IN THE SUPREME COURT OF FLORIDA

BRUCE KYLE EMERSON,

Petitioner,

v.

KYLE MICHAEL LAMBERT, et al.,

Respondents.
_____/

Case No.: SC20-1311
L.T. Nos.: 2D18-1872
2D18-4103
2015-CA-4089

ON DISCRETIONARY REVIEW FROM THE SECOND DISTRICT COURT OF APPEAL

PETITIONER'S REPLY BRIEF

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The statement of the case in the initial brief accurately states the relevant issues and facts in the light most favorable to the verdict. The answer brief does not purport to identify any failing in that regard, but instead offers its own statement, which improperly slants the issues and facts in its favor, even though it lost in the trial court.

Ms. Lambert opens by mischaracterizing the evidence Mr. Emerson offered, which the jury accepted in finding that he had met his burden of proving that Ms. Lambert possessed a bailment interest. The jury's finding did not rest on the fact that she "was the predominant user of the family vehicle and that she happened to be the one who was home when her son asked to use" the vehicle. (Ans. Br. 1.) Nor did it depend, in any way, on "various fact questions pertaining to individual family dynamics." (Ans. Br. 2.)

It is Ms. Lambert who is seeking to insert issues of family dynamics into this case. Mr. Emerson's position is the same as this Court's position in *Aurbach v. Gallina*, 753 So. 2d 60 (Fla. 2000) ("*Aurbach II*") – there are not separate rules for liability under the dangerous instrumentality doctrine when there is a bailment

between family members. The evidence he offered is accurately and completely set forth in the initial brief, which provides the proper context for answering the certified question.

The parties and their amici all agree on one point: this case turns not on what this Court might think represents the best rule of law as a matter of public policy, but on whether this Court held in *Aurbach II* that there is no exception for bailment liability under the dangerous instrumentality doctrine for bailments between family members. All agree that any expansion or reduction to the rule of liability recognized in *Aurbach II* should come from the Legislature.

As shown in the initial brief, this Court squarely held twice in *Aurbach II* that Florida common law did not recognize an exception for bailments between family members. First, its finding that it had conflict jurisdiction depended on its determination that no such exception was recognized in *Frankel v. Fleming*, 69 So. 2d 887 (Fla. 1954), which placed the district court's decision in express and direct conflict with *Frankel*'s recognition of bailment liability. Second, its merits holding that "we disapprove of the [Fourth District's] opinion" was directed at (and limited to) the district court's suggestion that "legal title is the only basis for imposing

vicarious liability in a family relationship" and clearly identified proof of a bailment interest as another basis for imposing liability even in a family relationship. 753 So. 3d at 66.

I. Ms. Lambert misconstrues the holding of *Frankel*.

Contrary to Ms. Lambert's position, *Frankel* did address the family context and made clear that bailee status is sufficient to attach vicarious liability even where the bailment may be between family members. *Id.* at 888. Ms. Lambert's argument that the woman in that case was not actually Frankel's wife misses the point. (Ans. Br. 24.) The Court in *Frankel* expressly stated that for "all intents and purposes" the woman "was the bailee's spouse." *Id.* Thus, it matters not whether the woman was actually his spouse because the bottom line is that the Court recognized bailment liability despite considering her to be his wife. Indeed, it suggested the family relationship makes bailment liability "especially" appropriate. *See id.* ("[W]e find no difficulty in now holding" that "a bailee" is "responsible in the instant case for injury caused by the one to whom he entrusted the car, **especially where** … **that person was the bailee's spouse**." (emphasis added)).

Ms. Lambert attempts to belittle the importance of the marital relationship status in *Frankel* by erroneously suggesting, without citation, that the Court referenced the parties' marital status merely to establish "permissive use by someone purportedly held out as the renter's wife, where the rental contract contained no provisions precluding such use." (Ans. Br. 24.) Ms. Lambert is conflating the relevant facts and reasoning of *Frankel* with its companion case *Fleming v. Alter*, 69 So. 2d 185 (Fla. 1953). Yes, in *Fleming* the marital status was relevant to establish permissive use, as that case concerned the distinct issue of whether the rental company could be held liable for the woman's conduct. *Id.* at 186. It had nothing to do with Frankel's liability as a bailee, and nothing in the *Frankel* decision suggests that the marital status was relevant to some nonexistent permissive use issue. In fact, the Court expressly acknowledged that most of the facts described in *Fleming* were irrelevant to the holding of *Frankel*. *Frankel*, 69 So. 2d at 887-88 ("The nature of the questions posed by the appellant makes it unnecessary to elaborate on the facts stated in [*Fleming*].").

Ms. Lambert's remaining arguments relating to *Frankel* involve pointing to factual differences between this case and *Frankel* that

are distinctions without a difference. First, Ms. Lambert points out that, in quoting the question presented as phrased by the appellant, the Court quoted the term "bailee [Frankel] for hire," suggesting that it matters whether the bailee is a gratuitous bailee or a bailee for hire. *Id.* But there is nothing in the *Frankel* decision that suggests that a bailee for hire should be treated any differently than any other kind of bailee, such as a gratuitous bailee in this case. And when the Court used its own words to declare its holding, it did not include the "for hire" designation. *Id.* ("[W]e find no difficulty in now holding the appellant, a bailee, responsible.").

As pointed out by the First District, "the rule adopted by the Supreme Court [in *Frankel*] was made applicable to bailees without restriction, although the defendant in that case was a bailee for hire." *Martin v. Lloyd Motor Co.*, 119 So. 2d 413, 415 (Fla. 1st DCA 1960). *See also Pabon v. InterAmerican Car Rental, Inc.*, 715 So. 2d 1148, 1150 (Fla. 3d DCA 1998) ("We see no justifiable reason why the liability imposed upon an owner of a motor vehicle under the dangerous instrumentality doctrine is not equally applicable to a bailee, whether the bailment be gratuitous, for hire, or for the mutual benefit of both parties.").

Ms. Lambert next points out that the roles the parties played in *Frankel* were slightly different than this case because in *Frankel* the wife was the operator and the husband was the bailee and that there was no discussion of a household dynamic. But these nits have nothing to do with whether or when a bailment interest is sufficient to attach vicarious liability under the dangerous instrumentality doctrine. It matters not whether Ms. Lambert gave permission to her son, her grandfather, or even a total stranger. The point is that both Mr. Frankel and Ms. Lambert were bailees that acquired the car with the permission of the owner, and both gave a family member permission to drive the car that caused an accident. Nothing in *Frankel* suggests that it mattered that the owner was a rental company as opposed to a family member.

II. Ms. Lambert misconstrues the holding of *Aurbach II*.

Ms. Lambert's position that *Aurbach II* created an exception whereby bailment status is insufficient to attach vicarious liability pursuant to the dangerous instrumentality doctrine in the family context when the title-holding spouse is found liable is not only incorrect, but it is expressly contradicted by this Court's opinion in *Aurbach II*:

> Finally, while we commend the Fourth District for its attempt to simplify this area of dangerous instrumentality law, we disapprove of the opinion 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 (emphases added). This Court could not have been clearer that "a parent can be held vicariously liable for his or her child's negligent operation of a motor vehicle" if that parent is found to have "an identifiable property interest in the vehicle, such as … bailment." *Id.* at 65. That is exactly what happened here, as the jury found Ms. Lambert held an identifiable property interest in the vehicle (bailment).

Ms. Lambert claims that Mr. Emerson's understanding of the jurisdictional basis for *Aurbach II* is incorrect, but it is difficult to understand what exactly Ms. Lambert disagrees with because, even under Ms. Lambert's explanation of the jurisdictional basis, Ms. Lambert should still be liable as a bailee. Ms. Lambert begins by correctly asserting that *Aurbach II* accepted jurisdiction because the Fourth District created a broad exception to the dangerous

instrumentality doctrine in the family context in conflict with *Frankel*. Ms. Lambert then correctly states that the Fourth District erred in holding that the only way to attach vicarious liability in a family situation is via legal title. Ms. Lambert then conveniently stops there and fails to note what the Court went on to hold was the other method of attaching liability beyond legal title. As is clear from the opinion, the additional method for obtaining liability in the family context exists where that parent has "an identifiable property interest, such as bailment," which is exactly what the jury found in this case. *Id.*

Ms. Lambert then asks this Court to reweigh evidence and reverse the jury's finding of fact that Ms. Lambert was a bailee. First, Ms. Lambert did not make any argument before the Second District or the trial court that the jury's factual finding that Ms. Lambert was a bailee was error, and it is therefore not preserved. *See Sunset Harbour Condo. Ass'n v. Robbins*, 914 So. 2d 925, 928 (Fla. 2005) ("[I]t is not appropriate for a party to raise an issue for the first time on appeal."). Second, competent, substantial evidence supports the jury's verdict, as Mr. Emerson presented evidence that the vehicle was her "daily driver," that she had the authority to

decide who could drive it, that she was in charge of its maintenance, and that it was she who gave Kyle permission to drive the vehicle on the day of the accident, just to name a few.

Ms. Lambert makes the erroneous claim that the facts of this case are materially similar to the facts of *Aurbach II*. Unlike this case where the jury expressly found the parent to be a bailee based on the competent, substantial evidence presented, in *Aurbach II* it was "undisputed" the non-title owner parent was not a bailee, and the plaintiffs did not even make the argument that the parent was liable as a bailee. *Aurbach*, 753 So. 2d at 65.

A. *Aurbach II* did not turn on a technicality; it turned on whether the parent held an identifiable property interest, such as bailment.

Ms. Lambert claims that whether she is a bailee versus a mere beneficial owner is a technicality and that bailment status was irrelevant to the holding of *Aurbach II*. Not so, as the jurisdictional basis for *Aurbach II* rested expressly on conflict with *Frankel* because the Fourth District's decision prevented vicarious liability in the family context where one spouse holds other "identifiable property interests, such as bailment," given that the Fourth District limited liability to title ownership only. *Id.*

This Court in *Aurbach II* emphasized that there was no evidence or argument that the non-title owner parent was a bailee and expressly held that being a bailee would have been sufficient to attach dangerous instrumentality liability. *Id.* at 65-66. Moreover, being a bailee is not just some characterization or label that a plaintiff chooses to call a defendant. Instead, it is a full-blown identifiable property interest that requires a question be given to the jury on the verdict form and affirmatively answered yes or no based on the evidence presented.

B. Principles related to beneficial ownership are irrelevant to this case.

Both Ms. Lambert and the Florida Defense Lawyers Association ("the FDLA") push the same straw man argument that erroneously claims that Mr. Emerson's argument is that mere beneficial ownership should be sufficient to attach dangerous instrumentality liability. As he has emphasized throughout, that is not his argument. Beneficial ownership has nothing to do with bailment. He has never asserted a claim based on beneficial ownership, much less attempted to prove one. If the jury had returned a verdict that found that Ms. Lambert was not the bailee of

the vehicle, then Mr. Emerson agrees that *Aurbach II* would require Mr. Emerson's claim to fail because at that point Ms. Lambert would not have any identifiable property interest in the vehicle. But that is not what happened. The jury found that Ms. Lambert had a specific property interest in the vehicle – bailment – and that is the reason why Mr. Emerson should prevail.

Ms. Lambert, the FDLA, and the Second District conflate principles relating to beneficial ownership with bailment status, but nothing in the opinion of *Aurbach II* suggests that principles applicable to beneficial ownership apply to somehow limit the applicability of the dangerous instrumentality doctrine when the parent is found to possess an identifiable property interest, such as bailment. In fact, the opposite is true, as the Court expressly concluded that beneficial ownership is not enough "absent an identifiable property interest in the vehicle," such as bailment. *Id.* at 65.

Contrary to Ms. Lambert's position, the other daughter in *Aurbach II*, the one that the car was purchased for and that was not driving on the day of the accident, would not be liable under Mr. Emerson's argument because there was no evidence that she was a

bailee or even that she had given permission to drive the car to the daughter that was driving at the time of the accident.

Finally, though not binding on this Court in any event, Ms. Lambert is incorrect to assert that the conclusion in *Stanford v. Chagnon*, 86 So. 3d 565, 568 (Fla. 2d DCA 2012), that a non-owner spouse can be held liable as a bailee was dicta. It was not dicta because it was part of the reasoning used to reach the court's holding, as the fact that the non-owner spouse was potentially liable as a bailee meant that the trial court erred in granting summary judgment in favor of the title-owning spouse because such a circumstance created a situation where it was possible that the title-owning spouse could also be liable as a bailor. *Id.*

III. Mr. Emerson agrees that *Aurbach II* is good law that should not be changed; this case is about the correct interpretation of *Aurbach II*.

Both parties, as well as their amici, agree that *Aurbach II* controls this case and that there is no need to consider overruling it to decide this case. However, in the event the Court decides to consider that prospect, Mr. Emerson disagrees that all this Court must decide is whether *Aurbach II*'s holding is clearly erroneous. In addition to that assessment, this Court must also look to whether

overruling *Aurbach II* would significantly affect reliance interests. *State v. Poole*, 297 So. 3d 487, 507 (Fla. 2020). As explained in Mr. Emerson's initial brief and the Florida Justice Association's (the "FJA's") amicus brief, overruling *Aurbach II* would significantly affect reliance interests.

Moreover, neither Ms. Lambert nor her amicus recognize the very sound principles explained in the FJA's amicus brief as to why the Court should be even more hesitant to engage in the judicial lawmaking entailed by modifying common-law precedents than it would be in reconsidering precedents interpreting written laws pursuant to the test set forth in *Poole*. (FJA Amicus Br. at 9-13.)

A. The Florida Legislature has not addressed bailee liability, despite making other changes to the dangerous instrumentality doctrine.

Contrary to Ms. Lambert's assertion, Mr. Emerson is not asking the Court to divine legislative intent to provide for unlimited liability to bailee non-owners spouses. That misses the point Mr. Emerson is making. Unlimited liability to non-owner bailee spouses is the status quo, and the Legislature could have changed that, but it did not. If the Legislature decides, in the future, to eliminate or cap non-owner spouse bailee liability, it can do so. The fact remains

that passing such a regulation should be for the Legislature, not the Court, and that is the point Mr. Emerson asserts.

Ms. Lambert and the FDLA are asking this Court to legislate from the bench with all their discussion about what is fair for Ms. Lambert and what is good policy for the state of Florida. The bottom line is that the Legislature has been deeply involved in passing laws regulating the dangerous instrumentality doctrine, and it passed a law capping title owner liability. That law and others did nothing to cap bailee liability, and that is that.

In any event, neither Mr. Emerson nor Ms. Lambert are asking the Court to do anything more than apply existing precedent, as the disagreement is merely what that existing precedent holds, not how this Court should change existing precedent. Thus, because the only question on this appeal is what is the Court's existing precedent, not whether it should be expanded or limited, this Court can disregard as irrelevant practically everything argued in the FDLA's amicus brief, as well as all of the policy arguments Ms. Lambert makes, because none of that will assist in any way in answering the question presented, which is simply what does the

Court's existing precedent require, not what should be changed about the existing law.

Finally, Ms. Lambert appears to be using the phrase "unlimited liability" as a sort of buzz phrase, but in the law of torts all liability is "unlimited" by default unless there is some law, such as a statute, capping liability. And so before the passing of a statute, liability was unlimited for both title owners and non-title owner bailees. The statute capped liability for title owners only, and so "unlimited liability" simply remains as the status quo for non-owner bailees. This concept is likewise overlooked by the FDLA's amicus brief, as they erroneously suggest that the dangerous instrumentality doctrine limits owner's liability and excuses long-term lessees from liability. It does not. The doctrine provides for unlimited liability for both of those categories, and it is only the statutes that limit liability, not the dangerous instrumentality doctrine.

B. This Court is not being asked to overrule any of its precedent.

Mr. Emerson agrees with Ms. Lambert that there is nothing for this Court to consider overruling. Instead, this Court is tasked

merely with interpreting its own precedent and holding in a manner consistent with those precedents. As discussed above, the parties disagree as to the interpretation of those precedents.

Given such, the parade of horribles described in the FDLA's amicus brief can be wholly ignored because, again, neither party is asking this Court to expand or narrow the dangerous instrumentality doctrine. First, nothing in the record supports the FDLA's claims of what the industry believes to be the current state of the law as far as dangerous instrumentality liability.

And that makes sense, given that no argument was made below about changing the doctrine, and so this record is devoid of facts necessary for this Court to make such a momentous decision. This is yet another reason why this case is not a proper vehicle to alter the dangerous instrumentality doctrine. Second, even if the FDLA was correct in its unsupported assertion that the insurance industry does not "contemplate" that parental bailees were potentially liable in these situations, ignorance of the law is no excuse.

Aurbach II is clear that proof of bailment is sufficient to attach liability even for bailments between family members. If the

insurance industry, which has not filed an amicus brief, or anyone else has suffered from the same inability to read and follow the opinion of *Aurbach II* as has Ms. Lambert and the district court, they have nobody to blame but themselves.

Respectfully submitted,

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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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