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,

Respondents.

# RESPONDENTS' ANSWER BRIEF ON THE MERITS

ANGELA C. FLOWERS
Kubicki Draper
25 West Flagler Street
City National Bank Building
Penthouse Suite
Miami, Florida 33130
Telephone No.: (305) 982-6636
Counsel for Respondents

## CERTIFICATE OF TYPE SIZE

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

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## INTRODUCTION

It is an undisputed fact that Mr. Gallina did not hold legal title to the vehicle driven by his adult daughter, Angelina. Accordingly, plaintiffs seek to create a new theory of dangerous instrumentality liability -- one premised upon the principle that the father is responsible as the "head of the household."[1] The Fourth District rejected plaintiffs' request. Aurbach v. Gallina, 721 So. 2d 756 (Fla. 4th DCA 1998).

In a well-reasoned decision, the Fourth District articulated the public policy reasons behind its decision. A parent's right to control an adult child's use of a vehicle the parent does not own is not a proper basis for legal liability. The imposition of legal liability should be measured by objective standards. In regard to the dangerous instrumentality doctrine, the objective standard has always been "an identifiable property relationship between a defendant and a motor vehicle." Id. at 759.

Plaintiffs' plea for a new basis of tort liability is fraught with danger and injustice. First, it would create an evidentiary nightmare. One of the primary principles recognized by the Fourth District is that the legal system is not well

[1]During closing, plaintiffs argued to the jury that, despite the fact that Mrs. Gallina owned the vehicle, "experience and common sense dictates that Mr. Gallina controlled that vehicle every bit as much as Mrs. Gallina." (T. 102-3). Accordingly, it seems appropriate to refer to this as the "head of the household" theory of liability.

equipped to determine "head of the household" status. Who is "in charge" is a very subjective concept. Indeed, in most households, both parents wear the "head of the household" hat from time to time and the designation may in fact shift from hour to hour and issue to issue.

Second, such expansion of tort liability would inevitably unlock the classic Pandora's Box. If a parent could be held liable for an adult child's operation of a motor vehicle solely on the fact that the parent wields some level of "head of the household" control over that adult child, then spouses who elect to own their motor vehicles independently may nevertheless be held liable for the other's operation of a motor vehicle based upon some proof of "head of the household" status, and adult children who care for resident elderly parents could be held liable on the theory that they exercise some "head of the household" control.

With this in mind, the Fourth District wisely recognized that any attempt to analyze family dynamics interjects a fuzzy legal standard. The better rule is to exclude family relationships, especially among adults, as a basis for dangerous instrumentality law.[2]

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[2]This Court need not, by its decision in this case, address the imposition of liability on a parent for the operation of a motor vehicle by a minor child. However, as discussed infra, the legislature has already addressed this issue in the context of dangerous instrumentality law and limited its application. See § 322.09 (2), Fla. Stat. (1997) (imposing vicarious liability on an adult who signs a minor's driver's license

## STATEMENT OF THE FACTS[3]

Angelina Gallina was two months short of her nineteenth (19) birthday at the time of this accident. (R1. 1, 104, 112; X Angelina Gallina, p. 2). Although she was attending community college, she was still living at home. (R1. 104; X. Angelina Gallina, p. 2). On the day of the accident, her car was not functioning, so she borrowed her younger sister's car. (X. Carolina Gallina, p. 2; X. Louis Gallina, p. 5). She had permission from her mother, who owned the car, to use it to drive to school that day. (R1. 17; X. Carolina Gallina, p. 3; 721 So. 2d at 759).[4]

Louis Gallina is Angelina's father. (X. Louis Gallina, p. 2). Louis Gallina was not the owner, bailee, or lessee of the vehicle. (X. Louis Gallina, p. 3; 721 So. 2d at 759). As far as Mrs. Gallina was concerned, it was understood that Louis Gallina would not use the vehicle. (X. Carolina Gallina, p. 4). Mr. Gallina did, however, ride in the car once when his wife took it for a test drive prior to purchasing it for the daughter. (X. Louis Gallina, p. 3; 721 So. 2d at 759).

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application).

[3]Petitioners' brief adequately sets forth the statement of the case. Respondents will utilize the same party designations and citation references adopted by Petitioner.

[4]In regard to plaintiffs' assertion that defendants admitted that both Carolina and Louis gave Angelina permission and consent to use the vehicle, there is no evidence in the record that this discovery document was ever presented to the jury for consideration.

Mrs. Gallina testified that she was in charge of taking care of all the paperwork on the cars and generally taking care of the whole house and everything in the house. (X. Carolina Gallina, p. 2-3). Mr. Gallina and his wife kept joint checking accounts, which funds were used to run the household and purchase the car. (X. Louis Gallina, p. 3, 6; 721 So. 2d at 759). Louis Gallina testified that he was not involved in the purchase of the vehicle, did not know how much was paid for it, did not control the use of the vehicle and could not have stopped Angelina from driving the vehicle. (X. Louis Gallina, p. 2-6).

> Q. And you could have withdrawn that permission and consent if you chose to, tell her, no, she can't drive that car, correct?
>
> A. I don't see any way I could've stopped her from driving it. You mean physically stopping her from driving the car?
>
> Q. You could've told her, no, you're not allowed to drive that car, if you wanted to, correct?
>
> A. I don't think she would have listened to me.

(X. Louis Gallina, p. 6).

On these facts, the trial court directed a verdict in favor of Mr. Gallina post-trial.[5] The Fourth District affirmed, and this review followed.

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[5]The trial court expressly permitted the jury to consider the issue of Mr. Gallina's liability in order to avoid the need for a retrial should the directed verdict be reversed. (X. Motion for Directed Verdict, p. 3).

## SUMMARY OF THE ARGUMENT

There is no conflict between this case and any other Florida appellate decision. The Fourth District followed the well-established rule that a person without an identifiable property relationship with a motor vehicle cannot be held liable for its negligent operation under the dangerous instrumentality doctrine. Accordingly, it is respectfully suggested that conflict jurisdiction is inappropriate in this case.

In reality, plaintiffs seek to impose a new legal responsibility on individuals who do not have any property connection to a vehicle based solely upon their status as a parent or "head of the household." There was no evidence presented at trial that Mr. Gallina owned or had a legal right to control the vehicle driven by Angelina. The mere fact that Louis Gallina is Angelina's father and that Angelina lives at her parents' home is not enough to create a legal right to control the vehicle. This is especially true since Angelina is an adult.

To impose dangerous instrumentality liability under these circumstances is to sanction a system that is completely lacking of foreseeability and predictability. The imposition of liability for fellow family members based upon the subjective concept of "head of the household" control is unrealistic. The "bright line standard" identified by the Fourth District offers the only legitimate method for imposing dangerous instrumentality liability within the family unit.

## ARGUMENT

THERE IS NO CONFLICT BETWEEN THE AURBACH CASE AND ANY OTHER FLORIDA DECISION; RATHER, AURBACH FOLLOWS THE RULE THAT A PERSON WITHOUT AN IDENTIFIABLE PROPERTY RELATIONSHIP WITH A MOTOR VEHICLE CANNOT BE HELD LIABLE FOR ITS NEGLIGENT OPERATION.

This Court accepted jurisdiction based upon alleged conflict with Frankel v. Fleming, 69 So. 2d 887 (Fla. 1954). The Frankel decision was part of a trilogy of decisions arising out of the same automobile accident. Three parties were each held liable to the injured plaintiff: the driver, Wellener v. Fleming, 69 So. 2d 895 (Fla. 1954); the bailee, Frankel v. Fleming, 69 So. 2d at 888; and the lessor/bailor/legal owner, Fleming v. Alter, 69 So. 2d 185 (Fla. 1953). Frankel, clearly established that multiple persons could be held liable for the operation of a dangerous instrumentality. Thus, the Court stated that "proof of actual ownership of the vehicle causing injury is not indispensable to recovery . . . ." 69 So. 2d at 888. For the first time, the Court held a bailee responsible for injury caused by the one to whom he entrusted the car. Id.

Respondents respectfully submit that there is no conflict between Frankel and Aurbach v. Gallina, 721 So. 2d 756 (Fla. 4th DCA 1998). Frankel followed and clarified the well-established rule that dangerous instrumentality liability arises from

an identifiable property relationship between the defendant and a motor vehicle. Likewise, the Fourth District in Aurbach recognized the need for a property interest in the vehicle as a prerequisite to the imposition of dangerous instrumentality liability for the operation of a motor vehicle. The directed verdict was appropriately entered for Mr. Gallina because he did not hold a legally identifiable possessory interest in the vehicle driven by Angelina.

Plaintiffs urge this Court to adopt a new rule imposing dangerous instrumentality liability on a non-title holder parent or "head of the household." The foundation for this new liability is not extremely clear. Apparently plaintiffs believe there is a moral or equitable ground for imposing such liability. As the Fourth District recognized, this ill-defined concept of plaintiffs' proposes a fuzzy legal standard that is undesirable as devoid of foreseeability and predictability, threatens to encourage litigation, and will potentially expand liability unjustifiably.

The dangerous instrumentality doctrine imposes absolute liability on the operators and owners of motor vehicles. In determining who is an "owner," the law has always looked to ownership or a legal relationship such as bailment, rental, lease or sale. See, e.g., Kraemer v. General Motors Acceptance Corp., 572 So. 2d 1363 (Fla. 1990); Roth v. Old Republic Ins. Co., 269 So. 2d 3 (Fla. 1972); Palmer v. R.S. Evans, Jacksonville, Inc., 81 So. 2d 635 (Fla. 1955); Frankel v. Fleming, 69 So. 2d

at 888; Wilson v. Burke, 53 So. 2d 319 (Fla. 1951). Plaintiffs have not cited a single case that did not involve such a possessory interest. In addition, the courts have repeatedly limited the imposition of liability based on parental relationship. See, e.g., Snow v. Nelson, 475 So. 2d 225, 226 (Fla. 1985) ("parent is not liable for the tort of a minor child because of the mere fact of paternity"); Kilgus v. Kilgus, 495 So. 2d 1230, 1231 (Fla. 5th DCA 1986), rev. denied, 504 So. 2d 767 (Fla. 1987) (parents not liable for negligent conduct by adult child which occurs on parents' property).

Simply stated, a jury should not be asked to evaluate whether the family dynamics are such that a "head of the household" possesses a mental or physical ability to control the use of a vehicle he does not own. Plaintiffs' theory requires an adjudication of family dynamics that may or may not be reflected in overt acts. From an evidentiary standpoint, allowing the imposition of legal liability on a family member who possesses nothing more than some degree of "head of the household" status is fraught with speculation.[6]

The Fourth District also foresaw the difficulty in limiting liability based upon such theoretical control. A moral or equitable possessory interest, if it existed, would

[6]Under the facts of this case, it is even questionable whether there was sufficient evidence to support a finding that Louis Gallina acted as "head of the household" in regard to the operation of the automobile. Appeal from this issue was negated by the entry of the directed verdict.

not be limited to parental supervision. In this case Angelina is an adult. There would be no practical difference between applying this new scope of liability to impose liability on Mr. Gallina for the actions of his adult daughter and imposing the same liability for the actions of his wife. Indeed, what about other family members residing in Mr. Gallina's household? Under plaintiffs' theory, Mr. Gallina could be held responsible for his elderly parents, aunts, uncles, son-in-law, daughter-in-law, and others who resided with him. Moreover, what would prevent this "head of the household" control from extending to a family member's use of a non-family vehicle.

Although not cited by plaintiffs, this legal theory was previously rejected in Wilsen v. Lesser, 434 So. 2d 1033 (Fla. 3d DCA), rev. denied, 441 So. 2d 633 (Fla. 1983). In Wilsen, the Third District was urged to impose liability on a father for his adult daughter's operation of a car titled in her name. The plaintiff argued that the father should be responsible under the dangerous instrumentality doctrine because he bought the car for his daughter, the daughter resided at home, and the father exercised some control over the car's operation. The court rejected plaintiff's theory of liability and affirmed a summary judgment for the father. 343 So. 2d at 1033; see also Wummer v. Lowary, 441 So. 2d 1151 (Fla. 4th DCA 1983), rev. denied, 451 So. 2d 849 (Fla. 1984) (employer who refinanced employee's automobile on his behalf did not have physical control over vehicle and could not be considered "beneficial

owner").

By adopting a bright line standard, the Fourth District correctly followed the law and clarified that dangerous instrumentality liability applies to persons who fall within legally recognizable possessory chains. Historically, this has been the law and represents the "better rule." 721 So. 2d at 759. This Court should likewise reject plaintiffs' invitation to expand dangerous instrumentality law.

Turning to plaintiffs' brief, none of the cases cited therein support an expansion of the doctrine of dangerous instrumentality liability. Despite plaintiffs' contention to the contrary, Brown v. Goldberg, Rubenstein & Buckley, P.A., 455 So. 2d 487 (Fla. 2d DCA 1984), rev. denied, 461 So. 2d 114 (Fla. 1985), is a "bailee" case and did not authorize presentation of a theoretical question of "control" to the jury:

> We hold that the evidence concerning the arrangement . . . give rise to conflicting inferences which require that a jury resolve the issue whether the law firm was in fact a bailee of the automobile and thus liable for damages inflicted by the negligent operation of that automobile by one permitted by the firm to use it. It is settled that a bailee may be held liable for negligent operation of the bailed vehicle by one to whom the bailee gives permission to operate it. . . . It may well be that a jury would find, on the evidence, that the law firm was in fact a bailee of the motor vehicle who gave permission for its use by Michael Edwards.

455 So. 2d at 488 (emphasis supplied).

As for the beneficial ownership cases cited by plaintiffs, these merely indicate that Florida law recognizes a distinction between "naked legal title" and "beneficial ownership." When the facts give rise to evidence that the person who holds "naked legal title" did not possess access or control over a motor vehicle, a jury question arises as to whether the holder of "naked legal title" can be held liable under the dangerous instrumentality doctrine. See Metzel v. Robinson, 102 So. 2d 385, 386 (Fla. 1958) (proper to hold, as a matter of law, that one who holds legal title to a vehicle is subject to liability under dangerous instrumentality doctrine); Marshall v. Gawel, 696 So. 2d 937, 938 (Fla. 2d DCA 1997) (court rejected defendant-owner's testimony that, despite her legal ownership, she had no authority or control over the vehicle and left issue to the jury to resolve)[7]; Palmer v. R.S. Evans, Jacksonville, Inc., 81 So. 2d at 636-37 (question of fact for jury to determine ownership under conditional sales contract).

These cases are irrelevant to the instant case because there was never a suggestion that Carolina Gallina, the holder of "naked legal title," did not possess ownership and control of the automobile titled in her name. Moreover, it is undisputed that Louis Gallina did not hold legal title to the subject vehicle and

[7] The only family relationship issue identified in Marshall was whether the wife, living separate and apart from the husband, could establish that the husband's use of the car constituted a species of conversion or theft. 696 So. 2d at 938.

plaintiffs never sued Louis Gallina as a holder of legal title.

Plaintiffs' assertion of "control" does not refer to ownership or possessory control, but to something corresponding to "head of the household" control. There is only one instance where a parent is held responsible for the operation of a motor vehicle on the basis of "head of the household" status. Pursuant to section 332.09 (2), Fla. Stat. (1997), the parent who signs the driver's license application for a minor child is vicariously liable for the child's operation of a motor vehicle. This responsibility ends, however, upon the child reaching the age of majority. § 332.09 (2), Fla. Stat. (1997).

The intent of the legislature in enacting section 322.09 (2) was to place responsibility on the "head of the household for damages as a result of the negligence or willful misconduct of any person under the age of eighteen years while he or she is driving a motor vehicle [and] . . . to protect persons who are injured or sustain property damage by reason of the negligence . . . of persons under the age of eighteen years who are driving by imputing their negligence or willful misconduct to the person or head of the family who has signed the application, who in reality is in the best position to control these minor drivers." Farrier v. Thompson, 234 So. 2d 11, 12-13 (Fla. 4th DCA 1970); Gracie v. Deming, 213 So. 2d 294 (Fla. 2d DCA 1968) ("financial responsibility lies at the heart of the statute"). The very fact that the

legislature took steps to enact such legislation illustrates the nonexistence of "head of the household" liability under the dangerous instrumentality doctrine.

The financial responsibility concerns raised by plaintiffs are adequately addressed by imposing liability on those with a legally traceable possessory interest. The rationale for the doctrine does not justify an expansion of liability based upon "head of the household" status. This is especially true when dealing with the concept of control over an adult child.

Finally, plaintiffs ask this Court to expand the law of dangerous instrumentality liability at a time when our Florida Legislature is enacting law to limit the scope of liability under the doctrine. Public policy, as expressed in amended section 324.021, is to shield the non-operator from absolute responsibility for one to whom he entrusts the operation of a motor vehicle and to place a cap on the amount of damages that can be recovered from a non-operator in the possessory chain. H.B. 775, The Florida Legislature, 1999 Session, § 28 (1999).

This Court has recognized that the dangerous instrumentality doctrine should not apply in every situation. See Castillo v. Bickley, 363 So. 2d 792 (Fla. 1978) (owner of vehicle not liable to persons injured by negligence of repairman or serviceman with whom the vehicle was entrusted). The same "considerations of both social policy and pragmatism" that led this Court to limit application of the dangerous

instrumentality doctrine in Castillo v. Bickley, 363 So. 2d at 793, should compel the Court to reject plaintiffs' urging to expand the doctrine in this case.

## CONCLUSION

Based upon the foregoing facts and legal authorities, Respondents, Louis Gallina, Carolina Gallina and Angelina Gallina, respectfully request that this Court affirm the Fourth District's decision and the final judgment entered below.

KUBICKI DRAPER
Counsel for Respondents
25 W. Flagler Street
Penthouse Suite
Miami, Fla 33130
Telephone: 305/982-6636

By: _____
ANGELA C. FLOWERS
Fla. Bar No. 510408

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondents' Brief on the Merits was mailed this ___ day of June 1999 to all counsel on the service list below.

_____
ANGELA C. FLOWERS

## SERVICE LIST

Nancy Little Hoffmann, Esq.
4419 West Tradewinds Avenue
Fort Lauderdale, Florida 33308
Co-Counsel for Petitioners

Dan W. Moses, Esq.
1 South Ocean Blvd.
Suite 317
Boca Raton, Fl 33432
Co-Counsel for Petitioners