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IN THE SUPREME COURT OF FLORIDA

Case No.: SC20-1311

BRUCE KYLE EMERSON,

Petitioner,

v.

KYLE MICHAEL LAMBERT,

Respondent.

_________________________________/

AMICUS BRIEF OF THE FLORIDA DEFENSE LAWYERS ASSOCIATION

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PRELIMINARY STATEMENT

This amicus curiae brief is submitted by the Florida Defense Lawyers Association (FDLA) in support of Respondent Kyle Michael Lambert.

STATEMENT OF IDENTITY AND INTEREST

The FDLA is a statewide organization of civil defense attorneys formed in 1967, and it has approximately 1,000 members. The goal of the FDLA is to “bring industry leaders and defense counsel together and form a strong alliance that promotes fairness and justice in the civil justice system for all parties.” The FDLA maintains an active amicus curiae program in which members donate their time and skills to submit briefs in important cases pending in state and federal appellate courts which involve significant legal issues that impact the interests of the defense bar or the fair administration of justice. The FDLA has actively participated in amicus briefing in numerous appellate cases with statewide impact on tort and insurance issues.

An issue on appeal was certified by the Second District Court of Appeal on the basis of certification of a question of great public importance, and the Petitioner also sought review with the Court based on direct and express conflict with a decision of another district court of appeal or this Court on the same question of law. The certified question reads:

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

Lambert v. Emerson, 304 So. 3d 364 (Fla. 2d DCA 2020). In certifying the question, the Second District recognized that its opinion touched an important issue in negligence law, which issue—the dangerous instrumentality doctrine—was shaped by many hands over the past century.

That court also opined that the case necessarily drew a demarcation that could affect many similar cases. It then synthesized the current state of the dangerous instrumentality doctrine to include that when title owners of a car entrust their car to a family member who, in turn, causes injury, the title owners may be held vicariously liable for that tort. But if a family member of the title owner has an identifiable property interest in a car (whether a bailment or some other recognized property interest) and entrusts the car to another, who in turn causes injury, that family member can be held vicariously liable for the tort only if the title owner denies vicarious liability for the entrustment.

The certified question is important because of the caps on damages payable for vicariously liability established by section 324.021, Florida Statutes. If both the title owner and the family member can be held vicariously liable, the injured party may be entitled to double recovery under the statute. Such double recovery is contrary to both the state of the law in Florida and public policy.

Many FDLA members represent defendants and insurance companies in personal injury cases. The FDLA is uniquely situated to provide the Court with input on a defendant's and insurers' reliance on section 324.021, Florida Statutes, as well as insurers' and defendant's reliance on the fact that such a risk need not be insured for in the state of Florida.

SUMMARY OF ARGUMENT

The certified question should be answered in the negative and decision affirmed. Under Florida's dangerous instrumentality doctrine, a family member bailee cannot be held vicariously liable when the family member title owner is also vicariously liable. Florida's dangerous instrumentality doctrine only imposes vicarious liability upon the owner of a motor vehicle who voluntarily entrusts the vehicle to an individual whose negligent operation causes damage to another. And that owner's vicarious

liability is limited by statute, depending upon the permissive user's insurance coverage.

The Lambert opinion is not inconsistent with this long-established doctrine or the statute. Reversal of Lambert would result in a judicial expansion of vicariously liability in violation of the separation of powers between the judiciary and legislature. Additionally, any expansion of the doctrine would cause far-reaching consequences not anticipated by insurers or vehicle owners. A reversal of the Lambert decision would result in the application of the doctrine in a way not foreseen by vehicle owners or insurers: It would put the onus on the insurance industry to educate customers on how to title a so-called "family" vehicle. Reversal of Lambert would also initiate a tidal wave of change in the longstanding history of how family vehicles are titled and insured. These consequences can only lead to higher costs to consumers without a requisite benefit to the potential plaintiffs.

ARGUMENT

I. Expansion of Vicarious Liability to a Family Member Bailee Would Violate Separation of Powers.

The public policy concerns that form the basis of the dangerous instrumentality doctrine are not in dispute. In order to address the need for responsibility for accidents on the roads, liability is assigned to the person

most logically to have the resources to cover damages occasioned by their allowing a permissive user to operate their vehicle—the vehicle's title owner. However, through the years, the definition and meaning of owner has morphed and changed to include beneficial owner. Certain exemptions and caps have been put in place by both the common law and the legislature to protect those individuals.

The specific nature of the relationship is not what is important (whether it is bailee/bailor, principal/agent, master/servant, licensor/ licensee, etc.). Rather, it is the public policy to hold the responsible actors accountable for damages. Given this overriding premise, the definition of owner is broad enough to extend to possessory interest if and when necessary to affect its purpose—to hold a person accountable for the damages in a foreseeable and predictable way. Aurbach v. Gallina, 753 So. 2d 60, 61 (Fla. 2000).

The doctrine does not apply to long-term lessors for this reason. Rather, they are exempt from vicarious liability and lessees with possession of the vehicle are responsible as they are better able to compensate for damages. The Legislature has also seen fit to cap damages for vicarious liability of innocent owners and balance their interests with the injured parties under section 324.021(9)(b)(3), Fla. Stat.

The Lambert opinion is not inconsistent with the dangerous instrumentality doctrine established by this Court's precedents. Thus, no further guidance form the Court is needed. Conversely, a reversal of Lambert would greatly expand the reach of vicarious liability, forcing the legislature to respond to the Court's encroachment into its legislative function:

> In a precedential system, the initial pronouncement of a legal norm marks only the beginning of its development. As cases begin to arise under a non-specific standard, courts must decide whether a particular set of facts satisfies the standard's triggering criteria. By rendering such decisions – which carry precedential force – courts will begin to elaborate on the content of the norm itself.

Michael Coenen, Rules Against Rulification, The Yale L. J., 124:644, 653 (2014). Furthermore, the Second District's holding in Lambert is a natural process and "recurring consequence of issuing opinions with precedential effect." Id. at 655. This allows for the standard to be applied to case after case. Id.

The Second District aptly summarized the history of the decisions shaping this area of common law. It did so in conjunction with the creation and permutations of the statute. The previous holdings must be read in the context of the facts of each case in which the legal title holders were attempting to avoid liability by asserting that another individual was the

actual "beneficial owner." The Lambert opinion correctly applies the established dangerous instrumentality doctrine to the facts here.

If the Court follows the Petitioner's argument to its logical conclusion, it will necessarily enter into the fuzzy area that the doctrine seeks to avoid. There is no need to expand the reach of vicarious liability where a title owner is not attempting to avoid vicarious liability. The public policy purpose of the doctrine is to assign liability to the person with resources available to assume responsibility for the danger that originates with the ownership of the motor vehicle. That policy does not extend to assign vicarious liability to as many people as possible.

Similarly, the purpose of the cap on damages established by section 324.021, Florida Statutes, is to balance the interests of an innocent title owner with the need to cover damage incurred on the roads in the state. The legislature added the statutory provision limiting strict vicarious liability imposed on innocent owners and lessors of motor vehicles to address the real and perceived inequities created by the application of the dangerous instrumentality doctrine. See § 324.021(9)(b)(3), Fla. Stat.; Richbell v. Toussaint, 221 So. 3d 764 (Fla. 4th DCA 2017); Walker v. Geico, 295 So. 3d 829 (Fla. 4th DCA 2020).

The text of the statute itself leads to the logical conclusion that a family member bailee is not also vicariously liable when the owner is not denying responsibility. The doctrine and the statute leave open the concept of ownership to account for differing factual scenarios rather than creating a bright line rule that may work an injustice on a particular set of facts, such as here. The statute specifically establishes that the extent of liability of the owner depends upon the insurance policy amounts of the permissive user. § 324.021(9)(b)(3), Fla. Stat. It makes sense for section 324.021, Florida Statutes, to omit a definition for the term "owner", because the legislature contemplated that vicarious liability could apply to only one "owner," even where there are multiple beneficial owners of the same vehicle. Given the clear provisions of the statute, it was no stretch for the Lambert court to find that the vicarious liability of the intermediate bailee also turns on the insurance coverage of the owner.

Reversal of Lambert would expand the dangerous instrumentality doctrine in violation of the separation of powers which erodes the public trust in the judiciary and judicial process, especially "[i]n an era of populist criticism of government and general distrust of policymaking by statute or rule." Philip A. Talmadge, Understanding the Limits of Power: Judicial Restraint in General Jurisdiction Court Systems, Seattle U.L. Rev., Vol.

22:695 (1999). To find as it did, the Second District applied existing law and adhered to common-law precedents and the applicable statute. The Second District did exactly as it should and looked to the legislative enactments for policy guidance. Finding the family member to be vicariously liable would have been an unnecessary expansion of the dangerous instrumentality doctrine in violation of separation of powers. "[C]ourts are concerned only with the power to enact statutes, not with their wisdom." U.S. v. Butler, 297 U.S. 1, 78, 56 S. Ct. 312, 80 L. Ed. 477 (U.S. 1936), Stone, J., dissenting; see also Jackson Lumber Co. v. Walton Cnty., 116 So. 771, 786 (Fla. 1928) ("[i]t is of course well settled that the courts are not concerned with the wisdom or policy of statutes").

The holding in Lambert does not overrule or create a conflict with Aurbach, 753 So. 2d 60, or Frankel v. Fleming, 69 So. 2d 887 (Fla. 1954). Instead, Lambert applies the rule and rationale to the facts herein and does not change or expand the doctrine or limit the ability to allege other tortious causes of action. By the act of affirming the decision in Lambert, the Court maintains the rule of law.

There is no authority or public policy justification to expand liability to include each possible family member bailee when the title owner is not denying vicarious liability. Conversely, it is justifiable to exclude the family

member bailee from vicarious liability when the title owner is not denying vicariously liability. Such a concept uphold the rationale for the doctrine while avoiding the slippery slope of the courts legislating from the bench to expand the rule. The common law doctrine should be workable and malleable without limiting proper findings for all future possible factual scenarios and in compliance with common sense and legislative intent. As the Honorable Justice William Orville Douglas once said, "common sense often makes good law." Peak v. U.S., 353 U.S. 43, 46, 77 S. Ct. 613, 1 L. Ed. 2d 631 (1957).

The options of this Court are clear—either maintain the doctrine or cause tumult as insurers, title owners, and the Florida Legislature respond to the far-reaching consequences of a change to the longstanding doctrine (e.g., long lines at the DMV to re-title motor vehicles, long waits for telephone calls with insurance agents, hurried revisions to all Florida motor vehicle insurance policies; increased litigation; increased costs to insureds, etc.). The upheaval that would ensue is indicative of overstepping the boundaries of the separation of the powers between the legislative and judicial branches. Judicial restraint is the norm to avoid infringements of that separation of powers.

II. Expansion of Vicarious Liability to a Family Member Bailee is a Risk Not Contemplated by Insurers.

Petitioner's view of the doctrine—that both the title owner and the family member bailee are vicariously liable, such that the intermediate permissive user is not subject to the cap on damages established by section 324.021(9)(b)(3), Florida Statutes—contemplates a risk that insurance companies do not take into account in underwriting policies and insuring drivers, i.e., a non-vehicle owner giving permission to another driver. Given the complex nature of family dynamics and limitless myriad of ways that a "family" car may be utilized, it would be impossible for insurers to anticipate and foresee every factual scenario.

For the same reasons that transferring the vicarious liability to long term lessees was found to adequately balance the interests of the innocent owners with the injured plaintiff), so too does the current ruling allow the plaintiff recovery from the title owner who has not denied responsibility. The legislature had a rational basis for enacting the statute providing that a lessor of an automobile is not its owner for purposes of vicarious liability and capping damages, so long as requirements for certain amounts of liability insurance were met. The same reasoning should apply here. The family member bailee should not be vicariously liable because the title owner has not denied responsibility.

Both family members should not be vicariously liable for the same permissive use. There is a legitimate state objective in shifting some responsibility for damages from the owner of a vehicle to the operator or lessee of the vehicle. The purpose of the statute was to limit the liability of innocent lessors/owners while still providing recovery to plaintiffs. The Second District's opinion did just that.

The soundness of this rationale is not new; indeed, at least one court has handled a similar factual scenario in the same way even before the statutory cap was created. See, e.g., Gordon v. Phoenix Ins. Co., 242 So. 2d 485 (Fla. 1st DCA 1970) (holding that where a person has been injured in an automobile accident, recovered a judgment against the insured driver of other vehicle, accepted payment on such judgment, and executed satisfaction thereof, such person was precluded from asserting any liability against other vehicle's owner). Insurers have relied upon this longstanding doctrine and statute. Expansion of vicarious liability to a host of unknown possible family member bailees is a risk that is unpredictable and impossible to determine and quantify.

Reversal of Lambert would result in an avalanche of changes within the insurance industry in Florida. Costly public education campaigns would be needed regarding the drastic change in the law. Extensive revisions to

insurance policies would be necessary. And vehicle owners would be required to retitle their motor vehicles.

Imposing vicarious liability on a family member bailee as an intermediate permissive user when the title owner has not denied vicarious liability would be contrary to the public purpose served by the common law. Requiring liability on the party most equipped to have the resources to cover the damages while limiting liability by avoiding imposition of "a fuzzy legal standard that will encourage litigation and potentially expand liability beyond that which is justified by the rationale for the rule." Aurbach, 721 So. 2d at 759.

III. Expansion of Vicarious Liability to a Family Member Bailee is a Risk Not Contemplated by Vehicle Owners.

The expansion of vicarious liability to a family member bailee so that both the record title owner and family member bailee are vicariously liable, as sought by Petitioner, is also not a risk that vehicle owners take into account when obtaining insurance or deciding how to title their vehicles. The question of how to title a family car is not in need of an overhaul. This scenario is not new.

Vehicle owners commonly title their vehicles in only one spouse's name, own a family vehicle, and permit family members to use their vehicle. Those family members often loan the vehicle to other family

members. The dangerous instrumentality doctrine imposes liability on the owner even when the owner does not directly loan their vehicle to the permissive user involved in a vehicle accident. Fischer v. Alessandrini, 907 So. 2d 569 (Fla. 2d DCA 2005). To expand uncapped vicarious liability to the other intermediate permissive user is not a result that car owners contemplate when deciding how to title their vehicles or when giving permission to others to use their vehicle.

Any suggestion that vehicles can be titled in a way to avoid such a liability ignores the way family ownership of vehicles has been treated since the dawn of the automobile industry and disregards the real consequences that reversing Lambert would cause. The longstanding tradition of titling family vehicles in only one spouse's name is even evident in the way the transfer of title of a vehicle from one spouse to another spouse does not garner sales tax per section 212.05(1)(a)(1)(b), Florida Statutes.

Expansion of vicarious liability would also create confusion among motor vehicle owners in the state regarding the need to change how they have their motor vehicles titled or insured, leading to an onslaught of work for the Department of Motor Vehicles and insurance agents. There is "no sound basis in the law to hold both the acknowledged title owner and the

family member bailee liable for the bailee's entrustment of a car under the dangerous instrumentality doctrine." Lambert, 304 So. 3d at 373.

CONCLUSION

WHEREFORE, FLORIDA DEFENSE LAWYERS ASSOCIATION respectfully requests this Court to affirm the decision of the Second District Court of Appeal and answer the certified question in the negative.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a copy of foregoing has been served on this 5th day of October, 2021 to all of the individuals on the service list.

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CERTIFICATION OF COMPLIANCE

In accordance with Florida Rules of Appellate Procedure Rules 9.045(e), 9.210(a)(2), and 9.370(b) the undersigned counsel hereby certifies that this brief complies with the font and word count requirements of the rules: Arial 14-point font and under 5000 words.

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