IN THE SUPREME COURT OF FLORIDA

CASE NO.: 94,597

MICHAEL AURBACH and MARCIA ELKINGTON AURBACH, his wife,

Petitioners,

v.

ANGELINA GALLINA, CAROLINA GALLINA, and LOUIS GALLINA, jointly and severally,

Respondents.

Discretionary Proceedings to Review a Decision by the
Fourth District Court of Appeal, State of Florida
Case No.: 97-1779

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CERTIFICATE OF INTERESTED PERSONS

Counsel for Petitioners, MICHAEL AURBACH and MARCIA ELKINGTON AURBACH, his wife, certify that the following persons or entities have or may have an interest in the outcome of this matter:

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(Plaintiff/Petitioner)

MICHAEL AURBACH
(Plaintiff/Petitioner)

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ANGELINA GALLINA
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CAROLINA GALLINA
(Defendant/Respondent)

LOUIS GALLINA
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CERTIFICATE OF INTERESTED PERSONS (Continued)

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CERTIFICATE OF TYPE SIZE

Counsel for Petitioners certify that the following type size and style is being utilized in this brief:

Times New Roman 14 pt

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QUESTION PRESENTED

WHETHER THE COURT SHOULD RESOLVE THE CONFLICT BETWEEN THE AURBACH AND FRANKEL DECISIONS BY HOLDING THAT LIABILITY UNDER THE DANGEROUS INSTRUMENTALITY DOCTRINE DEPENDS UPON THE RIGHT AND ABILITY TO CONTROL THE VEHICLE AND NOT SOLELY ON LEGAL TITLE

PREFACE

This brief is submitted on behalf of the Petitioners, MICHAEL AURBACH and MARSHA ELKINGTON AURBACH, his wife, in support of their petition to review a decision of the Fourth District Court of Appeal. In Aurbach v. Gallina, 721 So. 2d 756 (Fla. 4th DCA 1998), the Fourth District affirmed the trial court's order setting aside a jury's finding that Defendant, LOUIS B. GALLINA, owned or had the right to control the vehicle negligently driven by his daughter and that he had given express or implied consent for her to drive it at the time of the accident. The Fourth District announced a new "bright line standard" requiring that in the context of family relationships, only the title owner of a motor vehicle would be responsible for its negligent operation under the dangerous instrumentality doctrine. Aurbach, 721 So. 2d at 759.

In this brief, the Petitioners, who were Plaintiffs before the trial court, will be referred to by name or as the "Plaintiffs." The Respondents, ANGELA GALLINA, CAROLINA GALLINA, and LOUIS B. GALLINA, will be referred to either by name or as the "Defendants." Reference to the Appendix to this brief, which consists of a copy of the opinion sought to be reviewed, will be by the abbreviation "A." followed by a page number. The record on appeal will be

referred to by the abbreviation "R." followed by a volume and page number. The trial transcript, which appears in Volume 4 of the record on appeal, will be referred to by the abbreviation "T." followed by a page number. The separate excerpts of the testimony of each of the Defendants, which appear in Volume 3 of the record (docket entries #95, 96 and 96c) will be referred to by the abbreviation "X." followed by the name of the individual defendant. Any emphasis appearing in quoted material is that of the writer unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Michael Aurbach was injured in an automobile accident by a car driven by Angelina Gallina. Aurbach and his wife Marsha sued Angelina and her parents, Louis and Carolina Gallina. The Gallinas admitted Angelina's liability (T.152). The case went to trial, and the jury awarded damages in favor of Mr. Aurbach but awarded no damages for his wife's loss of consortium (T.2/232-234). Mrs. Aurbach filed a motion for additur on her consortium claim, but the trial court declined to grant it. On appeal as to that issue, the Fourth District reversed and remanded with directions that the motion for additur be granted, and that the trial court determine an appropriate amount

for Mrs. Aurbach's loss of consortium. Aurbach, 721 So. 2d at 758 (A.3). That ruling is not an issue in the present proceeding.

The jury also found, upon proper instructions by the court, that Louis Gallina owned or had the right to control the vehicle driven by his daughter, Angelina, at the time of the accident, and that Angelina had her father's express or implied consent to drive it (R.2/232). The evidence at trial on that issue was that the car was purchased with Louis and Carolina's joint funds, but was titled in Carolina's name (X.Louis Gallina, p.3). Before buying the car, the Gallinas test drove it together (X.Louis Gallina, p.3). They purchased the car with the intent that the Gallinas' other daughter, Caroline, be the primary user, but that both of their daughters would be allowed to drive it (X.Louis Gallina, p.5). The expenses to maintain the car were paid out of the Gallinas' joint account (X.Louis Gallina, p.6). The Gallinas kept the automobile at the home where both of them resided (A.4).

After the trial, Louis Gallina moved for judgment in accordance with his motion for directed verdict, and the trial court granted that motion (R.2/256-257). On appeal as to that issue, the Fourth District acknowledged that a post-trial directed verdict admits the truth of all facts in evidence and every conclusion or inference that could be drawn by the jury favorable to the non-

moving party. The appellate court also recognized that a verdict could properly be directed only where there is no room for reasonable minds to differ, and the moving party is clearly entitled to judgment as a matter of law. Aurbach, 721 So. 2d at 758-759 (A.4).

The court also acknowledged that the rationale for the dangerous instrumentality doctrine is that the person who entrusts an automobile to another, thus originating the danger, is in the best position to make certain that there will be adequate resources with which to pay the damages caused by its negligent operation, citing Kraemer v. General Motors Acceptance Corporation, 572 So. 2d 1363, 1365 (Fla. 1990). Aurbach, 721 So. 2d at 759 (A.4). The court then went on to discuss briefly several decisions which have held that the doctrine of dangerous instrumentality is not limited to the title owner of a motor vehicle, including Frankel v. Fleming, 69 So. 2d 887 (Fla. 1954) and Brown v. Goldberg, Rubenstein & Buckley, P.A., 455 So. 2d 487, 488 (Fla. 2nd DCA 1984), rev. denied, 461 So. 2d 114 (Fla. 1985). The court also cited opinions holding that the parties' intent regarding beneficial ownership of a vehicle must be determined by their overt acts in each case, including Marshall v. Gawel, 696 So. 2d 937, 939 (Fla. 2nd DCA 1997) and Brown, 455 So. 2d at 488. Aurbach, 721 So. 2d at 759 (A.4).

Nonetheless, rather than applying the principles of those cases, the Fourth District pronounced: "In the context of family relationships, the better rule is to have legal responsibility follow title ownership, a bright line standard which makes liability under the dangerous instrumentality doctrine both foreseeable and predictable." Aurbach, 721 So. 2d at 759 (A.4). The court went on to state that determining the beneficial owners of a car in a family situation would "impose a fuzzy legal standard that will encourage litigation and potentially expand liability beyond that which is justified by the rationale for the rule." Aurbach, 721 So. 2d at 759 (A.4). The court affirmed the directed verdict, holding as a matter of law that "Louis Gallina was not an owner, bailee, or lessee of the automobile sufficient to impose liability under the dangerous instrumentality doctrine." Aurbach, 721 So. 2d at 759 (A.4).

Plaintiffs sought this Court's discretionary review of the Fourth District's decision because of that decision's conflict with Frankel v. Fleming, 69 So. 2d 887, 888 (Fla. 1954) and other decisions holding that imposition of liability for the negligent operation of a motor vehicle depends not solely on legal title, but on issues such as beneficial ownership and control of the vehicle. This Court has accepted jurisdiction to review the Fourth District's opinion.

SUMMARY OF ARGUMENT

An express and direct conflict exists between the decision of the Fourth District Court of Appeal and decisions of this Court and other appellate courts on the issue of imposing liability on non-title holders of a negligently operated vehicle under the dangerous instrumentality doctrine. The Fourth District Court of Appeal held in this case that where there is a family relationship, legal responsibility under the dangerous instrumentality doctrine must follow title ownership in all cases, establishing a "bright line standard." That decision cannot be reconciled with decisions of this Court such as Frankel v. Fleming, 69 So. 2d 887, 888 (Fla. 1954), holding that proof of actual ownership of a vehicle is not indispensable to recovery, as well as other decisions from this Court and other district courts of appeal on this subject.

The conflict between those decisions should be resolved in favor of Frankel and the other decisions of this Court holding that it is not mere legal title, but the right to control that determines liability under the dangerous instrumentality doctrine.

ARGUMENT

THIS COURT SHOULD RESOLVE THE CONFLICT BETWEEN THE AURBACH AND FRANKEL DECISIONS BY HOLDING THAT LIABILITY UNDER THE DANGEROUS INSTRUMENTALITY DOCTRINE DEPENDS UPON THE RIGHT AND ABILITY TO CONTROL THE VEHICLE AND NOT SOLELY ON LEGAL TITLE.

The dangerous instrumentality doctrine is intended to protect those injured upon the highways of this state by providing that the party who had custody or control of a motor vehicle and relinquished that control to another should be responsible for the damages caused by its negligent operation. In its initial decision establishing that doctrine in Florida, this Court stated:

> In intrusting the servant with this highly dangerous agency, the master put it in the servant's power to mismanage it, and as long as it was in his custody or control the master was liable for any injury which might be committed through his negligence. This is the doctrine of the common law as applied to a new instrumentality imminently dangerous to the persons using the public highways.

Southern Cotton Oil Company v. Anderson, 80 Fla. 441, 86 So. 629, 636 (Fla. 1920). That this Court still adheres to that philosophy is made clear by this Court's statement in Kraemer v. General Motors Acceptance Corporation, 572 So. 2d 1363, 1365 (Fla. 1990) wherein it explained that the rationale for the dangerous instrumentality doctrine is

> ...That the one who originates the danger by entrusting the automobile to another is in the best position to make certain that there will be adequate resources with which to pay the damages caused by its negligent operation.

Id. at 1365.

This Court has repeatedly rejected a mechanistic application of this doctrine, refusing to apply any bright line test in determining who shall be responsible under the dangerous instrumentality doctrine. Making it clear that the doctrine is not limited in scope to the title owner of the negligently operated vehicle, this Court has stated:

> Proof of actual ownership of the vehicle causing injury is not indispensable to recovery, for the misfortune of the injured person should not depend entirely on the repository of the legal title, nor is recovery dependent upon perfection of title in a given person,...

Frankel v. Fleming, 69 So. 2d 887, 888 (Fla. 1954).

Similarly, in Palmer v. R.S. Evans, Jacksonville, Inc., 81 So. 2d 635 (Fla. 1955), this Court held that the dangerous instrumentality rule should impose liability on the beneficial owner of a vehicle rather than the holder of mere naked legal title, where title is held only as security for payment of a purchase price. Id. at 637. As this Court held later in Metzel v. Robinson, 102 So. 2d 385, 386 (Fla. 1958), the question of beneficial ownership is intertwined with issues of control. Thus, in Metzel, this Court found that since the operator's aunt, who

had purchased the car and delivered it to her nephew, was still in a position to exert some dominion and control over the vehicle, both parties thus "had a species of ownership and either or both of them could have been held liable for the accident." In Brown v. Goldberg, Rubinstein & Buckley, P.A., 455 So. 2d 487, 488 (Fla. 2nd DCA 1984), rev. denied, 461 So. 2d 114 (Fla. 1985), the court reversed a summary judgment on the issue of liability under the dangerous instrumentality doctrine, since factual questions existed as to whether a law firm, which was neither owner nor bailee of a motor vehicle, but which had arranged for rental vehicles to be provided to its clients and was paid for by the firm, could nonetheless be held liable. In Marshall v. Gawel, 696 So. 2d 937, 939 (Fla. 2nd DCA 1997), summary judgment was again reversed because of factual issues as to whether the mother owned the vehicle, whether the father had been driving it with the mother's consent, and so forth. The court held that the parties' intent regarding beneficial ownership of the vehicle must be determined by their overt acts and could not be decided as a matter of law. Id. at 939.

In the present case, the jury was instructed as follows:

> The first issue for your determination of the claim of Michael against Angelina and Carolina and Louis on a count [sic] of the alleged negligence of Angelina is whether Louis owned or had a

> right to control the vehicle driven by Angelina and whether Angelina was operating the vehicle with the express or implied consent of Louis. A person who owns or has the right to control a vehicle and who expressly or impliedly consents to another's use of it is responsible for its operation.

(T.152-153). That instruction was taken directly from Florida Standard Jury Instruction 3.3(a), which has remained unchanged for many years. The jury was then presented with a verdict form which asked the following question:

> Did Louis Gallina own or have the right to control the vehicle driven by Angelina Gallina at the time of the accident and did Angelina Gallina have expressed or implied consent of Louis Gallina to drive said vehicle?

The jury answered that question "yes" (R.2/232). The evidence at trial, which the jury accepted and believed, was that both Mr. and Mrs. Gallina had purchased the car with joint funds and maintained it out of their joint account, keeping it at home where they both resided. The car was purchased primarily for Angelina's sister, but was being driven by Angelina at the time of the accident. The Defendants had admitted in their answers to requests for admissions that Angelina's use of the vehicle on that occasion was with the permission and consent of Louis and Carolina Gallina (R.1/17). Thus, the jury found that although the legal title was solely in the name of Mrs. Gallina, Mr. Gallina also

owned or had the right to control the vehicle at the time of the accident, and Angelina had his express or implied consent to drive it.

The trial court, in considering Mr. Gallina's post-trial motion for directed verdict, was required to deny the motion unless there was absolutely no evidence and no inferences from the evidence which could support the jury's conclusion that Mr. Gallina had the right to control the vehicle driven by his daughter Angelina. See Amoroso v. Samuel Freidland Family Enterprises, 604 So. 2d 827, 831 (Fla. 4th DCA 1992), affirmed, 630 So. 2d 1067 (Fla. 1994). Nonetheless, the trial court granted the motion and entered a directed verdict in favor of Mr. Gallina (R.2/256-257). The Fourth District, while recognizing that Mr. Gallina's motion admitted the truth of all facts in evidence and every conclusion or inference that the jury could draw in favor of the Plaintiff, Aurbach, 721 So. 2d at 759 (A.4), nonetheless affirmed the judgment in favor of Angelina's father.

It is interesting to note that the Fourth District did not find that there was no evidence of Mr. Gallina's right to control the vehicle or of his having expressly or impliedly consented to Angelina's use of it -- which was the question the jury was asked to determine (T.152-153). Instead, the Fourth District apparently based its decision on the fact that Mr. Gallina “did not put the

car in the possession of a non-family member." Aurbach, 721 So. 2d at 759 (A.4). The court thus established a new "bright line standard" which now requires in that district that in all cases involving family relationships, only the party holding actual title ownership will be responsible for the vehicle's negligent operation by another family member. Presumably, in future litigation, the question of ownership will no longer be a factual one, intertwined with issues of control, as has long been the case in Florida.

This Court held over 40 years ago that the question of liability for damages caused by negligent operation of a vehicle did not require proof of actual title, but rather proof to establish who exerted such dominion over the vehicle as to be responsible for damage caused by it. Wilson v. Burke, 53 So. 2d 319, 321 (Fla. 1951). Not long thereafter, in Frankel v. Fleming, this Court again specifically held that

> Proof of actual ownership of the vehicle causing injury is not indispensable to recovery, for the misfortune of the injured person should not depend entirely on the repository of the legal title; nor is recovery dependent upon perfection of title in a given person....

Frankel, 69 So. 2d at 888. Under the Fourth District's new rule, presumably the question of financial responsibility for the damages suffered by a person injured in a traffic accident will be determined as a matter of law and limited solely to

the individual who held actual legal title on the date of the accident. In the future, injured parties may be deprived of the full extent of the damages awarded them by a jury where the parents had the forethought to title the vehicle driven by their teenager in the name of one parent, while titling the rest of the family assets in the name of the other parent.

While the Fourth District has determined its new rule to be "the better rule," because it is "both foreseeable and predictable," Aurbach, 721 So. 2d at 759 (A.4), Plaintiffs respectfully submit that the Fourth District has lost sight of the true rationale for the rule, namely providing for the injuries suffered by victims of traffic accidents. It would certainly be simpler for such decisions to be made as a matter of law, but such a determination would fly in the face of decades of judicial decisions in this state, wisely holding that the party who has the actual ability to control a vehicle, by deciding who should drive it, should bear the consequences for its negligent operation. The jury in this case found that Louis Gallina had such control, and there was evidence in the record to support that finding. Accordingly, the trial court should have denied Mr. Gallina's post-trial motion for directed verdict. The Fourth District's affirmance of that directed verdict, and its announcement of a new and different rule applicable where the vehicle has been entrusted to a family member, is directly

contrary to the law as established by this Court for many years and should not be permitted to stand.

CONCLUSION

For the reasons set forth above, the decision of the Fourth District Court of Appeal should be quashed and the case remanded with directions that judgment be entered against Louis Gallina.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing and attached has been served by mail this 17th day of May, 1999, to: **DAN W. MOSES, ESQUIRE**, One South Ocean Boulevard, Suite 317, Boca Raton, Florida 33432, Co-Counsel

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