IN THE SUPREME COURT OF FLORIDA

SUN STATE FORD, INC.,

Petitioner,

vs.

CASE NO.: SC04-157
Lower Tribunal No.: 5D02-2807

LAVERICA BURCH, as Parent and Natural Guardian of NY`JAE AALIYAH MILES, and REGINA PACE, as Parent and Natural Guardian of AKEIA D. MILES, jointly as Co-Personal Representatives for the Estate of AARYON MILES, and WILLIE GENE BEAUFORD, JR., individually,

Respondents.

RESPONDENTS' BRIEF ON THE MERITS

DARYL D. PARKS, ESQUIRE
FBN: 0054097
Parks & Crump, LLC
Attorney for Respondents/Plaintiffs
240 North Magnolia Drive
Tallahassee, FL 32301
(850) 224-6400
(850) 224-6679(Facsimile)

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INTRODUCTION

The Respondents, LAVERICA BURCH LAVERICA BURCH, as Parent and Natural Guardian of NY JAE AALIYAH MILES, and REGINA PACE, as Parent and Natural Guardian of AKEIA D. MILES, jointly as Co-Personal Representatives for the Estate of AARYON MILES (Plaintiffs), seek affirmation of the Fifth District Court of Appeals' reversal and remand of the lower court's granting of the Defendant, Sun State Ford's Motion for Summary Judgment.

The Petitioner, Sun State Ford, Inc., was the Defendant in the court below and will be referred to on appeal as the Petitioner or by name.

The following abbreviations are used for citation purposes:

App.- Appendix

R.- Record on Appeal Volume #

The page number where the information referenced may be found follows each abbreviation.

Unless otherwise specified, all emphasis in this brief is that of the writer.

STATEMENT OF THE CASE AND FACTS

Respondents, **LAVERICA BURCH as Parent and Natural Guardian of NY`JAE AALIYAH MILES, and REGINA PACE, as Parent and Natural Guardian of AKEIA D. MILES, jointly as Co-Personal Representatives for the Estate of AARYON MILES** respectfully request that this Court affirm the Fifth District Court of Appeals ("DCA") reversal of summary judgment. App. 1. The Fifth DCA properly reversed as there was a genuine issue of material fact regarding the intent of the driver at the time of the subject collision. Given the subjectivity of the driver's intent in the instant case, the Fifth DCA could only find that an issue of fact was in dispute and had to be resolved by the trier of fact. In ruling that there was a genuine issue of material fact, the court utilized the dangerous instrumentality doctrine, the governing rule of law, which holds owners liable for the negligent actions of the driver he entrusts with his vehicle. App. 1. Negligence is the most basic theory of liability. The dangerous instrumentality doctrine imputes liability for any actions on the part of the driver, save intentional, upon which an owner can be held vicariously liable.

The facts of this case are as follows: On June 28, 1999, the decedent, Aaryon Miles ("Miles") provided Teresa Rene Wilson ("Wilson") and Bridgette Lee ("Lee") with a ride from a local nightclub. R. 268-269. Willie Gene Beauford, Jr. ("Beauford"), who had driven them to the nightclub, followed the vehicle driven by Miles after perceiving what he believed to be an altercation between the three individuals. R. 269-270. Concerned for their safety, Beauford followed in a vehicle owned by Petitioner,

Sun State Ford, Inc., and rented to his sister, Carla Lewis. R. 270. Mrs. Lewis had given Beauford her express consent to utilize this rented vehicle. R. 265.

While driving, Beauford closely followed Miles' vehicle. R. 270. Consequently, Miles accelerated his speed and took evasive action to get away from Beauford who continued to follow Miles closely, causing Miles' vehicle to crash. R. 285. Miles died in the automobile crash and the passengers in his vehicle, Wilson and Lee, were severely injured. R. 285-287.

The Co-personal representatives of the decedent's estate in the instant case brought a wrongful death action after he was killed in this crash. R. 1-6. Sun State Ford, Inc. owned the vehicle used by Defendant, Beauford. In the instant case, the trial court found that the owner of a vehicle was not vicariously liable under the dangerous instrumentality doctrine and granted summary judgment in favor of Sun State Ford in contravention of existing Florida case law. R. 546.547. The Fifth DCA reversed this ruling in compliance with existing case law holding that the dangerous instrumentality doctrine is not limited to the negligent operation of a vehicle and that reckless driving or other intentional misconduct by an operator does not terminate liability under the dangerous instrumentality doctrine. App. 1. Thus, the Fifth DCA properly recognized that there are categories of intentional misconduct which would allow the court to imputes vicarious liability upon the owner. The Fifth DCA further stated that whether Beauford pursued the vehicle in a manner intended to inflict physical injury was a jury question precluding summary judgment. App. 1.

SUMMARY OF ARGUMENT

The dangerous instrumentality doctrine has been utilized by Florida courts as a method of holding an owner liable for the negligent actions of a permissive user. However, as noted by the Fifth District Court of Appeal ("DCA"), an owner is also liable if that user is reckless or involved in certain aspects of intentional misconduct. App. 1. The focus by the appellant upon Florida's need to dispense with the dangerous instrumentality doctrine is not ripe for this appeal. Neither the lower court nor the Fifth DCA heard argument on the issue of the dangerous instrumentality doctrine being an improper basis of owner liability. The only true issue is whether or not the actions of Beauford constituted intentional conduct thereby taking it outside of the scope of the dangerous instrumentality doctrine. It is our position that it does not.

Furthermore, the reliance by Florida courts upon the dangerous instrumentality doctrine is proper. Florida courts have properly maintained their adherence to the dangerous instrumentality doctrine due to their desire to protect the public from the offensive actions of owners of vehicles who permit them to be used by others. In the instant case, Sun State Ford, Inc., as an owner of a dangerous instrumentality should be liable for any actions of a permissive user as permitted under the dangerous instrumentality doctrine. It was foreseeable that an individual would use the vehicle to follow someone they believe is in danger. As a result, Beauford's actions do not fall within the realm of intentional misconduct that is not foreseeable which would suffice

to bar imposition of liability on Sun State Ford, Inc.

STANDARD OF REVIEW

The standard of review of a summary judgment order is de novo and requires viewing of the evidence in the light most favorable to the non-moving party. Florida Bar v. Cosnow, 797 So. 2d 1255 (Fla. 2001); See also Krol v. Orlando, 778 So. 2d 490, 491 (Fla. 5th DCA 2001).

ARGUMENT

I. THE DANGEROUS INSTRUMENTALITY DOCTRINE SHOULD NOT BE DISPENSED WITH FOR FAULT-BASED LIABILITY UNDER §390 OF THE RESTATEMENT (SECOND) OF TORTS.

The rules of this court require that "in order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved." *See Keech v. Yousef*, 815 So. 2d 718 (Fla. 5th DCA 2002). Florida courts have traditionally held that questions not timely raised and ruled upon in the trial court will not be considered on appeal. *Id.* at 720. In *Keech*, a vehicle owner had hired a mechanic to increase horsepower of his cars. *Id.* The vehicle owner claimed that the mechanic had not done the work as promised and sued him on claims of breach of contract, breach of implied warranty, and deceptive and unfair trade practices. *Id.* The vehicle owner presented competent evidence relating to the claims with the exception of the claim relating to the Florida Deceptive and Unfair Trade Practices Act (DUPTA). *Id.* The vehicle owner proved only one act that fell under DUPTA rather than showing that the mechanic engaged in a pattern of prohibited practices, as required, and the mechanic appealed. *Id.* However, the court entered judgment in favor of the vehicle owner. *Id.* The Fifth DCA in articulating its holding stated that, "because the DUPTA issue was not presented to the trial court, the issue was waived for appellate review. *Id.* In the instant case, the Petitioners

lengthy exposition as to why this court should dispense with Florida's dangerous instrumentality doctrine for fault-based liability under §390, is an issue that was not raised in the trial court or before the Fifth DCA, therefore failure to preserve such a legal argument for appellate review constitutes a waiver.

Alternatively, if this Court elects to review Petitioner's argument to adopt §390 of the Restatement (Second) of Torts as the legal standard for determining liability of one who provides an automobile to another under the circumstances presented here in lieu of Florida's dangerous instrumentality doctrine, then Respondents' argument is stated hereafter. This Court should not replace the dangerous instrumentality doctrine with a fault-based theory of liability for dangerous chattels under §390 of the Restatement (Second) of Torts. Replacing the dangerous instrumentality doctrine with §390 would in essence be lowering the standard of liability for owners of automobiles as a means of insulating an owner from liability to injured plaintiffs, defeating the primary objective of which the doctrine is designed to protect against.

Florida courts have recognized that an automobile, although not dangerous per se, is dangerous in its operation, and the principles of the common law do not permit the owner of an instrumentality that is not dangerous per se, but is peculiarly dangerous in its operation, to authorize another to use such instrumentality on the public highways without imposing such owner liability for negligent use. *See Southern Cotton Oil Co. v. Anderson*, 86 So. 629 (Fla. 1920). Adopted in 1920, Florida's dangerous instrumentality doctrine imposes strict vicarious liability upon the owner of

a motor vehicle who voluntarily entrusts that motor vehicle to an individual whose negligent operation causes damage to another. *See Southern Cotton Oil Co. v. Anderson*, 86 So. 629, 637 (1920). In *Southern Cotton Oil Co.* this court stated, "one who authorizes and permits an instrumentality that is peculiarly dangerous in its operation to be used by another on the public highway is liable in damages for injuries to third persons caused by the negligent operation of such instrumentality on the highway by one authorized by the owner." Id. at 632. This doctrine has been extended to lessors. *See Susco Car Rental Sys. v. Leonard*, 112 So. 2d 832 (Fla. 1959). The court further noted that, "a lessor's liability results from the owner's obligation to have the vehicle properly operated when it is by authority on the public highway." *Id.* at 836. The doctrine seeks to provide greater financial responsibility to pay for the carnage on the roads. It is premised on the theory that one who originates the danger by entrusting the automobile to another is in the best position to make certain that there will be adequate resources with which to pay the damages caused by its negligent operation. *Id.* Under the dangerous instrumentality doctrine, an owner who gives authority to another to operate the owner's vehicle, by express or implied consent, has a nondelegable obligation to ensure the vehicle is operated safely. *Id.* In the instant case, Sun State Ford is liable to plaintiffs under the dangerous instrumentality doctrine because it was the owner of the vehicle driven by Beauford, which it had rented to Beauford's sister. This rule arises from the absolute duty which is owing to the public by those who employ in their business dangerous agencies or

appliances, engines, or instruments liable, if negligently managed, to result in great damage to others. *Id.* at 632. When Sun State Ford rented the vehicle, they were solely responsible for the actions of the permissive user, Defendant Beauford.

In determining who is vicariously liable under the dangerous instrumentality doctrine, the court repeatedly has required that the person to be held vicariously liable have an identifiable property interest in the vehicle, such as ownership, bailment, rental, or lease of a vehicle. *Aurbach v. Gallina*, 753 So. 2d 60 (Fla. 2000). In *Aurbach*, Michael Aurbach was injured in an automobile accident by a motor vehicle operated by Angelina Gallina, age eighteen. *Id.* Aurbach and his wife sued Gallina as the operator of the vehicle and her parents, Louis and Carolina. Although the vehicle was titled in the name of Carolina Gallina, the Aurbachs also sought to hold Louis Gallina vicariously liable under the dangerous instrumentality doctrine, alleging that he owned or had a right to control the motor vehicle driven by his daughter. *Id.* Louis Gallina claimed that he was not the owner of the vehicle, as required by the dangerous instrumentality doctrine, thus he could not be held liable for the resultant accident. *Id.* The court held that Louis Gallina was not the owner, bailee, or lessee and did not have control of the automobile sufficient to impose liability under the dangerous instrumentality doctrine. *Id. See also Vic Potamkin Chevrolet Inc. v. Horne*, 505 So. 2d 560 (Fla. 3d DCA 1987) (where the court refused to hold the defendant, who had sold the car and no longer had any control over it, liable for the plaintiff's injuries). Contrary to *Aurbach*, in the instant case, Sun State Ford was the owner and

maintained a general right to control the operation or use of the vehicle they had rented out to Carla Lewis to operate.

Under Florida's dangerous instrumentality doctrine, the owner of a vehicle is liable to third persons for its negligent operation by anyone to whom it has been entrusted, even if the bailee grossly violates the owner's express instructions concerning its use. *Avis Rent-A-Car Sys. V. Garmas*, 440 So. 2d 1311 (Fla. 3d DCA 1983, citing *Southern Cotton Oil Co. v. Anderson*, 86 So. 629 (1920). In *Avis Rent-A-Car Sys.*, Avis Rent-A-Car was a defendant in a personal injury action arising from an accident admittedly caused by the grossly negligent operation of one of its rental vehicles. *Id.* Avis contended that the negligence caused by the driver who the vehicle was not rented to insulated the company from liability. *Id.* The court in determining that a rental-vehicle-lessee's departure from an express agreement that he could not permit anyone else to operate it, did not affect the rent-a-car company's liability. *Id.* Moreover, this Court has held that an owner cannot deliver a vehicle into the hands of another without assuming, or continuing, his full responsibility to the public. *See Id.* (Citing the Supreme Court in *Susco v. Leonard*, 112 So.2d 832, 837 (1959)). The court further noted, that such statutory provisions would, of course, be quite nugatory if ultimate liability could be escaped by contract of the owner. *See Susco Car Rental Sys. of Fla. v. Leonard*, 112 So. 2d 832 (Fla. 1959). In the instant case, the vehicle driven by Defendant Beauford was rented to Carla Lewis, a non-party and Beauford's sister, from Sun State Ford, therefore making Sun State Ford liable for the damages

sustained by the plaintiffs.

Moreover, the owner is free of liability only in cases of intentional misconduct which is not foreseeable. *See Caetano v. Bridges*, 502 So. 2d 51, 53 (Fla. 1st DCA 1987) (citing *Southern Cotton Oil Co. v. Anderson*, 86 So. 2d 629 (Fla. 1920)). In the instant case, it is foreseeable that an individual would attempt to rescue those he believes may be in imminent harm. Out of concern for the women's safety, Defendant Beauford merely attempted to rescue the women that appeared to be arguing with the decedent Aaryon Miles. Conversely, in *Caetano*, the defendant expressed an intent to run down her boyfriend who was hand in hand with the plaintiff in that case. *Id.* Under the transferred intent doctrine, her intent to injure her boyfriend would then apply to the plaintiff in that case. As the intent to injure her boyfriend would transfer to the injury actually inflicted upon the plaintiff in Caetano, the court would have reasonably concluded that the owner was not liable.*Id.* However, in the instant case since Beauford lacked the intent to inflict bodily injury upon any of the occupants of the vehicle driven by Miles, the dangerous instrumentality doctrine should not be construed to absolve the owner of vicarious liability in this case.

Furthermore, in establishing the dangerous instrumentality doctrine, this court clearly evidenced an intent to hold owners of vehicles liable even if the vehicle is used in a manner that is outside the scope of the owner's express consent. In *Southern Cotton Oil Co. v. Anderson*, 86 So. 629, 630 (Fla. 1920), this court stated that the responsibility of an owner of an automobile extends to its use by one with his

knowledge or consent. An automobile operated upon the public highways being a dangerous machine, its owner is responsible for the manner in which it is used, and his liability extends to its use by anyone with his knowledge or consent. *Id.* In the instant case, Sun State Ford's lessee, Beauford's sister gave him the express consent to use the vehicle.

Sun State Ford by maintaining ownership, control and possession of a dangerous instrumentality and notably loaning an auto to a third party should be held liable for any accident that results. The dangerous instrumentality doctrine imposes strict vicarious liability upon the owner of a motor vehicle who voluntarily entrusts that motor vehicle to an individual whose negligent operation causes damage to another. Additionally, the liability under the doctrine of respondeat superior is not foreign to the rule of liability that one who authorizes and permits an instrumentality that is peculiarly dangerous in its operation to be used by another on the public highway, is liable in damages to third persons that are caused by the negligent operation of such instrumentality on the highway by one who is so authorized by the owner. *See Southern Cotton Oil Co.* at 629.

The respondents ask this court to follow the lead of our district courts and hold that Beauford was not engaged in an intentional tort as a matter of law for which Sun State Ford should be held vicariously liable. If Florida's traffic problems were sufficient to prompt its adoption in 1920, there is all the more reason for its application to today's high-speed travel upon crowded highways. *Aurbach v. Gallina*, 753 So.

2d 60 (Fla. 2000). The courts then, as they do today recognize the grave harm that foreseeably results when an accident occurs.

II. SUN STATE FORD SHOULD BE HELD LIABLE UNDER THE DANGEROUS INSTRUMENTALITY DOCTRINE BECAUSE BEAUFORD'S ACTIONS WERE NEGLIGENT AND SUBJECTIVE INTENT SHOULD BE THE APPROPRIATE TEST TO IMPOSE LIABILITY.

The dangerous instrumentality doctrine was introduced as a method of addressing the large number of accidents occurring on Florida highways. In the past, it was a way to assess liability upon owners of motor vehicles under the valid assumption that motor vehicles are inherently dangerous. When originally proposed, it was this Court's intent to utilize the dangerous instrumentality doctrine as a method to hold owners liable when they permissively allow an individual to use their vehicle and an accident results. *See Southern Cotton Oil Co. v. Anderson*, 80 Fla. 441 (Fla. 1920). The court in *Southern Cotton Oil* made clear that a superior must respond in damages for the negligent acts of persons to whom he intrusts instrumentalities that are dangerous *per se* or dangerous in their use. *Id.* at 468, 469. In that case, which both parties agree is the progeny of cases to delineate the application of the dangerous instrumentality doctrine, the Court asserted that an owner is to be held liable for negligently entrusting his automobile to the use of others. *Id.* An automobile being a dangerous machine, its owner should be held responsible for the manner in which it is used; and his liability should extend to its use by anyone with his consent. *See*

Southern Oil Co. v. Anderson, 80 Fla. 441, 457 (Fla. 1920) quoting *Christy* v. *Elliott*, 216 Ill. 31, 47 N.E. Rep. 1035. He may not deliver it over to anyone he pleases and not be responsible for the consequences. *Id.* at 635. The court insisted upon holding an owner liable if he allowed the vehicle to be entrusted to someone who used the vehicle outside of the parameters of its intended use.

Further, the Court went on to assert that the relationship between the parties, the owner of the vehicle and the one he entrusts to operate it, is akin to that of master and servant. *Id.* In entrusting the servant with this highly dangerous agency, the master put it in the servant's power to mismanage it, and as long as it was in his custody or control the master was liable for any injury which might be committed through his negligence. *Id.* at 461. In essence, the court has clearly stated the fact that it intended to hold any owner liable when he allows his vehicle to be used by someone and an accident results. In its insistence upon an objective view of harm, the petitioner would have this state adopt a basis for liability that would essentially absolve an owner of any liability should his vehicle become involved in an accident. An objective view of harm requires that the owner know that the individual is likely to be involved in an accident or is prone to dangerous propensities. A focus solely upon the objective foreseeability of harm rather than the subjective intent of the driver will result in numerous Plaintiffs having no remedy in a civil action brought against the owner of the vehicle.

In the instant case**,** Beauford upon borrowing the vehicle clearly did not intend to kill Aaryon Miles and seriously injure Teresa Wilson and Bridget Lee. Although it

was reasonably foreseeable to Sun State Ford that Carla Lewis, the renter of the vehicle, could possibly loan it to someone else during the time of her rental. To assert that the only way Sun State Ford, the owner, can be held liable for the actions of Beauford, the lendee, is through their having actual or constructive knowledge of the danger.

III. THE TRIAL COURT ERRONEOUSLY ENTERED SUMMARY JUDGMENT IN FAVOR OF SUN STATE FORD BECAUSE A MATERIAL DISPUTE EXISTED AS TO WHETHER BEAUFORD HAD ENGAGED IN INTENTIONAL MISCONDUCT.

In the instant case, a genuine issue of material fact existed as to whether Beauford's action of following and then chasing Miles was intentional or the result of negligence. Pursuant to Fla. R. Civ. P. 1.510, summary judgment can only be rendered when the pleadings, depositions, answers to interrogatories and admissions on file together with affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *See Caetano v. Bridges***,** So. 2d 51 (Fla. 1st DCA 1987). Florida's dangerous instrumentality doctrine holds that the owner of a dangerous instrumentality, for example an automobile, who entrusts its use to another is liable for the negligence of the person to whom the instrumentality is entrusted. Thus, the owner of an automobile who allows his vehicle to be driven on the open road is liable only if the driver is negligent. On the facts before us, Beauford stated unequivocally in his deposition his only intent in chasing the vehicle was out of concern for the safety of his girlfriend and

her cousin. Unlike *Caetano*, where the defendant Elaine F. Caetano, stated that she intentionally and deliberately ran over the plaintiff, Natalie K. Bridges, in the instant case, Beauford stated that he only followed the vehicle out of concern for the safety of the women, he had no intent to injure any of the occupants of the vehicle. Therefore, it is a question for the jury to determine Beauford's intent.

IV. THE FIFTH DISTRICT'S DECISION DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THE FIRST DISTRICT'S DECISION IN *CAETANO V. BRIDGES*, THE THIRD DISTRICT'S DECISION IN *SUN CHEVROLET, INC. V. CRESPO,* NOR THE DECISION SET FORTH BY THIS COURT IN *OREFICE V. ALBERT*.

The instant case is not a case in which the court below reached a different result than that reached in other district courts or this Court's cases involving the same controlling facts. Pursuant to Fla. Const. Art. V §3 (b)(3), the Supreme Court has subject-matter jurisdiction over any decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal or of the Supreme Court on the same question of law. The Fifth DCA's holding that "Florida's Dangerous Instrumentality Doctrine is not limited to the negligent operation of a vehicle" and that "reckless driving or other intentional misconduct by an operator does not terminate the owner's liability under the doctrine, unless the operator makes weapon-like use of the vehicle with the intent to cause physical harm," does not expressly and directly conflict on the same question of law with the holdings articulated by the First DCA in *Caetano v. Bridges*, 502 So. 2d 51 (Fla. 1st DCA

1987), the Third DCA in *Sun Chevrolet, Inc. v. Crespo*, nor this Court's holding in *Orefice v. Albert*. Thus, there is no **express and direct conflict** which could serve as a basis for this court's jurisdiction, and the decision of the Fifth DCA should be upheld. *See Dept. of Revenue v. Johnston*, 442 So. 2d 950 (Fla. 1983) (where cause was before court on apparent conflict, but cause was distinguishable on its facts, Supreme Court would discharge jurisdiction).

CONCLUSION

The Fifth DCA's holding that the lower court's granting of summary judgment should be reversed is well within the progeny of cases that have dealt with the dangerous instrumentality doctrine. The dangerous instrumentality doctrine is well founded case law that should not be dispensed with for §390 fault based liability. Accordingly, this Court should affirm the Fifth DCA's opinion in this case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded via U.S. Mail this 30th day of August, 2004 to Warren Kwavnick, Esquire, Cooney, Mattson, Lance, Blackburn, Richard & O'Connor, P.A., P. O. Box 14546, Fort Lauderdale, Florida 33302,, *Co-Defendant Beauford/Respondent*; Lucinda A. Hoffman, Esq., Holland & Knight, LLP, 701 Brickell Avenue, Suite 3000, Miami, FL 33131, *Counsel for Florida Defense Lawyers Association*, and Marisa I. Delinks, Esq., Hinshaw and Culbertson, LLP, Southtrust Bank Building, One East Broward Boulevard, Suite 1010, Fort Lauderdale, Florida 33301, *Counsel for Defendant/Petitioner*.

PARKS & CRUMP, L.L.C.
240 North Magnolia Drive
Tallahassee, Florida 32301
Telephone: (850) 224-6400
Facsimile: (850) 224-6679

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Daryl D. Parks, Esquire

FBN: 0054097

CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that this Respondent's Brief on the Merits complies with Rule 9.210, Fla. R. App. P. and is typed in Times New Roman 14-point font.

_____
Daryl D. Parks, Esquire
FBN: 0054097