wolf v. Commander . . . ."); *Wood v. Fraser*, 677 So. 2d 15, 18 (Fla. 2d DCA 1996) ("[W]e find it significant that since our judicial interpretation of the interplay between section 95.11(4)(b) and former section 768.57(4), now section 766.106(4), the legislature has continually reenacted these statutory provisions without any change in language. We note, in that regard, Florida's well-settled rule of statutory construction that the legislature is presumed to know the existing law when a statute is enacted, including 'judicial decisions on the subject concerning which it subsequently enacts a statute'.").

In 1955, the *Shiver* Court interpreted the Wrongful Death Act's requirement that an injured party would have been entitled to maintain an action and recover damages to not include disabilities which would have been personal to the injured party and are therefore not inherent in the tort. Although the Wrongful Death Act, over the course of the ensuing years, has endured numerous revisions, the legislature has chosen not to alter the holding of *Shiver*. This shows that the *Shiver* Court

correctly interpreted the Wrongful Death Act, and any abrogation of *Shiver* or its progeny would be contrary to the legislature's intent. *See Davis v. Simpson*, 313 So. 2d 796, 798 (Fla. 1st DCA 1975) (declining to overrule prior judicial interpretation of Wrongful Death Act where legislature had repeatedly modified the Act without addressing law created by prior judicial construction: "We must assume that the legislature knew the construction that had been placed upon the previous death by wrongful act statute by the Supreme Court in *Stokes* when it enacted the new statute.").

As the AFTL has correctly pointed out, *Parker v. City of Jacksonville*, 82 So. 2d 131 (Fla. 1955) and *St. Francis Hospital, Inc. v. Thompson*, 31 So. 2d 710 (Fla. 1947), stand for the proposition that any personal disability of the decedent has no effect on the survivor's right to independently sue the tortfeasor and those responsible for him. Alamo fails to explain how these holdings comport with the Fifth District's decision in the instant case. An injured person who fails to bring an action within the limitations period is no more "entitled" to maintain an action and recover damages than an injured person barred by interfamilial immunity or her alleged ownership status of a vehicle.

For all of the reasons discussed above, Alamo's continued assertion that the non-bailee status of Ms. Stuttard's children is irrelevant is wrong, and its reliance once more on the Fifth District's concurrence is misplaced. (A.B. pp. 18-19). Although

Judge Harris expresses his concerns about encroaching on the legislature, an abrogation of *Shiver* would do just that.[2]

Alamo's reliance on *Metropolitan Life Insurance Co. v. McCarson*, 467 So. 2d 277 (Fla. 1985) does not support its unfounded contention that Toombs' argument disregards "proviso 2." In *McCarson*, this Court held that the Wrongful Death Act prohibited the decedent's surviving spouse from bringing an action arising out of the breach of a contract on behalf of her estate because the deceased had not been a party to or even a beneficiary of the breached contract. *Id.* at 279-80. In contrast, Mr. Stuttard breached a duty of care that was owed to Julia Stuttard, thus giving rise to a prima facie negligence action.

The several out-of-state cases cited by Alamo in footnote 6 are similarly inapplicable. For instance, the decedent's survivors in *Bertelmann v. Taas Associates*,

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[2] Judge Harris' immediately preceding attempt to distinguish *Shiver* from the instant case is questionable. Judge Harris notes that the husband in *Shiver* breached a duty to not shoot his wife, whereas Alamo had no duty to not rent a car to Ms. Stuttard and her husband. 762 So. 2d at 1044 n.2. This logic is misplaced, as vicarious liability does not arise out of a breach of a duty by the vicariously liable party. Rather, the dangerous instrumentality doctrine is premised on the important public policy of holding owners who place automobiles on public highways to be held responsible for the carnage that results from accidents caused by their vehicles, and applies regardless of whether the owner is negligent. *See Southern Cotton Oil Co. v. Anderson*, 86 So. 629 (Fla. 1920). "[T]he dangerous instrumentality doctrine stands alone, independent of other theories of liability." *Lambert v. Indian River Elec., Inc.*, 551 So. 2d 518, 519 (Fla. 4th DCA 1989). As in *Shiver*, this cause of action arose when Mr. Stuttard breached his duty to his wife and children to exercise reasonable care in the operation of the automobile he was driving.

735 P.2d 930 (Haw. 1987), were not entitled to proceed against a hotel that had violated a statute prohibiting the sale of alcohol to intoxicated consumers because the class that the statute was intended to protect was innocent third parties who were injured by the intoxicated consumer. Because the decedent was the intoxicated consumer himself, the statute did not create a duty to protect him and he therefore would not have had a cause of action against the hotel had he survived. In contrast, Julia Stuttard was owed a duty of care that was breached, and Alamo's status as an automobile owner renders it vicariously liable for that breach.

In *Riley v. Brown and Root, Inc.*, 836 P.2d 1298 (Okla. 1992), also cited by Alamo, the decedent's estate was barred from bringing an action because the statute of repose had expired. This holding is not analogous to and in no way conflicts with the positions taken by Toombs and the *Alley* court, as the failure to file a claim within an applicable repose period deprives the court of jurisdiction to adjudicate the claim. *See Comercia Bank & Trust v. S.D.I. Operating Partners, L.P.*, 673 So. 2d 163, 166 (Fla. 4th DCA 1996). Similarly, the other non-Florida cases cited by Alamo do not involve causes of action brought under Wrongful Death statutes, and therefore do not involve causes of action that would be precluded merely by the decedent's former personal status.

B. In The Alternative, The Trial Court Erred in Entering Summary Judgment for Alamo Because A Triable Issue

of Fact Exists on Whether Julia Stuttard was a Co-Bailee of Alamo's Vehicle at The Time of The Accident.

Alamo asserts that the trial court properly ruled as a matter of law that Ms. Stuttard was a co-bailee of Alamo's vehicle, despite the fact that it was never established that she rented, accepted possession of, or had any control over the car at the time of the accident. Although the Fifth District was correct in noting that some of the facts relevant to Ms. Stuttard's ownership status are largely not in dispute, as Alamo points out, the trial court's and Fifth District's incorrect conclusion that she was a co-bailee was based on the mistaken assumption that those facts alone could establish a bailment. A rental car passenger's status as a co-bailee requires an examination of all of the facts in order to determine whether there was an acceptance by the bailee of the goods which are the subject of the bailment. *See Rudisill v. Taxicabs of Tampa*, 147 So. 2d 180, 183 (Fla. 2d DCA 1962). The law "does not thrust upon one the liabilities of a bailee without his knowledge or consent . . . ." *Id.* Even Alamo acknowledges that in order to have a bailment the subject matter of the bailment must have been accepted by the putative bailee. (A.B. p. 20).

The cases cited by Alamo do not prove otherwise. The opinion in *Gonzalez v. Enterprise Leasing Co.*, 24 Fla. L. Weekly D2502 (Fla. 3d DCA 1999), does not provide any facts other than that the passenger was listed as an additional driver in the rental agreement. The Third District did not specify that this fact alone conferred co-bailee status, but merely held that the trial court "had substantial competent evidence

before it" to find that the plaintiff was jointly entrusted with the rental car. *Id.* at D2502. *Alley*, 728 So. 2d 272, also does not help Alamo. Without indicating whether there were other pertinent facts, the *Alley* opinion merely states that the decedent, with her husband, rented an automobile, and that she was listed on the lease agreement as an "authorized additional driver." Without any discussion the Second District noted that the parties did not dispute the fact that the decedent was a co-bailee of the automobile. Similarly, *Enterprise Leasing Co. v. Almon*, 559 So. 2d 214 (Fla. 1990), is not dispositive, because in that case the plaintiff was given sole custody of the rented automobile, enough so that he was able to entrust the automobile to a third party.

Although Alamo attempts to distinguish the case of *Alamo Rent-A-Car, Inc. v. Clay*, 586 So. 2d 394 (Fla. 3d DCA 1991), where passengers in a rental car were held to not be co-bailees under similar facts, it does not suggest how the facts are any different from those in the instant case, even though in both cases the driver was the sole lessee and the rented car was not jointly entrusted to the driver and passenger. Alamo also fails to distinguish *Brown v. Goldberg, Rubenstein & Buckley*, 455 So. 2d 487 (Fla. 2d DCA 1984), where the Second District held that the issue of a renter's bailee status was one for the jury. Although Alamo attempts to differentiate *Brown* with the alleged fact that the renter there had an unwritten agreement with the rental company, the unwritten agreement was that the defendant law firm would rent cars for

its clients. The opinion does not suggest that the law firm, which was paying for these rental cars, did not sign a written agreement when it rented the car involved in the accident. Further, the "conflicting inferences" regarding bailee status in *Brown* did not arise out of the issue of whether or not the agreement was in writing.

In contrast to the cases cited by Alamo where co-bailee status was not disputed, Toombs strongly disputes Ms. Stuttard's status as a co-bailee and has asserted that she did not accept custody of or exercise dominion and control over the rental car. It was undisputed at the trial court level that the rental agreement was signed only by Ian Stuttard. (R. 63-64). It was also undisputed that Julia Stuttard did not sign the rental agreement as an additional driver. Furthermore, the rental agreement itself plainly states that the person signing the agreement – and only that person – is deemed the renter of the vehicle. The rental agreement also states that the only party to the agreement other than Alamo is the person who signed it. (R. 201-03; T. 17-21).

Although Alamo contends that Julia Stuttard's failure to sign the rental agreement still does not create an issue of fact regarding her control over the rental car, it fails to support this assertion. As stated above, the *Gonzalez* opinion was based on those parties' "joint stipulated statement of facts," which was not provided in the opinion. The opinion in *Carter v. Baby Dy-Dee Service, Inc.*, 31 So. 2d 400 (Fla. 1947), also does not support Alamo's position. The *Carter* Court held that *the person who had borrowed a car* was a bailee of the car while the car was still in her

possession. The case did not address whether a passenger who does not sign a rental agreement is nonetheless a bailee of the rental car as a matter of law.

Because there are a number of factual issues in regard to whether or not Julia Stuttard exercised dominion and control over the Alamo rental car at the time of the accident, the Fifth District erroneously held that Toombs should be precluded from establishing the lack of a bailment based on the facts.

CONCLUSION

Based on the facts and authorities discussed above, Petitioner respectfully requests that the Fifth District's decision be quashed, that the Second District's decision in *Alley* be approved, and that the Fifth District be instructed to cause the trial court to reinstate Petitioner's wrongful death claim.

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this____ day of _January__ 2001, to all counsel on the attached Service List.

Respectfully submitted,

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