

**IN THE SUPREME COURT OF FLORIDA**

BRUCE KYLE EMERSON,

Petitioner,

v.

Case No.: SC20 -1311

L.T. Nos.: 2D18-1872,

KYLE MICHAEL LAMBERT, et al.,

2D18-4103

2015-CA-4089

Respondent.

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

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**PETITIONER'S INITIAL BRIEF ON THE MERITS**

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RECEIVED, 07/19/2021 04:28:31 PM, Clerk, Supreme Court

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## **STATEMENT OF THE CASE AND OF THE FACTS**

It is not uncommon for the owner of a motor vehicle to allow a person to use the vehicle and for that person to then allow someone else to drive it. This brief coins the term “intermediate bailee” to refer to such a person because they are a “bailee” as to the owner and a “bailor” as to the driver.<sup>1</sup> This case presents the question of whether there should be a judicially-crafted exception to relieve intermediate bailees from liability under the common-law dangerous instrumentality doctrine when they were given control of the motor vehicle by a family member.<sup>2</sup>

This Court recognized and enforced the liability of intermediate bailees under the common law in *Frankel v. Fleming*, 69 So. 2d 887 (Fla. 1954), but the district court here decided to fashion an exception to relieve the intermediate bailee of any responsibility when the person that entrusted the vehicle to them is

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<sup>1</sup> See *Bailment*, Black’s Law Dictionary (11th ed. 2019) (defining “Bailment” as “[a] delivery of personal property by one person (the *bailor*) to another (the *bailee*) who holds the property for a certain purpose”); see also *McDowell v. Rodriguez*, 822 So. 2d 14, 16 (Fla. 5th DCA 2002) (using term “interim bailee/bailor”).

<sup>2</sup> The responsibility of the ultimate bailee (the driver) and the original bailor (the owner) are not in dispute.

a family member. *Lambert v. Emerson*, 304 So. 3d 364, 367-73 (Fla. 2d DCA 2020). Finding support in an earlier decision by another district court recognizing the same exception, *Aurbach v. Gallina*, 721 So. 2d 756, 759-60 (Fla. 4th DCA 1998) (“*Aurbach I*”), the court reversed the judgment below as against an intermediate bailee, and certified the question to be of great public importance. 304 So. 3d at 373-74.

This Court accepted review after Bruce Kyle Emerson invoked its jurisdiction based not only on the certified question, but also on the ground that the decision expressly and directly conflicts with both *Frankel* and this Court’s decision in *Aurbach v. Gallina*, 753 So. 2d 60 (Fla. 2000) (“*Aurbach II*”), which – in Mr. Emerson’s view, at least – expressly rejected *Aurbach I*’s exception and held that *Frankel* applies to bailments between family members. The one area where the parties and district court agree is that any changes to the dangerous instrumentality doctrine should come from the legislature, not the courts, so the ultimate question is which party is correctly interpreting and applying *Frankel* and *Aurbach II*.

\* \* \*

The relevant facts and procedural history are straightforward. On the evening of January 5, 2015, in Wesley Chapel, Mr. Emerson suffered catastrophic injuries rendering him quadriplegic when he was thrown from his motorcycle after colliding with a car driven by Kyle Lambert (referenced hereinafter by his first name, consistent with the district court’s opinion and to avoid confusion with his parents, whom the opinion references as “Mr. and Ms. Lambert”). (T:574-78, 729-39, 678-79, 1574.)<sup>3</sup>

Kyle’s father, Keith Lambert, held the title but had entrusted day-to-day control and maintenance of the car to his wife (Kyle’s mother), Debbie Lambert, as “her daily driver.” (T:702, 887, 897-98.) Mr. Lambert consented to anyone in the family using the car, but he let Ms. Lambert control the car on a daily basis and decide

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<sup>3</sup> The district court submitted the record to this Court through several separate filings on May 12, 2021. This brief cites the components of the record referenced herein using the following abbreviations of the description of these components in the docket notes: “R” for “Record on Appeal” (the record from the trial court that was before the district court), “T” for “Transcript” (the transcript from the trial), and “A” for “Certified Copies of Appeal Papers – 530 pg” (the appellate filings in case number 2D18-1872, most of which are duplicated in the similarly titled file ending “531 pg,” which contains the filings in case number 2D18-4103). The number following the abbreviation in each citation reflects the pdf page number, including for the trial transcript.

when to let others drive it. (T:887-88.) The night of the accident, Kyle had asked for and received permission to drive the car from Ms. Lambert. (T:659, 685, 887, 898.)

Mr. Emerson sued all three, alleging that Kyle was negligent, Mr. Lambert was vicariously liable as the title owner, and Ms. Lambert was vicariously liable as a bailee who entrusted the car to Kyle. (R:1-4.) Ms. Lambert maintained throughout that she had no responsibility even if she were a bailee because she did not hold the title to the car, but the trial court consistently rejected that claim in light of *Aurbach II*. (R:9, 34, 36-37, 39-42, 1601-19, 1739-45, 2306-09; T:1733-39, 1743-45.)

The jury found in favor of Mr. Emerson against all three defendants, including a finding that Ms. Lambert was a bailee who allowed Kyle to use the car. (R:1711, 1713.) It awarded over \$27 million in damages, but found that Mr. Emerson was comparatively negligent, apportioning 75% of the fault to Kyle and 25% to Mr. Emerson. (R:1710-12.) The trial court entered judgment for just under \$19 million against Kyle, representing the full amount of damages less Mr. Emerson's percentage of fault and agreed setoffs. (R:1718-19, 1979.) It later entered a separate judgment for the

same amount against Ms. Lambert and for \$600,000 against Mr. Lambert to comply with the cap on the liability of title owners imposed by section 324.021(9)(b)3, Florida Statutes (2015). (R:1718-19, 2932-33.)

After Kyle appealed the judgment against him in case number 2D18-1872, and Mr. and Ms. Lambert appealed the judgment against them in case number 2D18-4103, the district court consolidated the appeals for all purposes. (A:37-41.) The only issue raised by Kyle and Mr. Lambert was a claim (joined by Ms. Lambert) that the trial court had erred in denying their motion for new trial based on alleged juror misconduct. (A:101-49.) The district court rejected that argument without comment and affirmed the judgments as to Kyle and Mr. Lambert. 304 So. 3d at 365.

The other issue raised on appeal was Ms. Lambert's claim that by letting the claim against her go to the jury, "[t]he trial court improperly extended dangerous instrumentality liability to a non-owner spouse under a theory of bailment contrary to [*Aurbach II*]." (A:88-101.) As the district court would conclude, the jury's finding that Ms. Lambert was a bailee was not "seriously disputed," and her appellate arguments "focuse[d] almost entirely on the broader legal

argument that a family member bailee of a car cannot be held liable pursuant to the dangerous instrumentality doctrine.” *Lambert*, 304 So. 3d at 366.

Mr. Emerson responded that this was the very argument that this Court had granted review to reject in *Aurbach II* because it directly conflicted with *Frankel*. (A:190-96.) He also noted that the district court had previously held that it was “possible” for a mother who was the bailee of a car owned by the father and who had lent the car to their daughter to be “liable in this context for her bailment to her daughter and that her husband is liable in turn as her bailor.” (A:195 (quoting *Stanford v. Chagnon*, 86 So. 3d 565, 568 (Fla. 2d DCA 2012)).)

Ms. Lambert replied that Mr. Emerson was misreading *Aurbach II* and *Stanford* and insisted that affirming the judgment against her would constitute an expansion of the dangerous instrumentality doctrine. (A:375-78.) At no point did Ms. Lambert suggest, much less seek to preserve, an alternative argument that either *Aurbach II* or *Frankel* were wrongly decided.

The district court “accept[ed] the jury’s determination that a bailment arose between Mr. and Ms. Lambert.” 304 So. 3d at 367.

But it reversed the judgment against Ms. Lambert by concluding a family member should not be held responsible as bailee for entrusting a car titled in the name of another family member, at least so long as the title owner accepts responsibility. *Id.* at 372-74.

After tracing the development of case law on the dangerous instrumentality doctrine as well as the concept of beneficial ownership, the court summarized its view of the current law:

Drawing together *Aurbach [II]*'s affirmance of [*Aurbach I*s] observations that the extension of beneficial ownership under the dangerous instrumentality doctrine should be reserved for instances where the car's owner was trying to deny vicarious liability, and the general development of the doctrine in both the common law and in legislation, we synthesize the current state of the dangerous instrumentality doctrine as follows: if title owners of a car entrust their car to a family member who, in turn, causes injury, the title owners may be held vicariously liable for that tort. If a family member has an identifiable property interest in a car (whether a bailment or some other recognized property interest) and entrusts their car to another who, in turn, causes injury, that family member can be held vicariously liable for the tort **if the title owner denies vicarious liability for that entrustment.**

304 So. 3d at 372-73 (citations omitted).

It then explained its view on whether the intermediate bailee family member could also be responsible for entrusting the vehicle to a negligent driver:

But we do not believe there is a sound basis in the law to hold **both** the acknowledged title owner **and** a family member bailee liable for the bailee's entrustment of a car under the dangerous instrumentality doctrine. To expand vicarious liability to that degree ignores the precautions *Aurbach [II]* repeated about this facet of the common law – that it is not expansive and is narrowly implicated outside of its “most common” application to title owners. *Aurbach [II]*, 753 So. 2d at 62-63. And with families, expanding the doctrine's reach beyond vicariously liable title owners to add spouses, children, step-children, siblings, and other relatives who may use a proverbial “family car” in varying ways under varying circumstances, would require courts to taxonomize the precise property rights among relatives whose use of a car may be so loose and vacillating as to be indiscernible.

*Id.* at 373. In support of this conclusion, the district court quoted the following passage from *Aurbach I*:

To analyze family dynamics to determine all the “beneficial” owners of a car is to impose a fuzzy legal standard that will encourage litigation and potentially expand liability beyond that which is justified by the rationale for the rule.

*Id.* (quoting *Aurbach I*, 721 So. 2d at 729).

The court concluded with two observations. First, the court commented that

it seems odd and certainly at cross-purposes to use the fiat of common law to expand a form of vicarious tort liability that the legislature has repeatedly curtailed. Indeed, the very imposition of a statutory cap on this form of vicarious liability to a singular entity

(defining “owner” as a person who holds the legal title of a motor vehicle “; or” a conditional vendee, or lessee, or mortgagor) suggests that the legislature viewed the state of dangerous instrumentality law in the same way we have.

*Id.* (citations omitted). Second, it dropped the following footnote:

We note that many of the judicial pronouncements about the public policies underlying this common law doctrine preceded the enactment of increasingly comprehensive legislation that addresses – and balances – the various societal and individual interests the courts were purporting to safeguard. Ascribing vicarious liability in a time when automobile operation is heavily regulated and car insurance has long been a mandatory condition for operating a car on a public road is perhaps a task better suited to the legislature than the courts.

*Id.* n.8.

The court recognized that it had articulated a contrary principle of law in *Stanford*, but concluded that language was both dicta and incorrect, expressing confusion as to why the *Stanford* court had made a statement about the mother’s possible liability because she was not a party and only the liability of the title-holding father was at issue. 304 So. 3d at 367, 373 n.9.

Recognizing that this issue “could affect many similarly situated cases,” the district court certified the following as a question of great public importance:

UNDER THE DANGEROUS INSTRUMENTALITY DOCTRINE, CAN ONE FAMILY MEMBER WHO IS A BAILEE OF A CAR BE HELD VICARIOUSLY LIABLE WHEN THE CAR'S ACKNOWLEDGED TITLE OWNER IS ANOTHER FAMILY MEMBER WHO IS ALSO VICARIOUSLY LIABLE UNDER THE DOCTRINE?

*Id.* at 374.

After the district court denied his motion for rehearing or rehearing en banc without comment, Mr. Emerson timely invoked the discretionary jurisdiction of this Court. (A:489, 492-93.) In his jurisdiction brief, Mr. Emerson urged the Court to grant review based not just on the certified question, but also on express and direct conflict with *Frankel* and *Aurbach II*. Ms. Lambert responded with her view that not only was Mr. Emerson misreading *Aurbach II*, but that this Court had actually “resolved the question” certified by the district court in her favor in that decision. This Court granted review and indicated it will set oral argument by separate order.

### **SUMMARY OF ARGUMENT**

As issue is which party has correctly interpreted this Court’s precedents in *Frankel* and especially *Aurbach II*. In other words, this is not an instance where the issue is which of two conflicting rules this Court should follow. All agree that any changes to the

dangerous instrumentality doctrine should come from the legislature, not the courts.

I. This Court recognized the liability of intermediate bailees under the dangerous instrumentality doctrine in *Frankel*, which in turn relied on an earlier decision making clear that it is the dominion to decide who drives the vehicle, not the species of property interest the defendant holds in the vehicle that determines liability. Moreover, *Frankel* involved a bailment among what the Court then considered to be family members. And in any event, the jurisdictional holding in *Aurbach II* was that a district court decision creating an intra-family exception expressly and directly conflicts with *Frankel*.

II. The decision below also violates this Court's holding on the merits in *Aurbach II*. (A) In rejecting the same holding reached by the Second District in this case, this Court held in *Aurbach II* that the Fourth District erred in creating an exception for intra-family bailments. While it held that the district court reached the right result by affirming a defense judgment in that case, it made clear that the only reason for that result was the failure of the

plaintiff to plead or prove that the defendant parent had a bailment or other property interest in the vehicle.

(B) Overlooking the directly-on-point holdings from *Aurbach II*, the district court and Ms. Lambert created and knocked down straw man arguments that Mr. Emerson was seeking to hold Ms. Lambert liable either as a beneficial owner or as a parent. But he has never done either, and he fully agrees that *Aurbach II* holds that neither theory of liability would be valid. But the sections of the opinion reaching those holdings make equally clear that a parent is liable if a bailment is proven.

III. This Court's holdings in *Frankel* and *Aurbach II* remain good law. (A) The legislature now occupies the field of dangerous instrumentality law, having built a host of regulations on top of the doctrine, including creating the specific exceptions and limitations on liability that it has determined, through the political process, are warranted. Since *Frankel*, for example, it enacted section 324.021, Florida Statutes, which it has amended twenty-eight times, including nine amendments since *Aurbach II*. While it is well aware of this Court's case law on the doctrine, it has never seen fit to limit, much less legislatively overrule, either decision. The district

court suggested that by limiting the liability of owners without addressing the liability of bailees, the legislature must silently agree with the second district's decision to limit bailee liability in the family context. The silent "intent" of the legislature, as opposed to its affirmative actions, should be irrelevant because it cannot modify the common law without a clear statement in actual legislation. Moreover, there are ample reasons to conclude that the legislature chose to only limit the liability of title holders while intending to keep full liability for those with harder-to-prove property interests who put the subject vehicle in the control of a negligent driver.

(B.) Finally, this case does not present occasion for this Court to determine whether to overrule any of its precedents. The parties and district court agree that any modifications to the common law should come from the legislature, not the courts. Ms. Lambert has not preserved any argument for overruling or limiting either *Frankel* or *Aurbach II*. Any such attempt would have required the impossible tasks of both showing that the decisions were contrary to a higher authority and would not disturb the reliance interests of not just the parties to this litigation, but all individuals and business

concerned with how to title or insure motor vehicles. Thus, there is no occasion for Mr. Emerson to have developed the record or legal arguments why this Court should decline to overrule precedent. But if the Court elects to consider that issue *sua sponte*, Mr. Emerson requests leave to be heard.

### **ARGUMENT**

**Bailees are vicariously liable for the negligence of drivers to whom they entrust the vehicle, regardless of whether a family member is also liable as the title holder.**

**Standard of Review.** Whether the dangerous instrumentality doctrine applies to a given set of facts is a pure question of law reviewed de novo. *Rippy v. Shepard*, 80 So. 3d 305, 306 (Fla. 2012).

Though this case is before the Court on both a certified question and a claim of express and direct conflict, this is not a case where this Court is asked to decide *de novo* how to answer the question or which of two conflicting decisions to follow. The parties and district court agree that the common-law dangerous instrumentality doctrine is not suited for any further judicial lawmaking given the degree to which the doctrine has been

regulated by the legislature. The issue here is who is correctly interpreting this Court's precedents in *Frankel* and *Aurbach II*.

This Court should answer the certified question in the affirmative, quash the decision below, and remand with directions to reinstate the judgment against Ms. Lambert because (I) the district court had no authority to fashion an exception to the common-law rule this Court recognized in *Frankel*, (II) this Court expressly considered and rejected the very same intra-family exception in *Aurbach II*, and (III) the legislature has not disturbed the common law on this issue, despite making other changes to the dangerous instrumentality doctrine, and this case does not present the question of whether this Court should overrule prior precedent.

**I. This Court recognized the liability of an intermediate bailee in *Frankel*, and the district court had no authority to create an exception.**

In the decision this Court cited as a source for the dangerous instrumentality doctrine, the Court of King's Bench recognized over two centuries ago that the doctrine made "persons having in their custody instruments of danger" liable for damages for injuries caused by those in whom they entrusted the instrument. *Dixon v.*

*Bell* (1816), 105 Eng. Rep. 1023, 1023, 5 Maule & Selwyn 198, 198, cited in *S. Cotton Oil Co. v. Anderson*, 86 So. 629, 631 (Fla. 1920).

Having previously determined that the automobile qualified as a dangerous instrumentality in *Southern Cotton Oil*, 86 So. at 621, the question in *Frankel* was whether “the doctrine of dangerous instrumentality [is] limited in scope to the owner thereof rather than to include a bailee ... who in turn delivers possession to another person.” 69 So. 2d at 888 (alterations in original). This Court refused to limit the doctrine because “[p]roof 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.” *Id.* (citing *Wilson v. Burke*, 53 So. 319 (Fla. 1951)); see *Wilson*, 53 So. at 321 (noting there was a factual dispute whether the defendant owned or leased the vehicle, but holding this was irrelevant because “it was not necessary to prove actual title, but only to establish who exerted such dominion over the truck as to be responsible for damage caused by it”). Thus, this Court had

no difficulty in now holding the appellant, a bailee, responsible in the instant case for injury caused by the one to whom he entrusted the car.

*Frankel*, 69 So. 2d at 888.

With one exception, the question this Court answered in *Frankel* was strikingly similar to the question the district court certified here: “Is the doctrine of dangerous instrumentality limited in scope to the owner thereof rather than to include a bailee [Frankel] for hire who in turn delivers possession to another person [Wellener].” 69 So. 2d at 888 (alterations in original). The exception, of course, is that the certified question in this case is limited to bailments between family members. But that should have been a distinction without a difference to the district court for two reasons.

First, *Frankel* actually dealt with a bailment among what this Court considered to be family members “to all intents and purposes.” *Id.* After being run down by a car, Fleming sued and recovered a judgment against (1) Wellener, who drove the car, (2) Fleming who lent the car to Wellener, and (3) the appellees in *Fleming v. Alter*, 69 So. 2d 185 (Fla. 1953), who were co-owners of the car that had rented it to Frankel. *Id.* In one appeal, this Court upheld the responsibility of the co-owners in *Fleming* because, even though there was no evidence they knew or consented to Frankel letting Wellener drive their car, (1) Frankel and Wellener appeared

to be married and (2) the circumstances implied the owners' consent that the car would "be driven by the members of the bailee's family who would normally operate the vehicle were it the man's own." *Fleming*, 69 So. 2d at 186. In the separate *Frankel* appeal, this Court affirmed the responsibility of Frankel, the intermediate bailee, for letting Wellener drive the car, noting that its conclusion that Fleming could be responsible as bailee was especially appropriate given their apparent familial relationship. *Frankel*, 69 So. 2d at 888.

Second, even if *Frankel* had not addressed bailments among family members, the district court lacked the authority to create an exception to its holding for intra-family bailments. District courts of appeal are bound to apply a precedent from this Court, even if they think it should be modified. *See generally Hoffman v. Jones*, 280 So. 2d 431, 434 (Fla. 1973). If there are scholarly reasons to modify a common-law doctrine recognized by one of this Court's precedents, a district court is free to explain them and certify the question so this Court can decide whether to overturn or modify its precedent. *Id.* But the panel did the opposite here.

True, the facts in *Frankel* concerned an intermediate “bailee ... for hire” and the bailment here was gratuitous. But the rule of law recognized and applied in *Frankel* (as well as in this Court’s earlier decision in *Wilson*) was that the intermediate bailee had control of the vehicle and entrusted it to the negligent driver, so the specific nature of the legal right to exert dominion over the vehicle was not dispositive. The specific type of property interest held by the defendant is therefore irrelevant under *Frankel* and *Wilson*.

In any event, to the extent a district court opinion holds that legal title is the only basis for imposing dangerous instrumentality liability in a family relationship, as occurred here, the decision is contrary to *Frankel*. This was the precise jurisdictional holding in *Aurbach II*. See 753 So. 2d at 61, 66 (noting that *Aurbach I* “could be construed to mean that legal title is the only basis for imposing vicarious liability in a family relationship” and exercising conflict jurisdiction because such a holding “would conflict with our decision in *Frankel*”).

Because this Court has never receded from *Frankel* (in *Aurbach II* or otherwise), the decision below cannot stand.

**II. This Court's decision in *Aurbach II* rejected the very exception for intra-family bailments that the district court applied in this case.**

The (lack of) authority of the district court to create an exception to the rule of liability established in *Frankel* aside, its decision to fashion such an exception for intra-family bailments directly conflicts with this Court's decision on the merits in *Aurbach II*. The facts in that case are strikingly similar to the facts here with one critical distinction. In each case, the negligent driver was driving a car titled in the name of one parent, the responsibility of the driver and title-holding parent were not challenged, and the issue on appeal was whether the other parent (the father in *Aurbach II* and the mother in this case) could also be responsible. 753 So. 2d at 61 (quoting *Aurbach I*, 721 So. 2d at 759). The distinguishing fact is that there was no claim, evidence, or jury finding in *Aurbach II* that the other spouse had a bailment or any other property interest in the car. *Id.* at 65-66.

On appeal from the trial court's grant of a directed verdict to the father in *Aurbach I*, the Fourth District made the following observation:

In the context of family relationships, the better rule is to have legal responsibility follow title ownership, a bright line standard which makes liability under the dangerous instrumentality doctrine both foreseeable and predictable. To analyze family dynamics to determine all the “beneficial” owners of a car is to impose a fuzzy legal standard that will encourage litigation and potentially expand liability beyond that which is justified by the rationale for the rule.

721 So. 2d at 759.<sup>4</sup> It then affirmed the trial court’s ruling, explaining its reasoning as follows:

In this case, Louis Gallina was not an owner, bailee, or lessee of the automobile sufficient to impose liability under the dangerous instrumentality doctrine. He did not put the car in the possession of a non-family member. Angelina Gallina’s operation of the car on the date of the accident was with the permission of the title owner, her mother Carolina.

*Id.*

As noted above, this Court granted review, holding that it had jurisdiction because the district court’s decision could be construed to limit application of the dangerous instrumentality doctrine to title owners in the family context. *Aurbach II*, 753 So. 2d at 61, 66. This Court approved the district court’s decision to affirm, but for its

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<sup>4</sup> This is the same language the district court in this case cited (indeed, quoted) as supporting its decision to recognize an intra-family exception to the dangerous instrumentality doctrine. *Lambert*, 304 So. 3d at 373.

own reasons. The Court examined and ultimately rejected three potential theories of liability against the father, but only the first one should have any bearing on this case.

**A. This Court held in *Aurbach II* that an intermediate bailee will be financially responsible for entrusting a vehicle to another, even if the owner is a family member.**

This Court began its analysis in *Aurbach II* by tracing the origin of the dangerous instrumentality doctrine in Florida and how it has been applied to impose responsibility on persons who had an “identifiable property interest” in a vehicle negligently driven by another. *Id.* at 62-63. It concluded its review of the case law by noting that in *Frankel*, the Court “recognized the vicarious liability of lessees and bailees of motor vehicles who authorize other individuals to operate the motor vehicles” and by emphasizing that whether someone is “vicariously responsible as a bailee for the negligent operation of a motor vehicle may be a fact-based inquiry.” *Id.* at 63.

When it applied this law to the facts before it, this Court held that the district court was correct to affirm the directed verdict in favor of the father, but not for the reason suggested by the district

court regarding intra-family bailments. *Id.* at 65-66. Affirmance was required, this Court held, for the sole reason that the father never acquired a bailment interest – the very fact that distinguishes that case from this one. The Court concluded that there was no dispute in the record that the father “was neither the legal title holder, beneficial owner, **nor bailor** of the vehicle.” *Id.* at 65 (emphasis added). While it noted the jury found that he “had the right to control the vehicle,” the record contained “no facts to support a finding that Louis Gallina had the right to control his adult daughter’s use of the vehicle other than an inference to be drawn from the fact he was her father.” *Id.* at 65-66. It emphasized that the plaintiffs did not contend the father “was liable as a bailor of the vehicle.” *Id.* at 66. In sum, it affirmed because the key fact present here was missing – the subject parent was not an intermediate bailee and had no property interest in the vehicle at all.

This Court’s rejection of the different rationale suggested by the Fourth District (and embraced by the district court here) was not just implicit in the foregoing analysis. This Court expressly rejected it:

[W]hile we commend the Fourth District for its attempt to simplify this area of dangerous instrumentality law, we disapprove of [*Aurbach I*] to the extent it could be construed to mean that legal title is the only basis for imposing vicarious liability in a family relationship, because this would conflict with our decision in *Frankel*. Although vicarious liability will generally flow from legal title, this principle does not preclude the imposition of vicarious liability under the dangerous instrumentality doctrine pursuant to other identifiable property interests, **including bailment**.

753 So. 2d at 66 (emphasis added).

Neither Ms. Lambert nor the district court have ever contended that this was dicta. Nor could they for two reasons. First, the Fourth District's erroneous conclusion that "legal title is the only basis for imposing vicarious liability in a family relationship" was the basis for this Court's conflict jurisdiction in *Frankel*. The Court could not approve the result below, unless it had jurisdiction to review the case. Second, the conclusion was also necessary to its merits decision. While the two courts reached the same result, the reason this Court approved the trial court's ruling was that while bailment was a valid theory of liability, it was simply not established by the facts.

Indeed, at one point in her initial brief below, Ms. Lambert seemed to acknowledge this holding. (A:93-94.) The only reason she

offered for escaping it was a passing claim that she had given her son permission to drive the car only “as a parent” and that “any legal relationship of bailment” was “missing” as between Mr. and Ms. Lambert. (A:94.) The district court concluded she did not “seriously disput[e] the discrete issue of whether she was a bailee.” *Lambert*, 304 So. 3d at 366. Regardless, it expressly accepted the jury’s finding that a bailment arose between Mr. and Ms. Lambert, *Id.* at 367, and that finding is fully supported by competent, substantial evidence. (T:659, 685, 702, 887-88, 897-98.)

The district court’s decision to nonetheless reverse based on its conclusion that the dangerous instrumentality doctrine does not apply to a bailee parent who entrusts the vehicle to a child is directly contrary to the express basis for this Court’s jurisdictional and merits rulings in *Aurbach II*.

**B. *Aurbach II*’s holdings regarding beneficial ownership and parental liability did not undermine its holding regarding intermediate bailment liability within a family.**

In avoiding this Court’s holdings in *Aurbach II* about intra-family bailments, the district court created and knocked down a straw man argument. Specifically, it suggested that Mr. Emerson

has argued for “the extension of beneficial ownership under the dangerous instrumentality doctrine,” and it focused on this Court’s discussion of the concept of “beneficial ownership” in *Aurbach II* as if that is a material issue in this case. *Lambert*, 304 So. 3d at 371-73. Ms. Lambert made similar arguments in her initial brief below, suggesting that Mr. Emerson was seeking to hold her responsible as a parent, instead of as a bailee. (A:90-95.) But as Mr. Emerson made clear to no avail in his answer brief and motion for rehearing, he sought to hold Ms. Lambert responsible solely as a bailee and not under any theory of beneficial ownership or parental liability. (A:190-94, 434-35.)

Thus, the district court erred in focusing on what this Court said in *Aurbach II* about refusing to expand the dangerous instrumentality doctrine based on these concepts. Indeed, the Court went out of its way in *Aurbach II* to make clear it was not limiting liability for intermediate bailees in the family context.

It first examined its case law on the concept of “beneficial ownership,” but held that this is a principle that only applies, if at all, to shield the title owner from liability and could not be used by an injured plaintiff as “an independent basis for vicarious liability

under the dangerous instrumentality doctrine.” 753 So. 2d at 63-65. But it appended to the end of this sentence a critical caveat making clear that this is only the case “absent an identifiable property interest in the vehicle.” *Id.* at 65.

It then examined the state of the law on the issue of whether “a parent can be held vicariously liable for his or her child’s negligent operation of a motor vehicle,” concluding that a parent could only be responsible if they signed the child’s driver’s license application and the child was still a minor. *Id.* (citing § 322.09(2), Fla. Stat. (1997)). But it again made clear that the parent could be liable as a bailee, appending the following caveat to its statement that this is the only time a parent can be held responsible as the parent: “absent an identifiable property interest in the vehicle, such as ownership, rental, lease, conditional sale or bailment.” *Id.*

And when it applied the law to the facts, this Court yet again made clear it was only saying these theories could not support liability by themselves, while continuing to make clear the father could have been liable if he had a bailment or other property interest in the vehicle beyond holding title:

We agree with the Fourth District that family dynamics and the parent-child relationship **cannot be used as an independent basis** for holding parents vicariously liable as beneficial owners of vehicles purchased for their children. In the absence of common law or statutory authority, we hold that a parent who holds neither legal title **nor an identifiable property interest** in a motor vehicle should not be held vicariously liable for his or her child's negligent operation of the vehicle under the dangerous instrumentality doctrine.

*Id.* at 66 (emphases added).

In sum, Mr. Emerson has not sought to “expand” anything. He has never asked any court to expand the dangerous instrumentality doctrine beyond the theory recognized in *Frankel* and specifically reaffirmed in the family context in *Aurbach II*. (See A:434 (making this point in motion for rehearing).) Rather, he has consistently argued that Ms. Lambert should be responsible because the vehicle was entrusted to her by Mr. Lambert (that is, a bailment existed between them) and she, in turn, entrusted it to Kyle. *Aurbach II* held this was a viable theory. It is the decision below that has contracted the common law to carve out a huge exception to the dangerous instrumentality doctrine contrary to this Court's jurisdictional and merits holdings in *Aurbach II*.

### **III. *Aurbach II* remains good law.**

As a common-law precedent of this Court, *Aurbach II* is binding unless and until it is overruled by either (A) the legislature or (B) this Court. See, e.g., *Connor v. S.W. Fla. Reg'l Med. Ctr., Inc.*, 668 So. 2d 175, 176 (Fla. 1995) (recognizing this Court's long-held view that because judicial branch is "least capable of resolving" questions of liability with "broad social implications," it is "best to leave to the legislature the decision of whether to modify the common law"); *Layne v. Tribune Co.*, 146 So. 234, 237 (Fla. 1933) ("Courts of justice are bound by the rule of *stare decisis* to follow the common law as it has been judicially declared in previously adjudicated cases."); see also Bryan A. Garner et al., *The Law of Judicial Precedent* 333-35 (2016) (explaining that the "American method" of *stare decisis* applies to common-law precedents to a greater extent than to constitutional precedents). The parties and district court all agree that any changes to the dangerous instrumentality doctrine should come from the legislature.

**A. The legislature has not disturbed the common law on this issue, despite making other changes to the dangerous instrumentality doctrine.**

The district court recognized that the legislature “began to assert its authority to define the public policy parameters of the dangerous instrumentality doctrine ... [t]he year after *Frankel* was decided” when it enacted section 324.021, Florida Statute (1955).<sup>5</sup> *Lambert*, 304 So. 3d at 370. Though it stopped well short of suggesting that the statute or any of its twenty-eight amendments over the years eliminated or limited the liability of intermediate bailees under the doctrine, it divined that the legislature would likely agree with its decision to limit the liability of intermediate bailees with regard to family-owned vehicles:

[I]t seems odd and certainly at cross-purposes to use the fiat of common law to expand a form of vicarious tort liability that the legislature has repeatedly curtailed. *See* § 324.021(9); *cf. Futch v. Head*, 511 So. 2d 314, 321 (Fla. 1st DCA 1987) (“[W]e are aware that the legislature often enacts legislation for the purpose of

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<sup>5</sup> This Court previously suggested that the legislature had given “express legislative approval” to the dangerous instrumentality doctrine even earlier when it not only made no attempt to abolish the doctrine since the 1920 *Southern Cotton Oil* decision, but had created specific exceptions to the doctrine. *Crenshaw Bros. Produce Co. v. Harper*, 194 So. 353, 365 (Fla. 1940).

amending the common law.”). Indeed, the very imposition of a statutory cap on this form of vicarious liability to a singular entity (defining “owner” as a person who holds the legal title of a motor vehicle “; or” a conditional vendee, or lessee, or mortgagor) suggests that the legislature viewed the state of dangerous instrumentality law in the same way we have. *See, e.g., Adler-Built Indus., Inc. v. Metro. Dade County*, 231 So. 2d 197, 199 (Fla. 1970) (“The [l]egislature is presumed to be acquainted with judicial decisions on the subject concerning which it subsequently enacts a statute.”)

304 So. 3d at 373.

As an initial matter, the referenced definition of “owner” in section 324.021(9) as well as the cap on an owner’s liability have been in the statute since before *Aurbach II* was decided so the district court’s reference to this statute cannot reasonably be read to hold that the *Aurbach II* has been legislatively overruled. Rather, Mr. Emerson reads this passage as a judicial guess that the legislature, having itself curtailed the dangerous instrumentality doctrine in some circumstances, would approve of the courts eliminating liability under the doctrine in other circumstances. Regardless, neither view finds any support in the law or logic.

Skepticism is warranted whenever a judicial decision depends on a court’s guess of what the legislature thinks or intends (as if it is a monolithic body with one mind) beyond what its duly-enacted

statutes provide. But putting that concern aside for the moment, the district court's observations support Mr. Emerson, not Ms. Lambert, because the issue here is not whether the common law should be expanded to create a new basis for imposing liability, but whether it should be judicially curtailed to eliminate a long-recognized basis for liability under the doctrine that the legislature has never seen fit to limit.

Not only have the political branches crafted twenty-eight amendments to this statute alone, it passed nine of them since *Aurbach II* rejected a judicial attempt to relieve intermediate bailees of responsibility under the dangerous instrumentality doctrine in the family context. Regardless, it should be clear that the political branches – the legislative branch in deciding whether to pass an amendment and the executive in deciding whether to veto it – have taken great care to determine when and how to limit the doctrine. What would be odd and at cross-purposes with these political decisions would be for a court to determine the political branches did not go far enough and curtail it further by judicial fiat. This is especially so because the legislature **is** presumed to be aware of this

Court's holdings in *Frankel* and *Aurbach II*, as the district court recognized.

We do not have to rely on presumptions that the legislature was aware that case law imposes liability. Section 324.021(9)(b) states that the limitations it provides not only trump any other statute, but also “existing case law.” Thus, the legislature made clear that its intent to limit case law is strictly limited to the circumstances specifically set forth in the statute.

In any event, guesses at legislative intent are improper in determining whether a common law rule has been modified. As the legislature certainly knows, this Court has repeatedly warned courts not to read legislative alterations into the common law without clear and direct intent spelled out in a statute. *See, e.g., McGhee v. Volusia Cty.*, 679 So. 2d 729, 733 (Fla. 1996) (“[A] statute will not be construed to modify the common law unless such intent is evident or the statute cannot otherwise be given effect.”). As this Court unanimously reaffirmed just a few years ago, a statute must “express a clear intent” to modify the common law doctrine, especially when (as here) it has modified other aspects of a particular doctrine. *Kumar v. Patel*, 227 So. 3d 557, 560-61 (Fla.

2017); accord *Barnett v. Dep't Fin. Servs.*, 303 So. 3d 508, 513 (Fla. 2020).

But even if we speculate about what the legislature would want, there is no basis for the district court's apparent belief that the legislature forgot about bailee liability and would have provided for the same or more protection for bailees had it thought to include them. Indeed, there are compelling reasons to reach the opposite conclusion – the legislature intended to provide a cap for those who have formally assumed the responsibility of putting their name on the title (or at least formally agreeing to do so contingent on an agreed sale being consummated), but not to bailees.

The text of section 324.021 makes clear that the legislature has recognized that (1) absent a cap, the dangerous instrumentality doctrine imposes liability for the full amount of a victim's damages and (2) certain specified classes of property interests warrant specified protection under specified circumstances. As relevant here, owners who are natural persons like Mr. Lambert no longer face full responsibility for the carnage caused by negligent permissive users of their automobiles. § 324.021(9)(b)3, Fla. Stat.

By putting their name on the title, owners formally place their assets on the line to pay damage awards up to the cap and are submitting themselves to all the regulations and duties imposed on motor vehicle ownership by myriad statutes, administrative regulations, and the common law – including relieving an injured victim of the burden of proving their ownership. A bailee does none of those things, and for injured citizens to hold a bailee responsible under the dangerous instrumentality doctrine, they must meet their burden of proof with facts proving what the district court itself characterized as a difficult task, especially in this family context – “taxonomize the precise property rights among relatives whose use of a car may be so loose and vacillating as to be indiscernible.” 304 So. 3d at 373. Whenever facts establishing a bailment are “indiscernible,” plaintiffs fail to meet their burden as this Court made clear in *Aurbach II*.

When the legislature puts caps on damages or otherwise limits an injured person’s remedies, it typically does so either conditioned on the defendant admitting liability or in exchange for imposing liability on defendants without fault. *See, e.g., Jones v. Martin Electronics, Inc.*, 932 So. 2d 1100, 1104 (Fla. 2006) (noting that

workers compensation statutes “provide limited medical and wage loss benefits, without regard to fault, for losses resulting from workplace injuries in exchange for the employee relinquishing his or her right to seek certain common law remedies”); *Univ. of Miami v. Echarte*, 618 So. 2d 189, 190 (Fla. 1993) (rejecting constitutional challenge to §§ 766.207, 766.209, Fla. Stat. (Supp. 1988), because they “provide a commensurate benefit to the plaintiff in exchange for the monetary cap”).

The text, structure, and context of section 324.021 tell us one more thing about the legislature’s intent. It decided to be sure that owners remain personally responsible for a victim’s damages at least up to \$100,000 (covering the vast majority of accidents) and to increase the likelihood that a victim can actually recover at least up to \$500,000. This is clear because section 324.021(9)(b)3 imposes a base line cap of \$100,000, which rises by another \$500,000 if “the permissive user of the motor vehicle is uninsured or has any insurance with limits less than \$500,000.”

Adhering to *Frankel* and *Aurbach II* furthers this intent not only by making it more likely a victim can actually recover damages even when the negligent driver is judgment-proof, but even more so

in the specific context of cases like *Aurbach II* and this very case where one spouse holds title and the other is a bailee. By making the spouses jointly liable at least up to the cap applicable to the owner, section 324.021(9)(b)3 and *Aurbach II* work together to allow the victim to collect a judgment against the couple's marital assets up to the statutory cap.<sup>6</sup> This is crucially important where, as here, the permissive user was not insured for at least \$500,000.

While the legislative intent that is apparent from the text of this statute would thus be especially undermined with regard to bailments between spouses, the district court's assessment of legislative intent is not limited to intra-family bailments. Its logic would equally support the elimination of responsibility for all intermediate bailees. If there is a valid policy reason for relieving bailees outside the family context of any responsibility (even when they take possession under a written contract with consideration), neither the district court nor Ms. Lambert have identified it.

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<sup>6</sup> The district court recognized that both are culpable in the sense that liability attaches "for what is, essentially, the same entrustment of the same vehicle." 304 So. 3d at 374. They both allowed a car in their possession to be used by a negligent driver, though Ms. Lambert was the more culpable by allowing him to have "her daily driver" the night of the accident.

The district court's implementation of what it believes the legislature silently intended would also have the perverse effect of giving more protection to the person who directly put a vehicle in their possession in the hands of a negligent driver than to the title owner who was not directly involved with that decision. The former would escape any responsibility, while the latter remains potentially responsible for several hundred thousand dollars.

The point of all of this is not so much to convince this Court that the legislature was right or wrong to leave *Frankel* and *Aurbach II* intact. It is simply to point out that there are valid reasons why the legislature has chosen not to overturn or limit this Court's holdings in *Frankel* or *Aurbach II*. And regardless of intent, the fact that it has not legislatively curtailed either decision requires reinstatement of the judgment against Ms. Lambert.

**B. This case does not present the question of whether this Court should overrule *Aurbach II*.**

In both the district court and this Court, Ms. Lambert's consistent position has been that her liability should be determined by *Aurbach II*, and she has never even intimated, much less preserved, an argument to overturn precedent. (See A:90-93

(arguing in initial brief below that the holding in *Aurbach II* required reversal); A:97-101 (arguing in initial brief that *Aurbach II* remains good law); Respondent’s Brief on Jurisdiction 3-8 (arguing this Court should decline review because *Aurbach II* provides the same answer to the certified question as provided by the district court with no attempt to preserve alternative argument that this Court should recede from precedent).)

Our precedent requires that an argument for reversal be specifically preserved in the trial court and then be specifically raised and briefed to the appellate court in order for that appellate court or a higher appellate court to consider it. Otherwise, the argument is waived. General or vague references to an issue will not suffice....

This requirement of specific argument and briefing is one of the most important concepts of the appellate process. Indeed, it is not the role of the appellate court to act as standby counsel for the parties. Moreover, it is only logical to require an argument to specifically be raised. Otherwise, the appellee “must not only respond to the specific reasons for reversal advanced by the [appellant] but also anticipate and respond to other reasons for reversal that may be advanced by the reviewing court.” In the end, absent some exception to the waiver doctrine, an appellant who abandons an argument cannot benefit from that argument in the future.

*D.H. v. Adept Cmty. Servs., Inc.*, 271 So. 3d 870, 888 (Fla. 2018) (Canady, C.J., dissenting) (citations omitted) (quoting *I.R.C. v. State*, 968 So. 2d 583, 588 (Fla. 2d DCA 2007)).

Indeed, this Court recently explained that it will only consider receding from its precedent upon a showing that the precedent clearly conflicts with “a higher legal authority – whether it be a constitutional provision, a statute, or a decision of the Supreme Court.” *State v. Poole*, 297 So. 3d 487, 507 (Fla. 2020). Neither Ms. Lambert nor the district court have ever suggested that Mr. Emerson’s interpretation of *Aurbach II* would render it in conflict with any higher legal authority. Ms. Lambert has cited no constitutional provision, statute, or decision of this Court that is even in tension with *Aurbach II*.

Moreover, even when a precedent of this Court is clearly erroneous, this Court will not overrule it if there are good reasons not to, and chief among those reasons are reliance interests, which are “at their acme in cases involving property and contract rights.” *Id.* (quoting *Payne v. Tennessee*, 501 U.S. 808, 828 (1991)). This case, of course, involves both kind of rights as a bailment is a property right acquired by agreement with the owner.

The likely reason that neither Ms. Lambert nor the district court have suggested this Court should overturn precedent is their consistent position that any changes to that doctrine should come from the legislature, not the courts. *Lambert*, 304 So. 3d at 372 n.8. Any change in the dangerous instrumentality doctrine necessarily results in picking winners and losers, impacts a host of financial and legal decisions by those who own or insure motor vehicles of all sorts, and can have all kinds of unintended consequences. Decisions to alter the law and strike a different balance of competing interests should come from the political branches that are directly accountable to the voters. For these reasons, Mr. Emerson agrees with Ms. Lambert and the district court that any expansion of the doctrine should come from the legislature.

But the same is true for any contraction of the doctrine. Indeed, the last time a certified question gave this Court the chance to create an exception to liability under the doctrine, it unanimously declined to do so, leaving the matter where it belongs – with the legislature. *See Christensen v. Bowen*, 140 So. 3d 498 (Fla. 2014) (rejecting an attempt to enlarge the beneficial ownership exception to the doctrine).

In short, Mr. Emerson prevailed in the trial court, and the burden of preserving and developing an argument for reversal has always rested on Ms. Lambert. Because she has never developed any argument to overturn precedent, Mr. Emerson has never had occasion to develop the record and arguments to defeat such an argument. To be clear, however, if this Court were to *sua sponte* consider overruling its precedent, Mr. Emerson would respectfully request the opportunity to do so.

### **CONCLUSION**

For the foregoing reasons, the Court should answer the certified question in the affirmative, quash the district court's decision, and remand with directions to reinstate the final judgment.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY that the foregoing brief complies with the font requirements of Florida Rule of Appellate Procedure 9.045(b) and the word limit requirements of Rule 9.210(a)(2).

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