

**IN THE SUPREME COURT OF FLORIDA**

**CASE NO. SC20-1311**

BRUCE KYLE EMERSON,

Petitioner,

vs.

L.T. Case Nos. 2D18-1872;  
2D18-4103; 2015-CA-4089

KYLE MICHAEL LAMBERT, et  
al.,

Respondent.

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**ON DISCRETIONARY REVIEW  
FROM THE FLORIDA SECOND DISTRICT COURT OF APPEAL**

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**AMICUS CURIAE BRIEF OF THE  
FLORIDA JUSTICE ASSOCIATION  
IN SUPPORT OF PETITIONER**

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RECEIVED, 08/05/2021 05:39:27 PM, Clerk, Supreme Court

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## **STATEMENT OF IDENTITY AND INTEREST**

The Florida Justice Association (FJA) is dedicated to strengthening and upholding Florida's civil justice system and protecting the rights of Florida's citizens and consumers. The FJA was founded in 1961 and currently has more than 3,500 members, including trial lawyers, consumer advocates, and injured victims. The FJA believes that all Floridians benefit when they have a fair chance to seek justice in our state's courts and that Florida's consumers are kept safer when wrongdoers are held accountable.

This case interests the FJA because the decision below changes the dangerous instrumentality doctrine by way of judicial lawmaking rather than legislative lawmaking. The FJA and other amici frequently advocate to the legislature to support or oppose changes to the doctrine. Such advocacy should remain restricted to the legislature, and changes to the doctrine should not be made by the courts expressly or implicitly overruling established judicial precedent. This is especially true here because the legislature has long since stepped in to fill the role of regulating the doctrine via legislative acts and relies on that established judicial precedent.

## **SUMMARY OF ARGUMENT**

The FJA fully supports the petitioner in this case, particularly his reading of the dangerous instrumentality precedents, their holdings, and their application to the facts of his case. Because the petitioner has capably argued these precedents, the FJA will not parrot those arguments.

This brief instead serves as a guide for this Court in fashioning its *stare decisis* policy in the context of common-law precedents. This Court recently has spoken, more than once, on its policy on precedents for written laws (constitutions, statutes, rules, etc.). But this Court has not recently addressed its policy for adhering to precedents on the common law—an uncodified body of judge-made law that significantly varies from the written laws.

Many common-law doctrines were fashioned in an era when wide gaps existed in the written laws, and thus, as Justices Holmes and Cardozo taught, common-law courts were required to effectively legislate to fill those gaps. Today, those gaps are few. Written laws are abundant. Legislatures have built upon the judge-made doctrines of centuries past to create bodies of law that are part statutory and part common law. That is certainly the case with Florida's dangerous

instrumentality doctrine. IB 30–38. Where, as here, the legislature repeatedly has changed a common-law doctrine, the judiciary should abstain from receding from its common-law precedents. Instead, a court should adhere to common-law precedents and employ standard tools of legal reasoning to determine how the holdings, rationales, and principles of those precedents apply to the facts of the case before the court.

An initial disclaimer. The respondent, Mrs. Lambert, has not preserved any argument for this Court to re-examine its precedents. So this Court should not consider such arguments. IB 38–40. This amicus brief, however, is presented in the abundance of caution in the event Mrs. Lambert or any amici supporting her seeks to change Florida’s common law via a judicial pronouncement.

### **ARGUMENT**

- I. Though the dangerous instrumentality doctrine originated in the common law, today only the legislature should modify that doctrine, something it frequently has done for more than 80 years.**

The dangerous instrumentality doctrine originated in the common law. *See, e.g.*, 3 Francis Wharton, *Treatise on the Law of Negligence* § 851, at 716 (1874) (“At common law a person using

dangerous instruments or mechanisms does so at his peril, and is responsible for any damages not caused by extraordinary natural occurrences, or by the interposition of strangers.”). The legislature enacted the common law long ago. See James W. Day, *Extent to Which the English Common Law and Statutes are in Effect*, 3 Fla. L. Rev. 303, 306–08 (1950) (explaining how the Florida Territorial Legislative Council enacted various statutes beginning in 1822 that adopted some form of English common law). Yet, the legislature always has stated that “the acts of the legislature” prevail over the common law. See § 2.01, Fla. Stat. (first adopted in 1829) (providing the common law “to be of force in this state” to the extent it was “not inconsistent with . . . the acts of the Legislature”).

A little more than a century ago, this Court first applied the common-law dangerous instrumentality doctrine to automobiles. See *S. Cotton Oil Co. v. Anderson*, 86 So. 629, 631 (Fla. 1920). But the legislature did not wait long to exercise its right to change this common-law doctrine. In 1937, it “granted [an] exemption from the doctrine in the case of injuries to gratuitous guests or hitch hikers.” *Crenshaw Bros. Produce Co. v. Harper*, 194 So. 353, 365 (Fla. 1940) (citing Ch. 18033, Laws of Fla. (1937)). As the opinion below

explained, since 1955, the federal and state legislatures frequently have “assert[ed] [their] authority to define the public policy parameters of the dangerous instrumentality doctrine.” *Lambert v. Emerson*, 304 So. 3d 364, 370 (Fla. 2d DCA 2020); *see also* IB 30–38.

The FJA represents to the Court that the legislature often considers proposed changes to the dangerous instrumentality doctrine. And those who are interested in such changes—like the FJA and other groups who lobby the legislature—routinely advocate for or against such changes. For example, the legislature recently modified the doctrine as it relates to “special mobile equipment.” Ch. 2019-104, § 1, Laws of Fla.

This Court should not become a second legislative branch where those who are displeased with established common-law precedents can seek—via appellate briefs—to change the law or argue what the law *should be*. Such forward-looking changes to the law should—and must—be sought in the legislature. *See* Neil M. Gorsuch, *A Republic, If You Can Keep It* 51 (2019) (“[T]he founders understood the legislative power as the power to prescribe new rules of general applicability for the future.”) In contrast, the judicial branch’s role is

to “resolv[e] disputes about *what existing law is* and how it applies to discrete cases and controversies.” *Id.* (emphasis added). When determining what is the existing unwritten common law, a judge “must . . . engage in legal reasoning to find . . . [a] case’s *holding*—the rule or principle necessary to justify or explain the outcome.” Bryan A. Garner et al., *The Law of Judicial Precedent 2* (2016).

In his initial brief, the petitioner ably presents *judicial*—not legislative or public policy—arguments showing that this Court’s common-law precedents *hold* that an intermediate bailee is financially responsible for entrusting a vehicle to another, even if the owner is a family member. IB 15–29. In contrast, the Second District—though attempting to couch its ruling in the law and legal reasoning—made a normative, public-policy judgment that there was no “sound basis” for two family members (one a title owner and the other a bailee) to be held liable for entrusting a car to a negligent driver. *See Lambert*, 304 So. 3d at 373. The Second District’s reasoning veered from the judicial lane and impermissibly encroached into the legislative lane.

As the Second District correctly observed below, “many of the judicial pronouncements about the public policies underlying [the

dangerous instrumentality] doctrine *preceded* the enactment of increasingly comprehensive legislation that addresses—and balances—the various societal and individual interests the courts were purporting to safeguard.” *Lambert*, 304 So. 3d at 372 n.8 (emphasis added). Some of this legislation reversed the preceding judicial pronouncements. *See, e.g.*, Ch. 18033, Laws of Fla. (1937); Ch. 2019-104, § 1, Laws of Fla. But the Second District below did not, and could not, cite to any legislation that reversed the preceding judicial pronouncements on the issue at hand—that is, the liability of an intermediate bailee entrusting a vehicle to another when the vehicle’s owner is a member of the bailee’s family.

Today’s jurists have recognized that “[w]hen exercising its inherent common-law authority,” a court “should look primarily to . . . legislative enactments for policy guidance.” *The Dutra Group v. Batterton*, 139 S. Ct. 2275, 2278 (2019) (Alito, J.). But what should a common-law court do where, as here, there is no explicit legislative enactment providing policy guidance? Should the court rely—like the Second District did below—on its own instincts about public policy? No. Above all else, in the absence of legislative direction, a court must adhere to precedent. As Justice Cardozo aptly said a century ago:

One of the most fundamental social interests is that the law shall be uniform and impartial. There must be nothing in its action that savors of prejudice or favor or even arbitrary whim or fitfulness. *Therefore in the main there shall be adherence to precedent.*<sup>[1]</sup>

Benjamin N. Cardozo, *The Nature of the Judicial Process* 112 (1921)

(emphasis added). Next, we explain the importance of adhering to common-law precedents and why this case is inappropriate for any departure from precedent.

**II. Even if Mrs. Lambert had preserved any argument asking this Court to re-consider its common-law precedents (she did not), this Court should adhere to those precedents.**

Fortunately, the Court need not—and may not—decide in this case the thorny, complicated judicial policy of how it should re-examine prior common-law precedents because the respondent, Mrs. Lambert, has not preserved any such argument. IB 38–40. But even if Mrs. Lambert were allowed to urge this Court to reconsider its prior

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<sup>1</sup> Of course, common-law controversies exist where, unlike here, no binding precedent governs. In such instances, judges must “fill[] the open spaces in the law.” See Cardozo, *supra*, at 113-114, 129 (quoting). But even then, judges should not impose their own public-policy judgments. They instead should follow, Justice Cardozo taught, “the traditions of the centuries;” “the example of other judges, [their] predecessors and [their] colleagues;” and “the collective judgment of the profession.” *Id.* at 114; see also *Air & Liquid Sys. Corp. v. DeVries*, 139 S. Ct. 986, 992 (2019) (Kavanaugh, J.) (stating that, when determining the common law, courts should consider, among other things, “judicial opinions, legislation, treatises, and scholarly writings.”).

common-law precedents, this Court should adhere to its precedents for the reasons argued herein.

**A. Adherence to precedent avoids the arbitrary exercise of judicial power.**

Alexander Hamilton wrote: “To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and *precedents* . . . .” *The Federalist No. 78* (emphasis added). Other legal giants—like William Blackstone, Justice Story, and Chancellor Kent—likewise agreed that adherence to precedent was an essential ingredient of the Anglo-American legal systems. See Garner, *supra* at 7–8. Adherence to precedent, also called *stare decisis*, is sometimes categorized as a “judicial policy.” *Id.* at 8. Whatever the label, adherence to precedent is not an “inexorable command.” *Id.* Yet, for the doctrine to prevent the arbitrary exercise of judicial power, departures from precedents must be principled.

**B. This Court’s recent judicial policies for departing from precedents on written laws generally are not instructive in this common-law case because of the differences between the written laws and the common law.**

Recently, this Court has established principles for departing from precedents grounded in *written laws*—like a constitution,

statute, or rule. *See, e.g., State v. Poole*, 297 So. 3d 487, 506–07 (Fla. 2020) (Sixth and Eighth Amendments); IB 40; *see also* Garner, *supra* at 1 (discussing the difference between written and unwritten laws). The Court has said that precedents interpreting written laws will be adhered to, unless it shown the precedents were “clearly erroneous.” *See Thompson v. DeSantis*, 301 So. 3d 180, 184 (Fla. 2020) (“[T]o justify departing from the principle of stare decisis, we would have to conclude that our relevant precedents clearly erred in their understanding of the ‘judicial power’ vested in Florida’s courts by article V, section 1.”); *Wilsonart, LLC v. Lopez*, 308 So. 3d 961, 964 (Fla. 2020) (holding precedents interpreting rule 1.510 were not “clearly erroneous” and thus the Court would not “recede from that jurisprudence or ‘reinterpret’ [the rule]”).

But the common law—the law governing this case—is very different than the written laws. *Cf.* Garner, *supra* at 1, 15. It is not at all clear how this Court could practically apply its “clearly erroneous” standard to common-law precedents. In the context of written laws, a predecessor court may have “clearly erred” by failing to apply the original public understanding of a constitutional or statutory text. In contrast, the common law has no text to interpret

or original public meaning to find.

After all, the common law is uncodified, judge-made law. *E.g.*, Garner, *supra* at 15. It is not a product of judicial interpretation. While the legal profession operated for centuries under the fiction that “that judges merely ‘discovered’” the common law, the profession in the early twentieth century acknowledged the reality “that judges in fact ‘make’ the common law.” Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution & Laws*, in *A Matter of Interpretation: Federal Courts & the Law* 10 (Amy Gutmann ed. 1997).

Stated bluntly, when fashioning the common law, courts of the past legislated. Albeit they did so in a limited sense by merely filling the gaps left open by legislators. As Justice Cardozo stated in 1921:

The law. . . is not found, but made. The process, being legislative, demands the legislator’s wisdom.

There is in truth nothing revolutionary or even novel in this view of the judicial function. It is the way that courts have gone about their business for centuries in the development of the common law.

. . . .

In countless litigations, the law is so clear that judges have no discretion. They have the right to legislate within the gaps, but often there are no gaps.

Cardozo, *supra* at 115–16, 129; *see also* *S. Pac. Co. v. Jensen*, 244

U.S. 205, 221 (1917) (Holmes, J. dissenting) (“I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions.”).

In this century, however, there has been a renewed emphasis on judges and legislators each staying in their respective lanes. See Gorsuch, *supra* at 50–54. Moreover, many more written laws exist today than did in the past,<sup>2</sup> and thus far fewer gaps need judicial fillings. So how should today’s courts treat common-law precedents from a bygone era where judges used their common-law powers to fill the wide gaps in the written laws?

During recent decades, this Court’s predecessors have claimed broad, legislative-like powers to change the common law fashioned by courts of past eras. For example, Justice Pariente writing for the Court said this: “All rules of the common law are designed for application to new conditions and circumstances, and we exercise a broad discretion taking into account the changes in our social and economic customs and present day conceptions of right and justice.”

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<sup>2</sup> See, e.g., Clint Bolik, *The Proper Role of “Judicial Activism,”* 42 Harv. J. L. & Pub. Pol’y 1, 2 (Winter 2019) (quantifying the growth of the U.S. Code since the country’s founding and, in particular, the explosion of statutes since 1958).

*Beal Bank, SSB v. Almand & Assocs.*, 780 So. 2d 45, 58 (Fla. 2001) (internal quotations and alterations omitted).

Chief Justice Wells, however, dissented and disagreed. Though acknowledging that “clarification” of the common-law precedents would be “beneficial to all concerned,” he opined that “such clarification is better a legislative task” because “[t]here are many consequences of such changes—some known and, in all probability, many unknown and likely unintended.” *Id.* at 63 (Wells, C.J., dissenting). Chief Justice Wells’ dissent aligns more closely with our era’s renewed emphasis on judges not legislating. *Cf.* Gorsuch, *supra* at 50–54. Today’s Court should steer clear of any doctrinal path that would allow it to depart from common-law precedents. The legislature is better suited to consider “changes in our social and economic customs and present day conceptions of right and justice” and then change the common law accordingly. *Cf.* *Beal Bank*, 780 So. 2d at 58 (quoting) (internal quotations omitted).

**C. The Court should adhere to its precedents on the dangerous instrumentality doctrine.**

1. Given the legislature’s extensive modifications to the dangerous instrumentality doctrine over the last eighty years, this

Court would be stepping outside of its judicial lane if it used its common-law powers to change this body of substantive law that the legislature, by its silence, has chosen not to change. This point has been adequately covered *supra* § I, at 3–8, and by Petitioner, IB 30–38; thus, no more needs to be said.

2. In establishing a doctrinal basis for reconsidering precedents on written laws, this Court has recognized that “reliance interests” may be a basis to adhere to precedents, even those that were clearly erroneous. *See Poole*, 297 So. 3d at 507 (quoting). A treatise co-authored by, among others, then-Judges Gorsuch and Kavanaugh stated this same principle as follows:

[A] respect for precedent is said to advance notice and reliance interests. To a society aspiring to live under the rule of law, it’s no small thing to ensure that citizens can determine in advance what the law will require of them and have the chance to conform their conduct to it.

Garner, *supra* at 11; *see also Beal Bank*, 780 So. 2d at 63 (Wells, C.J., dissenting) (“[T]o suddenly judicially change [the common law] and place new legal requirements . . . appears to me to create a myriad of legal, constitutional, and fairness issues.”)

These same interests likewise should inform whether this Court adheres to common-law precedents. The law on liability arising out

of the negligent operation of an automobile does not fall exclusively in either a statutory or common-law bucket; both sources of law govern. The common-law foundation came first, and over the course of a century, that foundation has been significantly altered by way of legislation.

When automobile owners, lessors, lessees, bailors, bailees, and operators (among others) decide how to order their affairs, they must know in advance both the statutory and common law on automobile liability. And these citizens can and do rely on both bodies of law to so order their affairs. For example, in this case, if the Lamberts wanted to reduce the risk of having one spouse (Mr. Lambert) being liable as an owner and a second spouse (Mrs. Lambert) being liable as an intermediate bailee, they simply could have designated the spouse who normally used and entrusted the vehicle (Mrs. Lambert) as the owner. Indeed, attorneys frequently advise married clients to do exactly that to minimize their risk of liability. The fact that Mr. and Mrs. Lambert did not receive, or follow, such advice is not a reason to change this Court's settled precedents.

These reliance interests extend to more than just the owners, bailors, operators, etc. of automobiles. These interests also extend to

the persons injured by the negligent operation of automobiles—the persons that FJA members represent—as well as countless others who handle such persons’ claims (insurance companies and their adjustors; mediators; personal injury attorneys and their investigators and paralegals, etc.). Every time a person is injured in Florida because of the negligent operation of an automobile, these countless persons (adjustors, mediators, etc.) rely on this Court’s common-law precedents to evaluate the injured person’s claim and achieve a just settlement.

Often, such claims are resolved without a lawsuit. But when a suit is required, the reliance on this Court’s precedents only increase, as attorneys for both the injured persons and the defendants will make innumerable strategic and tactical decisions based on the precedents. These precedents guide, for example, decisions on: (i) whom to sue and not sue; (ii) whom to name as third-party defendants or at-fault responsible non-parties; and (iii) with whom to settle and not settle. Changing these precedents now—after such suits have been filed—seriously upsets these reliance interests.

In short, many people in Florida make decisions every day based on this Court’s common-law precedents governing automobile

liability. Of course, the law is not immutable. For the benefit of the Florida citizenry, this law may need changes. But such changes should come from the democratically elected members of the legislature, not the seven members of this Court.

### **CONCLUSION**

This Court should reverse the decision of the Second District for the reasons stated by the Petitioner.

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### **CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY that the foregoing document complies with the word-count limitation of Rule 9.370(b), Florida Rules of Appellate Procedure, in that it contains 3,392 words (including words in headings, footnotes, and quotations), according to the word-processing system used to prepare this document. This document also complies with the line spacing, type size, and typeface requirements of Rule 9.045, Florida Rules of Appellate Procedure.

/s/Bryan S. Gowdy

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing motion was filed with the Clerk of Court on August 5, 2021, via the Florida Courts E-Filing Portal and that a true and correct copy of the foregoing has been furnished via email to:

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