

IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC21-1255

SAMANTHA ELAINE TSUJI and
CRYSTAL IVY WILLIAMS,

Petitioners,

v.

L.T. Case Nos: 1D20-0901
2018 CA 218

H. BART FLEET, as the duly
appointed Personal Representative
of the Estate of THOMAS E.
MORTON JR., Deceased, and
THE LEWIS BEAR COMPANY,

Respondents.

_____/

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF
APPEAL, FIRST DISTRICT, STATE OF FLORIDA

ANSWER BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE AND FACTS

This is a discretionary appeal of a decision by the First District in a personal injury case. The issue before this Court is whether Plaintiffs' claims are barred by the statute of repose in Chapter 733, Florida Statutes. The trial court properly entered summary judgment in favor of the Estate of Thomas Morton, Jr. (the "Estate") and The Lewis Bear Company ("LBC") on the basis of Chapter 733's statute of repose, and the First District properly affirmed the decision of the trial court.

This Court accepted jurisdiction of this matter because of a certified direct conflict between the First District's opinion below and the Fourth District's opinion in *Pezzi v. Brown*, 697 So. 2d 883 (Fla. 4th DCA 1997), *rev. denied*, 705 So. 2d 7 (Fla. 1997), in regard to the interpretation and application of the statute of repose in Florida's Probate Code.

This Court should affirm the First District's opinion and reject *Pezzi*.

1. FACTS OF THE CASE

The parties do not dispute the general circumstances of the accident giving rise to Plaintiffs' claims in this action:

- Thomas Morton, Jr. negligently caused a collision with a motor vehicle occupied by Plaintiffs on June 14, 2014. (TR131, ¶¶ 10, 11; TR135, ¶¶ 29, 30; TR163, ¶¶ 10, 11; TR164, ¶¶ 29, 30¹)
- Thomas Morton, Jr. was employed by The Lewis Bear Company (“LBC”) at the time of the accident. (TR48)
- Mr. Morton was driving a motor vehicle in the course and scope of his employment with LBC at the time of the accident. (TR48-49)
- The vehicle being driven by Mr. Morton at the time of the accident was owned by LBC and used with LBC’s consent. (*Id.*)

It is further undisputed that Mr. Morton died on June 28, 2014, less than three weeks after the accident. (TR26, 28, 63, 64)

2. PLAINTIFFS’ ALLEGATIONS

Both the initial complaint and the amended complaint alleged direct negligence on the part of Mr. Morton. Specifically, Plaintiffs alleged “Defendant, THOMAS E. MORTON, JR., negligently operated

¹ “TR” and “AR” refer, respectively, to the trial and appellate courts’ records.

or maintained the motor vehicle so that it collided with Plaintiff's motor vehicle." (TR11, ¶ 7-8; TR14, ¶¶ 22-23; TR131, ¶¶ 10-11; TR135, ¶¶ 29-30)

But neither the initial complaint nor the amended complaint alleged any active or direct negligence on the part of LBC in causing the accident. Instead, Plaintiffs alleged LBC was merely *vicariously* liable under the dangerous instrumentality doctrine (TR12, ¶¶ 11-14; TR14-15, ¶¶ 26-29; TR132-133, ¶¶ 16-19; TR134-135, ¶¶ 24-27; TR137, ¶¶ 35-38) and respondeat superior. (TR13, ¶¶ 17-20; TR16, ¶¶ 34-37; TR134, ¶¶ 25-27; TR139, ¶¶ 44-46)

3. TRIAL COURT PROCEEDINGS

Plaintiffs initially commenced their personal injury action against Mr. Morton and LBC on February 6, 2018—three years and seven months after Mr. Morton's death. (TR10) Several months later, on May 24, 2018, Appellants moved to amend their complaint to, among other things, substitute the Estate of Thomas Morton, Jr. as a party defendant. (TR107-126) The trial court granted Plaintiffs' motion to amend and to substitute the Estate as a party defendant. (TR127-128)

LBC filed its motion for summary judgment on March 16, 2018. (TR48-59) The trial court heard LBC's motion for summary judgment on November 21, 2019. (TR228-245) The trial court granted LBC's motion and entered summary final judgment in favor of LBC and the Estate on December 12, 2019. (TR215-217)

Eight days later, on December 20, 2019, Plaintiffs filed their motion for rehearing. (TR218-367) LBC filed its response to the motion for rehearing on February 18, 2020. (TR368-374) The trial court denied Plaintiffs' motion for rehearing on February 21, 2020. (TR375)

Plaintiffs appealed the trial court's summary final judgment to the First District Court of Appeal on March 16, 2020. (TR376-377)

4. PROCEEDINGS IN THE FIRST DISTRICT

The First District affirmed the trial court's entry of summary judgment in favor of the Estate and LBC. (AR252) In its opinion of August 4, 2021, the First District found that the trial court did not commit reversible error under the facts at hand. *Id.*

At the outset of the First District's analysis, it noted the purposes of Florida's Probate Code: "Chief among [those purposes] is to promote the timely settlement of a decedent's estate." (AR254)

a. Section 733.702, Florida Statutes (2013).

To accomplish that goal, the First District explained that creditors' claims must be presented against a deceased person's estate under section 733.702(1), Florida Statutes (2013), within three months after first publication of the notice to creditors or within 30 days after service on a creditor. *Id.* But the First District also noted that section 733.702 contains some significant caveats to those deadlines:

- First, section 733.702(4) exempts from the three month/30-day deadline claims that seek, "to the limits of casualty insurance only, a proceeding to establish liability that is protected by casualty insurance." (AR254-255)
- Second, section 733.702(5) states that "nothing in section 733.702 extends the limitations period set out in section 733.710." (AR255)

b. Section 733.710, Florida Statutes (2013).

The First District then turned to section 733.710, Florida Statutes:

That section, which cuts off the estate's liability for claims presented more than two years after the decedent's death

is entitled, “Limitations on claims against estates.” Subsection (1) of the statute provides:

Notwithstanding any other provision of the code, 2 years after the death of a person, neither the decedent’s estate, the personal representative, if any, nor the beneficiaries **shall be liable** for any claim or cause of action against the decedent, whether or not letters of administration have been issued, except as provided in this section.

§ 733.710(1), Fla. Stat. (2013) (emphasis supplied).

(AR255) The First District described section 733.710 as a “jurisdictional statute of nonclaim that automatically bars untimely claims and is not subject to waiver or extension in the probate proceedings.” *Id.* (quoting *May v. Illinois National Ins. Co.*, 771 So. 2d 1143, 1157 (Fla. 2000)).

Thus, the First District found that “[u]nder the plain language of the statute, the estate, the personal representative, and the beneficiaries of the estate are not liable for any claim or cause of action against the tortfeasor decedent unless the creditor presents the claim within two years of the death of the decedent.” (AR256) And, because of the Probate Code’s “central purpose of fostering the expeditious settlement of the estate of decedents . . . plaintiffs have

four years to bring tort actions against living tortfeasors but only two years to bring the same claim against decedent tortfeasors.” (AR256)

c. The First District rejected Plaintiffs’ interpretation of section 733.710.

The First District rejected Plaintiffs’ argument that section 733.710 does not bar claims against a decedent’s casualty insurer, even when those claims are commenced beyond the statute’s two-year limitations period. (AR256) The First District noted the basic proposition that, “[u]nder Florida’s non-joinder statute, section 627.4136(1), Florida Statutes, a plaintiff may not file a ‘direct action’ against a liability insurer without first obtaining a settlement or a verdict against the insured.” (AR257) Instead, a plaintiff must “establish the liability of the decedent tortfeasor (through his estate) and then obtain a settlement or verdict against the decedent tortfeasor (through his estate).” (AR257) “Thus, to present their claim against Morton’s estate (and ultimately hold Morton’s casualty insurer liable), Appellants had to file their claim seeking to establish the liability of Morton and his estate within two years of Morton’s death.” (AR257)

d. The First District acknowledged conflict with *Pezzi*.

The First District readily observed that its construction of sections 733.702 and 733.710 appeared to conflict with the Fourth District’s decision in *Pezzi*. The First District was critical of *Pezzi* because the Fourth District “never addressed the limitation on claims expressed in section 733.702(5).”² (AR257)

e. The First District applied the concepts of vicarious liability to the claims against LBC.

In Part B of its opinion, the First District found the trial court did not err in concluding that, because Plaintiffs’ claims against the Estate were time-barred, Plaintiffs’ claims against LBC were likewise time-barred. (AR258-259) “[A] plaintiff may not hold an employer liable until the employee is found to be liable.” (AR259) Relying on *Buettner v. Cellular One, Inc.*, 700 So. 2d 48 (Fla. 1st DCA 1997), *rev. denied*, 717 So. 2d 529 (Fla. 1998)—which relied on *Bankers Multiple Line Ins. Co. v. Farish*, 464 So. 2d 530, 532 (Fla. 1985), which, in turn, relied on *Mallory v. O’Neil*, 69 So. 2d 313, 315 (Fla. 1954)—the First District confirmed the concept that, when a principal’s liability

² “Nothing in this section shall extend the limitations period set forth in s. 733.710.”

rests solely on the doctrine of vicarious liability, a principal cannot be held liable if the agent is exonerated. (AR259)

This appeal followed.

SUMMARY OF ARGUMENT

The First District’s opinion in *Tsuji v. Fleet*, 326 So. 3d 143 (Fla. 1st DCA 2021), correctly determined that Plaintiffs’ claims were time-barred under the two-year statute of repose contained in Florida’s Probate Code. Plaintiffs did not commence their action against the Estate and LBC until over 19 months after the expiration of the statute of repose, thus barring Plaintiffs’ direct negligence claims against the Estate.

Plaintiffs’ claims against LBC are also time-barred under the Probate Code’s statute of repose. Plaintiffs’ only claims against LBC were for vicarious liability under the theories of respondeat superior and dangerous instrumentality. Under Florida law, the vicarious liability of a principal is wholly dependent on the liability of the agent. And where a claim against a party for whom a defendant may be vicariously liable—including the defendant’s agent or employee—is dismissed on timeliness grounds, the dismissal constitutes an

adjudication on the merits. Because Plaintiffs' claims against the Estate were adjudicated to be time-barred—and because LBC was only alleged to be vicariously liable—Plaintiffs' claims against LBC were likewise time-barred.

The First District's analysis and application of the time limitations in the Probate Code were correct. The case with which the First District certified conflict, *Pezzi v. Brown*, 697 So. 2d 883 (Fla. 4th DCA 1997), *rev. denied*, 705 So. 2d 7 (Fla. 1997), failed to account for the plain language in the Probate Code that rendered the two-year statute of repose paramount over any other timeliness provisions in the Code.

This Court should affirm the First District and disapprove *Pezzi*.

ARGUMENT

The Probate Code’s statute of repose bars claims against a decedent’s estate and the decedent’s vicariously liable employer if those claims are not commenced within two years of the death of the decedent—regardless of whether the decedent or the employer is protected by casualty insurance.

Jurisdiction: This Court has jurisdiction under Art. V, § 3(b)(4), Fla. Const., because the First District certified conflict with *Pezzi v. Brown*, 697 So. 2d 883 (Fla. 4th DCA 1997).

Standard of Review: Where the merits of the case only concern statutory interpretation, this Court’s review is de novo. *Alachua County v. Watson*, 333 So. 3d 162, 169 (Fla. 2022).

A. Plaintiffs’ claims are barred under Chapter 733’s statute of repose.

Because Plaintiffs asserted their claims well over two years after Mr. Morton’s death, their claims are time-barred under section 733.710, Florida Statutes. The First District correctly interpreted and applied section 733.710 to the circumstances of this action.

1. Plaintiffs’ claims are time-barred because section 733.710 contains a two-year statute of repose for claims against decedents’ estates.

Section 733.710 contains a broad prohibition on untimely claims against decedents' estates. Specifically, section 733.710(1) states:

Notwithstanding any other provision of the [probate] code, 2 years after the death of a person, neither the decedent's estate, the personal representative, if any, nor the beneficiaries shall be liable for any claim or cause of action against the decedent, whether or not letters of administration have been issued, except as provided in this section.

Section 733.710 itself contains only two specific exceptions to the two-year limitation on claims against decedents' estates, personal representatives, and beneficiaries—neither of which are applicable to the claims or defenses in this matter:

- i. Under subsection 733.710(2), the two-year limitation does not apply to “a creditor who has filed a claim pursuant to s. 733.02 within 2 years after the person's death, and whose claim has not been paid or otherwise disposed of pursuant to s. 733.705.”
- ii. Under subsection 733.710(3), the two-year limitation “does not affect the lien of any duly recorded mortgage or security interest or the lien of any person in possession of

personal property or the right to foreclose and enforce the mortgage or lien.”

Section 733.7101(1) is a statute of repose. *Jones v. Golden*, 176 So. 3d 242, 248 (Fla. 2015). It is also referred to as a “nonclaim” statute. *Id.* at 245; *see also Langford v. Ferrara*, 823 So. 2d 795 (Fla. 1st DCA 2001). Statutes of repose “bar actions by setting a time limit within which an action must be filed as measured from a specified act, after which the cause of action is extinguished.” *Hess v. Philip Morris USA, Inc.*, 175 So. 3d 687, 695 (Fla. 2015) (quoting *Merkle v. Robinson*, 737 So. 2d 540, 542 n. 6 (Fla. 1999)).

“[S]tatutes of repose are a valid legislative means to restrict or limit causes of action in order to achieve certain public interests.” *Id.* (quoting *Carr v. Broward Cnty.*, 5050 So. 2d 568, 570 (Fla. 4th DCA 1987)). “Statutes of repose are ‘legislative determination[s] that there must be an outer limit beyond which [claims] may not be instituted,’ ‘attempt[ing] to balance the rights of injured persons against the exposure of [defendants] to liability for endless periods of time.” *Id.* (quoting *Kush v. Lloyd*, 616 So. 2d 415, 421-422 (Fla. 1992)). In the context of the Probate Code, “Public policy requires that estates of decedents be speedily and finally determined. It is

pursuant to this policy that statutes of non-claim have been enacted by the Legislature.” *Estate of Brown v. Gulf Fertilizer Co.*, 117 So. 2d 478, 480 (Fla. 1960).

2. The statute of limitation in section 733.702.

In addition to the statute of repose in section 733.710(1), the Probate Code also contains a statute of limitation in section 733.702(1). *See Jones v. Golden*, 176 So. 3d at 242 (“We have held that section 733.702 is a statute of limitations . . .”); *Namon v. Elder*, 331 So. 3d 835, 838 (Fla. 1st DCA 2021) (Section 733.702(1) has been “[l]ong construed as a statute of limitations”). Section 733.702(1) provides that claims against a decedent’s estate must be brought in a probate proceeding within “the later of the date that is 3 months after the time of the first publication of the notice to creditors or, as to any creditor required to be served with a copy of the notice to creditors, 30 days after the date of service on the creditor.” § 733.702(1), Fla. Stat.

3. The exceptions to and the constraints on the statute of limitation.

The time limits in the statute of limitation in section 733.702(1)

are subject to a variety of exceptions. They are also subject to various constraints.

a. The exceptions to the deadlines in section 733.702(1).

The exceptions to the deadlines are set forth in sections 733.702(3) and 733.702(4). Under these provisions, the three-month/30-day time limit does not apply to:

- A claim for which the trial court has granted an extension. § 733.702(3), Fla. Stat. Such extensions are limited to circumstances involving “fraud, estoppel, or insufficient notice of the claims period.” *Id.*
- “A proceeding to enforce any mortgage, security interest, or other lien on the property of the decedent.” § 733.702(4)(a), Fla. Stat.
- “To the limits of casualty insurance protection only, any proceeding to establish liability that is protected by casualty insurance.” § 733.702(4)(b), Fla. Stat.
- “The filing of a cross-claim or counterclaim against the estate in an action instituted by the estate; however, no recovery on a

cross-claim or counterclaim shall exceed the estate's recovery in that action." § 733.702(4)(c), Fla. Stat.

b. The constraints on section 733.702(1).

All of the time limits in section 733.702(1) (and the exceptions thereto) are constrained, however, by other provisions in section 733.702. These constraints limit a claim against a decedent's estate to the two-year statute of repose in section 733.710.

First, the prefatory clause in section 733.702(1) limits claims in probate proceedings to those that are not otherwise barred by section 733.710 ("If not barred by s. 733.710, no claim or demand against the decedent's estate that rose before the death of the decedent...")

More importantly, section 733.702(5) states, "Nothing in this section shall extend the limitations period set forth in s. 733.710." Subsection (5) thus incorporates the two-year statute of repose in section 733.710(1) into section 733.702.

Plaintiffs claim, however, section 733.702(4) does not prevent them from commencing a proceeding against the Estate "to establish liability that is protected by casualty insurance." Initial Br., pp. 41-42. This is a faulty reading of both sections 733.702 and 733.710. First, section 733.702(5) trumps the other provisions in section

733.702: “Nothing in this section shall extend the limitations period set forth in s. 733.710.” Second, section 733.710(1) contains a two-year statute of repose as to Plaintiffs’ claims against the Estate. That statute of repose is applicable to all other time limitations in the Probate Code: “*Notwithstanding any other provision of the code, 2 years after the death of a person, neither the decedent’s estate, the personal representative, if any, nor the beneficiaries shall be liable for any claim or cause of action against the decedent . . .*” § 733.710(1), Fla. Stat. (2013) (emphasis supplied).

4. Statutes of limitation vs. statutes of repose.

Statutes of limitation require actions to be commenced within a certain time limit—typically the occurrence of the last element of the cause of action. *Kush v. Lloyd*, 616 So. 2d 415, 418 (Fla. 1992). In contrast, statutes of repose extinguish a cause of action if not timely filed—even if the cause of action has not yet accrued. As this Court explained in *Kush*:

There is considerable misunderstanding of the relationship between statutes of limitation and statutes of repose. A statute of limitation begins to run upon the accrual of a cause of action except where there are provisions which defer the running of the statute in cases of fraud or where the cause of action cannot be reasonably discovered. On the other hand, a statute of repose, which

is usually longer in length, runs from the date of a discrete act on the part of the defendant without regard to when the cause of action accrued. This is explained by W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 30, at 168 (5th ed. 1984), as follows:

A statute of repose generally begins to run at an earlier date and runs for a longer period of time than the otherwise applicable statute of limitations unaffected by the discovery accrual rule. Repose statutes may begin to run from the time of the defendant's act or neglect, as in the medical malpractice context, or upon the occurrence of a specific and identifiable event shortly thereafter — as from the substantial completion of the structure, in actions against architects and contractors, or from the manufacture or sale of the product, in products liability cases. Statutes of repose by their nature reimpose on some plaintiffs the hardship of having a claim extinguished before it is discovered, or perhaps before it even exists, and their constitutionality has been challenged on a variety of state and federal grounds. Although some of the statutes have been declared unconstitutional, the courts in most jurisdictions have upheld their statutes and the legislatures in those that have not have sometimes reenacted new repose legislation that has withstood constitutional attack.

616 So. 2d at 418-419. *See also* *Nehme v. Smithkline Beecham Clinical Laboratories, Inc.*, 863 So. 2d 201, 208 (Fla. 2003) (“The very purpose of a statute of repose is to extinguish valid causes of action, sometimes before they even accrue.”)

5. The two-year statute of repose in section 733.710(1) is paramount over the statute of limitation in section 733.702.

The two-year statute of repose in section 733.710(1) “is paramount over the limitations period in section 733.702(1).” *Comerica Bank and Trust, F.S.B. v. SDI Operating Partners, L.P.*, 673 So. 2d 163, 165 (Fla. 4th DCA 1996). “Reading the two sections together, it appears that section 733.702 fixes the basic time frame for filing of claims in decedent’s estates being probated in Florida, but section 733.710 sets an *absolute deadline beyond which no claim may be entertained.*” *Id.* (emphasis supplied). Similarly, section 733.710 “takes precedence over all other provisions in the probate code” and is formulated to “extinguish any liability that the estate, the beneficiaries or the PR might have had for any claim or cause of action against the decedent.” *Id.*

Plaintiffs contend that section 733.702(4)(b) (the liability insurance provision in the statute of limitation) allowed them to proceed against the Estate and LBC. That contention flies in the face of the constraint in section 733.702(5). To the extent the two-year statute of repose in section 733.710(1) is paramount over the limitation periods in section 733.702, it is not a reasonable and

logical reading of section 733.702(4)(b) to exclude the two-year non-claim limitation from such claims. Indeed, section 733.702(5) makes no exceptions for these types of claims.

6. Standards for statutory interpretation.

Although Plaintiffs' initial brief goes to great lengths to articulate the history of sections 733.702 and 733.710, that statutory history is of modest value at best. Instead, the plain meaning of these provisions should be the starting point for this Court's analysis.

"The 'plain meaning of the statute is always the starting point in statutory interpretation.'" *Alachua County v. Watson*, 333 So. 3d at 169 (quoting *GTC v. Edgar*, 967 So. 2d 781, 785 (Fla. 2007)). "A court's determination of the meaning of a statute begins with the language of the statute." *Halifax Hosp. Med. Center v. State*, 278 So. 3d 545, 547 (Fla. 2019). If the statutory language is clear, the statute is given its plain meaning, and a court does not look behind that language for legislative intent or resort to rules of statutory construction. *Id.* (citing *City of Parker v. State*, 992 So. 2d 171, 176 (Fla. 2008)). "Because even a clearly discernable Legislative intent cannot change the meaning of a plainly worded statute, it would only confuse matters to focus on what the Legislature might have intended

rather than what the statute actually says.” *State v. Peraza*, 259 So. 3d 728, 733 (Fla. 2018). Likewise, “when determining the meaning of a statute, courts do not reach policy considerations where the statute’s meaning is clear.” *Shim v. Beuschel*, No. SC21-249 (Fla. May 26, 2022). And the legislative history of a statute is irrelevant when the wording of a statute is clear. *See Aetna Cas. & Sur. Co. v. Huntington Nat. Bank*, 609 So. 2d 1315, 1317 (Fla. 1992); *Goldenberg v. Sawczak*, 791 So. 2d 1078, 1083 (Fla. 2001) (“No reliance on legislative history is needed to determine intent where the statutory language is clear.”)

Here, the meanings of sections 733.702 and 733.710 are clear and unambiguous. *See Comerica Bank & Trust, F.S.B. v. SDI Operating Partners, L.P.*, 673 So. 2d 163, 168 (Fla.4th DCA 1996) (“To repeat ourselves, there is no ambiguity in the words used in section 733.710. They say that, in spite of anything contained in any other statute, the estate is simply not liable on any claim filed more than 2 years after the decedent’s death.”) Thus, this Court need not resort to any rules of statutory construction other than the plain meaning of those statutes.

7. The process of perfecting a tort claim against a deceased person.

Plaintiffs claim that the Probate Code's statute of repose protects only three parties (or types of parties) from liability: the deceased person's estate, the personal representative of the estate, and the estate's beneficiaries. *See* Initial Br., p. 35. Plaintiffs further assert that the statute of repose, therefore, does not shield either LBC or its insurers. *Id.* at 36. Although Plaintiffs are correct that the statute of repose specifies only three parties who are protected by the statute, this is far from the end of the analysis as to the ultimate effect of the statute of repose. In order to perfect a tort claim against a deceased person, the following steps must be taken in a timely manner:

a. A claim against a deceased person must be brought against the person's estate.

A tort claim against a deceased tortfeasor in circuit court must necessarily be brought against the tortfeasor's estate. Florida law does not give dignity to a legal action against a deceased tortfeasor unless and until a probate estate has been established for the tortfeasor. The First District examined this concept in *In re: 73 Engle-Related Cases*, 239 So. 3d 166 (Fla. 1st DCA 2018), *rev. denied*, 2020

WL 710294 (Fla. Feb. 12, 2020). There, the court addressed the propriety of the dismissal of 73 personal injury cases filed on behalf of dead persons in the *Engle* progeny litigation. *Id.* at 167-168. In affirming the dismissal, the First District reasoned:

We find no error in the trial court’s decision to dismiss the personal injury lawsuits filed by plaintiffs’ counsel on behalf of dead plaintiffs. The lawsuits filed here were nullities because a dead person cannot file and maintain a lawsuit. It is a basic legal truth that “unless an *in rem* proceeding is before the court, a cause of action must be conducted by or opposed by a ‘person’ recognized under the laws of this state.” *Cocoa Acad. For Aerospace Tech. v. Sch. Bd. of Brevard Cty., Fla.*, 706 So. 2d 297, 398 (Fla. 5th DCA 1998). Dead persons aren’t qualified to conduct a suit. *Xtra Super Food Ctr. v. Carmona*, 516 So. 2d 300, 301 (Fla. 1st DCA 1987) (“Deceased persons cannot be parties to a judicial or quasi-judicial proceeding.”); *see also In re Engle Cases*, 767 F. 3d 1082, 1086-1087 (11th Cir. 2014) (“As any lawyer worth his salt knows, a dead person cannot maintain a personal injury claim.”); *DeArmas v. Blonstein*, 356 So. 2d 1339 (Fla. 3d DCA 1978) (affirming the dismissal of a personal injury claim where the plaintiff died before the lawsuit was filed).

Id. at 168-169. Likewise, the court stated that the real party in interest in a tort claim involving a dead person is the decedent’s estate, and that the personal representative is a nominal party to the claim. *Id.* at 169 (quoting *Estate of Eisen v. Philip Morris USA, Inc.*, 126 So. 2d 323 (Fla. 3d DCA 2013)).

Here, Mr. Morton's estate was the real party in interest for Plaintiffs' claims against Mr. Morton after his passing.

b. Plaintiffs must assert a timely claim against the Estate.

As discussed throughout this brief, Plaintiffs were obligated to commence their claims within the two-year time period set forth in the Probate Code's statute of repose. *See* §§ 1-3, *supra*. Section 733.710(1) is a statute of repose that bars any claims filed against the Estate more than two years after Mr. Morton's death. This statute "creates an immunity from liability arising from the lapse of the period stated" against Mr. Morton. *Comerica*, 673 So. 2d at 165.

The Estate is immune from Plaintiffs' claims, however, because Plaintiffs failed to commence an action against the Estate in a timely manner, *i.e.*, within two years after Mr. Morton's death.

c. Plaintiffs were required to obtain a settlement or verdict against the Estate.

If Plaintiffs asserted a timely lawsuit against the Estate, Plaintiffs were required to obtain a settlement or verdict against the Estate in order to perfect their claim such that they could avail themselves of any insurance coverage that might inure to the Estate's benefit. Stated otherwise, Plaintiffs' assertion that their claims were

not barred because of the potential availability of casualty insurance is only relevant if and when they obtain a verdict or settlement against the Estate. Florida's non-joinder statute, section 627.4136, Florida Statutes (2014), prevented Plaintiffs from asserting a direct claim against any insurance carrier that might provide casualty insurance to cover Mr. Morton.

Because of the non-joinder statute—and the fact that Mr. Morton's estate is the real party in interest—the *only* party who might be held liable by the jury for the direct negligence of Mr. Morton is Mr. Morton's estate.

Plaintiffs argue, however, that section 733.710(1) “shields three—and only three—persons from liability: estates, personal representatives, and beneficiaries.” Initial Br., p. 35. Plaintiffs' argument in this regard misses the mark—and supports the Estate and LBC's arguments as to the untimeliness of Plaintiffs' claims. Under the non-joinder statute, Plaintiffs could not commence a direct action against a casualty insurance carrier. Instead, Plaintiffs could only sue Mr. Morton's *estate*—the real party in interest—by virtue of the fact that he died shortly after the accident. If section 733.710(1) protects the Estate against untimely claims, and the Estate is the

only real party in interest (because of the non-joinder statute), logic dictates that there are *no other viable parties* against whom Plaintiffs could assert a timely claim for Mr. Morton's direct negligence.

But section 733.710(1) creates immunity for the Estate for such a cause of action where, as here, the causes of action were not commenced within two years of Mr. Morton's death.

The Estate and LBC discuss the effect of this immunity as it relates to Plaintiffs' vicarious liability claims against LBC in Section E, *infra*.

8. The First District correctly held that the Probate Code's statute of repose barred Plaintiffs' claims against the Estate.

The parties do not dispute that Plaintiffs first commenced their claims against Mr. Morton over three years and seven months after Mr. Morton's death. But because the statute of repose in section 733.710(1) bars claims against a decedent tortfeasor's estate if not commenced within two years, Plaintiffs' claims against Mr. Morton's estate were time-barred. Stated otherwise, Plaintiffs' claims against Mr. Morton's estate must have been commenced on or before June 28, 2016 (*i.e.*, within two years after his death). Plaintiffs did not,

however, file suit until February 6, 2018—over 19 months *after* the expiration of the statute of repose.

And none of the timeliness exceptions in section 733.702—including the casualty insurance exception in 733.702(4)(b)—provide any saving grace to Plaintiffs. This is because section 733.702 contains two important constraints on the timeliness exceptions:

- First, the prefatory clause in section 733.702(1) states, “If not barred by s. 733.710 . . .” This prefatory clause clearly constrains claims under section 733.702 to those that are timely filed within the two-year statute of repose in section 733.710.
- More importantly, section 733.702(5) states, “Nothing in this section shall extend the limitations period set forth in s. 733.710.” Even absent the prefatory clause in section 733.702(1), this language in section 733.702(5) is a clear and unequivocal legislative requirement that the two-year statute of repose trumps any timeliness provisions in section 733.702.

Applying the plain language of sections 733.702 and 733.710 to

the undisputed facts reveal that Plaintiffs asserted their claims against the Estate well after the expiration of the Probate Code's statute of repose. The First District was thus correct in affirming the trial court's summary final judgment in favor of the Estate and LBC.

B. The First District did not misconstrue the term “liable” in determining the Probate Code’s statute of repose barred Plaintiffs’ claims.

Plaintiffs go to great lengths to advocate for the proposition that the First District's decision below conflated the concept of “liable in a pay-money sense” with “liable in a breach-of-duty sense.” See Initial Br., pp. 45-49. Plaintiffs argue that the First District's “construction of the long statute [the statute of repose] changed the meaning of ‘liable’ to a breach-of-duty sense rather than the pay-money sense dictated by text and context.” *Id.* at p. 48. The Court should reject these arguments.

Should one wish to parse the appropriate use of the term “liable,” one need not venture farther than Chapter 768, Florida Statutes. Chapter 768 contains at least 54 instances of the term “liable.” The majority of those instances are contained in statutes that confer immunity upon a defendant who has committed an act

resulting in injury or death, but by legislative grace, is not liable, *i.e.*, obligated to pay money, to a plaintiff. *See, e.g.*, § 768.075, Fla. Stat. (2021) (conferring immunity on a person or organization who causes death or injury to a trespasser impaired by drugs or alcohol); § 768.091, Fla. Stat. (2021) (conferring immunity on an employer providing ridesharing services to employees for injuries or damages); § 768.125, Fla. Stat. (2021) (conferring limited immunity on sellers of alcoholic beverages for injury or damage); § 768.13, Fla. Stat. (2021) (conferring immunity to “Good Samaritans” who render emergency care or treatment for damages sustained by patients); § 768.1382, Fla. Stat. (2021) (conferring immunity to streetlight providers for personal injury or wrongful death under certain circumstances).

Plaintiffs argue that “a decedent can’t be ‘liable’ in a pay-money sense because, well, dead people can’t pay money. A decedent can be ‘liable’ only in a breach-of-duty sense.” Initial Br., p. 46. This Court should reject this argument. Plaintiffs’ argument in this regard fails to acknowledge a basic tenet of Florida tort law.

This Court articulated the difference between the concepts of breach-of-duty liability and pay-money liability in *Wallace v. Dean*, 3

So. 3d 1035, 1044-1045 (Fla. 2009). In *Wallace*, the Court explained the distinction between (i) non-liability due to the absence of a duty on the part of a defendant with (ii) immunity from suit:

Under traditional principles of tort law, the absence of a duty of care between the defendant and the plaintiff results in *a lack of liability*, not application of immunity from suit. See, e.g., *Clay Elec. Coop., Inc. v. Johnson*, 873 So. 2d 1182, 1185 (Fla. 2003) (identifying “duty of care” as the first required element of a negligence claim). Conversely, sovereign immunity may shield the government from an action in its courts . . . even when the State may be otherwise liable to an injured party for its tortious conduct. . . . In other words, the *presence of sovereign immunity* does not render the State’s actions nontortious (it simply means that the State has *not consented to suit* in its court with regard to certain claims). In contrast, the *absence of a duty of care* renders the defendant nonliable as a matter of law because his, her, or its actions are therefore nontortious vis-à-vis the plaintiff.

[emphasis in original].

It is wholly consistent that the use of the term “liable” in section 733.710(1) (the two-year statute of repose) has the same meaning as the Florida legislature used in enacting a wide variety of tort statutes over the years, *i.e.*, those statutes providing immunity or some other bar to a civil claim when a defendant has caused injury or death.

C. The First District’s opinion did not violate any related-statutes or surplusage canons.

Plaintiffs argue the First District erred because its interpretation of sections 733.702 and 733.710 would render section 733.702(2) inconsequential. See Initial Br., pp. 49-51. Plaintiffs assert, “[t]he First District’s construction fails to integrate the extinguishment provision and the long statute into a cohesive, workable whole.” *Id.* at p. 51. This Court should reject this argument.

1. Section 733.702(2).

Section 733.702(2) states, “No cause of action, including, but not limited to, an action founded upon fraud or other wrongful act or omission, shall survive the death of the person against whom the claim may be made, whether or not an action is pending at the death of the person, unless a claim is filed within the time periods set forth in *this part*.” (emphasis supplied). Plaintiffs contend that the First District’s interpretation of the relevant provisions of Chapter 733 renders section 733.702(4) (the casualty insurance exception to the statute of limitations) “inoperative.” *Id.* at p. 51. Thus, Plaintiffs argue, the First District was wrong in its interpretation and

application of these statutory provisions. This argument should be soundly rejected.

2. Chapter 733 is divided into parts and sections.

As with many chapters in the Florida Statutes, Chapter 733 contains a variety of “parts.” See *Comerica*, 673 So. 2d at 165; see also *National Corporacion Venezolana v. M/V Manaure V*, 511 So. 2d 968, 969-970 (Fla. 1987) (explaining “parts” of statutory chapters). Specifically, Chapter 733 contains nine parts. For instance, Part I is titled “General Provisions.” Part IV is titled “Fiduciary Bonds.” Part VI is titled “Duties and Powers of Personal Representative.” And Part VII is titled “Creditors’ Claims.”

Part VII of Chapter 733 contains nine sections—sections 733.702 through 733.710. Thus, simple logic indicates that the term “this part” in section 733.702(4) refers to Part VII of Chapter 733—including section 733.710(1). Stated otherwise, section 733.702(2)’s reference to “the time periods in this part” necessarily includes the two-year statute of repose in section 733.710(1).

3. The First District did not err in its interpretation or application of sections 733.702 and 733.710.

Contrary to Plaintiffs' arguments, the First District's interpretation of Part VII does not cause any logical gaps or legal inconsistencies. Nothing in the First District's opinion would lead one to the conclusion that section 733.702(2) would eliminate any statutorily-enumerated exceptions to the three-month/30-day statute of limitation or the two-year statute of repose. That section 733.702(2) requires a claim to be asserted "within the time periods set forth in this part" merely indicates that claims against decedents are subject to the statute of limitation set forth in section 733.701(1) and the statute of repose in section 733.710(1)—both of which are contained in Part VII of Chapter 733.

Plaintiffs state, however, "[U]nder the First District's construction, all creditors in such proceedings [under section 733.702(4)]—not just tort plaintiffs—must file claims in the probate court within two years of the decedent's death or risk forfeiture." Initial Br., p. 51. That's not what the First District held.

The First District clearly acknowledged that section 733.702(4) contained exceptions. (AR255) The court's recognition of those exceptions is wholly ignored by Plaintiffs, however. Furthermore, the exceptions in sections 733.702 and 733.710 are not made

“inconsequential” by anything in the First District’s opinion. Plaintiffs claim, for example, that the First District’s construction of these statutes “eliminates” (at least in part) the exceptions for mortgagees or lienholders in sections 733.702(4)(a) and 733.710(3). Initial Br., p. 51. As demonstrated below, this assertion is incorrect.

It is important to note that, unlike tort claimants, other types of creditors or claimants are relieved from Chapter 733’s statute of limitation and statute of repose. Notably, in the case of a secured lender or a mortgagee, there are significant exceptions to both the statute of limitations and the statute of repose:

- In regard to the statute of limitation in section 733.702(1), section 733.702(4) states, “Nothing in this section affects or prevents . . . [a] proceeding to enforce any mortgage, security interest, or other lien on property of the decedent.”
- In regard to the statute of repose in section 733.710(1), 733.710(3) states, “This section shall not affect the lien of any duly recorded mortgage or security interest or the lien of any person in possession or personal property or the right to foreclose and enforce the mortgage lien.”

In enacting these provisions, it is manifestly abundant the Legislature intended to afford this class of creditor significantly more rights than other types of creditors. Nothing in the First District's opinion erodes those rights.

D. The First District correctly construed and applied the non-joinder statute.

The First District's application of the non-joinder statute was appropriate under the circumstances at hand.

1. The non-joinder statute.

Florida's non-joinder statute, section 627.4136, Florida Statutes (2014), prevented Plaintiffs from asserting a direct claim against any insurance carrier that might provide casualty insurance to cover Mr. Morton or the Estate. Because of the non-joinder statute—and the fact that the Estate is the real party in interest—the only party who might be held liable by the jury for the direct negligence of Mr. Morton is the Estate.

Florida law bars the joinder of a liability insurer in a tort claim:

It shall be a condition precedent to the accrual or maintenance of a cause of action against a liability insurer by a person not an insured under the terms of the liability insurance contract that such person shall first obtain a

settlement or verdict against a person who is an insured under the terms of such policy for a cause of action which is covered by such policy.

§ 627.4136(1), Fla. Stat. (2014). This statute prohibits the filing of a “direct action” against a liability insurer without first (1) obtaining a settlement against the insured, or (2) obtaining a verdict against the insured. *See, e.g., Progressive Select Ins. Co. v. Bigney*, 264 So. 3d 222 (Fla. 5th DCA 2018). *See also Lexington Ins. Co. v. James*, 295 So. 3d 367 (Fla. 1st DCA 2020) (denying insurer’s motion to intervene where plaintiff’s claims had not yet been reduced to a verdict). Here, Plaintiffs did not satisfy either of these prerequisites.

2. Whether Plaintiffs could have sued only LBC is a moot issue.

Plaintiffs assert that the nonjoinder statute does not preclude their claims, as they “*could have* established Mr. Morton’s liability by suing either his estate, his employer (LBC), or both.” Initial Brief, p. 54. [emphasis supplied]. Regardless of the legal accuracy of this assertion, the cold fact remains that Plaintiffs *didn’t* elect to sue only LBC. They sued *both* the Estate *and* LBC. In doing so, Plaintiffs allowed the Estate and LBC to assert their defenses—whatever they might be—before the trial court. It was not inconceivable that the

Estate and LBC might assert one or more dispositive defenses—including timeliness defenses under Chapter 733. Having voluntarily submitted their claims against the Estate to a court of competent jurisdiction, and the claims against the Estate being time-barred under the statute of repose in the Probate Code, it was appropriate for the trial court to enter summary judgment in favor of LBC.

The Estate and LBC are unaware of any statutory requirements or decisional law in Florida requiring that an employee who causes an accident be joined in a personal injury claim asserting vicarious liability against the employee’s employer. Perhaps counterintuitively, Florida law does not provide much guidance on the issue of whether an agent is a necessary or indispensable party in a personal injury or death claim against the agent’s principal.

But even if Plaintiffs had *not* sued the Estate, the result would be the same. *See* Section E, *infra*.

3. *Fincher and Pendarvis* are not pertinent to the circumstances at hand or Plaintiffs’ theories of recovery.

Plaintiffs assert they “could have sued only Mr. Morton’s employer (LBC) to establish Mr. Morton’s liability.” Plaintiffs support

this proposition by citations to (i) this Court’s decisions in *Fincher Motor Sales, Inc. v. Lakin* and *Pendarvis v. Pfeifer*, (ii) secondary sources, and (iii) an intermediate court decision from Washington, *Orwick v. Fox*, 828 P. 2d 12 (Wash. Ct. App. 1992). Initial Br., pp. 53-54. For various reasons, none of these authorities lend much to the issues currently before this Court.

a. *Fincher* and *Pendarvis*

Plaintiffs cite to *Fincher Motor Sales, Inc. v. Lakin*, 156 So. 2d 672 (Fla. 3d DCA 1963), and *Pendarvis v. Pfeifer*, 182 So. 307 (Fla. 1938), for the proposition that it is “optional” whether a plaintiff sues a negligent agent or the vicariously liable principal. Initial Br., pp. 53-54. But *Fincher* and *Pendarvis* are inapposite to this issue because both of these cases addressed a plaintiff’s “option” in the context of joint and several liability. As will be discussed below, however, the alleged liability of LBC is not joint and several—any liability was merely vicarious. This Court (and many others) draw a firm distinction between claims involving joint and several liability with claims involving, as here, only vicarious liability.

In *Pendarvis*, the relevant issue before the Court was whether the plaintiff in a school bus accident was obligated to sue the third-

party motorist who may have shared fault for causing the accident. 182 So. at 309. It was in that context that the Court stated, “Joint tortfeasors are separately as well as jointly liable but it is optional with the plaintiff whether he seeks a judgment against one or all of them.” *Id.*

Likewise, in *Fincher*, the Court addressed the issue of whether Fincher Motor Sales (the owner of an automobile which was involved in an accident) was required to sue both the driver of the vehicle (Lakin) and the alleged lessor of the automobile (Gulf Land & Title Company) in an indemnity action. *Fincher Motor Sales, Inc. v. Lakin*, 156 So. 2d 672, 673 (Fla. 3d DCA 1963). This Court found that the trial court erred in ruling that Gulf was an indispensable party. *Id.* at 674. “When two parties are liable to another jointly and severally it is optional with the plaintiff whether he sues either or both.” *Id.*

As will be explained below, neither *Fincher* nor *Pendarvis* offer this Court any meaningful guidance to the issues at hand. Both of those cases addressed the joinder of a jointly and severally liable party—an issue that is immaterial to concept of vicarious liability founded on respondeat superior or the dangerous instrumentality doctrine.

b. Joint and several liability vs. vicarious liability.

Vicarious liability is a wholly distinct legal theory from joint and several liability. In *Williams v. Hines*, 86 So. 695, 697 (Fla. 1920), this Court stated:

Where the common-law rule prevails, unmodified by statute, the weight of authority supports the holding that in an action against a principal, or master, and his agent, or servant, for damages resulting solely from the negligence of the agent, or servant, acting as such, a verdict of the jury exonerating the agent, or servant, exonerates the principal or master. *They are in no sense joint tort-feasors*, but the basis of the liability of the principal, or master, is the well-known doctrine of respondeat superior.

[emphasis supplied]. 65 years later, this Court reaffirmed its adherence to this concept (and *Williams*) in *Bankers Multiple Line Ins. Co. v. Farish*, 464 So. 2d 530, 532 (Fla. 1985). A variety of Florida's district courts fully concur. See, e.g., *Grobman v. Posey*, 863 So. 2d 1230, 1235 (Fla. 4th DCA 2003) ("Vicarious liability does not mesh with the concept of liability that can be apportioned among joint tortfeasors."); *Hunter v. Shaw*, 182 So. 3d 784, 785 (Fla. 1st DCA 2015) ("The trial court here erred in concluding that Appellant, alleged to be vicariously liable for the deputy's alleged negligence, is a joint tortfeasor. . ."); *Dabasse v. Reyes*, 963 So. 2d 288, 290-291

(Fla. 2d DCA 2007) (error to enter money judgment against defendant on a joint and several basis where that defendant's liability was merely vicarious); *J.R. Brooks & Son, Inc. v. Quiroz*, 707 So. 2d 861, 863 (Fla. 3d DCA 1998) (distinguishing between vicarious liability and joint and several liability).

4. Plaintiffs' Secondary Sources

Plaintiffs also cite to 27 *Am. Jur. 2d* Employment § 378 (Feb. 2022 update) and *Federal Practice and Procedure* § 1623 (3d ed. April 2021) for the proposition that an employee is not a necessary party to a respondeat superior action against an employer. Initial Br., p. 54. Neither of these resources are binding on this Court. More importantly, Plaintiffs omit from their initial brief a portion of at least one of these resources that runs directly counter to Plaintiffs' arguments.

Notably, a full and fair reading of the American Jurisprudence (Second) note cited by Plaintiffs reveals the following:

At common law, an employer and employee may each and both be liable for the employee's tort in the course of employment. The proper defendant in an action based on a theory of respondeat superior is the employer. The right of an injured party to sue the employer is a direct or primary right because the claim is distinct and separate from the claim against the employee; therefore, the

employee is not a necessary party to an action against an employer. Accordingly, a claim asserting the negligence of an employee for acts undertaken within the scope of employment that does not constitute a claim in legal or medical malpractice may be brought against the employer without joining the negligent employee as a party.

An exception to the general rule that an employer may be sued separately for the employee's negligence, without joinder of the negligent employee, occurs when the statute of limitations expires as to the employee before suit was brought against the employer. Any release of a party that would prevent the indemnification of the party who eventually had to satisfy a judgment based on another's negligence will prevent suit based upon respondeat superior.

27 *Am. Jur. 2d* Employment Relationship § 378 (May 2022 update)

[emphasis supplied]. This comment is substantially similar to commentary in 3 *C.J.S. Agency* § 523 (May 2022 update):

A plaintiff may sue a principal for its vicarious liability based on the existence of an agency relationship and acts within the scope of an agent's authority to act for the principal, including apparent agency. Circumstances in which it would be improper to permit a plaintiff to proceed solely against a principal on its vicarious liability for the conduct of its agent include . . . when the agent is immune from suit, either by statute or by the common law, [or] when the plaintiff's claim against the agent is procedurally barred by operation of law before the plaintiff asserts a vicarious liability claim against the principal.

[emphasis supplied].

Likewise, Plaintiffs' citation to Federal Practice and Procedure ("[J]oinder has not been required of principals and agents") offers little guidance—especially since the note specifically mentions that some states treat auto accident cases in a different manner:

Auto collision cases in which the owner of the car is not the same as the driver who allegedly caused the accident also have received some special treatment because of differences in state law. *Under some state laws imposing liability on the owner, the courts have ruled that the owner is a party required to be joined under Rule 19(b), but under others, the injured party may choose to sue either the owner or the driver, and joinder of the absent party will not be required.*

7 Fed. Prac. & Proc. Civ. § 1623 (3d ed.) (emphasis supplied).

In this regard, Federal Practice and Procedure cites to *Caldararo v. Au*, 570 F. Supp. 39 (S.D.N.Y. 1983). *Caldararo* addressed the issue of whether the owner of a motor vehicle was jointly and severally liable: "Even though the [New York] statute does create joint and several liability, the label 'joint tortfeasor' as applied to an owner is an artificial one. New York courts consistently have held that an owner's liability is vicarious, resting not on his own negligence but on a finding of the driver's negligence." *Id.* at 40. The court found that the vehicle's owner was an indispensable party:

[A]n adjudication on the driver's part could unfairly prejudice Chu [the owner], particularly if the driver has less incentive than Chu to defend effectively. Chu would be collaterally estopped from contesting a finding of negligence against the driver with independent evidence in a second action. This extreme, potential prejudice makes Chu an indispensable party to this action.

Id. at 41.

The concerns noted in *Caldararo* are equally valid under Florida law. As explained by this Court in *Houdaille Ind., Inc. v. Edwards*, 374 So. 2d 490, 492-493 (Fla. 1979), a vicariously liable party is entitled to indemnity from the party at fault. Indemnity “[s]hifts the entire loss from one who, although without active negligence or fault, has been obligated to pay, because of some vicarious, constructive, derivative, or technical liability, to another who should bear the costs because it was the latter’s wrongdoing for which the former is held liable.” *Id.* at 493. This long-standing precedent from this Court indicates an active tortfeasor is obligated to indemnify a merely vicariously liable defendant. *See also Safecare Medical Center v. Howard*, 670 So. 2d 1020, 1022 (Fla. 1st DCA 1996) (“A classic example of an indemnity action is when an employer held vicariously liable to a third person seeks recovery from the employee whose negligence caused injury.”) But here, just as Plaintiffs’ claims against

the Estate are time-barred under Chapter 733's statute of repose, so too would any indemnity claim by LBC against the Estate be time-barred.

5. *Orwick v. Fox* does not provide helpful guidance.

Orwick v. Fox, 828 P. 2d 12 (Wash. Ct. App. 1992) lends no meaningful guidance to this Court because Washington law, unlike Florida law, holds that employees and employers are jointly and severally liable for the negligent acts of employees. "An employer and its employees are jointly and severally liable for the negligent acts of the employee in the scope of employment, and one damaged by such acts can sue both the employer and the employee or either separately." 828 P. 2d at 18. As discussed above, this Court and a variety of Florida district courts have long maintained that vicarious liability is a wholly separate and distinct theory of liability from joint and several liability. *See Williams v. Hines, supra*.

6. Judgment required?

This Court should flatly reject Plaintiffs' argument that the First District's opinion required entry of a judgment against the Estate or LBC before any insurance carrier could be liable under Florida's non-joinder statute. *See Initial Br.*, p. 55.

That is not a precise and full characterization of what the First District said. To be sure, the First District stated “[A]n insurer cannot be liable for such claims until a creditor seeks and perfects a claim against the decedent tortfeasor through the entry of a judgment establishing the decedent’s liability.” (AR256) But in the very next sentence, the court clarified, “Under Florida’s non-joinder statute, section 627.4136(1), Florida Statutes, a plaintiff may not file a ‘direct action’ against a liability insurer without first obtaining a *settlement or a verdict* against the insured.” (AR257) [emphasis supplied]. This is exactly what the statute requires.

The First District’s legal analysis as to the effect of the non-joinder statute, though perhaps loosely worded, accurately reflected the appropriate rule of law in regard to the non-joinder statute.

E. The First District correctly applied the so-called “exoneration rule.”

The First District correctly found that the application of the Probate Code’s statute of repose operated to relieve Mr. Morton, and thus LBC, of liability.

At the outset, it warrants mention that Florida jurisprudence does not contain a concept titled “exoneration rule” in the context at hand. Although this may be a handy manner with which to characterize a variety of related legal concepts, this nomenclature is wholly self-created by Plaintiffs.

1. Vicarious liability, generally.

Plaintiffs’ only claims against LBC are for vicarious liability under the doctrines of respondeat superior and dangerous instrumentality. Plaintiffs do not allege that LBC had any direct role in causing the accident. In general, “the doctrine of vicarious liability takes a party that is free of legal fault and visits upon that party the negligence of another.” *American Home Assur. Co. v. National R.R. Passenger Corp.*, 908 So. 2d 459, 468 (Fla. 2005). “The vicariously liable party has not breached any duty to the plaintiff; its liability is based solely on the legal imputation of responsibility for another party’s tortious acts.” *Id.*

Respondeat superior is a type of vicarious liability that “imposes liability upon a principal for the negligent acts of his agent undertaken within the scope of the agent’s employment.” *Crowell v. Clay Hyder Trucking Lines*, 700 So. 2d 120, 123 (Fla. 2d DCA 1997),

rev. denied, 705 So. 2d 569 (Fla. 1998). Under the doctrine of *respondeat superior*, an employer is liable for its employee's negligent conduct, without regard to the employer's conduct. See *Alexander v. Alterman Transp. Lines, Inc.*, 350 So. 2d 1128, 1130 (Fla. 1st DCA 1977) ("Of course, [the employer] is liable for all compensatory damages resulting from the acts of its employee in operating the company's motor vehicle by reason of its status as employer").

The dangerous instrumentality doctrine is another form of vicarious liability. Under the dangerous instrumentality doctrine, "an automobile owner is generally liable for another's negligent misuse of his automobile." *Cofty v. Smith*, 686 So. 2d 728, 729-30 (Fla. 1st DCA 1997). It is well-established that the liability under the dangerous instrumentality is merely vicarious. As this Court has explained, the dangerous instrumentality doctrine "impos[es] strict vicarious liability on those with an identifiable property ownership interest in the vehicle." *Christensen v. Bowen*, 140 So. 3d 498, 501 (Fla. 2014) (citing *Kraemer v. Gen. Motors Acceptance Corp.*, 572 So. 2d 1363, 1365 (Fla. 1990)). See also *Smith v. Ryder Truck Rentals, Inc.*, 182 So. 2d 422, 424 (Fla. 1966) ("[T]he dangerous instrumentality

doctrine . . . is founded on respondeat superior.”); *Hunt v. Ryder Truck Rentals, Inc.*, 216 So. 2d 751, 754 (Fla. 1968) (same).

Further explaining this form of vicarious liability, the Fifth District noted that the “strict” component of the dangerous instrumentality doctrine merely means that “a plaintiff need not prove that an owner negligently entrusted the vehicle to its operator for liability to attach.” *Burch v. Sun State Ford, Inc.*, 864 So.2d 466, 470 (Fla. 5th DCA 2004), *rev. dismissed*, 889 So. 2d 778 (Fla. 2009).

Under either of these theories of vicarious liability, however, the liability of the principal is wholly dependent on the liability of the agent. Accordingly, “[i]n an action against an employer for the actions of the employee based upon the theory of vicarious liability or respondeat superior, the plaintiff must show liability on the part of the employee: ‘[I]f the employee is not liable the employer is not liable.’” *Walsingham v. Browning*, 525 So. 2d 996, 997 (Fla. 1st DCA 1988) (quoting *Mallory v. O’Neil*, 69 So. 2d 313, 315 (Fla. 1954)); *see also Buettner v. Cellular One, Inc.*, 700 So. 2d 48 (Fla. 1st DCA 1997), *rev. denied*, 717 So. 2d 529 (Fla. 1998). As this Court stated in *Williams v. Hines*, 86 So. 690, 695 (Fla. 1920): “[I]n an action against a principal, or master, and his agent, or servant, for damages

resulting solely from the negligence of the agent, or servant, acting as such, a verdict of the jury exonerating the agent, or servant, exonerates the principal or master.” *See also Mallory v. O’Neil*, 69 So. 2d 313, 315 (Fla. 1954) (“[T]his Court is committed to the rule that if the employee is not liable the employer is not liable.”); *Bankers Multiple Line Ins. Co. v. Farish*, 464 So. 2d 530, 532 (Fla. 1985) (“It is generally recognized that, when a principal’s liability rests solely on the doctrine of respondeat superior, a principal cannot be held liable if the agent is exonerated.”)

The application of this concept is exemplified in *Green v. EMSA Limited Partnership*, 725 So. 2d 1194 (Fla. 3d DCA 1999). In *Green*, the jury returned a defense verdict in favor Dr. Katz, but returned a verdict against Dr. Katz’s medical group, EMSA. *Id.* at 1195. The Third District reversed the verdict against EMSA, stating, “The verdict for Dr. Katz itself precluded any recovery based on vicarious liability for his actions on his group, EMSA.” *Id.* (citing *Williams v. Hines*, 86 So. 695 (Fla. 1920)). “Because we find no competent evidence to sustain a finding that EMSA was itself guilty of any additional, independent, actionable breach of duty [cites omitted], the judgment against it cannot stand.” *Id.*

2. Vicarious liability is not an available remedy against an employer if the employee's actions are privileged or the employee is otherwise immune from suit.

An employer may be relieved from vicarious liability where an employee's conduct is privileged or the employee is otherwise immune from suit. *See Saxon v. Knowles*, 185 So. 2d 194, 196 (Fla. 4th DCA 1966) (defamation claim against municipality barred where city manager's defamatory comments were "absolutely privileged"); *Canto v. J.B. Ivey and Co.*, 595 So. 2d 1025, 1028 (Fla. 1st DCA 1992) (verdict in employer's favor affirmed where employees' actions in detaining patrons were privileged); *Palm Beach Cnty. Health Care District v. Professional Medical Education, Inc.*, 13 So. 3d 1090, 1096 (Fla. 4th DCA 2009), *review denied*, 34 So. 3d 2 (Fla. 2010) ("Because the liability of the District on the defamation count is predicated on its status as Davis's employer, the absolute immunity of Davis 'necessarily requires the exoneration' of the District."); *Medina v. City of Hialeah*, 2003 WL 1562281, *2 (S.D. Fla. Mar. 24, 2003) ("If a city official has absolute immunity against claims for defamation, then the city cannot be liable for defamation where the liability against the City is premised on *respondeat superior*.")

3. An untimely claim against an agent relieves the principal of vicarious liability.

In *Wilhelm v. Traynor*, 434 So. 2d 1011 (Fla. 5th DCA 1983), *rev. denied*, 444 So. 2d 418 (Fla. 1984), the Fifth District addressed the issue of whether the expiration of the statute of limitations against an agent was dispositive of the claims against a vicariously liable principal. The plaintiff in *Wilhelm* sued various doctors and hospitals for medical malpractice. *Id.* at 1012. The trial court granted summary judgment in favor of Dr. Traynor, a physician at Orlando General Hospital, on statute of limitations grounds. *Id.* The Fifth District affirmed. *Id.* at 1013. In doing so, the *Wilhelm* court also affirmed the entry of summary judgment in favor of Orlando General Hospital:

As to Orlando General Hospital, the complaint alleged that Dr. Traynor was acting under the supervision, direction and control of Orlando General Hospital. Because Orlando General Hospital is only vicariously responsible for the acts of Dr. Traynor, and he has no liability, the hospital is not liable.

Id. at 1013.

Similarly, in *Panther Air Boat Corp. v. MacMillan-Buchanan & Kelly Ins. Agency*, 520 So. 2d 601 (Fla. 5th DCA 1988), *reversed on other grounds*, 531 So. 2d 333 (Fla. 1988), the trial court entered

summary judgment in favor of the defendant insurance agency on statute of limitations grounds. *Id.* at 602. Citing *Wilhelm*, the trial court also granted summary judgment in favor of the insurance carrier on the grounds that “a principal is not vicariously liable where the cause of action against the agent is time barred.” *Id.* The Fifth District affirmed, holding that, because the statute of limitations had expired, the insurance carrier “could not be vicariously liable when its agent had been relieved of liability.” *Id.* at 603.

Other courts have similarly held. *Preis v. Lexington Ins. Co.*, 508 F. Supp. 2d 1061, 1078-1079 (S.D. Ala. 2007) (claim against insurance company barred where claims against agents were time-barred); *Kapitan v. DT Chicagoland Exp., Inc.*, 2013 WL 5655704, *4 (N.D. Ind. Oct. 15, 2013) (summary judgment granted in favor of trucking company-employer where statute of limitations had expired against driver-employee); *Rick Bounds Auto Sales, Inc. v. W. Heritage Ins. Co.*, 2009 WL 3190339 (S.D. Miss. 2009) (“[i]t is generally held that a suit barred by a statute of limitations against an agent will likewise bar the same claim against the principal whose liability is based solely upon the principal and agency relationship...”); *Stephens v. Petrino*, 86 S. W. 2d 836 (Ark. 2002) (summary judgment granted

in favor of physician-employers where statute of limitations had expired against CRNA-employee); *Al-Shimmari v. Detroit Medical Center*, 731 N. W. 2d 29 (Mich. 2007) (claims against defendant-hospitals barred where statute of limitations had run against defendant-physician); *Lowery v. Statewide Healthcare Service, Inc.*, 585 So. 2d 778, 780 (Miss. 1991) (“It is generally held that a suit barred by a statute of limitation against an agent will likewise bar the same claim against the principal whose liability is based solely on the principal and agency relationship, and not some act or conduct of the principal separate and apart from the act or conduct of the agent.”); *Hewett v. Kennebec Valley Mental Health Ass’n.*, 557 A. 2d 622, 624 (Maine 1989) (“the [employer’s] liability under Count II being vicarious to [the employee’s] liability, the [employer] had available the same statute of limitations defense that was available to [the employee]”); *Karaduman v. Newsday, Inc.*, 416 N.E. 2d 557, 564 (N.Y. Ct. App. 1980) (where statute of limitations extinguished reporters’ liability, newspaper’s vicarious liability was similarly extinguished); *Comer v. Risko*, 833 N. E. 2d 712 (Ohio 2005) (claim against defendant-hospital barred where statute of limitations had run against defendant-physicians). *But see Krekelberg v. City of*

Minneapolis, 2018 WL 3621031 (D. Minn. Jul. 30, 2018) (citing *Buettner* and collecting cases on statute of limitations defenses of agents and principals); *Hughes v. Doe*, 639 S. E. 2d 302 (Va. 2007).

4. *JFK Medical Center.*

Plaintiffs cite to *JFK Medical Center, Inc. v. Price*, 647 So. 2d 833 (Fla. 1994) for the proposition that the First District's reliance on *Buettner* was misplaced. Initial Br., pp. 62-63. A thorough examination of *JFK Medical Center*, however, reveals that Plaintiffs' arguments are unfounded.

An examination of the rule of law announced in *JFK Medical Center* necessarily requires a look at the precise legal issues this Court did—and didn't—adjudicate. *JFK Medical Center* came before this Court on appeal from the Fourth District's decision in *Price v. Beker*, 629 So. 2d 911 (Fla. 4th DCA 1994). The issue on appeal in the Fourth District in *Price* was whether the trial court's dismissal with prejudice against the defendant hospital's physician-employee barred the plaintiff's claims against the hospital. 629 So. 2d at 911.

In *Price*, the plaintiff settled with the physician-employee, but did not settle with the hospital (a passive tortfeasor). *Id.* As part of the settlement, the plaintiff and the physician-employee stipulated to

the entry of a dismissal without prejudice of the claims against the physician-employee. The hospital claimed that the dismissal as to the physician-employee was effective to bar the plaintiff's claims against the hospital. The Fourth District concluded that the dismissal was not effective to bar the plaintiff's claims against the hospital. *Id.* at 913. But the *Price* court also stated:

In a respondeat superior situation, it is the fault of the active tortfeasor that gives rise to the liability of the active tortfeasor's principal, the passive tortfeasor. When there has been an adjudication on the merits in favor of an active tortfeasor, it is clear that the passive tortfeasor may use the adjudication as a defense to his own liability.

Id. at 912. (emphasis supplied).

The *JFK Medical Center* Court affirmed *Price*. 647 So. 2d 835. In doing so, this Court did not disturb the holding in *Price* that “the passive tortfeasor may use the adjudication [of the active tortfeasor's fault] as a defense to his own liability.” Indeed, this Court explicitly acknowledged the parties' agreement that “when there has been an adjudication on the merits in favor of an active tortfeasor, the passive tortfeasor may use the adjudication as a defense.” *JFK Medical Center*, 647 So. 2d at 834.

With this in mind, this Court’s opinion in *JFK Medical Center* was limited to the issue of whether the voluntary dismissal of the active tortfeasor pursuant to a settlement was, *standing alone*, sufficient to conclude the plaintiff’s claims against the hospital.

That precise issue is not present before this Court, however. Instead, the pertinent rule of law articulated in *Price*—and left wholly undisturbed in *JFK Medical Center*—is that a “passive tortfeasor may use the adjudication [on the merits] as a defense to his own liability.” *Price*, 629 So.2d at 912. The issue, then, becomes whether the trial court’s dismissal of Plaintiffs’ claims against the Estate was an adjudication on the merits and, if so, whether that dismissal was a dispositive defense for LBC. That issue is discussed below.

5. Dismissals on timeliness grounds are adjudications on the merits.

In *Allie v. Ionata*, 503 So. 2d 1237, 1242 (Fla. 1987), this Court held that dismissals based on limitations statutes are adjudications on the merits. In *Allie*, the Court addressed (but rejected) the appellee’s contention that “a judgment dismissing a claim as barred by a statute of limitation determines procedural matters only, and cannot be deemed an adjudication on the merits.” 503 So. 2d at

1241. In response to that argument, the Florida Supreme Court stated, “We are compelled by both public policy considerations and the overwhelming weight of authority to disagree.” *Id.* After examining Rule 41(b), Federal Rules of Civil Procedure (the federal counterpart to Florida’s involuntary dismissal rule, Rule 1.420(b)), the *Allie* Court stated, “A dismissal of a claim as time barred clearly falls within [Rule 1.420(b)’s] ambit, thus making it an adjudication on the merits.” *Id.* at 1242. The *Allie* Court continued, “[w]e are compelled to hold that dismissals based upon limitation statutes are adjudications on the merits for res judicata purposes.” *Id.*

To be sure, the *Allie* Court stated, “The expiration of a statute of limitations does not resolve the underlying merits of the consequently barred claim in favor of either party; it merely cuts off the remedy of the party who has slept on its rights.” *Id.* at 1239-1240. But this caveat is of no help to Plaintiffs. A claim may be dismissed or disposed of without reference to the underlying merits of the claim or a determination of fault. Such circumstances include, obviously, claims barred by a statute or limitation or statute of repose. Those circumstances might also include cases in which a party is privileged or immune from a plaintiff’s claims. *See, e.g.,*

Saxon, supra. Thus, it is neither a new or novel concept that Florida law recognizes the dismissal of a party's claim without an examination or assessment of the merits of the claim.

Furthermore, Plaintiffs use an overly narrow interpretation of the term “exonerated” within the context of the issues at hand. “Exonerate” has been defined to mean “to free from a charge or the imputation of guilt; declare or prove blameless; exculpate.” *Galloway v. State*, 802 So. 2d. 1173, 1175 (Fla. 1st DCA 2001) (quoting Webster's New World Dictionary 477 (3d ed. 1988)). The First District also adopted the definition of “exonerate” from *Black's Law Dictionary*: “to free from responsibility.” *Id.* at 1175.

In the context of the issues currently before this Court it is improper to limit the term “exonerate” to include only a formal judicial determination that a party is freed from responsibility because of *actual* innocence or non-culpability. To be sure, a party may be exonerated by affirmative evidence that he or she did not commit a certain act. But it also stands to reason a party may also be exonerated (“free[d] from responsibility”) by other legal mechanisms—including the expiration of a statute of limitations or a statute of repose, or some form of immunity or privilege—that do not

weigh the merits of the claim or allegation against the party. As discussed in Section B, *supra*, the Florida Legislature provides no shortage of statutes that serve to immunize or exonerate (“free from responsibility”) a tortfeasor—regardless of the actual fault of the tortfeasor. The same is true for a variety of privileges and immunities afforded under Florida law. *See also Saxon, supra*, and *Palm Beach County, supra*. Indeed, section 733.710 is one such statute that creates immunity. *See Comerica Bank & Trust, F.S.B. v. SDI Operating Partners, L.P.*, 673 So. 2d 163, 165 (Fla. 4th DCA 1996) (section 733.710 “creates an immunity from liability arising from the lapse of the period stated.”) The concept of “exoneration” should not be disregarded in circumstances, like here, where a statute of repose has wholly extinguished a cause of action. *See Nehme*, 863 So. 2d at 208.

F. The First District’s opinion appropriately noted the errors in the *Pezzi* court’s interpretation of Chapter 733.

Plaintiffs claim the First District improperly ignored the legislative and judicial acceptance of *Pezzi v. Brown*, 697 So. 2d 883 (Fla. 4th DCA 1997), *rev. denied*, 705 So. 2d 7 (Fla. 1997). *Pezzi*,

however, contains one or more flaws that suggest its interpretation of the statute of repose was incorrect.

1. *Pezzi* did not consider section 733.702(5), Florida Statutes.

Nowhere in *Pezzi* did the Fourth Circuit Court of Appeal address—or even mention—section 733.702(5), Florida Statutes. This section states, “Nothing in this section shall extend the limitations period set forth in s. 733.710.” Section 733.702(5) is a critical portion of the Probate Code’s statute of repose. It clarifies that, even if a party seeks to recover only insurance proceeds against a deceased person’s estate, the two-year statute of repose contained in section 733.710(1) is paramount. The *Pezzi* court’s failure to account for this critical portion of the statute indicates that the statutory interpretation underpinning the court’s opinion is subject to valid criticism. Indeed, the *Pezzi* court made clear the importance of reading sections 733.702 and 733.710 in *pari materia*. *See Pezzi*, 697 So. 2d at 886. (“However, sections 733.702 and 733.710, which relate to the same subject matter, should be read in *pari materia*.”) But the *Pezzi* court’s analysis of these statutes wholly omitted section 733.702(5), which is a statutory “bridge” linking the limitation period

in section 733.702(1) with the statute of repose in section 733.710(1). The *Pezzi* court's effort to read sections 733.702 and 733.710 in pari materia was incomplete.

2. Some of the precedent relied upon in *Pezzi* was decided before the 1989 amendments to sections 733.702 and 733.710.

Pezzi cited *Koschmeder v. Griffin*, 386 So. 2d 625 (Fla. 4th DCA 1980) and *Kent Ins. Co. v. Estate of Atwood*, 481 So. 2d 1294 (Fla. 1st DCA 1986), for the proposition that “a plaintiff is not barred from pursuing a cause of action to establish liability of the decedent or personal representative and recovering up to the limits of the applicable insurance coverage.” Although a plaintiff's right to do so existed in some form at the time *Koschmeder* and *Kent Ins. Co.* were decided, both *Koschmeder* and *Kent Ins. Co.* were decided prior to the 1989 amendments to sections 733.702 and 733.710. Notably, when *Koschmeder* and *Kent Ins. Co.* were decided, section 733.702 did not contain subsection (5) (“Nothing in this action shall extend the limitations period set forth in s. 733.710.”) See Ch. 89-340, 1989 Laws of Florida, §5. (AR161) Similarly, section 733.710(1) (providing for a two-year statute of repose) did not exist when these cases were

decided. *Id.* at § 9. (AR163) Thus, these precedential underpinnings greatly attenuate the precedential effect of *Pezzi*.

To the extent that those underpinnings are no longer valid, there should be no reluctance on the part of this Court to disapprove *Pezzi*.

3. *Pezzi* is inconsistent with the Fourth District’s own opinion in *Comerica*.

One of the cases underpinning the opinion in *Pezzi* is *Comerica Bank and Trust, F.S.B. v. SDI Operating Partners, L.P.*, 673 So. 2d 163 (Fla. 4th DCA 1996). *See Pezzi*, 697 So. 2d at 886. But the *Comerica Bank* court opined that the two-year statute of repose in section 733.710 “sets an absolute deadline beyond which no claim may be entertained.” *Comerica Bank*, 673 So. 2d at 165. “Clearly, section 733.710 creates a self-executing absolute immunity to claims filed for the first time, as here, more than 2 years after the death of the person whose estate is undergoing probate.” *Id.* at 167.

And, as stated above, *Comerica Bank* also recognized that section 733.710 is “paramount” over the limitations period in section 733.702:

The introductory adverbial phrase in section 733.702(1), “[i]f not barred by s. 733.710,” means that the 2-year

period of section 733.710 is paramount over the limitations period in section 733.702(1). Reading these two sections together, it appears that section 733.702 fixes the basic time frame for filing of claims in decedent's estates being probated in Florida, but section 733.701 sets an absolute deadline beyond which no claim may be entertained.

673 So. 2d at 165.

That *Pezzi* allowed the plaintiff's claim to proceed in the face of the expiration of the two-year "absolute deadline" is a marked logical inconsistency that the First District avoided. To the extent that *Comerica* was appropriately decided, the precedential value of *Pezzi* is greatly attenuated.

4. Legislative inaction.

Plaintiffs assert that the Florida Legislature's inaction in the wake of *Pezzi* constitutes the Legislature's tacit approval of the *Pezzi* court's interpretation of various provisions in Chapter 733. How Plaintiffs divined the Legislature's approval of *Pezzi* instead of other cases interpreting the same provisions is not explained, however.

To the contrary, it is equally as likely that the Legislature took no action to revise the statute of limitations and the statute of repose in Chapter 733 because the Legislature agreed with *Comerica's* interpretation that the statute of repose in section 733.710 is

“paramount” over any limitations period in section 733.702 and “sets an absolute deadline beyond which no claim may be entertained.” 673 So. 2d at 165.

And the fact that the Legislature took no action in light of the First District’s opinion below—despite the fact that the First District noted its conflict with the Fourth District in *Pezzi*—indicates that it is just as likely that the Legislature takes no position on the issues at hand.

CONCLUSION

This Court should affirm the First District’s decision below and reject *Pezzi*.

CERTIFICATE OF SERVICE

I CERTIFY that this document has been filed with the Florida Courts E-Filing Portal for electronic distribution to the counsel on the attached service list on June 20, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 9.045(e), Florida Rules of Appellate Procedure, I certify that the foregoing document complies with the word count limitation in Rule 9.210, Florida Rules of Appellate Procedure, in that it contains 12,874 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(b), Florida Rules of Appellate Procedure.

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