NO. SC04-157

IN THE
SUPREME COURT OF FLORIDA

SUN STATE FORD, INC.,	)	Appeal from the Fifth
	)	District Court of Appeal
Petitioner,	)	No. 5D02-2807
	)	
v.	)	There Heard on Appeal
	)	from the Circuit Court
LAVERICA BURCH, et al.,	)	of the Ninth Judicial
	)	Circuit, Orange County
Respondents.	)	
	)	The Honorable R. James
	)	Stroker, Judge Presiding

PETITIONER'S REPLY BRIEF ON THE MERITS

Hinshaw & Culbertson LLP
Southtrust Bank Building
One East Broward Blvd.
Suite 1010
Ft. Lauderdale, FL 33301
Phone: (954) 467-7900
Facsimile: (954) 467-1024

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

ARGUMENT

I. SUN STATE'S CONTENTION THAT FAULT-BASED LIABILITY SHOULD SUPPLANT THE DANGEROUS INSTRUMENTALITY DOCTRINE IS PROPERLY BEFORE THIS COURT.

Plaintiff argues that this Court cannot consider Sun State's suggestion that Florida should adopt section 390 of the Restatement (Second) of Torts in lieu of the dangerous instrumentality doctrine because the point was not raised below. (Resp. Br. at pp. 7-8) There is no merit in plaintiff's argument.

Procedurally, Sun State was not required to make this argument below in order to assert it here. Sun State prevailed in the circuit court, and no aspect of the circuit court's ruling was unfavorable to it. Accordingly, Sun State's position below was properly "confined to the support of the judgment of the lower court[,] . . . even if in error as to its reasoning." *Hall v. Florida Board of Pharmacy*, 177 So.2d 833, 835 (Fla. 1965). Indeed, because the circuit court expressly found that the dangerous instrumentality doctrine was inapplicable to Sun State under the facts of this case, it would have been silly for Sun State to argue below that the District Court should consider a different theory of liability.

The only ruling that was adverse to Sun State was the District Court's. That was the first court to hold that the dangerous instrumentality doctrine might apply to Sun State. Moreover, its decision announced a new rule of law that conflicted with what other districts had previously held. (App. 1, p. 7) And because the point

on which the District Court certified conflict was a pure question of law (whether liability depends on the "degree" of intentional misconduct involved), it was the first time the theoretical underpinnings of the doctrine became an issue.

Accordingly, under *Hall* and its progeny, the first time it became incumbent on Sun State to assign error was after the District Court issued its opinion, because that was the first time that any court had ruled adversely to Sun State. Further, once this Court accepted jurisdiction to resolve the legal issue in conflict, it acquired jurisdiction over *all* issues, including "the authority to consider issues other than those upon which jurisdiction is based," so long as "these other issues have been properly briefed and argued and are dispositive of the case." *Murray v. Regier*, 872 So. 2d 217, 223 n.5 (Fla. 2002); *see also Savoie v. State*, 422 So. 2d 308, 312 (Fla. 1982) (when the supreme court accepts jurisdiction, it is "as though the case had originally come to this Court on appeal.")

Hence, there is no waiver because the error assigned by Sun State concerns (1) an adverse ruling on a question of law that arose in the first instance as a result of the District Court's decision; and (2) the issue is case-dispositive, has been fully briefed and argued, and falls well within the plenary review of this Court.

II. FAULT-BASED LIABILITY SHOULD BE THE STANDARD FOR AUTO-OWNERS, JUST AS IT IS FOR LANDOWNERS AND FIREARMS DEALERS.

Plaintiff's brief misapprehends the argument advanced by Sun State in this appeal. The crux of the argument is that it is illogical to hold auto-owners strictly liable for the intentional torts of others when firearms dealers and landowners are liable only if the intentional tort was reasonably foreseeable. *See Kitchen v. K Mart Corp.*, 697 So. 2d 1200 (Fla. 1997); *Wal-Mart Stores, Inc. v. Caruso*, 2004 WL 1196628 (Fla. 4th DCA June 2, 2004). Sun State contends that this Court should either: (1) dispense with the dangerous instrumentality doctrine altogether and adopt section 390 of the Restatement (Second) of Torts in its place; or (2) establish a bright-line rule in auto cases that requires the plaintiff to plead and prove that the driver's intentional tort was reasonably foreseeable to the auto-owner.

Either one of these approaches would serve the overriding goal of tort law to allocate liability based on fault. Moreover, both would expand the class of persons to whom liability would extend, reduce the cost of litigation, and harmonize Florida law with that of the vast majority of states.

Plaintiff's brief offers basically one argument in response. She asserts that adopting section 390 in place of the dangerous instrumentality doctrine (or the imposition of a "foreseeability" requirement in intentional tort cases) will "lower" the standard of liability for auto-owners and insulate them from liability, "defeating

the primary objective of which the doctrine is designed to protect against." (Pltf. Br. at p. 8)[1] In another portion of her brief, plaintiff states the same argument somewhat differently, saying that a standard based on objective foreseeability of harm (instead of the subjective intent of the driver) "will result in numerous Plaintiffs having no remedy in a civil action brought against the owner of the vehicle." (Pltf. Br. at p. 15)

The primary defect in plaintiff's argument is that it is a logical fallacy, for it treats the point that is in dispute -- whether the purpose of the dangerous instrumentality doctrine was to make auto-owners strictly liable for a driver's intentional tort -- as an established legal principle, when *Southern Cotton Oil v. Anderson*, 86 So. 629 (Fla. 1920) said nothing of the sort.

Southern Cotton Oil was a simple case of driver negligence. To the extent there is any suggestion in the opinion that the doctrine would also apply when the driver committed an intentional tort (which is denied), it was merely *obiter dicta*, *i.e.* a "gratuitous observation or remark made in pronouncing an opinion and which concerns some rule, principle or application of law not necessarily involved in the case or essential to its determination." *Bunn v. Bunn*, 311 So. 2d 387, 389 (Fla. 4th DCA 1975).

---

[1] Presumably, what plaintiff means to say is that the standard of liability would be "higher" under Sun State's argument (not "lower"), since strict liability (the current standard) does not require proof of fault.

Consequently, the premise of plaintiff's argument is faulty, because it cannot be said that the "primary objective" of *Southern Cotton Oil* was to impose strict liability on auto-owners for the intentional torts of permissive users. In fact, when *Southern Cotton Oil* is read together with *Susco Car Rental System of South Florida v. Leonard*, 112 So. 2d 832 (Fla. 1959), the implication is that the dangerous instrumentality doctrine was intended to be confined to negligence cases in which the accident arose from the ordinary use of an automobile for "pleasure, convenience or business." 112 So. 2d at 835.

Because *Southern Cotton Oil* was not concerned with an auto-owner's vicarious liability for a driver's intentional tort, the issue is how to construct a legal precedent for this category of cases. On this score, *Southern Cotton Oil* is highly instructive and exposes the secondary defect in plaintiff's argument, namely, the insupportable notion that liability should depend on the "subjective intent" of the driver rather than the objective foreseeability of harm. (Pltf. Br. at p. 15.)

In this respect, plaintiff's brief utterly ignores the theoretical underpinnings of *Southern Cotton Oil*, which plainly had nothing to do with driver intent. Instead, the heart of the Court's opinion was foreseeability of harm. There is no other explanation for the opinion's analysis of how an object that is not dangerous *per se* could become so when put to its ordinary and intended purpose, or for the Brandeis-like examination of the statistics on the frequency of auto accidents.

Manifestly, the adoption of the dangerous instrumentality doctrine was based on the conclusion that driver negligence was objectively foreseeable because of the statistical frequency of accidents when autos are used for the purpose for which they were designed. Driver intent did not enter into the Court's analysis, and therefore a rule of law grounded on driver intent, as urged by plaintiff and the District Court, is actually at odds with *Southern Cotton Oil* rather than in harmony with it.

Given the rationale behind *Southern Cotton Oil*, and the development of Florida's common law ever since, it becomes clear that proof of foreseeability of harm should be the rule in *all* auto-owner liability cases involving a permissive user's negligent, willful, wanton, reckless, or intentional misconduct. This Court's decision in *Kitchen v. K Mart Corp.*, 697 So. 2d 1200 (Fla. 1997) was the first to adopt section 390 of the Restatement (Second) of Torts and to establish the tort of "negligent entrustment" in the context of firearms. Likewise, it has long been the law in Florida that a landowner is not liable for the intentional torts of third parties unless the tort was reasonably foreseeable. *See e.g. Relyea v. State*, 385 So. 2d 1378, 1383 (Fla. 4th DCA 1980). Although both of these cases involved intentional torts, as recently as two years ago this Court recognized that "reasonable foreseeability" is "the cornerstone of our tort law." *Malicki v. Doe*, 814 So. 2d 347, 362 (Fla. 2002).

Plaintiff's brief offers no real justification for continuing to adhere to the dangerous instrumentality doctrine in the wake of these more recent tort law precedents. She says dispensing with the dangerous instrumentality doctrine will alter the standard of liability and make it harder for injured plaintiffs to recover, but offers no reason why those injured in auto accidents should not have to prove the auto-owner was at fault when those who are injured by a firearm (or who are attacked while on another's land as a business invitee) must meet a higher standard of proof in a suit against the gun dealer or the landowner.

As this Court held more than thirty years ago, "In the field of tort law, the most equitable result that can ever be reached by a court is the equation of liability with fault." *Hoffman v. Jones*, 280 So. 2d 431, 438 (Fla. 1973). Continued adherence to the dangerous instrumentality doctrine does violence to this rule, because it is inequitable to hold auto-owners strictly liable for the torts of others when firearms dealers and landowners are not. The adoption of section 390 in lieu of the dangerous instrumentality doctrine would rectify that inequity, while at the same time preserving the rights of injured plaintiffs to recover damages from *anyone* who negligently entrusts a vehicle to another, regardless of ownership or the nature of the driver's tort. This is the rule in the vast majority of jurisdictions, and it should be the rule in Florida.

At a minimum, however, the Court should require proof of foreseeability in all actions against auto-owners for the willful, wanton, reckless, or intentional torts of permissive users. Such a rule would represent the logical corollary of *Southern Cotton Oil*. This is because the relative infrequency of auto accidents involving reckless or intentional misconduct, which makes them less foreseeable to auto-owners, justifies a different standard of liability than accidents involving driver negligence, which *Southern Cotton Oil* held were objectively foreseeable as a matter of law. This would also be consistent with the liability standard that is applied to firearms dealers and landowners for the intentional torts of others. If such a standard is an adequate civil remedy in other intentional tort cases like *Kitchen* and *Wal-Mart Stores*, there is no reason why it would be inadequate in the context of a case like this one.

III. PLAINTIFF CANNOT MAINTAIN THAT BEAUFORD'S CONDUCT WAS MERELY NEGLIGENT WHEN PLAINTIFF'S PLEADINGS AND DISCOVERY RESPONSES SAY THE EXACT OPPOSITE.

At pages 12 and 14-15 of her brief, plaintiff argues that Beauford "lacked the intent to inflict bodily injury on any of the occupants of the vehicle driven by Miles" because his conduct was motivated by a belief that the two women in Miles' auto were in imminent danger. There are three reasons this argument must be rejected.

First, plaintiff's argument misrepresents the record. Beauford testified that, initially, he merely "followed" Miles' vehicle due to concern about the women's safety. (R. 269-70, 274) However, he then candidly explained that he became "really mad" and began to "chase" Miles' vehicle after Miles tricked him into stopping at an intersection so that Miles and the women could get "a good head start on him" and "lose him." (R. 269-70, 274, 278-80)

Second, plaintiff's complaint and answers to interrogatories confirm exactly what Beauford said at his deposition, and contradict the argument plaintiff makes here. Both the complaint and discovery answers state, quite plainly, that Beauford "reckless[ly] pursued" Miles' vehicle at a high rate of speed, causing plaintiff to "think he was being chased and threatened," to "be in fear of his health and safety," and to "loose (sic) control of his [vehicle] which resulted in Aaryon Miles being killed." (R. 69, 313, 318)

The allegations of the complaint, together with Beauford's deposition testimony and plaintiff's sworn answers to interrogatories, compel but one conclusion -- the conduct which precipitated the accident was a reckless, high speed chase, and not a simple matter of one car following another too closely because of concern about a girlfriend's safety.

Finally, plaintiff's argument ignores that Beauford's conduct was both substantially certain to cause injury and created a fear of imminent physical harm

in the mind of his victim. These are the hallmarks of reckless, intentional misconduct, not negligence. Plaintiff's brief makes no response at all to the case law which expressly permits the Court to imply intent when the danger of an action is a substantial certainty, as here. *See Spivey v. Battaglia*, 258 So. 2d 815 (Fla. 1972).

There is no question on this record that Beauford made a weapon-like use of his auto. Consequently, even under the District Court's view of the law, the circuit court's judgment should have been affirmed.

IV. THE DISCRETIONARY JURISDICTION OF THIS COURT HAS BEEN PROPERLY INVOKED

Plaintiff asserts that review of this case was improvidently granted because, according to plaintiff, the Fifth District's decision does not conflict with any other district court decision nor with any decision by this Court. (Pltf. Br. at p. 17) This argument was previously considered, and presumably rejected, when this Court accepted jurisdiction. To the extent plaintiff is suggesting that the Court should reconsider the jurisdictional issue, her argument is devoid of merit.

The jurisdiction of this Court to review decisions of district courts of appeal is conferred under Article V, section 3(b)(3) of the Florida Constitution and codified in Rule 9.030(a)(2), Fla.R.App.P. Under these provisions, discretionary jurisdiction to review decisions of district courts arises under six specific circumstances. *See*, Rule 9.030(a)(2)(A)(i)-(vi), Fla.R.App.P.

Rule 9.030(a)(2)(A)(iv) provides that this Court may review any decision of a district court of appeal that expressly and directly conflicts with the decision of another district court of appeal or of the supreme court on the same question of law. This type of jurisdiction is usually called "conflict jurisdiction." *The Florida Star v. B. J. F.*, 530 So. 2d 286, 287, n. 1 (Fla. 1988).

Conflict jurisdiction provides the broadest sense of subject-matter jurisdiction over any decision of a district court that expressly addresses a question of law within the four corners of the opinion itself. *Id*. at 288. "That is, the opinion must contain a statement or citation effectively establishing a point of law upon which the decision rests." *Id.* The requisite finding that the district court's decision "expressly and directly conflicts" with a decision of another district court on the same question of law is meant to limit the supreme court's ability to exercise discretion in favor of granting jurisdiction, however, that does not mean that a "conflict" must actually exist:

> . . . it is not necessary that conflict actually exist for this Court to possess subject-matter jurisdiction, only that there be some statement or citation in the opinion that hypothetically could create conflict if there were another opinion reaching a contrary result.

Id. What constitutes an express and direct conflict and whether jurisdiction will be accepted under these provisions falls within the inherent power of this Court, and no other authority exists that may nullify the Court's pronouncements on these questions. *Id*.

In this case, the Fifth District announced a rule of law which established that the dangerous instrumentality doctrine imposes strict vicarious liability on all auto-owners for any accident that might occur except those in which the auto is unforeseeably used in a weapon-like manner with the intent to cause physical harm. (App. 1, p. 9) No other court has so held.

To the contrary, the First and Third Districts have held that liability under the doctrine terminates when the driver's misconduct is simply "intentional," which can encompass many forms of conduct other than simple negligence. *See Caetano v. Bridges*, 502 So. 2d 51, 53 (Fla. 1st DCA 1987); *see also Sun Chevrolet v. Crespo*, 613 So. 2d 105 (Fla. 3rd DCA 1993) (holding that doctrine applies only to negligent operation of vehicle). Moreover, this Court has not addressed whether the dangerous instrumentality doctrine applies when the driver's conduct is willful, wanton, reckless, or intentional; instead, the decisions have always restated the rule in the words of *Southern Cotton Oil*, *i.e.* as a doctrine which makes auto-owners vicariously liable for driver "negligence." *See e.g. Orefice v. Albert*, 237 So.2d 142 (Fla. 1970).

Under these circumstances, it cannot be gainsaid that conflict jurisdiction exists. The Fifth District based its opinion on a "point of law" which it expressed in much narrower terms than did either the First or Third Districts when confronted with similar fact patterns. Moreover, the decision arguably conflicts with the prior

decisions of this Court (which have heretofore applied the dangerous instrumentality doctrine solely in the context of driver negligence), as well as with how this Court might hypothetically rule if presented with the same question.

Another way in which this Court may accept jurisdiction to review a district court of appeal decision is when the district court certifies its decision to be in direct conflict with a decision of another district or certifies a question to be of great public importance and requests this Court's review. *See*, 9.030(a)(2)(A)(v)&(vi), Fla.R.App.P. Here, the Fifth District reviewed the decisions in *Caetano* and *Sun Chevrolet*, "declined to follow" *Caetano,* and "certified conflict" over that portion of the *Caetano* opinion that said the driver's intent to injure must be directed at the plaintiff. (App. 1, p. 9)

Accordingly, there are four grounds on which jurisdiction exists in this Court – a direct and express conflict among the district courts over the circumstances under which liability terminates under the dangerous instrumentality doctrine, an apparent conflict with the decisions of this Court applying the doctrine only to cases involving driver negligence, a hypothetical conflict with how this Court might rule on the same issue, and a certified conflict over a portion of the First District's *Caetano* decision. Jurisdiction is unquestionably proper.

CONCLUSION

For all of the foregoing reasons, the defendant-petitioner, Sun State Ford, Inc., respectfully requests that this Court quash the decision of the District Court and affirm the summary final judgment entered in its favor by the circuit court.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the Petitioner's Reply Brief on the Merits was served via U.S. Mail this 1st day of October, 2004, upon Daryl D. Parks, Esq. and Kendra N. Davis, Esq., Parks & Crump, LLC, 240 North Magnolia Drive, Tallahassee, FL, 32301, Tel: (850) 224-6400, *Counsel for Plaintiffs/Respondents*; Warren B. Kwavnick, Esq. and Dennis R. O'Connor, Esq., Cooney Matson Lance Blackburn Richard & O'Connor, P.A., P.O. Box 14546, Fort Lauderdale, FL 33302, Tel: (954) 568-6669, *Counsel for Appellant, Co-Defendant Beauford*; Lucinda A. Hoffman, Holland & Knight, LLP, 701 Brickell Avenue, Suite 3000, Miami, FL 33131, *Counsel for Florida Defense Lawyers Association, for Appellee, Sun State Ford.*

Respectfully submitted,

Hinshaw & Culbertson LLP
Southtrust Bank Building
One East Broward Blvd.
Suite 1010
Ft. Lauderdale, Florida 33301
Telephone: (954) 467-7900
Facsimile: (954) 467-1024

_____
Marissa I. Delinks
Fla. Bar No. 0008885
Robert K. Tucker
Fla. Bar No. 116410

CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that this reply brief complies with Rule 9.210, Fla.R.App.P., and is typed in Times New Roman 14-point font.

_____

Marissa I. Delinks
Fla. Bar No. 0008885