

IN THE SUPREME COURT OF FLORIDA
CASE NO. SC21-1255

SAMANTHA ELAINE TSUJI AND
CRYSTAL IVY WILLIAMS,

Petitioners

vs.

L.T. Case Nos. 1D20-0901;
2018-CA-000218

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

INITIAL BRIEF OF PETITIONERS

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The probate code does not bar a cause of action, founded on a decedent’s wrongdoing, initiated more than two years after the decedent’s death in a proceeding that seeks to establish the decedent’s and his employer’s liability—protected by casualty insurance—but that does not seek to hold liable the decedent’s estate, personal representative, or beneficiaries. 34

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STATEMENT OF THE CASE AND FACTS

The question presented is:

Whether the probate code bars a cause of action, founded on a decedent’s wrongdoing, initiated more than two years after the decedent’s death in a proceeding that seeks to establish the decedent’s and his employer’s liability—protected by casualty insurance—but does not seek to hold liable the decedent’s estate, personal representative, or beneficiaries.

“No” is the answer. The First District’s contrary decision must be quashed.

a. This case

1. The statutes

The two statutes at issue are in Part VII of the probate code. See §§ 733.702, 733.710, Fla. Stat. (2013). Both have timeliness bars. The “short” statute’s bar ranges from 30 days to three months and runs from a publication or service date. § 733.702(1).¹ The “long” statute’s bar is two years and runs from the date of death. § 733.710(1).

¹ Unless otherwise indicated, all citations of “§ XXX.XXX” refer to the 2013 version of the Florida Statutes.

2. The facts

In June 2014, Plaintiffs, Samantha Tsuji and Crystal Williams, were injured by a vehicle driven by Thomas Morton, Jr. TR131, 135 ¶¶10, 12, 29, 30.² It was undisputed that:

- Mr. Morton was negligent.
- Mr. Morton was working as an employee of The Lewis Bear Company (LBC).
- LBC owned the vehicle driven by Mr. Morton and consented its use.
- A few weeks after the incident, Mr. Morton died of unrelated causes.

TR47-49, 82, 108,131-39, 142-45, 163-64.

LBC's insurance covers the automobile accident:

- Zurich American Insurance disclosed LBC as a "named insured" and Mr. Morton as an "insured" in a \$1,000,000 policy. TR247, 249, 252, 253, 261.
- Travelers Insurance disclosed LBC and its employees as insureds in a \$10,000,000 umbrella policy. TR319-20, 323, 333.

3. The pleadings

Plaintiffs sued in February 2018, within the four-year limitations period for negligence actions. TR10-17, 90; § 95.11(3)(a).

² "TR" and "AR" refer, respectively, to the trial and appellate courts' records. "AX" refers to the appendix.

They sued Mr. Morton for negligence, and LBC for vicarious liability under the doctrines of *respondeat superior* and dangerous instrumentality. TR10-17.

When they sued, Plaintiffs were unaware of Mr. Morton's death. TR108. LBC answered and moved for summary judgment based on Mr. Morton's death. TR18-21, 48-59. In response, Plaintiffs amended their complaint to replace Mr. Morton with his personal representative. TR107-112, 127-128. The amended complaint's causes of action remained the same. TR129-140.

The amended complaint clarified that Plaintiffs were not seeking to recover from Mr. Morton's estate, personal representative, or beneficiaries. TR110, 129-40. The negligence counts requested a judgment "establishing the liability of the Decedent...and awarding damages...up to the limits of any and all casualty insurance coverage...." TR132, 136. The vicarious-liability counts lacked any similar limitation on damages. TR133, 135, 138-39. However, Plaintiffs concede the damages recoverable from LBC are likewise limited.

Represented by the same attorney, LBC and the personal representative answered the amended complaint and admitted the facts recited *supra*, ¶ a.2, at 2. TR143-45, 150, 163-64, 168.

4. Summary-judgment papers

Only LBC—not the personal representative—moved for summary judgment, though LBC asked that judgment be granted “in favor of Defendants.” TR6-9, 58. Invoking the probate code’s long statute, LBC argued that section 95.11’s four-year limitations period “is significantly compressed...upon the death of a potentially responsible defendant: ‘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.’” TR52 (emphasis added) (quoting §733.710(1)). LBC anchored its argument in the First District’s decision in *Buettner v. Cellular One, Inc.*, 700 So. 2d 48 (Fla. 1st DCA 1997). TR53-58.

In response, Plaintiffs explained that they would not seek to recover from the estate and instead would recover from the insurance policies. TR83 n.1. Plaintiffs relied on the probate code’s short statute, which permits “[t]o the limits of casualty insurance protection only, any proceeding to establish liability that is protected

by the casualty insurance.” TR88 n.3 (citing section § 733.702(4)(b)). They also relied on *Pezzi v. Brown*, 697 So. 2d 883 (Fla. 4th DCA 1997), which held that the short and long statutes, read *in pari materia*, permit a plaintiff to bring a cause of action against a tortfeasor’s estate more than two years after the tortfeasor’s death, provided the plaintiff seeks to recover from an insurance policy and not from the estate’s other assets. TR90-96. Plaintiffs further argued these statutes did not “operate as a time-bar to the Plaintiffs’ claims against [LBC]...for vicarious liability arising from [Mr. Morton’s] negligence.” TR83 n.1 (capitalization altered); *accord* TR196-98.

5. Summary judgment hearing and order

At the hearing (TR228-45), defense counsel suggested that the trial court could grant LBC’s motion in part, “to the extent that Mr. Morton...is immune from his estate or any other personal assets,” and deny it in part, “to the extent that he has insurance coverage.” TR232-33. Defense counsel then argued that any immunity of Mr. Morton would apply to LBC, such that it would likewise be liable “only to the extent that they have insurance coverage.” TR233. Defense counsel requested that the court grant its motion in full under

Buettner but agreed to “take a half win if that’s what the Court decides.” TR233.

Plaintiffs’ counsel distinguished *Buettner*. TR234-36. He also relied on *dictum* in *May v. Illinois National Insurance*, 771 So. 2d 1143, 1159 (Fla. 2000), that “the total failure to file a timely claim against an estate does not prevent a creditor from recovering up to the policy limits of a decedent’s casualty insurance.” TR236.

The trial court said it was “bound by” *Buettner*. TR244. It entered summary judgment for both Defendants, concluding that Plaintiffs’ claims were time-barred by the long statute because Plaintiffs had failed to commence their suit within two years of Mr. Morton’s death. TR215-17. It rejected *Pezzi*. TR216-17.

Plaintiffs moved for rehearing, arguing the court had overlooked section 733.702(4)(b)’s insurance exception. TR218-25. The court denied rehearing, and Plaintiffs appealed. TR375-76.

6. Proceedings in the First District

Only LBC—not the personal representative—appeared in the First District. *See* AR38-39, 172-76, 217. The First District “affirm[ed] the judgment entered in favor of LBC.” AR260. Though it did not explicitly affirm the judgment for the personal representative

(AR260), the First District stated “the trial court reached the right result when it concluded that [Plaintiffs] claims against Morton’s estate were time-barred” (AR259 n.3). Nevertheless, the First District agreed with Plaintiffs that “the trial court incorrectly [had] relied on *Buettner*...for its conclusion that [Plaintiffs] claims against Morton’s estate were time-barred.” AR259 n. 3.

The First District began its analysis by stating that a “purpose[]” of the probate code was to “promote the timely settlement of a decedent’s estate.” AR254. It then examined the statutory text and acknowledged that the timeliness bars in subsections (1) and (2) of the short statute were subject to exceptions in subsection (4) of that statute, including the insurance exception. AR254-55. “Even so,” the court reasoned, “the Legislature emphasized in subsection (5) that nothing in [the short statute] extends the limitations period set out in [the long statute].” AR255. After quoting the long statute and this Court’s statement in *May* that the statute was “not subject to...extension,” 771 So. 2d at 1157, the court concluded that “to hold Morton’s estate liable for his negligence, [Plaintiffs] had to file their cause of action within two years of Morton’s death.” AR255-56. It rejected Plaintiffs’ argument that section 733.710’s text “bars

untimely claims [only] against the estate, the personal representative, and the beneficiaries of the estate.” AR256; *see* AR58 (Plaintiffs’ brief (“[B]y its plain text, [the long statute] neither extinguishes the cause of action against the decedent nor relieves any insurer, employer, or vehicle-owner of liability.”))

The First District also reasoned that: (i) “an insurer cannot be liable...until a creditor seeks and perfects a claim against the *decedent tortfeasor* through the *entry of a judgment* establishing the *decedent’s liability*,” AR256 (emphasis added), and (ii) “until a plaintiff establishes the liability of the decedent tortfeasor (*through his estate*) and then obtains a settlement or verdict against the insured decedent tortfeasor (*through his estate*), the plaintiff cannot proceed against the insurer.” AR257 (emphasis added). Citing the nonjoinder statute, § 627.4136, the court said: “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 added); *see infra* ¶D, at 52-57 (addressing these statements).

In certifying conflict, the First District acknowledged the Fourth District’s contrary holding in *Pezzi* and this Court’s approval in *May* of *Pezzi*’s reasoning (albeit in *dictum*). AR257-58, 260. But the First

District reasoned that neither *Pezzi* nor *May* addressed subsection (5) of the short statute. AR257-58. Plaintiffs had argued that because “*Pezzi* [had] correctly decided that the limitations period in [the long statute] did not apply,” “*Pezzi* had no reason to consider whether [the long statute’s] inapplicable limitations period could not be extended.” AR242. The First District, however, disagreed and made subsection (5)—and its nonmention in *Pezzi* and *May*—the lynchpin of its reasoning. See AR258 (“[M]ore importantly, the *May* court, like the Fourth District in *Pezzi*, never addressed or considered section 733.702(5)’s express limitation on claims under section 733.702.”)

Finally, the First District dismissed Plaintiffs’ argument (AR81-84) that LBC should be vicariously liable for Mr. Morton’s negligence. Relying on *Buettner* and its formulation of the common-law exoneration rule, the court reasoned that: (i) a “plaintiff may not hold an employer liable until the employee is found to be liable;” and (ii) “LBC was not vicariously liable for Morton’s negligence because the claims against Morton were time-barred.”AR259.

b. Statutory history

Textualists consider statutory history because—unlike legislative history—it “form[s] part of the [statute’s] context.” Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, § 40, at 256 (2012).

1. Overview

The probate code’s short and long statutes originated in a 1974 bill. Ch. 74-106, § 1, at 239, 255, Laws of Fla. (enacting §§ 733.108, 733.702, Fla. Stat.). That bill was based on the 1969 Uniform Probate Code. See Synopsis of House Bill 997 (AX48). The 2013 version of these statutes applies here and is the same as the 2021 version. Between 1974 and 2013, however, several amendments were made, most significantly in the late 1980’s.

Today’s short statute has five subsections. Three subsections—(1), (2), and (4)—originated in the 1974 bill. See Ch. 74-106, § 1, at 255, Laws of Fla.; *infra* b.2, at 11-14. The other subsections—(3) and (5)—originated in the 1988 and 1989 amendments. See Ch. 88-340, § 6, Laws of Fla.; Ch. 89-340, § 5, Laws of Fla.; *infra* b.3, at 15-25.

Today’s long statute has three subsections. Subsection (3) is grounded in the 1974 bill and a 1977 amendment. § 733.710(3); Ch.

74-106, § 1, at 239, Laws of Fla. (§ 733.108), Fla. Stat; Ch. 77-87, § 36, at 180, Laws of Fla. Though traces of subsections (1) and (2) can be found in the 1974 bill, their language is more firmly rooted in the 1989 amendment. *Compare* Ch. 89-340, § 9, Laws of Fla., *with* § 733.710(1)&(2); *see also infra* ¶b.3.ii, at 23-25.

The 1989 addition of subsection (5) to the short statute and the other 1988-89 amendments are illuminating given the First District's reliance on subsection (5) to repudiate *Pezzi's* holding and *May's dictum*. Later, we describe the 1988-89 amendments, the 1997 *Pezzi* construction, and the legislative and judicial response to *Pezzi*. *See infra* ¶¶ b.3-5, at 15-29. But first we review subsections (1), (2), and (4) of today's short statute that are rooted in the 1974 bill.

2. 1974 bill and the short statute

The ensuing quotations from today's short statute are substantially the same as the 1974 bill's wording. *See* Ch. 74-106, § 1, at 255. Footnotes 3-6 list the bills that, since 1974, have made immaterial amendments and that have resulted in today's exact wording. An annotation in our appendix details, by each footnote, the amendments leading to today's wording. AX14-15. This brief also notes any pre-1974 origins of these provisions.

Subsection (1) states: “[N]o claim for damages, including...an action founded on...[a] wrongful act or omission of the decedent, is *binding on the estate, on the personal representative, or on any beneficiary* unless filed in the probate proceeding” before one of two short deadlines running from the date of actual or publication notice.³ § 733.702(1) (emphasis added). Subsection (1) is similar to a provision in the Uniform Probate Code. AX55-56 (UPC § 3-803(a)(1)). While subsection (1) renders an untimely claim not “binding on the estate,” a pre-1974 predecessor did more work than this: It stated “no claim...shall *be valid or binding* upon an estate [etc.]” unless certain formalities were satisfied, and it rendered “*void*” any untimely claim. § 733.16(1), Fla. Stat. (1973) (emphasis added); *accord* Ch. 16103, § 120, at 585, Laws of Fla. (1933).

Today’s subsection (2) also does more work than subsection (1). Subsection (2) *extinguishes any cause of action* one could have brought against the decedent unless the claim is timely filed: “No cause of action...shall survive the death of the person against whom

³ Ch. 75-220, § 84, at 554; Ch. 81-27, § 4, at 59; Ch. 83-216, § 160, at 966; Ch. 88-340, § 6; Ch. 89-340, § 5; Ch. 2001-226, § 146. See AX14.

the claim may be made...unless a claim is filed within the time periods set forth in this part.”⁴ § 733.702(1); *accord* Ch. 74-106, § 1, at 255, Laws of Fla. Similar language existed in the pre-1974 probate code. *See* § 733.16(1), Fla. Stat. (1973) (“[N]o cause of action...shall survive the death of the person against whom such claim may be made...unless such claim be [timely] filed....”); *accord* Ch. 22889, § 1, at 979, Laws of Fla. (1945). Subsection (2)’s extinguishment provision, however, lacked any analogue in the Uniform Probate Code. AX55-56.

Subsection (2)’s last two words—“this part”—also enable subsection (2) to do more work than subsection (1). These two words refer to Chapter 733’s Part VII, which contains both the short and long statutes. Thus, unlike subsection (1), subsection (2) incorporates *both* the short and long deadlines to extinguish untimely filed claims.

Subsection (4) establishes exceptions to the timeliness bars in subsections (1) and (2). The 1974 exceptions subsection—located at that time in subsection (3)—was almost verbatim to a provision in

⁴ Ch. 90-23, § 4; Ch. 2001-226, § 146. *See* AX14-15.

the Uniform Probate Code. Ch. 74-106, § 1, at 255 (§ 733.702(3)); AX56 (§ 3-803(c)). The exceptions subsection states that “[n]othing in this section affects or prevents”⁵ and then lists the exceptions. § 733.702(4). “[T]his section,” of course, refers to the short statute—which had only three subsections in 1974. *See* Ch. 74-106, § 1, at 255.

The first two exceptions in today’s statute—which also existed in the 1974 bill—are the mortgage/lien and insurance exceptions:

- (a) A proceeding to enforce any mortgage, security interest, or other lien on property of the decedent.
- (b) To the limits of casualty insurance protection only, any proceeding to establish liability that is protected by the casualty insurance.⁶

§ 733.702(4)(a)&(b); *accord* Ch. 74-106, § 1, at 255 (then at § 733.702(3)(a)&(b)). The insurance exception had no pre-1974 predecessor, but the mortgage/lien exception did. *See* § 733.16(1)(1)(b), Fla. Stat. (1973) (“[T]he right to foreclose and enforce such mortgage or lien shall not be impaired or affected by failure to file [a timely] claim..., but such failure shall bar the right to enforce any personal liability against the estate.”); Ch. 16103, § 120,

⁵ Ch. 74-106, § 1, at 255; Ch. 75-220, § 84, at 555. *See* AX15.

⁶ Ch. 2001-226, § 146, Laws of Fla. *See* AX15.

at 585, Laws of Fla. (1933) (same). The third exception for counterclaims and cross-claims was added in 1985. § 733.702(4)(c); Ch. 85-78, § 4, at 447-48.

3. 1988 and 1989 amendments to the short and long statutes

Two cases from the 1980's spurred the legislature to twice amend the statutes. *See May*, 771 So. 2d at 1150-53.

i. Barnett Bank amendments

Barnett Bank of Palm Beach County v. Estate of Read, 493 So. 2d 447 (Fla. 1986) caused the legislature to insert in the short statute a new subsection (3)—the no-waiver/extension subsection—and to move the exceptions subsection to subsection (4). *See May*, 771 So. 2d at 1150-52; Ch. 88-340, § 6, Laws of Fla.

Barnett Bank held that the short statute was a non-jurisdictional statute of limitations. 493 So. 2d at 448-49. The Court further concluded the short statute's timeliness bars were subject to: (1) waiver if the statute was not pled by the personal representative; and (2) avoidances like estoppel or fraud asserted by a creditor. *Id.* While the former conclusion was a holding, the latter was *dictum*. *See id.* at 449 ("Had the estate objected...we would have remanded for an

evidentiary hearing on the issue of estoppel. The estate’s failure to raise the...statute of limitations coupled with...Barnett Bank[‘s] present[ation of] a valid note...requires us to order reinstatement of the trial court’s order.”); *Pedroza v. State*, 291 So. 3d 541, 547 (Fla. 2020) (defining dictum).

Less than two years later, the 1988 legislature nullified *Barnett Bank’s* holding but substantially adopted its *dictum*. Specifically, the 1988 amendment stated no objection was required to bar an untimely claim, but it allowed a creditor to seek an “extension” to file his claim “only upon” a showing of fraud or estoppel:

Any claim not timely filed as provided in this section is barred even though no objection to the claim is filed...unless the court *extends* the time in which the claim may be filed....[A]n *extension* may be granted...only upon grounds of fraud or estoppel.

Ch. 88-340, § 6, Laws of Fla. (emphasis added).

ii. Pope amendments

While the legislature was working on the 1988 amendment, the U.S. Supreme Court was writing a decision that would require the

legislature to amend the probate code again in 1989.⁷ See *Tulsa Prof'l. Collection Servs., Inc. v. Pope*, 485 U.S. 478 (1988); *May*, 771 So. 2d at 1152; Ch. 89-340, §§ 5, 9, Laws of Fla.

➤ *Pope* decision

In examining Oklahoma's probate code, *Pope* observed that state probate nonclaim statutes "come in two basic forms." 485 U.S. at 480. "Some provide a relatively short time period, generally two to six months, that begins to run after the commencement of probate proceedings," while "[o]thers call for a longer period, generally one to five years, that runs from the decedent's death." *Id.* As examples of "short" statutes, *Pope* noted the Uniform Probate Code and Florida's statute that granted creditors "months from publication"—not from death—"in which to file claims." *Id.* For these "short" statutes, *Pope* reasoned "the substantial involvement of the probate court" was "sufficient government action to implicate the Due Process Clause," and thus, actual notice was required for "known or reasonably ascertainable creditors." *Id.* at 487, 491.

⁷ *Pope* was decided on April 19, 1988, during the legislature's 1988 regular session. (<https://www.flsenate.gov/PublishedContent/OFFICES/SECRETARY/SessionsoftheFloridaSenateFromStatehood.pdf>.)

Pope distinguished these “short” statutes from statutes with longer periods that were “self-executing” and that “provid[ed] repose for potential defendants” to “avoid[] stale claims.” *Id.* at 486-87. *Pope*’s due-process and actual-notice holdings did not apply to these latter “long” statutes: “We...have no occasion to consider the proper characterization of nonclaim statutes that run from the date of death, and which generally provide for longer time periods, ranging from one to five years.” *Id.* at 488; *see also Jones v. Golden*, 176 So. 3d 242, 248 (Fla. 2015) (“[*Pope*] determined that where a time bar is self-executing—such as the two-year statute of repose in section 733.710—there is insufficient state action to implicate the Due Process Clause.”)

Taking its cue from *Pope*, the 1989 legislature amended the probate code to have: (i) “short” timeliness bars running from the date of notice subject to due process (§ 733.702); and (ii) distinct “long” timeliness bars running from the date of death *not* subject to due process (§ 733.710). *See* Ch. 89-340, §§ 5, 9, Laws of Fla.

➤ 1989 changes to the short statute

To address *Pope*, the 1989 legislature imposed new obligations on personal representatives to identify and notify creditors. Ch. 89-

340, § 2, Laws of Fla. (adding § 733.212(4)(a), Fla. Stat.). For the timeliness bar in subsection (1)—which protected only the estate, the personal representative, and the beneficiaries—the legislature established two alternative deadlines: three months from publication notice or, if applicable, 30 days from when the creditor was served with actual notice. Ch. 89-340, § 5, Laws of Fla. (amending § 733.702(1), Fla. Stat. (1988)).

The 1989 amendment did not change all the short statute’s provisions. Notably, subsection (2)—the provision that extinguishes a cause of action—was not amended. *See id.* Accordingly, the “this part” language of subsection (2) meant that a cause of action would be extinguished if a creditor failed to meet either subsection (1)’s “short” deadlines running from the date of notice or the long statute’s two-year deadline running from the date of death. *See* §§ 733.702(1)&(2), 733.710(1) Fla. Stat. (1989 & 2013). However, “nothing” in subsection (2) “affect[ed] or prevent[ed]” a “proceeding to enforce any mortgage, security interest, or other lien on [the decedent’s] property” or “to establish liability of the decedent or the personal representative for which he is protected by the casualty

insurance.” § 733.702(4)(a)&(b) Fla. Stat. (1989); *see also* § 733.702(4)(a)&(b), Fla. Stat. (2013) (materially the same).

The most critical 1989 changes to the short statute were: (i) the amendment to subsection (3)’s no-waiver/extension provision; (ii) the addition of subsection (5); and (iii) the insertion in subsection (1) of a cross reference to the long statute. The following illustrates these 1989 changes (*italicized*), alongside the 1988 changes (*underlined*), and highlights the word “extend” and its cognates (**bolded**):

(1) *If not barred by s. 733.710,...*no claim for damages...*is binding on the estate, on the personal representative, or on any beneficiary unless filed [timely]....*

(2) No cause of action...shall survive the death of the person against whom the claim may be made...unless the claim is filed in the manner provided in this part and within the time limited.

(3) Any claim not timely filed as provided in this section is barred...unless the court **extends** the time in which the claim may be filed. Such an **extension** may be granted only upon grounds of fraud, estoppel, or insufficient notice of the claims period. No independent action or declaratory action may be brought upon a claim which was not timely filed unless such an **extension** has been granted. If the personal representative or any other interested person serves on the creditor a notice to file a petition for an **extension** or be forever barred, the creditor shall be limited to a period of 30 days from the date of service of the notice in which to file a petition for **extension**.

....

(5) *Nothing in this section shall **extend** the limitations period set forth in s. 733.710.*

§ 733.702, Fla. Stat. (1989) (emphasis added); *see* Ch. 89-340, § 5; Ch. 88-340, § 6, Laws of Fla.

Why did the 1989 legislature make these italicized changes? As reflected by the underlining, the 1988 legislature had decided that “fraud or estoppel” were the “only” grounds to obtain an “extension” of the short statute’s deadlines. Ch. 88-340, § 6, Laws of Fla.; *supra* § b.3.i, at 15. But *Pope* forced the 1989 legislature to address circumstances where “known or reasonably ascertainable creditors” did not receive actual notice. 485 U.S. at 491. Accordingly, the 1989 legislature added a third ground—“insufficient notice of the claims period”—to the existing grounds of fraud and estoppel as a basis by which a court could “extend” the short statute’s deadlines. Ch. 89-340, § 5, Laws of Fla. (amending § 733.702(3), Fla. Stat.).

But could creditors who had received insufficient notice—or been defrauded or misled—“extend” the long two-year deadline in section 733.710 by seeking an “extension” under subsection (3) of the short statute (§ 733.702)? No, they could not, the 1989 legislature decided. *See* Ch. 89-340, § 5.

Recall *Pope* signaled that, unlike a “short” statute, a “long” statute could bar a claim by a creditor who never received notice. See *supra* at 17-18. Consequently, the 1989 legislature prohibited a creditor from using an extension authorized under the short statute (§ 733.702(3)) as a basis to extend the long statute’s deadline (§ 733.710(1)). How did the legislature accomplish this? By adding subsection (5) and the prefatory clause to subsection (1) of the short statute. See *supra* at 20.

In 1988, the legislature had used the cognates of “extend” three times, in subsection (3), to establish how a court could extend deadlines and nullify timeliness bars. See *supra* at 20 (underlined and bolded); Ch. 88-340, § 6, Laws of Fla. In 1989, the legislature used “extend” and its cognates three additional times. Specifically, in subsection (3), it used extend’s cognates to establish the circumstances under which a court could extend the short statute’s deadlines because of insufficient notice, and in subsection (5), it used “extend” to establish that “nothing” in the short statute “shall extend the limitations period” in the long statute. See *supra* at 20 (italicized and bolded); § 733.702(3), (5), Fla. Stat. (1989 & 2013). As argued *infra*, ¶ A.3, at 39-40, the legislature used “extend” and its cognates

to refer to the grounds (fraud, estoppel, and lack of insufficient notice) by which statutory deadlines could, or could not, be *extended*—but not to negate the mortgage, insurance, and other *exceptions* in subsection (4).

➤ 1989 changes to the long statute

The 1989 legislature overhauled the long statute. From 1974 until 1989, the long statute shielded from liability only unadministered estates.⁸ Under the 1989 amendment, the long statute applied regardless of whether “letters of administration [had] been issued,” yet the clock still started to run from the decedent’s death (though the period was shortened from three to two years). Ch. 89-340, § 9, Laws of Fla.; *accord* § 733.710.

Which persons did the 1989 long statute protect? The same three persons protected by the timeliness bar in subsection (1) of the short statute—estates, personal representatives, and beneficiaries. *Compare* Ch. 89-340, § 9, Laws of Fla. (“2 years after the death of a person, neither the decedent’s *estate*, the *personal representative*, if

⁸ Ch. 74-106, § 1, at 239 (§ 733.108, Fla. Stat.). The statute was moved to section 733.710 in 1975, Ch. 75-220, § 50, at 534, Laws of Fla., and was substantively amended once before 1989, Ch. 77-87, § 36, at 180, Laws of Fla. The Uniform Probate Code’s analogue had substantially different wording. AX55-56 (§ 3-803(a)(2)).

any, nor the *beneficiaries* shall be liable for any claim or cause of action against the decedent.” (emphasis added)), and § 733.710(1), (same), with § 733.702(1) (“[N]o claim for damages...is binding on the estate, on the *personal representative*, or on any *beneficiary* unless [timely] filed.” (emphasis added)).

What causes of actions did the 1989 long statute extinguish? We must examine subsection (2) of the short statute because the 1989 legislature left the “this part” language of that subsection untouched.⁹ This language incorporated the long statute and thereby extinguished a cause of action not filed within two years of the decedent’s death *unless* one of the exceptions in subsection (4) applied (like proceedings to enforce a mortgage or to establish liability protected by insurance).¹⁰ The 1989 legislature also added a new subsection (2) to the *long* statute to clarify that it did not “apply to a

⁹ See § 733.702(2), Fla. Stat. (1989) (“No cause of action...shall survive the death of the person against whom the claim may be made...unless the claim is filed in the manner provided in *this part* and within the time limited” (emphasis added).); § 733.702(2), Fla. Stat. (2013) (materially the same).

¹⁰ See § 733.702(4)(a)&(b), Fla. Stat. (1989) (“Nothing in this section affects or prevents” a “proceeding to enforce any mortgage, security interest, or other lien on [the decedent’s] property” or “to establish liability of the decedent or the personal representative for which he is protected by the casualty insurance.”); § 733.702(4)(a)&(b), Fla. Stat. (2013) (materially the same).

creditor who has filed a claim” under the *short* statute “within 2 years after the person’s death.” Ch. 89-340, § 9, Laws of Fla.; *accord* § 733.710(2).

A 1990 amendment clarified the “this part” clause in the extinguishment provision as follows: “unless the claim is filed ~~in the manner provided in this part and~~ within the time periods set forth in this part limited.” Ch. 90-23, § 4, at 54; *accord* § 733.702(2). The next historical event was the Fourth District’s 1997 *Pezzi* decision.

4. 1997 Pezzi decision

The Fourth District in *Pezzi* addressed essentially the same issue now before this Court:

[W]hether a cause of action may be brought against the estate of tortfeasor more than two years after the tortfeasor’s death, where the plaintiff seeks to recover damages only from the tortfeasor’s liability insurance policy and not from the assets of the estate.

Pezzi, 697 So. 2d at 884. The court held such an action could be brought. *Id.* at 886.

Pezzi began its analysis with the short statute’s text. 697 So. 2d at 884-85. It quoted subsection (2)’s extinguishment provision: “no cause of action ‘shall survive the death of the person against whom the claim may be made’ unless the claim is filed within the specified

time limits.” *Id.* at 885 (quoting § 733.702(2), Fla. Stat. (1995)¹¹). *Pezzi* then noted subsection (4), which provided, among other exceptions, that subsection (2) “does not affect or prevent ‘[t]o the limits of casualty insurance protection only, *any proceeding to establish liability...[that] is protected by the casualty insurance.*” *Id.* (quoting § 733.702(4)(a)(1995)).

Reading these subsections together, *Pezzi* concluded the plaintiffs could not hold the estate or the personal representative liable for their damages because they had not filed a timely claim in probate court. *Id.* The plaintiffs, however, could recover “to the extent of the applicable liability insurance.” *Id.* And, though shielded from personal liability, the personal representative was “the proper nominal party...to establish liability of the decedent tortfeasor” in light of the nonjoinder statute’s prohibition on initiating a direct action against the insurer. *Id.* (citing § 627.4136, Fla. Stat. (1995)¹²).

Pezzi next considered the long statute: “[B]y its own terms, [the long statute] does not bar a cause of action against a decedent; it

¹¹ The 1995 statutes were materially indistinguishable from the 2013 statutes. *Compare* §§ 733.702, 733.710, Fla. Stat. (1995), *with* §§ 733.702, 733.710, Fla. Stat. (2013).

¹² The nonjoinder statute was last amended in 1992.

merely states that neither the decedent's estate, the personal representative nor the beneficiaries shall be liable for any claim or cause of action filed more than two years from the decedent's death." 697 So. 2d at 885 (discussing § 733.710(1), Fla. Stat. (1995)). *Pezzi* further concluded the long statute was a limitation on liability that "is specific to the decedent's estate, the personal representative, and the beneficiaries; the limitation does not extend to the decedent's insurance policy." *Id.*

Granted, *Pezzi* did not mention the short statute's subsection (5). Yet, *Pezzi* acknowledged the long statute does not contain the short statute's liability-insurance exception. *Id.* at 886. Because the short and long statutes "relate to the same subject matter," *Pezzi* determined the statutes must "be read *in pari materia*," explaining:

The exception in [the short statute] is an exception to the general statement that disallows causes of action where no claim has been filed within the specified time periods. [The long statute], on the other hand, does not disallow causes of action but rather provides an absolute limitation on liability of specified entities (or individuals).

Id. Thus, "where the decedent's estate, the personal representative, and the beneficiaries could not be held personally liable as a result

of the application of [the short statute], [the long statute] has no additional impact on plaintiffs' cause of action." *Id.*

5. 2000-2021: legislative and judicial response to *Pezzi*

In its 2000 *May* decision, this Court relied on *Pezzi* to unanimously recognize that the short and long statutes must be read *in pari materia*. *May*, 771 So. 2d at 1155. The five-justice majority also cited *Pezzi* to assert in *dicta*:

- “[The short and long statutes] do not bar a creditor from stating a cause of action to recover up to policy limits from decedent’s casualty insurance even though the creditor has not filed a timely claim in the probate proceedings.” *Id.* at 1157 n.13.
- “[I]t is well settled that the total failure to file a timely claim against an estate does not prevent a creditor from recovering up to the policy limits of a decedent’s casualty insurance.” *Id.* at 1159.

After *May* and *Pezzi*, the legislature amended the short statute four times¹³ and the long statute once.¹⁴ But unlike the 1988-89 amendments that responded to *Barnett Bank* and *Pope*, these post-2000 amendments neither repudiated *Pezzi* or *May* nor materially modified the short and long statutes for purposes of this case.

¹³ Ch. 2001-226, § 146, Laws of Fla.; Ch. 2002-82, § 6, Laws of Fla.; Ch. 2006-312, § 26, Laws of Fla.; Ch. 2010-4, § 21, Laws of Fla.

¹⁴ Ch. 2001-226, § 152, Laws of Fla.

District courts also indicated *Pezzi* was correctly decided. One reversed a summary judgment “based on the indistinguishable authority of *Pezzi*.” *Wilson v. Sayer*, 706 So. 2d 16, 16 (Fla. 2d DCA 1997). Another approvingly cited *Pezzi* and *May*. *In re: Estate of Arroyo*, 211 So. 3d 240, 249-50 (Fla. 3d DCA 2017).

After nearly a quarter century of legislative silence and judicial agreement on the meaning of the short and long statutes, the First District in this case repudiated *Pezzi* and *May*’s *dictum*. *Tsuji v. Fleet*, 326 So. 3d 143, 147-48 (Fla. 1st DCA 2021). The First District’s decision should be quashed, as we argue next.

SUMMARY OF ARGUMENT

Each engine part does its own work, but also works in sync with other parts, enabling the engine to work as an integrated whole. Statutes are similar. Each provision does its own work, but also works in sync with other provisions, enabling the statutes to work as an integrated whole. Mechanics and judges must use their tools to ensure the work is synchronized.

The probate statutes at issue have four overlapping parts that must be construed to work together:

- short and long timeliness bars protecting *only* estates and their proxies (personal representatives and beneficiaries) §§ 733.702(1), 733.710(1)-(2);
- an extinguishment provision that incorporates short and long deadlines to bar *any* cause of action founded on the decedent's conduct—and that protects *all* persons liable for that conduct, *including employers*, § 733.702(2);
- extensions to the short deadlines (30 days to three months from notice)—but not the long deadline (two years from death)—because of fraud, estoppel, or insufficient notice, § 733.702(3), (5); and
- exceptions to some of the timeliness bars for proceedings involving insurance, mortgages or liens, and counterclaims or cross-claims, § 733.702(4).

This case turns on whether one part (the insurance exception) applies and negates another part (the extinguishment provision). The

exception applies. Thus, this proceeding to establish LBC’s and Mr. Morton’s liability, protected by insurance, is not “affect[ed] or prevent[ed]”—though payment on such liability must be from insurance.

Both short timeliness bars—the one protecting the estate and the one extinguishing any cause of action and protecting any liable person—are housed exclusively in the short statute. § 733.702(1)-(2). The long timeliness bar protecting *the estate and its proxies* is housed in the long statute. § 733.710(1)-(2). On the other hand, the long bar extinguishing any cause of action and protecting *all liable persons* is housed, counterintuitively, in the short statute’s extinguishment provision (§ 733.702(2)), which uses the words “this part” to incorporate the long statute’s two-year deadline.

Neither short timeliness bar applies because Plaintiffs were never given notice. However, *absent an extension or exception*, both long timeliness bars—the one protecting the estate (§ 733.710(1)-(2)) and the extinguishment provision (§ 733.702(2))—apply because Plaintiffs did not file a probate claim within two years of the death.

May the long deadline be *extended*? The short statute’s subsection (3), read by itself, would seem to authorize extensions of

all deadlines—short and long—for insufficient notice. But statutory provisions (like engine parts) do not work alone. Subsection (5) prohibits extensions of the *long deadline* that otherwise would be authorized under subsection (3). Subsection (5)’s work is to prohibit subsection (3)’s *extensions*—not to negate subsection (4)’s *exceptions*.

Does an exception apply? None applies to the long timeliness bar protecting *the estate* as that bar is housed exclusively in section 733.710, which lacks any applicable exception. Thus, the estate’s assets are safe from Plaintiffs’ suit.

But an exception does apply to the long bar extinguishing any cause of action and protecting *all liable persons*—the one housed in subsection (2) of section 733.702—because this case is a “proceeding to establish liability...protected by...insurance.” § 733.702(4)(b). Subsection (4) plainly states that “[n]othing in this section affects or prevents” such a proceeding, subject “[t]o the limits of...insurance protection.” § 733.702(4)(b).

Subsection (4) thus negates subsection (1)’s short timeliness bar, subsection (2)’s extinguishment provision, subsection (3)’s “barred” provision, and subsection (5)’s provision prohibiting extensions of the long deadline. These *negated* provisions are the *only*

provisions that could protect *all* persons—including LBC and its insurers—from liability for Mr. Morton’s tort because of Plaintiffs’ failure to file a probate claim within two years of Mr. Morton’s death. The long statute, § 733.710(1)-(2)—when unaided by the negated extinguishment provision—protects *only the estate and its proxies*.

Rather than integrate these statutes into a workable whole, the First District misconstrued the word “liable” to expand the long statute’s text to protect *all* liable persons—not just the estate and its proxies—thereby duplicating the extinguishment provision’s work and rendering its “this part” language surplusage. The First District also misconstrued the nonjoinder statute by assuming Mr. Morton’s liability had to be established by a judgment against his estate, rather than a judgment against LBC or one limited to the insurance policy. Moreover, confronted with a question of statutory interpretation, the First District misapplied the common-law exoneration rule—which it should not have applied at all. Finally, the First District ignored twenty-five years of legislative acquiescence and judicial approval of *Pezzi*’s construction.

ARGUMENT

The probate code does not bar a cause of action, founded on a decedent’s wrongdoing, initiated more than two years after the decedent’s death in a proceeding that seeks to establish the decedent’s and his employer’s liability—protected by casualty insurance—but that does not seek to hold liable the decedent’s estate, personal representative, or beneficiaries.

Jurisdiction. Based on a certified conflict (AR260), this Court has jurisdiction, Art. V, § 3(b)(4), Fla. Const., and it may “consider all issues appropriately raised in the appellate process,” *Savoie v. State*, 422 So. 2d 308, 312 (Fla. 1982).

Standard of review. This Court’s review is de novo because the question presented concerns statutory interpretation and summary judgment. *D.H. v. Adept Cmty. Servs., Inc.*, 271 So. 3d 870, 877 (Fla. 2018).

A. No statutory provision prevents this proceeding to establish LBC’s and Mr. Morton’s liability protected by casualty insurance.

We examine the text of the short and long statutes, explain how they apply in this case, and show they do not prevent this proceeding to establish LBC’s and Mr. Morton’s liability protected by insurance.

1. The short and long timeliness bars protecting *only* the estate and its proxies

The text of subsections (1) of both the short and long statutes shield three—and only three—persons from liability: estates, personal representatives, and beneficiaries.¹⁵ § 733.702(1); § 733.710(1). To stop the clock on these timeliness bars, a creditor must file a claim *in the probate proceeding* (not any other proceeding). § 733.702(1) (“unless filed in the probate proceeding”); § 733.710(2) (rendering the two-year bar inapplicable “to a creditor who has filed a claim pursuant to s. 733.702 ”); *Spohr v. Berryman*, 589 So. 2d 225, 228 (Fla. 1991) (holding filing a lawsuit against the personal representative did not comply with section 733.702 because the creditor failed to file in the probate proceeding).

Notwithstanding these similarities, the two subsections (1) operate differently because of the different due process rights recognized in *Pope*, 485 U.S. at 478. *See supra* ¶b.3.ii, at 17-18; *Jones*, 176 So. 3d at 248-49. The short deadlines are tied to *notice*. *See* § 733.702(1). In contrast, the long deadline runs from the date of

¹⁵ As argued later, the First District misconstrued subsection (1) of the long statute by expanding its text to protect *all* persons liable for the decedent’s breaches of duty. *Infra* ¶ B, at 43-49.

death—even in the absence of notice to the creditor, see § 733.710(1); *Jones*, 176 So. 3d at 248-49.

In this case, no evidence exists of notice provided to Plaintiffs (the creditors), and thus subsection (1) of the short statute does not apply. *Cf. Jones*, 176 So. 3d at 248 (holding section 733.702(1) does not apply if actual notice is not provided to a known or reasonably ascertainable creditor). However, Plaintiffs admittedly did not file a claim in the probate proceeding (or any proceeding) within two years of Mr. Morton’s death. Thus, subsection (1) of the long statute—which lacks a notice requirement—does apply, meaning “neither the *decedent’s estate*, the *personal representative...*, nor the *beneficiaries* shall be liable for [Plaintiffs’] claim or cause of action against [Mr. Morton].” § 733.710(1) (emphasis added). But, this provision, by its plain text, does not shield from liability Mr. Morton’s *employer* (LBC) or its *insurers* (Zurich American and Travelers).

Yet, another provision—the extinguishment provision in section 733.702(2)—would shield Mr. Morton’s employer and its insurers from liability *if it applies*. We turn to that provision.

2. The extinguishment provision that incorporates the short and long deadlines to protect all persons liable for the decedent's conduct

Subsection (2) of section 733.702 houses both the short and long timeliness bars extinguishing a cause of action: “*No cause of action, including...an action founded upon...[a] wrongful act or omission, shall survive the death of the person against whom the claim may be made...unless a claim is filed within the time periods...in this part.*” § 733.702(2) (emphasis added). This wording means *any* cause of action founded on the decedent’s conduct—including a vicarious liability action—is *extinguished* unless a claim is timely filed per *both the short and long deadlines* in sections 733.702 and 733.710.

By stating that “no cause of action...shall survive” if not timely filed, section 733.702(2) negates in part the general survival statute, which states:

No cause of action dies with the person. All causes of action survive and may be commenced, prosecuted, and defended in the name of the person prescribed by law.

§ 46.021 (emphasis added). Under this statute, a cause of action normally survives—and is not extinguished by—the tortfeasor’s death. See *Cameron v. Mittuch*, 113 So. 2d 389, 390 & n.4 (Fla. 3d

DCA 1959) (citing § 45.11, Fla. Stat. (section 46.021's predecessor); *Kahn v. Wolf*, 10 So. 2d 553 (Fla. 1942)). But when applicable, the timeliness bars incorporated by section 733.702(2) override the general survival statute and extinguish the cause of action.

Again, because no evidence exists of notice provided to Plaintiffs, section 733.702(2)'s extinguishment provision does not apply insofar as it incorporates the short deadlines in section 733.702(1). *Cf. Jones*. 176 So. 3d at 248. However, because Plaintiffs did not file a probate claim within two years of Mr. Morton's death, the extinguishment provision applies insofar as it incorporates the long deadlines in section 733.710(1)-(2). Accordingly, *absent an extension or exception*, section 733.702(2) would extinguish Plaintiffs' causes of action based on Mr. Morton's negligence—including any action seeking to hold his employer (LBC) liable for that negligence.

Yet, this conclusion leads to two additional questions:

(1) Are Plaintiffs entitled to an extension of the long deadline? No. *Infra* ¶A.3, at 39-40.

(2) Is subsection (2) of section 733.702—which uses the short and long deadlines to extinguish causes of action—subject to an exception? Yes. *Infra* ¶A.4, at 41-43.

We turn to answer these two questions.

3. Extension provisions

Subsection (3) of the short statute begins: “Any claim not timely filed as provided in [section 733.702] is barred.” § 733.702(3). But subsection (3) also provides: “An *extension* may be granted only upon grounds of fraud, estoppel, or *insufficient notice of the claims period*.” § 733.702(3) (emphasis added). This latter sentence—read in isolation—authorizes the extension of *any* deadline, short or *long*.

Notwithstanding subsection (3)’s general authorization of extensions, subsection (5) rescinds in part that authorization by prohibiting any extension of the long deadline: “Nothing in [section 733.702]”—including subsection (3)—“shall *extend* the [two-year] limitations period set forth in [section 733.710].” § 733.702(5) (emphasis added). And to reinforce that an extension of the short deadlines would not extend the long deadline, the legislature added the prefatory clause to subsection (1): “If not barred by [section] 733.710....” § 733.702(1).

Under the whole-text canon, a word’s meaning “typically” must be “compatible with use of the same word...elsewhere in the statute.” Scalia and Garner, *supra* § 24, at 168. Similarly, the consistent-usage canon presumes that a word “bear[s] the same meaning

throughout a text.” *Id.* § 25, at 170. Recall that subsection (3) (which permits extensions) and subsection (5) (which prohibits an extension of the long deadline) were enacted together in the 1988-89 amendments, along with subsection (1)’s prefatory clause. *See supra* ¶ b.3., at 15-17, 18-23. The word “extend” as used in subsection (5) must bear the same meaning as that word and its cognates bear when used—five times—in subsection (3). *See supra* ¶ b.3.ii, at 20 (showing in bold the short statute’s use of “extend” and its cognates).

By saying “[n]othing” in section 733.702 “shall extend the limitations period” in section 733.710, the legislature meant that no extension of the short deadlines in subsections (1) and (2) of section 733.702—as authorized by subsection (3)—would extend the long deadline in section 733.710. That’s a straightforward interpretation of subsection (5).

The First District, however, construed subsection (5)’s use of the word “extend” to negate the exceptions in subsection (4). *See AR.* 257-58. That was error. Subsection (4)’s exceptions do not *extend* any deadlines; instead, they declare that subsections (1), (2), (3), and (5) of section 733.702 do not “affect[] or prevent[]” specified proceedings and claims, § 733.702(4), as we explain next.

4. The exceptions subsection

Subsection (4) starts: “Nothing in this section affects or prevents....” § 733.702(4). “[T]his section” refers to section 733.702, and thus means that subsections (1), (2), (3), and (5) of section 733.702 do not “affect[] or prevent[]” the proceedings listed in subsection (4). “Affect” means “to act upon; to produce an effect or change upon,” and “prevent” means “to stop or keep from doing something.” *Webster’s New Universal Unabridged Dictionary* 32, 1426 (2d. ed. 1983).

Subsection (4) then lists the following proceedings that are not “affect[ed] or prevent[ed]” by subsections (1), (2), (3), and (5):

(a) A proceeding to enforce any mortgage, security interest, or other lien on property of the decedent.

(b) To the limits of casualty insurance protection only, any proceeding to establish liability that is protected by the casualty insurance.

(c) The filing of a cross-claim or counterclaim against the estate....

§ 733.702(4).

Plaintiffs’ suit is a “proceeding to establish liability...protected by...insurance.” § 733.702(4)(b); *supra* ¶ a.2, at 2. Thus, although normally subsections (2) and (3) of section 733.702 would prevent

Plaintiffs from proceeding on their causes of action (as they were not filed in Mr. Morton’s probate proceeding within two years of his death), subsection (4) plainly states that subsections (2) and (3) do not “prevent[]” Plaintiffs from “proceeding to establish liability...protected by...insurance.” § 733.702(4)(b); *see also Tank v. Peterson*, 332 N.W. 2d 669, 671-72 (Neb. 1983) (summarizing cases interpreting the insurance exception in the Uniform Probate Code). Subsection (4) also plainly states that subsection (5)’s prohibition on extensions of the long deadline—if applicable—does not “prevent[]” Plaintiffs from “proceeding to establish liability...protected by...insurance.” § 733.702(4)(b).

Although subsection (4) excludes the other subsections from applying to the instant proceeding, that does not mean Plaintiffs can recover their damages from *any* estate asset. Paragraph (4)(b) permits the establishment of liability “only” “[t]o the limits of...insurance protection.” § 733.702(4)(b). This limitation protects the estate’s assets, leaving them to heirs, devisees, and other creditors. *See Matter of Daigle's Est.*, 634 P.2d 71, 78 (Colo. 1981) (discussing Uniform Probate Code’s insurance exception).

In sum, the only provisions that might protect Mr. Morton’s employer and its insurers from liability are the extinguishment provision (§ 733.702(2)), the “barred” provision (§ 733.702(3)), and the provision prohibiting extensions of the long deadline (§ 733.702(5)). But because this proceeding seeks “to establish liability...protected by...insurance,” these provisions do not “affect[] or prevent[]” this proceeding. § 733.702(4)(b).

B. By misconstruing the word “liable,” the First District expanded the long statute’s text to protect *all* persons—not just the estate and its proxies—who are liable for Mr. Morton’s negligence.

Contrary to the insurance exception’s text (§ 733.702(4)(b)), the First District prevented this proceeding to establish LBC’s and Mr. Morton’s liability protected by insurance. How did the court reach this result? Rather than adhere to the textual limitation protecting only estates and their proxies, the court atextually broadened the long statute’s protection to employers, insurers, and other persons who are liable for claims and causes of action against decedents. AR256-57, 258-59. This reading incorrectly knocked out a pillar of our primary argument. *See supra* ¶A.1, at 35.

The long statute states that two years after the decedent’s death, three persons—estates, representatives, and beneficiaries—“shall [not] be *liable* for any claim or cause of action against the decedent.” § 733.710(1) (emphasis added). “Liable” and its cognates have many different meanings. See, e.g., *Liability, Black’s Law Dictionary* (11th ed. 2019). Because the probate code does not define “liable” or “liability,” § 731.201, this Court must construe “liable” in its “aptest, most likely sense” based on all the “contextual and idiomatic clues.” Scalia and Garner, *supra* 70, 418. Here, the clues include not only the words and context of the long statute, but also of the related extinguishment provision (§ 733.702(2)).

Those clues indicate that, as used in the long statute, “liable” means “[t]he state or condition of a person who is *responsible for payment* or who is under *obligation to pay*.” James A. Ballentine, *Law Dictionary* 751 (1948) (emphasis added); see *Liability, Black’s Law Dictionary, supra* (defining “civil liability” as “the quality, state, or condition of being legally obligated for civil damages”); *Thatcher v. Comm’r*, 533 F.2d 1114, 1117 (9th Cir. 1976) (“In its ordinary meaning, the term ‘liability’ means ‘that which one is under an obligation to pay...’” (quoting *Webster’s New International Dictionary*

(2d ed. 1941)); § 607.0850(5), Fla. Stat. (2021) (“‘Liability’ means the obligation to pay a judgment” or “settlement.”).

This pay-money definition of “liable” is more likely than any other definition. Consider, for instance, this alternative definition: “[T]he state or condition of a person after he has *breached his contract* or *violated any obligation resting upon him.*” Ballentine, *supra* 751 (emphasis added); see *Liability, Black’s Law Dictionary, supra* (defining “tortious liability” as “aris[ing] from the breach of a duty”). “Liable” in this sense means one has breached a duty, but he may not necessarily be liable to pay money. See *Engle v. Liggett Grp., Inc.*, 945 So. 2d 1246, 1262–63 (Fla. 2006) (“A finding of liability necessarily precedes a determination of damages, but does not compel a compensatory award.”); *Echo v. MGA Ins.*, 157 So. 3d 507, 514 (Fla. 1st DCA 2015) (concluding “liability” in a statute meant the insured’s “liability for causing an injury or accident” but not “an insurer’s obligation to make payments...as a result of [the] injury or accident”).

The long statute does not use “liable” in the breach-of-duty sense. Unlike other statutes, the long statute does not concern claims or causes of action arising out of breaches of duty *by the personal*

representative. Cf., e.g., § 733.619(2) (“A personal representative is individually liable...for torts committed in the course of administration only if personally at fault.”); § 733.608(10)-(11) (specifying “failure[s]” by a personal representative for which he “shall not be liable”). The long statute instead concerns “claim[s] or cause[s] of action *against the decedent.*” § 733.710(1) (emphasis added).

Thus, if the *decedent* breached a duty (committed a tort, breached a contract, etc.), then the *decedent*—not his estate—is “liable” in the breach-of-duty sense. Indeed, the First District used “liable” in this sense. AR256 (“liability of the decedent tortfeasor” and “establishing the decedent’s liability”). And so have other courts. *See, e.g., Estate of Basile v. Famest, Inc.*, 718 So. 2d 892, 892 (Fla. 4th DCA 1998) (“The trial court...found the decedent remained liable under the guaranty....”).

But 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. Who then could be liable in a pay-money sense for a decedent’s breach-of-duty liability? Estates, employers, and insurers, among others. To be sure, estates, employers, and insurers may independently breach duties owed to plaintiffs. *Cf., e.g.,*

Bankers Multiple Line Ins. v. Farish, 464 So. 2d 530, 532 (Fla. 1985) (holding an employer’s “additional activity” was sufficient for a jury to find an employer liable, even though it found the employee not liable). Here, however, Mr. Morton’s estate, employer, and insurer did not independently breach any duty owed to Plaintiffs or do any wrong. These persons thus are not “liable” to Plaintiffs in a breach-of-duty sense like Mr. Morton is “liable” in that sense.

Instead, Mr. Morton’s estate, his employer, and its insurers may be “liable” in a pay-money sense—under probate law, *respondeat superior*, and insurance law—“for any claim or cause of action against the decedent.” § 733.710(1). The long statute, however, shields only the estate and its proxies—not every person who may be liable in a pay-money sense for “claim[s] or cause[s] of action against the decedent.” *Id.* It does not shield employers or insurers.

Nor does the long statute extinguish *Mr. Morton’s liability*—at least not by itself. The long statute, § 733.710(1)-(2), must work together with the extinguishment provision, § 733.702(2), to extinguish Mr. Morton’s liability—which, in turn, also terminates the liability of employers and others responsible to pay money for Mr. Morton’s negligence. *Supra* ¶¶ A.2, at 37-38; *infra* ¶ C, at 49-51. But

the extinguishment provision is subject to exceptions, and one exception (insurance) applies to this case. *Id.* ¶A.4, at 41-43.

Simply stated, in this proceeding, Plaintiffs do not seek to hold Mr. Morton’s estate “liable” in the pay-money sense. Instead, they seek payment *only* from the insurance policies of Mr. Morton’s employer (LBC). *See supra* ¶ a.2, at 2. Thus, the long statute textually does not—and legally should not—prevent Plaintiffs’ suit.

The First District’s construction, nonetheless, prevented Plaintiffs’ suit. Its construction of the long statute changed the meaning of “liable” to a breach-of-duty sense rather than the pay-money sense dictated by text and context. Put another way, the First District re-wrote the long statute as follows: “2 years after the death..., [the decedent] shall [not] be liable for any claim or cause of action....” § 733.710(1) (re-written).

The First District’s re-writing—or interpretation—of the long statute cannot be reconciled with the related-statutes and surplusage canons, which we discuss next. *Infra* ¶ C, at 49-51. At bottom, these and other canons integrate various parts of the law so they “fit together” and “make sense.” *Alachua County v. Watson*, SC19-2016, 2022 WL 247086, at *6 (Fla. Jan. 27, 2022); Scalia and

Garner, *supra* § 39, at 252. Reading the word “liable” in a pay-money sense (as we do) allows the long statute’s timeliness bar (§ 733.710(1)-(2)) to fit together with the extinguishment provision (§ 733.702(1)) so each does its own work and neither duplicates the other. On the other hand, reading “liable” in the long statute to extinguish a decedent’s liability and to protect *all* persons who may be financially responsible for that liability—like the First District does—fails to integrate the long statute and the extinguishment provision into a workable whole.

C. The First District’s construction violates the related-statutes and surplusage canons.

Statutes “dealing with the same subject—being *in pari materia*...—should if possible be interpreted harmoniously.” Scalia and Garner, *supra* § 39, at 252. And “[i]f possible, every word and every provision is to be given effect...None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence.” *Id. supra* § 26, at 174. The First District’s construction of the long statute duplicates section 733.702(2)’s

extinguishment provision and renders that provision’s “this part” language inconsequential.

The extinguishment provision states that “no cause of action...shall survive” the decedent’s death “unless a claim is filed within the time periods set forth in *this part*.” § 733.702(2) (emphasis added). By extinguishing an untimely-filed action, subsection (2)’s text performs more work than the text of the two subsections (1)—which protect only the estate and its proxies from liability for untimely claims. Compare § 733.702(2), with §§ 733.702(1), 733.710(1); see *supra* ¶¶ A.1, 2, at 35-38. Subsection (2)’s additional work is to protect *any* person from liability—subject to three exceptions—for untimely claims founded on a decedent’s conduct. See § 733.702(2), (4); *supra* ¶¶ A.2, 4, at 37-38, 41-43.

Absent an exception, the phrase “this part” means that subsection (2) extinguishes claims that are untimely under *both* the *short and long* statutes. *Supra* ¶ A.2, at 37-38. Yet, the effect of the First District’s interpretation is that the words “this part” in section 733.702(2) duplicate the words of section 733.710(1)-(2), serve no purpose, and are inconsequential. If the legislature had said “this section” instead of “this part” in the extinguishment provision, the

two statutes would operate the same as the First District’s reading. But the legislature did not say “this section;” it said “this part.” § 733.702(2).

The First District’s construction also eliminates in part exceptions for proceedings involving mortgages or liens, insurance, and cross-claims or counterclaims. Specifically, it renders inoperative subsection (4)’s text—that such proceedings are not “affect[ed] or prevent[ed]” by the extinguishment provision—insofar as the extinguishment provision’s “this part” wording incorporates the long deadlines. As a result, under the First District’s construction, all creditors in such proceedings—not just tort plaintiffs—must file claims in the probate court within two years of the decedent’s death or risk forfeiture.

In sum, the First District’s construction fails to integrate the extinguishment provision and the long statute into a cohesive, workable whole.

D. The First District misconstrued the nonjoinder statute when it assumed Mr. Morton's liability had to be established by a judgment against the estate that would allow collection on its assets.

The First District erroneously assumed that: (1) Mr. Morton's liability could be established only by a lawsuit against his *estate* and *not* against his *employer* (LBC) and (2) a *judgment* had to be entered against an insured (specifically, the estate) before the insurers could be liable. AR256-57. Both assumptions misconstrued the nonjoinder statute, and the latter assumption failed to appreciate that the trial court can enter a judgment that protects the estate's assets.

1. Plaintiffs could have sued only Mr. Morton's employer (LBC) to establish Mr. Morton's liability.

The nonjoinder statute requires a plaintiff to "first obtain a settlement or verdict against...an *insured*" before an "insurer may be joined as a party defendant for the purposes of entering final judgment or enforcing [a] settlement." § 627.4136(1), (4) (emphasis added). Both LBC and Mr. Morton were *insureds*. *See supra* ¶ a.2, at 2. Plaintiffs in this proceeding are attempting to "first obtain a settlement or verdict" against one insured (LBC) *and* the personal representative of the other insured (Mr. Morton). § 627.4136(1). Once

a settlement or verdict is obtained, Plaintiffs will ask to join the insurers to the judgment. § 627.4136(4).

The First District’s assumption—that a plaintiff must “establish[] the liability of the decedent tortfeasor (*through his estate*)” before he can proceed against the insurer, AR257 (emphasis added)—is wrong. The nonjoinder statute does not say a decedent’s liability must be established *through his estate*. The statute merely prevents a plaintiff from joining *insurers*. It says nothing about *which insureds* may or must be sued to establish liability “for a cause of action which is covered by [the insurance] policy.” § 627.4126(1).

The nonjoinder statute does not apply when determining *which insureds* may or must be joined. Instead, for that determination, the joinder rule applies: “Any person *may*...be made a party if that person’s presence is necessary or proper to a complete determination of the cause.” Fla. R. Civ. P. 1.210(a) (emphasis added). “May” ordinarily denotes a permissive term. *The Fla. Bar v. Trazenfeld*, 833 So. 2d 734, 738 (Fla. 2002).

By its text, the joinder rule does not require a plaintiff to sue both an employee (or his estate) and his employer. Fla. R. Civ. P. 1.210(a). Consistent with that text, caselaw teaches that where an

employer is vicariously liable for an employee's tort, "it is optional with a plaintiff whether he sues either or both." *Fincher Motor Sales, Inc. v. Lakin*, 156 So. 2d 672, 674 (Fla. 3d DCA 1963) (citing *Pendarvis v. Pfeifer*, 182 So. 307, 309 (Fla. 1938)) (holding a plaintiff not required to sue both the negligent driver and a vicariously liable person); see 27 *Am. Jur. 2d* Employment § 378 (Feb. 2022 update) ("[T]he employee is not a necessary party to [a *respondeat superior*] action against an employer."); Mary Kay Kane, *Federal Practice and Procedure* § 1623 n.5 (3d ed. April 2021) ("Under generally accepted principles of tort law...joinder has not been required of principles and agents."); *Orwick v. Fox*, 828 P.2d 12, 18 (Wash. Ct. App. 1992) (citing cases).

In sum, Plaintiffs could have established Mr. Morton's liability by suing either his estate, his employer (LBC), or both.

2. Once Mr. Morton's liability is established by a settlement or verdict, a judgment against an insured is not required to hold the insurers liable, but even if were, the judgment can be crafted to protect the estate.

Preliminarily, because Mr. Morton's employer (LBC) is an insured, any judgment could be against only LBC. Neither the nonjoinder statute nor any other legal principle requires a judgment

against *both* insureds. See § 627.4136. Indeed, before a judgment is entered, Plaintiffs may drop the estate as a party and proceed solely against LBC. See Fla. R. Civ. P. 1.250, 1.420(a).

But even if the estate was the only insured, the nonjoinder statute's text does not require a judgment against an insured before an insurer is liable. In fact, the statute's silence indicates a judgment is *not* required, as it merely requires a "settlement or verdict":

It shall be a condition precedent to the accrual or maintenance of a cause of action against a liability insurer by a [non-insured plaintiff]...that such person shall first obtain a *settlement or verdict* against a person who is an insured...for a cause of action which is covered by such policy.

§ 627.4136(1) (emphasis added).

"Settlement" and "verdict" are different than "judgment." Cf. *White v. Steak & Ale of Fla., Inc.*, 816 So. 2d 546, 550 (Fla. 2002) ("[J]udgment obtained" was "not [to] be equated with the jury verdict.") A court may not add a provision making a "judgment" a condition precedent. See Scalia and Garner, *supra* § 8, at 94. But the First District did just that. AR256 ("[A]n insurer cannot be liable...until a creditor...perfects a claim against the decedent tortfeasor *through the entry of a judgment....*" (emphasis added)).

The nonjoinder statute does not change the insurer’s status as a real party in interest. *Markert v. Johnston*, 367 So. 2d 1003, 1005 (Fla. 1978) (“[B]y enacting [a nonjoinder statute], the legislature [did] not alter[] the [judicial] policy of recognizing insurers as the real parties in interest....”).¹⁶ The statute “merely specifies the precise moment during the judicial proceeding when [an insurer] [could] be *formally recognized* as the real party in interest.” *Id.* (emphasis added). The insurer is a real party in interest because its “money is at stake” and it defends the insured, controls the defense, and hires the lawyer. *Springer v. West*, 769 So. 2d 1068, 1070 (Fla. 5th DCA 2000) (Harris, J. concurring); *see also Dudley v. Carroll*, 467 So. 2d 706, 707 (Fla. 5th DCA 1985) (“Allstate was the real party in interest as to any liability its insured would have to pay.”).

After a settlement or verdict, this real party in interest—the insurer—“*may* be joined...for the purposes of entering final judgment.” § 627.4136(4) (emphasis added). The statute’s text does not require the insurer *and* insured both be on the judgment. *See id.*

¹⁶ The legislature later revised the nonjoinder statute discussed in *Markert*. *See VanBibber v. Hartford Accident & Indem. Ins.*, 439 So. 2d 880, 882 (Fla. 1983). But this Court never has receded from its recognition that the insurer is a real party in interest.

Even if an insured or the estate were required to be on the judgment, a trial court could prohibit execution on the estate's assets and thus comply with the long statute's purpose of protecting the estate and its proxies. Analogous issues arise when a defendant is bankrupt or a sovereign. Courts routinely craft judgments against bankrupt defendants that limit collection to an insurance policy and that protect the bankruptcy estate. *See, e.g., Whritenour v. Thompson*, 145 So. 3d 870, 872 (Fla. 2d DCA 2014); *IAG Engine Ctr. Corp. v. Cagney Glob. Logistics, Inc.*, 1:17-CV-23271-KMM, 2019 WL 7905009, at *2 (S.D. Fla. May 1, 2019). Similarly, with judgments against sovereigns—in which amounts above the statutory cap must be paid by a claims bill—this Court has directed the “judgment correspond[] to the jury’s award of damages but limit[] [the sovereign’s] liability for payment” to the cap. *Plancher v. UCF Athletics Ass’n, Inc.*, 175 So. 3d 724, 729 (Fla. 2015).

In sum, under the nonjoinder statute, an insurer’s liability is triggered by a “settlement or verdict,” and the statute does not require a judgment against an insured. If such a judgment is required, one can be entered to limit collection to the insurance policies.

E. The First District misapplied the exoneration rule.

Applying a common-law rule, the First District decided the long statute’s timeliness bar shielding an estate from liability “exonerates” the estate’s deceased employee (Mr. Morton) and his employer (LBC). R259. We explain the origins of the common-law rule, *infra* ¶ E.1, at 58, and then argue the First District misapplied this rule, *infra* ¶ E.2, 3, at 59-65.

1. The origins of the common-law exoneration rule

In *Williams v. Hines*, 86 So. 695 (Fla. 1920), the plaintiff sued an employee and an employer, alleging the employee injured the plaintiff by negligently operating a locomotive. *Id.* at 695-96. The suit sought “recovery against the [employer]” based “solely upon [the employee’s] negligent act.” *Id.* at 696. The jury rendered a verdict against the employer and in favor of the employee (but not based on a timeliness bar). *Id.* The trial court set aside the verdict against the employer and entered judgment in favor of both defendants. *Id.* This Court affirmed, reasoning that, under the common law, “a verdict...exonerating the [employee] exonerates the [employer]” in “an action against [the employer] for damages resulting solely from the negligence of the [employee], acting as such.” *Id.* at 697, 702.

2. This case involves statutory interpretation, not the common law.

The question of statutory interpretation presented should be decided without resort to the common law. The long statute's text protects only three persons, does not extinguish the decedent's liability, and does not protect employers and insurers. § 733.710(1)-(2). The common law can neither negate nor expand this text. Justice Holmes similarly rejected using the common law to bar a cause of action permitted by a statute:

The common law view of the responsibility of a master for his servant...[is] not enough to override the plain meaning of statutory words...[C]ourts in dealing with statutes sometimes have been too slow to recognize that statutes even when in terms covering only particular cases may imply a policy different from that of the common law....

Panama R. Co. v. Rock, 266 U.S. 209, 216 (1924) (Holmes, J. dissenting); see also *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 185 (2011) ("The common law of trusts does not override the specific trust-creating statutes and regulations...").

In sum, the common-law exoneration rule is irrelevant because the long statute's text does not exonerate LBC and its insurers.

3. Under the common law, a timeliness bar does not exonerate the employee or the employer.

If this Court considers the common-law exoneration rule to be relevant, then the First District misapplied it.

A statutory timeliness bar merely “prevents the enforcement of a cause of action,” but “it does not determine the underlying merits of the claim.” *Houck Corp. v. New River, Ltd., Pasco*, 900 So. 2d 601, 603 (Fla. 2d DCA 2005) (citing *Allie v. Ionata*, 503 So. 2d 1237, 1240-41 (Fla. 1987)). Overlooking this principle, the First District below relied on *Buettner*, 700 So. 2d at 48, AR259, a case that misapplied the common-law exoneration rule.

As in the instant case, the *Buettner* plaintiff sued: (i) a deceased employee for negligently driving an automobile and (ii) the employers to hold them vicariously liable for that negligence. 700 So. 2d at 48. The trial court granted judgment on the claim against the employee “based on the two-year statute of limitations...in sections 733.702(5) and 733.710,” and unlike this case, the plaintiff failed to appeal that ruling. *Id.* at 48 n.1. The trial court then entered judgment for the employers, which the plaintiffs appealed. *Id.* at 48. The *Buettner* court affirmed, reasoning “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*.” *Id.* (emphasis added).

Buettner and the First District below failed to analyze this Court’s decision in *Williams* to determine the scope of its exoneration rule. See Bryan A. Garner et al., *The Law of Judicial Precedent* § 6, at 80 (2016) (“[A] judicial decision must be interpreted with reference to the circumstances of the particular case and the question under consideration.”) In *Williams*, the employee was exonerated by a *verdict on the merits*. 86 So. at 695-97. Neither *Buettner* nor the opinion below pondered whether a timeliness bar that protects an employee’s estate was analogous to a merits verdict in favor of an employee. AR258-59; see also Garner, *supra* § 9, at 105-14 (“[I]t is proper to argue by analogy....But the analogy must be close.”)

Buettner’s reasoning was “without elaboration.” *Cameron v. Osler*, 930 N.W.2d 661, 666 (S.D. 2019). It consisted of a string citation to five cases, *Buettner*, 700 So. 2d at 48—two of which, along with *Buettner*, were cited in the First District’s opinion here, AR259. None of the cited cases address (even in *dicta*) whether a timeliness bar is analogous to a jury’s verdict exonerating an employee. See, e.g., *Mallory v. O’Neil*, 69 So. 2d 313, 314-15 (Fla. 1954) (holding

plaintiff stated a cause of action against an employer for negligently retaining an employee); *Farish*, 464 So. 2d at 532 (declining to apply the exoneration rule—despite a verdict in the employee’s favor—because of the employer’s own independent wrongdoing).

One case cited by *Buettner*—from this Court—refutes the proposition that a statute-of-limitations defense is an adjudication on the merits. *See Allie*, 503 So. 2d at 1239-40 (“The expiration of a statute of limitation does not resolve the underlying merits...in favor of either party; it merely cuts off the remedy of the party who has slept on his rights.”).

Two of *Buettner*’s cited cases (*Walsingham* and *Citibank*) directly contradict a holding of this Court. *Compare JFK Med. Ctr., Inc. v. Price*, 647 So. 2d 833, 834 (Fla. 1994) (“[A] voluntary dismissal of the [employee], with prejudice,...pursuant to [a] settlement, is not the equivalent of an adjudication on the merits that will serve as a bar to continued litigation against the [employer].”), *with Walsingham v. Browning*, 525 So. 2d 996, 997–98 (Fla. 1st DCA 1988) (holding claimants’ voluntary dismissal with prejudice of their claim against the employee, pursuant to a settlement, “was a negative adjudication on the merits” that “precluded litigation of the vicarious

liability...claim against the [employer]”), and *Citibank, N.A. v. Data Lease Fin. Corp.*, 904 F.2d 1498, 1500-01 (11th Cir. 1990) (similar).

Other than the decision below, only one Florida appellate court has cited *Buettner*. See *Molina v. Watkins*, 824 So. 2d 959, 962 (Fla. 3d DCA 2002). There, the jury rendered a verdict absolving the employee of wrongdoing. *Id.* Thus, that case does not indicate a probate timeliness bar exonerates an employee and his employer.

In contrast to *Buettner*, most high courts have decided that a timeliness bar of a claim against an employee neither exonerates the employer nor bars a *respondeat superior* action against the employer.¹⁷ See, e.g., *Hughes v. Doe*, 639 S.E.2d 302, 304 (Va. 2007) (“[T]he order dismissing the claims against [the employee] with prejudice for failure to comply with the statute of limitations...neither exonerated [the employer] nor otherwise precluded [the plaintiff] from pursuing her claim against [the employer] for [the employee’s] negligence on a theory of *respondeat superior*.”); see also *Methodist Healthcare-Olive Branch Hosp. v. McNutt*, 323 So. 3d 1051, 1053

¹⁷ Granted, a few high courts allow a timeliness bar of a claim against an employee to exonerate his employer. *Cameron*, 930 N.W.2d at 665 (rejecting the decisions). But their reasoning contravenes Florida law, and none of them imputes to an employer a probate claim bar that protects a deceased employee’s estate.

(Miss. 2021); *Cameron*, 930 N.W.2d at 666; *Cohen v. Alliant Enters., Inc.*, 60 S.W.3d 536, 539 (Ky. 2001); *Leow v. A & B Freight Line, Inc.*, 676 N.E.2d 1284, 1286–87 (Ill. 1997). These courts have relied on three rationales, all of which apply to Florida law.

First, “the negligence of the servant... is imputed to the master, not the *liability*.” *Cameron*, 930 N.W.2d at 666. Florida law agrees: “[T]he negligence of one person may be imputed to another....” Thomas D. Sawaya, *Florida Personal Injury & Wrongful Death Actions* § 4:1 (2021-22 ed.) (discussing vicarious liability).

Second, a ruling that a claim is untimely adjudicates only the employee’s liability, not his wrongdoing. *See Cameron*, 930 N.W.2d at 664 (citing multiple cases). Florida law agrees: “A ‘statute of limitations’...prevents the enforcement of a cause of action that has accrued,” but “it does not determine the underlying merits of the claim.” *Houck Corp.*, 900 So. 2d at 603; *see also May v. Palm Beach Chem. Co.*, 77 So. 2d 468, 469, 473 (Fla. 1955) (although the law prohibited plaintiff from suing her husband for negligently operating an automobile, she could sue the vicariously liable automobile owner for her husband’s negligence).

Third, a plaintiff need not sue the employee before suing the employer under *respondeat superior*. *Cameron*, 930 N.W.2d at 664 (citing multiple cases). Florida law agrees. *Supra* ¶ D.1, at 53-54. Because a plaintiff is not required to sue the employee, then it is “illogical” and “absurd” to suggest that a timeliness bar that protects only the employee (or his estate) bars a suit against the employer. *McNutt*, 323 So. 3d at 1064 (Maxwell, J., concurring).

In sum, under the common law, a timeliness bar does not exonerate an employee or his employer, and thus, an employer that is timely sued may be vicariously liable for an employee’s wrongdoing even if the claim against the employee is time barred.¹⁸

F. The First District’s construction improperly disregarded a quarter century of legislative and judicial approval of Pezzi’s construction.

The legislature repeatedly has amended the statutes at issue during the preceding forty-eight years. *Supra* ¶¶ b.1-3, at 10-25. It has responded to judicial constructions and expressly repudiated those constructions with which it disagreed. *Id.* ¶ b.3, at 15-25. But since 1997, the legislature has not changed *Pezzi*’s construction—

¹⁸ Our arguments, though couched in *respondeat superior*, apply to all types of vicarious liability, including the dangerous instrumentality doctrine pled below.

though it has amended the statutes several times. *Id.* ¶ b.4-5, at 25-29.

“Long-term legislative inaction after a court construes a statute amounts to legislative acceptance or approval of that judicial construction.” *Goldenberg v. Sawczak*, 791 So. 2d 1078, 1081 (Fla. 2001). This principle applies to constructions by district courts. *Specialty Hosp.-Gainesville, Inc. v. Barth*, 277 So. 3d 201, 207 (Fla. 1st DCA 2019) (inaction of eleven years indicated the legislature accepted a district court’s construction). The legislature reacts when it disagrees with a district court’s decision. *See, e.g.*, Staff Analysis, S.B. 286 (March 14, 2013) (indicating legislature enacted a statute because it disagreed with a district court decision).

The legislature’s inaction for the past twenty-five years indicates it has accepted *Pezzi*’s construction. What’s more, so had two other district courts and this Court in *dicta*. *Supra* ¶ b.5, at 29. While *dicta* is not binding, this Court’s vertical *dicta* should be given “significant weight.” Garner, *supra* § 4, at 69-70 (“All federal courts place significant weight on the dicta of the U.S. Supreme Court.”).

In sum, the First District erroneously ignored a quarter century of legislative and judicial acceptance of *Pezzi*’s construction.

CONCLUSION

The Court should quash the First District's opinion and remand consistent with the legal principles argued herein.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing document complies with the word count limitation of Rule 9.210, Florida Rules of Appellate Procedure, in that it contains 12,941 words (including words in headings, footnotes, and quotations), according to the word-processing system used to prepare this document. This document also complies with the line spacing, type size, and typeface requirements of Rule 9.045, Florida Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been electronically filed via the Florida Courts E-Filing Portal on April 4, 2022, and an electronic copy has been furnished to the following counsel of record:

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