ORIGINAL

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' BRIEF ON JURISDICTION

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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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STATEMENT OF THE CASE AND FACTS

Respondents, Angelina Gallina, Carolina Gallina and Louis Gallina, without restating the facts, adopt and incorporate the facts regarding the purchase and maintenance of the vehicle in question as contained in the opinion of the Fourth District Court of Appeal.[1] This Court is limited to those facts in determining whether conflict jurisdiction exists. Reaves v. State, 485 So. 2d 829, 830 n.3 (Fla. 1986)(only the facts contained in the four corners of the decision allegedly in conflict are relevant to a decision to accept or reject a petition for review based on conflict jurisdiction). Said facts are also set forth in Petitioners' brief on jurisdiction.

Respondents would only add that noticeably absent from Petitioners' statement of the case and facts is the recognition by the Fourth District that Florida courts impose liability under the dangerous instrumentality doctrine "where there has been an identifiable property relationship between a defendant and a motor vehicle." (A.3). Similarly absent is any mention of Wilsen v. Lesser, 434 So. 2d 1033 (Fla. 3d DCA), rev. denied, 441 So. 2d 633 (Fla. 1983), which was relied upon by the Fourth District in its opinion. (A.3). As noted by the Fourth District, the facts in Wilsen are similar to those presented in this case, and Wilsen supports the decision that Mr. Gallina is not

[1]Citations to the opinion of the Fourth District Court of Appeal which is contained in Petitioner's Appendix shall be referred to as "A".

liable under the dangerous instrumentality doctrine. (A.3).

JURISDICTIONAL STANDARD

This Court may exercise discretionary jurisdiction over any decision of a district court of appeal "that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." Art. V, § 3 (b)(3), Fla. Const.; 9.030(a)(2)(A)(iv), Fla. R. App. P. This provision has been interpreted to limit the Court's jurisdiction to those cases where the conflict is express and not implied. Jenkins v. State, 385 So. 2d 1356, 1359 (Fla. 1980). "Article V uses the words 'direct conflict' to manifest a 'concern with decisions as precedents as opposed to adjudications of the rights of particular litigants.'" Mystan Marine, Inc. v. Harrington, 339 So. 2d 200, 201 (Fla. 1976). Further, where allegedly conflicting cases are factually distinguishable, jurisdiction will not lie. Department of Revenue v. Johnston, 442 So. 2d 950, 950 (Fla. 1983).

SUMMARY OF THE ARGUMENT

The Fourth District's opinion does not conflict with a decision of this Court or of another district court of appeal. The opinion simply applies existing precedent regarding liability under the dangerous instrumentality doctrine to the specific facts of this case which revealed that Mr. Gallina was not an owner, bailee or lessee of the vehicle. In fact, all of the case law relied upon by Petitioners to support conflict

jurisdiction requires the existence of some type of "identifiable property relationship between a defendant and a motor vehicle" before liability under the dangerous instrumentality doctrine is imposed. Mr. Gallina had no legal or "identifiable property relationship" with the vehicle. The cases cited by Petitioners are factually distinguishable because they impose liability where there was an identifiable property relationship. Thus, they cannot be the basis for conflict review.

ARGUMENT

THE DECISION OF THE DISTRICT COURT DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH A DECISION OF THIS COURT OR OF ANOTHER DISTRICT COURT ON THE SAME QUESTION OF LAW UNDER COMPARABLE FACTS.

Petitioners have failed to identify any express and direct conflict with any case law of this Court or any other district court as required for the exercise of this Court's jurisdiction under Article V, § 3(b)(3) of the Florida Constitution. As recognized by the Fourth District, liability has been imposed under the dangerous instrumentality doctrine "where there has been an identifiable property relationship between a defendant and a motor vehicle." (A.3). As discussed in the Fourth District's opinion and in the case law cited therein, liability under the dangerous instrumentality doctrine has been based upon ownership or a legal relationship such as bailee, renter or lessee. In this case, there was no identifiable properly relationship between Mr. Gallina and

the vehicle in question. Thus, each case relied upon by Petitioner to support conflict jurisdiction is factually inapposite and cannot support the exercise of this Court's jurisdiction.

Specifically, in Frankel v. Fleming, 69 So. 2d 887 (Fla. 1954), defendant rented a car which he allowed to be driven by the woman who had been living with him as his wife. Defendant was liable for the damages caused by the woman while driving the car because defendant was a bailee of the vehicle.

In Palmer v. R.S. Evans, Jacksonville, Inc., 81 So. 2d 635 (Fla. 1955), this Court held that where beneficial ownership of a vehicle had been transferred from a seller to a buyer under a conditional sales contract, a seller who holds mere naked title cannot be held liable for the negligent operation of the vehicle by the buyer.

In Metzel v. Robinson, 102 So. 2d 385 (Fla. 1958), it was held that defendant was liable for injuries caused by her nephew where the record established that she was, as a matter of law, the owner of a vehicle driven by her nephew. In Metzel, in order to assist her minor nephew in purchasing a car, defendant signed finance papers and took title of the vehicle in her name. Thereafter, the nephew made the payments. However, defendant insured the vehicle in her name and took no action to divest herself of title. Because of the legal relationship between defendant and the vehicle, it was held that defendant and her nephew both had a species of ownership of the vehicle and

could both be held liable for the accident.

Similarly, in Brown v. Goldberg, Rubenstein & Buckley, P.A., 455 So. 2d 487 (Fla. 2d DCA 1984), rev. denied, 461 So. 2d 114 (Fla. 1985), it was held that summary judgment was improper because, based upon the evidence presented, a jury could find "that the law firm was in fact a bailee of the motor vehicle." Thus, if the law firm was legally found to be a bailee it could be held liable under the dangerous instrumentality doctrine for negligent operation of the bailed vehicle by the client whom they permitted to use the vehicle.

Thereafter, in Kraemer v. General Motors Acceptance Corp., 572 So. 2d 1363 (Fla.1990), this Court held that a lessor and legal owner of a vehicle could be held liable under the dangerous instrumentality doctrine.

Likewise, in Marshall v. Gawel, 696 So. 2d 937 (Fla. 2d DCA 1997), it was held that where defendant was the registered legal owner of a vehicle, had insurance on the vehicle and had taken no steps to divest herself of title, summary judgment finding that she could not be liable under the dangerous instrumentality doctrine was improper.

In this case, the Fourth District examined the unique facts presented and recognized that Mr. Gallina was not an owner, bailee or lessee of the vehicle sufficient to impose liability under the dangerous instrumentality doctrine. (A.3). In addition, the Fourth District recognized that Angelina Gallina's use of the automobile was with the

permission of the title owner, her mother Carolina Gallina. (A.3). Applying relevant precedent, the Fourth District discussed the existing law and noted that in "the context of family relationships, the better rule is to have legal responsibility follow title ownership." Thus, the Fourth District held that "[u]nder the facts of this case, the trial court did not err in granting Louis Gallina's motion in accordance with his motion for directed verdict." (A.3).

Contrary to Petitioners' contention, there is no express and direct conflict between the Fourth District's opinion and that of any other case of this Court or another district court. The opinion simply applies existing precedent and is limited to factual circumstances where there is only a familial relationship and no legal relationship between the defendant and the vehicle.

Moreover, the statement in Petitioners' brief, that "[t]he 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" is inapposite. As discussed herein, those cases cited in Petitioners' brief which involve family relationships, namely, Frankel, Metzel, and Marshall, are factually distinguishable because in those cases there was a legal relationship such as owner or bailee in addition to the family relationship.

CONCLUSION

Based upon the foregoing facts and legal authorities, no direct or express conflict exists between the decision of the Fourth district and the cases cited by Petitioners. Accordingly, Respondents, Angelina Gallina, Carolina Gallina and Louis Gallina, respectfully request that this Court deny Petitioners' request for discretionary review.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondents' Brief on Jurisdiction was mailed this 2nd day of February 1999 to all counsel on the service list below.

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