

IN THE SUPREME COURT OF FLORIDA

CASE NUMBER 73,651

ENTERPRISE LEASING COMPANY,  
a corporation,

Petitioner,

vs.

SHEDRICK ALMON,

Respondent.

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**FILED**

SID J. WHITE

FEB 14 1989

CLERK, SUPREME COURT

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Deputy Clerk

ON PETITION FOR CERTIORARI FROM  
THE DISTRICT COURT OF APPEAL, FIRST DISTRICT

**PETITIONER'S BRIEF ON JURISDICTION**

TAYLOR, DAY & RIO

Charles M. Johnston  
Florida Bar No. 264741  
121 West Forsyth Street  
Tenth Floor  
Jacksonville, Florida 32202  
Attorneys for Petitioner

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### STATEMENT OF THE CASE AND FACTS

Petitioner, Enterprise Leasing Company, leased a vehicle to Olivia Adams, pursuant to a contract which provided a provision that no one else should use the vehicle without Petitioner's consent.<sup>1</sup> Without obtaining such consent, Adams allowed Respondent's brother to use the vehicle. Later that same evening Respondent's brother allowed Respondent to use the vehicle. Respondent drove the car to the residence of Bill Wise, and Respondent and Wise then used the vehicle to visit several clubs. During the course of the night, Respondent became tired and asked Wise to drive. After departing one of the clubs in the early morning hours, with Wise driving and Respondent in the front passenger seat, an accident occurred and Respondent was injured. The trial court granted summary judgment in favor of Petitioner on the grounds that Respondent was not legally entitled to recover against the owner of the vehicle because Respondent was a sub-bailee of the motor vehicle who entrusted the vehicle to the person whose negligence caused the accident. The First District reversed finding that the circumstances presented a jury question as to whether Respondent had terminated his status as a bailee and had become solely a passenger at the time of the accident.

### SUMMARY OF ARGUMENT

The decision of the First District expressly and directly conflicts with State Farm Mut. Auto. Ins. Co. v. Clauson, 311 So.2d 1085 (Fla. 3d DCA 1987). The issue before both courts was

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<sup>1</sup>The First District's opinion is contained in the Appendix attached hereto at pages 1-5. The undisputed facts are set forth at page 2 of the opinion.

whether a sub-bailee, who has been given possession and control of a vehicle and who in turn entrusts the vehicle to another, can recover against the owner for injuries sustained as a passenger due to the negligent driving of the very person he placed in control of the vehicle. The Clauson court held as a matter of law that the injured passenger/sub-bailee can not recover against the owner. The First District under facts not materially different than Clauson found that a jury question is created as to whether the sub-bailee regains his status as a passenger once he turns the vehicle over to the negligent driver. The First District's decision was based on its prior decision in Toner v. G & C Ford Co., 249 So.2d 703 (Fla. 1st DCA 1971), cert dismissed, 263 So.2d 214 (Fla. 1972). The Third District in Clauson expressed the possibility that its decision was in conflict with Toner. In light of the facts of the present case, it is impossible to reconcile the First District's decision in the present case with the decision in Clauson. This Court should accept jurisdiction to resolve the question: whether, as a matter of law, a sub-bailee of a vehicle is prohibited from recovering against the owner for injuries the sub-bailee receives as a passenger due to the negligent driving of the very person the injured sub-bailee placed in control of the car.

WHETHER THIS COURT HAS JURISDICTION PURSUANT TO ARTICLE V, SECTION 3(b)(3), FLORIDA CONSTITUTION, BECAUSE THE DECISION OF THE COURT BELOW EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL IN STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. V. CLAUSON, 511 So.2d 1085 (Fla. 36 DCA 1987).

State Farm Mutual Automobile Insurance Co.  
v. Clauson. 511 So.2d 1085 (Fla. 36 DCA 1987)

In Clauson the issue before the Court was whether an injured sub-bailee of a vehicle who permitted another to drive the vehicle could recover against the owner of the vehicle for injuries to the sub-bailee who had become a passenger. The facts in the case were undisputed:

The plaintiff, Mrs. Clauson, is an officer of an advertising agency which, as part of her compensation, provided her an automobile which it had leased from We Try Harder, Inc. for her full-time, unrestricted use. While returning from a social event, she was riding as a passenger in the car which she had allowed her husband to drive. He did so negligently and she was injured.

Id. at 1085.<sup>2</sup> On cross motions for summary judgment, the trial court ruled that Mrs. Clauson was entitled to recover against the owner of the **vehicle**.<sup>3</sup> The Third District reversed finding that

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<sup>2</sup>A copy of the Clauson decision is contained in the Appendix attached hereto at pages 6-8.

<sup>3</sup>In Clauson Mrs. Clauson was making a claim on Mr. Clauson's State Farm uninsured motorist coverage based on the asserted liability of the vehicle's owner, We Try Harder, under the dangerous instrumentality doctrine. Therefore, even though the lawsuit was for UM benefits and not against the owner/lessor, the court was required to determine whether Mrs. Clauson could legally recover from the owner of the vehicle.

the law was "clearly established that an injured bailee of a vehicle could not recover against the owner of the vehicle for injuries caused by the negligent operation of her own sub-bailee." Id. at 1085. As a matter of law, Mrs. Clauson was not legally entitled to recover from the owner: "Here, it is stipulated that the vehicle was, in fact, 'given' to the injured plaintiff who therefore has no valid claim against the owner or, as a result, under UM against State Farm."

**Almon v. Enterprise Leasing Co.,**  
**No. 88-590 (Fla. 1st DCA January 13, 1989)**

With one exception<sup>4</sup>, the undisputed facts in the present case are not materially different from the facts in Clauson: the vehicle was "given" to Respondent to use, he took possession and control of the vehicle, he turned the car over to another party, and he was injured while a passenger due to the negligence of the very person he allowed to drive the car. When the facts of the two cases are compared, it is impossible to reconcile the holding of the court below with the Clauson decision:

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<sup>4</sup>In the present case, Petitioner, Enterprise Leasing Company, specifically prohibited, in the rental contract, the lessor from allowing others to use the vehicle. In Clauson, the lessor, We Try Harder, imposed no such restriction: the vehicle was leased to Mrs. Clauson's employer and the employer allowed Mrs. Clauson to use the car as a benefit of her employment.

**Enterprise**

1. Appellee leased car to Olivia Adams
2. Adams allowed Respondent's brother to use car with no restrictions
3. Respondent's brother allowed Respondent to drive the car without restriction
4. While returning from a social event Respondent permitted Bill Wise to drive the car while he was a passenger.

**Clauson**

1. We Try Harder leased car to Ad Agency
2. Ad Agency allowed Mrs. Clauson to use car with no restrictions
3. While returning from a social event Mrs. Clauson permitted her husband to drive the vehicle while she was a passenger

Clauson says that a sub-bailee, who has been given possession and control of an automobile, as a matter of law, cannot recover from the owner of the automobile for injuries incurred when the sub-bailee is injured as a passenger due to the negligence of the very person the sub-bailee permitted to drive the car. The First District finds that the sub-bailee's status is a question for the jury even though the facts are undisputed that the car was "given" to Respondent and he was the one who placed the negligent driver in control of the vehicle.

**The First District's Decision Conflicts  
with the Underlying Rationale of Clauson**

The rationale for the Clauson court's ruling is grounded in the "chain of command" between the owner of the vehicle and the injured party:

To the same extent as the owner, a bailee (or sub-bailee) of a motor vehicle is liable to third persons under the dangerous instrumentality doctrine for the negligence of one to whom he has entrusted it. . . . thus, if Mr. Clauson had injured a pedestrian

or another driver, not only We Try Harder but Mrs. Clauson (and her employer as well) would be vicariously responsible for his negligence. In the present case, however, in which the bailee, Mrs. Clauson, has, in effect, sued We Try Harder for Mr. Clauson's negligence, she is barred by the fact that his negligence is imputed directly to her and is, as it were, stopped on its attempted way up the chain of responsibility before it reaches the owner. Looking at it another way, the husband's negligent driving is imputed to both the plaintiff and the owner-defendant. She is as much--if not, as the immediate bailee, more--responsible for his conduct as the 'defendant' We Try Harder.

Id. 511 So.2d at 1086.

By leaving it to the jury whether a sub-bailee who has been given Possession and control of the vehicle can still recover against the owner when the sub-bailee is injured due to the negligence of the very person the sub-bailee placed in control of the car, without any intervening action on the Part of the owner, the First District's holding breaks the "chain of command" set forth in Clauson, creates an inconsistency with the underlying rationale in Clauson, and conflicts with the holding in Clauson.

**The Clauson Court  
Expressed the Possibility  
that its Decision Conflicted with  
a Prior Decision of the First District**

The First District's holding in the case sub judice was grounded on its prior decision in Toner v. G & C Ford Co., 249 So.2d 703 (Fla. 1st DCA 1971), cert dismissed, 263 So.2d 214 (Fla. 1972).<sup>5</sup> In Clauson the Third District expressed

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<sup>5</sup>The Toner decision is contained in the Appendix attached hereto at pages 9-11.

reservations about the Toner decision but attempted to distinguish Toner by stating that, under the particular facts of the case, Toner found "it a jury question as to whether the vehicle was in fact entrusted to the injured passenger or directly to the negligent driver." The Third District stated that if they were wrong about their attempted distinction of Toner, then they disagreed with Toner. State Farm Mut. Auto. Ins. Co. v. Clauson, 511 So.2d 1085, 1087 n.4 (Fla. 3rd DCA 1987). In the court below the First District acknowledged that the Third District in Clauson "expressed some potential disagreement" with Toner.

There are facts in Toner that arguably created a jury question on Toner's status at the time of the accident. The original bailment between G & C Ford Company and Senator Pope was an "open bailment" wherein the car was loaned to Senator Pope and "whoever needed it" in the campaign. Id., 249 So. 2d at 703. On the night of the accident Toner was driving the car for personal and campaign purposes. He met McGowan, and McGowan "offered to assist in the campaign in his spare time," Id. at 704. Later that night Toner allowed McGowan to drive the car. As the First District explained in its opinion in the instant case, in Toner a jury question was presented as to whether "the campaign worker's (Toner's) status, at the time of his injury, had become solely that of a passenger." (Appendix, p. 4) Presumably the jury could have found that McGowan had become part of the campaign on the night of the accident, and, since the car was loaned to Senator

Pope and "whoever needed it" in the campaign, once McGowan started driving the car he became the bailee of Senator Pope and Toner resumed his status as passenger.

Unlike Toner there are no similar facts in the present case that arguably create a jury question on Respondent's status at the time of the accident. As stated above, Petitioner, Enterprise Leasing Company, prohibited the lessee from loaning the car to others. Therefore, unlike Toner, there is no arguable nexus between the owner/lessor of the vehicle and the ultimate driver of the vehicle. Notwithstanding this prohibition against loaning the car, the car was turned over to Respondent for the evening, he had possession and control of the car, and he turned it over to the negligent driver.

**It is Apparent that  
Clauson Conflicts with Toner**

When the underlying rationale of Clauson is considered, the Clauson court's attempt to distinguish Toner fails, and it is apparent that the decision in Toner also conflicts with Clauson. The Clauson holding is grounded on the fundamental principle that the person responsible for placing an automobile on the public streets and highways assumes responsibility for the negligent operation of that automobile. Conversely, if that same person is injured as a passenger as a result of the negligence of someone whom he allowed to drive the car, then the injured passenger is estopped from seeking damages against the owner. Even though the leased automobile in Toner was owned by C & G Ford Company, on the night of the accident Toner had possession and control of the

car. Toner turned the car over to McGowan, and McGowan negligently drove the car injuring Toner. In the present case, even though the automobile was owned by Enterprise Leasing, on the night of the accident Respondent had possession and control of the car. Respondent turned the car over to Bill Wise, and Wise negligently drove the car injuring Respondent. ~~Clausen~~ holds, as a matter of law, that Respondent cannot recover against the owner. The First District in the present case and in ~~Toner~~ holds that the question is one for the jury to decide.

**This Court should Accept  
Jurisdiction to Resolve the  
Conflict Created by these Decisions**

The present issue before the Court is an important one and affects the rights of individuals far beyond the particular litigants of the present case. The issue is really the reverse side of the dangerous instrumentality doctrine: **As** a matter of law, can a person, who has been given possession and control of a motor vehicle and who turns the vehicle over to another to drive, recover against the owner for injuries sustained as a passenger due to the negligent operation of the vehicle by the very person the passenger placed in control of the vehicle.<sup>6</sup> The ~~Clausen~~ court says no. Toner and the present case state otherwise. This Court should exercise its certiorari jurisdiction to resolve the conflict created by the decisions below with respect to this important issue.

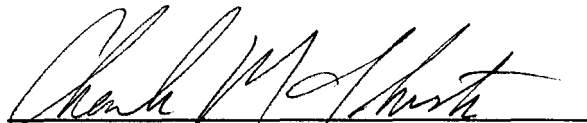
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<sup>6</sup>Of course, the sub-bailee passenger is not left without a remedy. He can maintain an action against the negligent driver.

**CONCLUSION**

Based upon the citations and arguments set forth above, Petitioner respectfully requests this Court to exercise its certiorari jurisdiction and to order briefs on the merits.

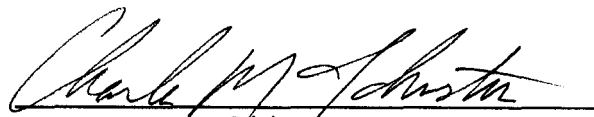
TAYLOR, DAY & RIO



**CHARLES M. JOHNSTON**  
Florida Bar No. 264741  
121 West Forsyth Street  
Tenth Floor  
Jacksonville, Florida 32202  
(904) 356-0700  
Attorneys for Petitioner

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Robert Stuart Willis, Esquire, Attorneys for Respondent, 503 East Monroe Street, Jacksonville, Florida 32202, by U.S. mail, this 13<sup>th</sup> day of February, 1989.



Attorney