

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

JANUARY TERM 2005

RYDER TRS, INC.,

Appellant,

v.

**PATRICIA HIRSCH, LISA MARIE ANN
HESSE, and COLLEGE PARK TEXACO,
INC.,**

Appellees,

CASE NO. 4D03-1426

Opinion filed May 11, 2005

Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Elizabeth T. Maass, Judge; L.T. Case No. CL 00-1857 AI.

Jane Kreuzler-Walsh of Jane Kreuzler-Walsh, P.A., West Palm Beach and Roderick McGee of Lignman & Martin, P.L., Miami, for appellant.

Julie H. Littky-Rubin of Lytal, Reiter, Clark, Fountain & Williams, LLP, West Palm Beach, and Jeffrey A. Shaffer of Mintmire & Associates, Palm Beach, for appellees.

ON MOTION FOR REHEARING

We deny appellant's motion for rehearing, rehearing en banc, and certification.

FARMER, C.J., and MAY, J., concur.
GROSS, J., concurs specially with opinion.

GROSS, J., concurring specially.

I concur with the majority opinion and the denial of the motions for rehearing, rehearing en banc, and certification. I write to fully explain my reasons.

Too many of the non-standard jury instructions proposed by the litigants at trial are incomprehensible. As Judge John Kane has written, in the first half of the nineteenth century, "when jurors were not presumed or screened for the ability to read, judges instructed them orally in frank, natural language." John L. Kane, *Giving Trials a Second Look*, 80 DENV. U. L. REV. 738, 739 (2003). More complex jury instructions arose once "appellate courts came into prominence." *Id.*

Cases were reversed for incorrect statements of the law, with the implied and characteristically unexamined assumption that the jury followed them in the first place. . . . As trial judges were naturally averse to being reversed and appellate courts rigorously insistent upon compliance with their increasingly precise pronouncements of law, resort was made to instructions written in the language of appellate opinions. . . .

As Professor Lawrence Friedman observed in his monumental *A History of American Law*, instructions became "technical, legalistic, utterly opaque . . . [and] almost useless as a way to communicate with juries; the medium contained no message. Each instruction had to be framed with great care, so as not to give the upper court a chance to find reversible error."

Id. (quoting LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 399 (2d ed. 1985)). As Judge Farmer wrote in his concurring opinion, this development of the law led to the "view that would allow no deviation from the text of a supreme court opinion laying out the substance of the law that is the subject of the instruction." *Ryder TRS, Inc. v. Hirsch*, 30 Fla. L. Weekly D585, D585 (Fla. 4th DCA Mar. 2, 2005) (Farmer, C.J., concurring specially).

The modern trend is to revise and update jury instructions so that they are expressed in plain English. *Kane, supra* at 740.

The standard of review of *Goldschmidt v.*

Holman, 571 So. 2d 422 (Fla. 1990), permits courts to use plain English, non-standard jury instructions and to move away from overly legalistic quotes from appellate cases. If a “miscarriage of justice” arises only where instructions are “‘reasonably calculated to confuse or mislead’ the jury,” then courts have leeway in instructing jurors using plain English. *Id.* at 425 (citation omitted).

In this case, Ryder sought to avoid the dangerous instrumentality doctrine based on the defense articulated in *Susco Car Rental System of Florida v. Leonard*, 112 So. 2d 832 (Fla. 1959). In that case, the supreme court wrote that “when control of . . . a vehicle is voluntarily relinquished to another, only a breach of custody amounting to a species of conversion or theft will relieve an owner of responsibility for its use or misuse.” *Id.* at 835-36. Later in the opinion, the supreme court used different language to describe the same defense, as one where an owner “has in fact been deprived of the incidents of ownership” of a “dangerous agency” such as a motor vehicle. *Id.* at 837.

In *Thomas v. Atlantic Associates, Inc.*, 226 So. 2d 100 (Fla. 1969), the supreme court acknowledged that *Susco*’s two descriptions of the defense are synonymous:

Since it affirmatively appeared that the owner had given its consent to the use or operation of the automobile beyond its own immediate control, the only real issue was whether the owner had ‘in fact been deprived of the incidents of ownership’ or, as stated elsewhere in *Susco*, there had been ‘a breach of custody amounting to a species of conversion or theft.’

Id. at 102 (quoting *Susco*, 112 So. 2d at 835-37).

Relying on *Susco*, one authority has written that “the dangerous instrumentality doctrine will not be applied to render the owner liable where the owner has been deprived of the incidents of ownership by conduct amounting to a species of conversion or theft.” 4A FLA. JUR. 2D *Automobiles and Other Vehicles* § 634 (2004) (footnotes omitted).

The instruction given by the trial judge tracked the language from *Susco* and *Thomas*. While legally correct, it is not as user friendly as the instruction the judge originally proposed. I cannot fault the trial judge for using language penned by the supreme court and quoted in Florida Jurisprudence. Because of the way the law has developed, perhaps the trial judge felt more secure in using an instruction containing language from appellate cases.

The defense instruction was verbose and confusing, unlikely to assist the jury in resolving Ryder’s defense. The instruction proposed by the court was more to the point, in language the jury could understand and apply. The instruction actually given substituted the term “incidents of ownership” for “use or possession.”

In non-legalese, the instruction given and the one the court proposed both asked the jury whether the truck had been stolen from Ryder prior to the accident. The legal concepts involved are not foreign to a jury and they were effectively discussed by both sides in their closing arguments.^{1,2}

¹The plaintiff characterized the defense as one avoiding responsibility “because there was a theft or conversion of the vehicle,” which failed because Ryder was never deprived of the “incident[s] of ownership of the vehicle.” The plaintiff argued that the car had never been stolen from Ryder:

They didn’t want [Saxon] arrested. If someone steals your car, you want them arrested. They specifically said, we don’t want him arrested . . . [w]hy, because they had some kind of agreement, loose arrangement that the vehicle was there, that he could use it and pay them, and if he didn’t use it, they were free to come and get it.

The plaintiff’s argument effectively discussed the language of the jury instruction:

[W]hat are the incidents of ownership of a truck? They are you’ve got the keys. You can drive it. You can have it. You can sell it. You can do what you want to do with it. And what did Saxon tell them on this vehicle when they raised the question? The keys are here. The truck’s here. Come and get

The rule in Florida is that “if jury instructions, viewed as a whole, fairly state the applicable law to the jury, the failure to give particular instructions will not be error.” *CSX Transp., Inc. v. Whittler*, 584 So. 2d 579, 586 (Fla. 4th DCA 1991). For that reason, “[a]n instruction is not rendered misleading and harmfully erroneous because the construction of the sentences or the words used are amenable to some criticism, so long as the meaning the court intended to convey is reasonably clear.” *Kline v. Publix Super Mkts., Inc.*, 178 So. 2d 739, 740 (Fla. 2d DCA 1965).

Typically, reversals based on deficient jury instructions involve incorrect statements of the law. For example, in *Bankers Multiple Line Insurance Co. v. Farish*, 464 So. 2d 530, 533

it, and . . . they basically just extended his agreement by inaction, and as such, it should not be defined as deprivation of incidents of ownership or as a theft or conversion.

²Ryder’s closing argument focused at length on the question of “incidents of ownership.” For example, the argument included the following:

[W]hat is the incidents of ownership, the number one thing, possession, legal possession to own your own property to possess it In any rental situation, the owner has the right to be entitled to the possession of that vehicle When the owner’s rights to possession are taken away by another person, we have been deprived of the possession of our property and as such, a conversion has been committed.

Ryder argued that the rental agency’s report to the police that the vehicle was stolen was evidence that they had not consented to Saxon’s continued possession of the car.

Forty days pass between the time when this police report was made and [Ryder] wanting to have [its] vehicle back until the accident occurred. In those 40 days, Mr. Sughrim . . . went by Saxon’s home to find the vehicle, so he could call the police, so that they could assist him in the recovery So the question for your very considered decision is was the rental vehicle the subject of a theft or a conversion . . . at the time of the December 25th, 1998 accident? The answer . . . is inescapably yes.

(Fla. 1985), the trial court gave an instruction that “the greater a defendant’s wealth, the greater must be punitive damages.” The supreme court reversed for a new trial on punitive damages, since the instruction was “not an accurate rule of law” that had been “specifically repudiated” in an earlier case. *Id.*; see also *Coble v. Am. Parks*, 576 So. 2d 422, 423 (Fla. 4th DCA 1991) (holding that reversal for a new trial was required where jury instruction relating to fraud “was incorrect”); *Poole v. Lowell Dunn Co.*, 573 So. 2d 51, 53-54 (Fla. 3d DCA 1990) (reversal mandated where instruction “misstated Florida law on causation”); *Barrier v. Duncan*, 541 So. 2d 631, 633 (Fla. 1st DCA 1989) (finding that reversal was required where instruction was “incorrect statement of law because substantial parts of the rule were omitted from” Corpus Juris Secundum quotation). This case did not involve an incorrect statement of the law.