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

REPLY BRIEF OF PETITIONERS ON THE MERITS

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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:

MARSHA ELKINTON AURBACH
(Plaintiff/Petitioner)

MICHAEL AURBACH
(Plaintiff/Petitioner)

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(Co-Appellate Counsel for Defendants)

HONORABLE JAMES T. CARLISLE
(Circuit Court Judge)

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ANGELINA GALLINA
(Defendant/Respondent)

CAROLINA GALLINA
(Defendant/Respondent)

LOUIS GALLINA
(Defendant/Respondent)

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:

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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 response to the merits brief of Respondents, ANGELA GALLINA, CAROLINA GALLINA, and LOUIS B. GALLINA. In this brief, as in the initial brief, the parties will be referred to either by name or as "Plaintiffs" and "Defendants." The same abbreviations used in the initial brief will also apply.

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.

It has been the law in this state for many years that the question of liability under the dangerous instrumentality doctrine depends upon resolution of factual issues as to beneficial ownership and control of the vehicle. Southern Cotton Oil Company v. Anderson, 80 Fla. 441, 86 So. 629, 636 (Fla. 1920); Frankel v. Fleming, 69 So. 2d 887, 888 (Fla. 1954); Kraemer v. General Motors Acceptance Corporation, 572 So. 2d 1363, 1365 (Fla. 1990). It has never been the law that

such factual issues may be determined as a matter of law simply because they arise in the context of a family relationship. Nonetheless, that is what the Fourth District held in the present case, and the Defendants are urging this Court to adopt that new, "bright line" test as the law of Florida. For the reasons which follow, Plaintiffs believe that the adoption of such a rule would be both unwise and unfair, and that it would be contrary to well-established Florida public policy.

In their brief, Defendants attempt to make it appear that it is the Plaintiffs who are advocating a new rule, which Defendants call the "head of the household" rule (answer brief, pp.1-2, 7-9), and that Plaintiffs are seeking an expansion of the dangerous instrumentality doctrine (answer brief, pp.10, 13). Such is not the case. It is not Mr. Gallina's role as Angelina's father that matters, but rather his role as the co-beneficial owner of the motor vehicle and his concomitant right to control its use, as determined by the jury, that requires that he share in the liability for the vehicle's negligent operation. Plaintiffs have never suggested, and do not contend, that there is a "moral or equitable ground for imposing such liability (answer brief, p.7)," nor that a parent may be liable solely by virtue of his or her status as a parent or alleged "head of the household." The rule which Plaintiffs advocate is nothing more and nothing less

than the rule which has been consistently applied by the courts of this state, namely that liability follows beneficial ownership and control of the vehicle. Accordingly, the cases relied upon by Defendants are inapplicable.[1]

The Defendants, in attempting to support their view, have repeatedly used the term "identifiable property relationship," a term also used by the Fourth District in its opinion. Aurbach v. Gallina, 721 So. 2d 756, 759 (Fla. 4th DCA 1998). Neither the Defendants nor the Fourth District have defined that term, and it is not at all clear what is meant thereby.

It has long been the law that a party's "beneficial ownership," which is often based upon who has paid for the vehicle, is sufficient to impose liability. See Palmer v. R.S. Evans, Jacksonville, Inc., 81 So. 2d 635, 637 (Fla. 1955). Indeed, in Brown v. Goldberg, Rubenstein & Buckley, P.A., 455 So. 2d 487, 488 (Fla. 2nd DCA 1984), the mere fact that a law firm paid a rental car company's fee for the rental of a vehicle to one of its clients, was sufficient to raise a jury issue as to its liability, even though there was no evidence that the law firm ever had possession of the vehicle. In the present case, it is undisputed that the car was purchased with the Gallinas' joint funds and kept at the marital home,

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[1] Snow v. Nelson, 475 So. 2d 225, 226 (Fla. 1985); Kilgus v. Kilgus, 495 So. 2d 1230, 1231 (Fla. 5th DCA 1986), rev. denied, 504 So. 2d 767 (Fla. 1987); Wilsen v. Lesser, 434 So. 2d 1033 (Fla. 3rd DCA), rev. denied, 441 So. 2d 633 (Fla. 1983).

although Mr. Gallina would not drive it because he hated small cars (X.Carolina Gallina, p.4).

In its opinion, however, the Fourth District decided that concepts of beneficial ownership should no longer be considered in determining liability under the dangerous instrumentality rule "in the context of family relationships." Aurbach, 721 So. 2d at 759. The court decided that since Louis Gallina's name was not on the title of the car, that as a matter of law he could not be a beneficial owner, and that as a matter of law he was absolved from liability for the vehicle's negligent operation, despite the jury's finding that he owned or had the right to control the vehicle and had given his daughter express or implied consent to drive it (R.2/232).

The Fourth District's decision advances no public policy of sufficient magnitude to justify its diminution of the protection afforded by the dangerous instrumentality doctrine to victims of traffic accidents. Where, as here, it is evident from the uncontradicted facts that both Mr. and Mrs. Gallina purchased the vehicle with joint funds and continued to maintain the vehicle in their household with joint funds, both have an ownership interest even though they had decided to have the title placed in only one name. Allowing parties to artificially limit their ownership liabilities by placing title in one name only, even

though both are the beneficial owners, defeats the purpose of the dangerous instrumentality rule, which is to protect those injured upon the highways and to make certain that there will be adequate resources to pay damages resulting from a vehicle's negligent operation. Kraemer, 572 So. 2d at 1365.

Similarly, neither the Defendants nor the Fourth District have advanced any rationale or policy reason sufficient to justify taking the factual issues of beneficial ownership and control from the jury in family cases. The Fourth District's assertion that its new "bright line" rule is "the better rule" because it is "both foreseeable and predictable," Aurbach, 721 So. 2d at 759, should not be approved by this Court. Juries will continue to be capable of determining issues such as beneficial ownership and ability to control, irrespective of whether they accrue within the context of a family relationship. No need has been shown or even mentioned in any prior opinion for such a "bright line" standard.

Should this Court determine that a "predictable" standard is necessary in family cases, then it certainly seems preferable to adopt the rule already applied in family law cases to determine beneficial ownership of a vehicle purchased during the marriage. Regardless of the name in which a vehicle's title is placed, if it is purchased during the marriage it is considered an asset of both marital partners. Howes v. Howes, 613 So. 2d 551, 552 (Fla. 4th DCA 1993). In the

event the parties' marriage were to be dissolved, both would be entitled to claim their ownership interest in the vehicle, irrespective of how it was titled. Id. at 552. Plaintiffs respectfully suggest that the Fourth District had no need to change the long-standing rule that a jury is to determine questions of beneficial ownership and control for purposes of the dangerous instrumentality doctrine, whether or not a family situation is involved. Since the jury found, based upon the evidence presented to it, that Mr. Gallina had sufficient ownership interest and control of the vehicle to subject him to liability, the Fourth District's opinion should be quashed and the cause remanded with directions that the trial court enter a judgment consistent with the jury verdict. On the other hand, should this Court be persuaded that a bright line standard is needed in family cases, then Plaintiffs request that the Court give serious consideration to adopting a rule consistent with that used in family law cases for determining ownership of property acquired during a marriage. Applying the "legal title" rule in every case, as advocated by the Fourth District, would require this Court to recede from the entire line of cases holding issues of beneficial ownership and control to be jury questions. More importantly, it would clearly disserve the victims of negligent operation of motor vehicles, for whose benefit the dangerous

instrumentality doctrine was developed, and for whom it continues to serve a very necessary and salutary function.

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 25th day of June, 1999, to: **DAN W. MOSES, ESQUIRE**, One South Ocean Boulevard, Suite 317, Boca Raton, Florida 33432, Co-Counsel for Petitioners; and **ANGELA C. FLOWERS, ESQUIRE**, Kubicki Draper, 25 West Flagler Street, Penthouse, Miami, Florida 33130, Counsel for Respondents.

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