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.
_____/

BRIEF OF AMICUS CURIAE, THE RENTAL CAR ASSOCIATION OF SOUTH FLORIDA, INC., IN SUPPORT OF POSITION OF RESPONDENT

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I.

STATEMENT OF THE CASE AND FACTS

This brief is filed on behalf of The Rental Car Association of South Florida, Inc. We have no quarrel with the statements of the case and facts set forth in the briefs of the Petitioner and the Respondent respectively. We emphasize simply that all parties and Petitioner's Amicus Curiae, AFTL, in effect agree that Petitioner's/Plaintiff's decedent, Julia Stuttard, as a co-bailee-non-third party - could not have stated a cause of action for vicarious liability against Alamo Rent-A-Car, Inc., a non-negligent entity.

II.
ISSUES PRESENTED ON REVIEW

We submit that, given the thrust of prior judicial analysis, the issue before the Court may be succinctly stated as follows:

> WOULD THE "OPERATIVE FACTS" IN THIS CASE HAVE GIVEN RISE TO A CAUSE OF ACTION IN FAVOR OF JULIA STUTTARD AGAINST ALAMO, A NON-NEGLIGENT ENTITY, IF DEATH HAD NOT ENSUED?

The Second District in *Enterprise Leasing Co. v. Alley*, 728 So.2d 272 (Fla. 2d DCA, 1999), answered this question in the affirmative. The Fifth District

herein answered the question in the negative. The Second District was wrong and the Fifth District is right.

III.

SUMMARY OF ARGUMENT

Unlike *Shiver v. Sessions*, 80 So.2d 905, 908 (Fla. 1955), and *Dressler v. Tubbs*, 435 So.2d 792 (Fla. 1983), the "operative facts" in the present case would not give rise to a "cause of action" in favor of Petitioner's/Plaintiff's decedent against Alamo, an innocent non-negligent entity, had death not ensued. Therefore, under the "operative facts" the decedent's statutory survivors under the Florida Wrongful Death Act have no "right of action" under that Act.

IV.
ARGUMENT

BECAUSE NO "CAUSE OF ACTION" WOULD HAVE ACCRUED TO JULIA STUTTARD AGAINST ALAMO, AN INNOCENT NON-NEGLIGENT ENTITY, HAD DEATH NOT ENSUED, HER SURVIVORS UNDER THE WRONGFUL DEATH ACT HAVE NO RIGHT OF ACTION UNDER THAT ACT.

We recognize that the issue before the Court has been thoroughly and ably briefed by the parties and other amici. Our purpose is not to belabor those analyses, but to spotlight the question which we submit lies at the heart of the discussion. We submit that all of the arguments presented lead unswervingly back to that provision of the Florida Wrongful Death Act referring to an "event [which] would have entitled the person injured to maintain an action . . . . if death had not

ensued," and this Court's treatment of that provision in *Shiver v. Sessions*, 80 So.2d 905, 908 (Fla. 1955). There this Court reasoned that, in order for a "right of action" to arise in favor of the Act's survivors, the "operative facts" surrounding or making up the "event" must be sufficient to give rise to a "cause of action" in favor of the decedent against the party to be charged, here Alamo, if death had not ensued. Clearly the "operative facts" in *Shiver* were sufficient to do that. There the party to be charged was the decedent's husband who had deliberately shot and killed her. Clearly this was an event made up of "operative facts" sufficient to give rise to a "cause of action" in favor of the person injured against the wrongdoer if death had not ensued. And the same is true of *Dressler v. Tubbs*, 435 So.2d 792 (Fla. 1983), involving the negligent operation of an airplane by the party to be charged. Thus, in *Shiver* and *Dressler* the operative facts were sufficient to create a cause of action in circumstances where the remedy would have been barred if death had not ensued.

The "operative facts" in the present case are in stark contrast. Here the party to be charged, Alamo, was a total stranger to the "event," and the "operative facts" causing injury and death to Julia Stuttard. Alamo committed no wrong whatever and was not even there. Thus, absent some legal fiction available to Julia Stuttard had she lived, no "cause of action" ever arose against Alamo. And, under the clear

teaching of this Court's decision in *Raydel, Ltd. v. Medcalfe*, 178 So.2d 569 (Fla. 1965), and its prodigy, we know that there was no legal fiction, i.e., the imputation of negligence under the Dangerous Instrumentality Doctrine, available to create a "cause of action" against Alamo because one of the central "operative facts" was the fact that Julia was (presumably) a co-bailee of the vehicle. Accordingly, no "right of action" could arise in favor of the statutory survivors.

Demonstrably, Petitioner's insistence that the legal consequences of Julia Stuttard's status as a co-bailee cannot effect this case arises from a mistaken and overbroad reading of very restricted language used in *Shiver* and *Dressler* in a wholly different context. These decisions referred exclusively to the decedent's status as the spouse of the tortfeasor and concluded that that status – one which simply barred the remedy - was personal to the decedent and its consequences could not effect the survivor's rights under the Wrongful Death Act. That is all *Shiver* and *Dressler* stand for, and clearly they do not, as Petitioner suggests, impose a wholesale prohibition against application of the legal consequences of the decedent's status in all circumstances where suit is brought under the Wrongful Death Act. Indeed, the decedent's status has been found to be controlling in a number of circumstances, some very similar to the present case:

1. Mullarkey v. Florida Feed Mills, Inc., 268 So.2d 363 (Fla. 1972), holds that the decedent's status as an employee covered by worker's compensation barred a suit by the decedent's statutory survivors against decedent's employer under the Wrongful Death Act. Note - the survivors were not employees covered by worker's compensation. See also, Howze v. Lykes Bros., 64 So.2d 277 (Fla. 1953); and Madaffer v. Managed Logistics Sys., 601 So.2d 1328 (2nd DCA, 1992).

2. Brailsford v. Campbell, 89 So.2d 241 (Fla. 1956), holds that the decedent's status as a guest passenger required the statutory survivors, suing the decedent's driver under the Wrongful Death Act, to establish gross negligence under Florida's former Guest Passenger Statute. Note – the survivors were not guest passengers.

3. Sanderson v. Freedom Sav. & Loan Assn., 496 So.2d 954 (1st DCA, 1986), holds that the decedent's status as a policeman killed during robbery of a savings and loan barred, based on the "Fireman's Rule", a suit by the decedent's survivors under the Wrongful Death Act. Note – the survivors were not policemen.

4. Metropolitan Life Ins. Co. v. McCarson, 467 So.2d 277 (Fla. 1985),

holds that the decedent's status as an incidental third party beneficiary to an insurance contract defeated a suit by decedent's surviving spouse for her wrongful death.

5. Diaz v. CCHC – Golden Glades, Ltd., 696 So.2d 1346 (3rd DCA, 1997), holds that the status of the decedent as an adult child precluded a suit by his parents against a hospital under the Federal Emergency Medical Treatment and Labor Act in view of the Florida Statute precluding parents of adult patients from recovering damages from a health care provider.

And, of course, Diaz highlights an important point which belies Petitioner's notion that a decedent's personal status, and the legal consequences thereof, cannot be allowed to effect or impede a survivor's right of action under the Wrongful Death Act. For the Wrongful Death Act itself imposes serious restrictions on survivors' right of action based upon the decedent's status as an adult, rather than minor, patient of a negligent health care provider. See, Florida Statutes, §768.21(8).

6. Finally, and of utmost importance, Alamo Rent-A-Car, Inc. v. Clay, 586 So.2d 394 (3rd DCA, 1991) clearly teaches that the issue of the status of the decedent as a co-bailee or joint venturer in a wrongful death action is deserving of

studious attention plainly because of the legal consequences of such status. In

Clay, Alamo sought to defeat liability under the Dangerous Instrumentality Doctrine by establishing that the survivors' decedents were joint venturers with their negligent driver and therefore not entitled to recover under the rule of Raydel, Ltd. v. Medcalfe, 178 So.2d 569 (Fla. 1965). Surely that issue would not have been litigated to jury verdict if the legal consequences of joint venturer status were not chargeable to the Plaintiff survivors so as to defeat their claims under the Wrongful Death Act.

In view of the foregoing, it is clear that in a number of circumstances the status of the decedent at the time of the fatal injury is not only important but often pivotal to the outcome of an action by decedent's survivors under the Wrongful Death Act. And we submit that here the decedent's status as a co-bailee is crucial. Absent allegations of direct negligence, such as negligent maintenance, by Alamo (and there are none) there can be no "cause of action" against Alamo unless the fictions and imputed negligence concepts inherent in the Dangerous Instrumentality Doctrine are available. This is not a situation, such as that in Shiver and Dressler, where the party to be charged clearly committed a wrong and asserts status as a bar to the remedy. Instead, this is a situation in which, in order

for a "cause of action" to exist, some wrong must be artificially imputed to Alamo by operation of law.

As Chief Justice Ehrlich stressed in Enterprise Leasing Company v. Almon, 559 So.2d 214 (Fla. 1990), the benefits of the doctrine, i.e., the "cause of action" against a non-negligent entity is available only to "third parties", and a bailee is not a "third party." 559 So.2d at 216. See also, Raydel, Ltd. v. Medcalfe, 178 So.2d 569, 572 (Fla. 1965). Moreover, these decisions further teach that the driver's negligence is imputed and chargeable to the co-bailee. See Almon, 559 So.2d at 216. And, as clearly the negligence of the survivor's decedent under the Wrongful Death Act is chargeable to the statutory survivors. Thus, we submit that Julia Stuttard's status as a non third party is a matter which does indeed: ". . . inhere in the tort – or 'cause of action' – upon which . . . [her survivor's] separate right of action is based." Shiver v. Sessions, 80 So.2d 905, 908 (Fla. 1955).

The teaching of these decisions, which are part and parcel of the Dangerous Instrumentality Doctrine, requires the conclusion that the Doctrine was not available to Petitioner below, and that therefore no liability can be imposed upon Alamo.

V.
CONCLUSION

In view of the foregoing, we respectfully submit that the decision under review should be approved and affirmed.

VI.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to Joel D. Eaton, Esquire, 25 West Flagler Street, Suite 800, Miami, Florida 33130, Walter A. Ketcham, Jr., Esquire, 390 North Orange Avenue, Suite 1900, Orlando, FL 32853-8065; John S. McEwan, II, Esquire, Post Office Box 753, Orlando, FL 32802; Keith M. Carter, Esquire, Post Office Box 3324, Tampa, FL 33601; Eugene K. Pettis, Esquire, 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 Ralph O. Anderson, Esquire, New World Tower, Suite 2402, 100 North Biscayne Boulevard, Miami, FL 33132 this ____ day of November, 2000.

Respectfully Submitted.

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