ORIGINAL

IN THE SUPREME COURT OF FLORIDA

CASE NO.: 94,597

FILED
SID J. WHITE
JAN 15 1999
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

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

JURISDICTIONAL BRIEF OF PETITIONERS

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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)

CARYN BELLUS-LEWIS, ESQUIRE
(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)

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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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QUESTION PRESENTED

WHETHER THE DECISION OF THE DISTRICT COURT OF APPEAL IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH FRANKEL V. FLEMING, 69 SO. 2D 887, 888 (FLA. 1954) AND OTHER DECISIONS.

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PREFACE

This brief is submitted on behalf of the Petitioners, MICHAEL AURBACH and MARSHA ELKINGTON AURBACH, in support of their discretionary petition for review of a decision of the Fourth District Court of Appeal filed November 12, 1998, announcing a new standard for imposing liability under the dangerous instrumentality doctrine within a family relationship. Petitioners have sought review because this rule conflicts with long-standing precedent from this Court and other district courts of appeal. 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. Any emphasis appearing in quoted material is that of the writer unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The following facts appear from the opinion of the Fourth District Court of Appeal, since this Court is limited to those facts in determining whether conflict jurisdiction exists. See Hardee v. State, 534 So. 2d 706, 708 (Fla. 1988).

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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 (A.1).

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. 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 (A.1-2). 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. 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. Before buying the car, the Gallinas test drove it together. 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. The expenses to maintain the car were paid out of the Gallinas' joint account. The Gallinas kept

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the automobile at the home where both of them resided (A.2).

After the trial, Louis Gallina moved for judgment in accordance with his motion for directed verdict, and the trial court granted that motion. 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 (A.2).

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) (A.2-3). 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); Brown v. Goldberg, Rubenstein & Buckley, P.A., 455 So. 2d 487, 488 (Fla. 2nd DCA 1984), rev. denied, 461 So. 2d 114 (Fla. 1985).

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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.

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 make liability under the dangerous instrumentality doctrine both foreseeable and predictable (A.3)." 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 (A.3)." 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 (A.3)."

JURISDICTIONAL STATEMENT

The Florida Supreme Court has discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with a

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decision of the supreme court or another district court of appeal on the same point of law, pursuant to Article V, Section 3(b)(3) of the Florida Constitution, and rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure.

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.

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ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH FRANKEL V. FLEMING, 69 SO. 2D 887, 888 (FLA. 1954) AND OTHER DECISIONS.

It has long been the law in this state, since adoption of the dangerous instrumentality doctrine, that the imposition of liability for negligent operation of a motor vehicle depends not solely on legal title, but on issues such as beneficial ownership and control of the vehicle. As this Court stated in Kraemer v. General Motors Acceptance Corporation, 572 So. 2d 1363, 1365 (Fla. 1990), 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. Early on, this Court made it clear that the doctrine of dangerous instrumentality is not limited in scope to the title owner of the negligently operated vehicle. This Court stated in Frankel v. Fleming, 69 So. 2d 887 (Fla. 1954) 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,...

Id. at 888. This Court thereafter, in Palmer v. R.S. Evans, Jacksonville, Inc., 81

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So. 2d 635 (Fla. 1955), 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

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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 evidence at trial, which the jury accepted and believed, was that both husband and wife had purchased the car with joint funds and maintained it out of their joint account and kept it at home where they both resided. The car was purchased primarily for their other daughter, but was being driven by her sister at the time of the accident. The jury found that although the legal title was solely in the name of Mrs. Gallina, that Mr. Gallina also owned or had the right to control the vehicle at the time of the accident, and that Angelina had his express or implied consent to drive it. Nonetheless, the Fourth District approved the setting aside of that verdict, and instead opted for a "bright line standard" of having legal responsibility follow title ownership in every case where a family relationship was involved (A.3). That rule is in express and direct conflict with the rule applied in all of the other cited cases. The fact that the Fourth District ostensibly intended for it to apply only within the family context does not obviate the conflict, since many of the decisions discussed in this brief also involve family relationships.

The clearest and simplest conflict exists with one of this Court's earliest

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decisions on the subject, Frankel v. Fleming. In that case, the injured parties were awarded a verdict against a man and the woman who had been living with him as his wife and who was driving the vehicle. This Court had no difficulty in imposing liability on Mr. Frankel because he was the one who had entrusted the car to a person who, as this Court found, was to all intents and purposes his spouse. Id. at 888. In that opinion, this Court specifically recited that "...the misfortune of the injured person should not depend entirely on the repository of legal title;..." Id. at 888.

Had the Fourth District applied the correct standard and imposed liability based upon the right and ability to control the vehicle, rather than the simplistic question of title ownership, the jury verdict would have remained undisturbed. The appellate court did not find insufficient evidence to support the jury's verdict on that issue; rather, it carved out a special exception to the concept of beneficial ownership for use only in family cases. In so doing, the opinion expressly and directly conflicts with the decisions cited in this brief, requiring resolution by this Court.

CONCLUSION

This Court has the discretionary jurisdiction to review the decision of the Fourth District Court of Appeal. Plaintiffs respectfully urge this Court to exercise

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that jurisdiction to resolve that conflict and consider the merits of the Plaintiffs' argument on that point.

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 13th day of January, 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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