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IN THE SUPREME COURT OF FLORIDA

SEAN BOGLE, as the Personal Representative of the ESTATE OF LICKSON GABRIEL, Deceased,

Appellant,

v.

WANDA I. ROMAN, Individually, and as Personal Representative of the ESTATE OF LUIS ANGEL VALENTIN, Deceased, and on behalf of HIS SURVIVORS,

Appellees.

_____ /

Case No.: SC13-
LT Case Nos: 5D12-1431
2010-CA-024806-O

APPELLANT'S, SEAN BOGLE, AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF LICKSON GABRIEL, DECEASED, INITIAL BRIEF ON JURISDICTION

On review from the Fifth District Court of Appeal of Florida

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INTRODUCTION

This Initial Brief on Jurisdiction is filed on behalf of the Appellant, Sean Bogle as Personal Representative of the Estate of Lickson Gabriel (the "Gabriel Estate"). This matter comes to the Florida Supreme Court on appeal from an opinion reversing and remanding a final judgment in favor of the Defendant/Appellant, the Gabriel Estate, and against the Plaintiffs/Appellees, Wanda Roman, Individually, and as Personal Representative of the Estate of Luis Angel Valentin, Deceased, and on Behalf of His Survivors (the "Valentin Estate"). A conformed copy of the Fifth District's Opinion is appended hereto as Appendix A, and citations to the Appendix shall be designated "A:[page number]."

STATEMENT OF THE CASE AND FACTS

This action arises out of a claim against the Gabriel Estate for the wrongful death of Luis Angel Valentin, Deceased ("Valentin"), resulting from an automobile accident that occurred on December 10, 2008, which killed both the driver, Lickson Gabriel ("Gabriel") and his passenger, Valentin. The Valentin Estate alleges that the accident was caused by Gabriel's negligence.

The owner of the involved vehicle was Gabriel's father, Lesore Gabriel. Gabriel was admittedly driving the vehicle with his father's consent; thus, under the dangerous instrumentality doctrine, Gabriel's father was subject to strict vicarious liability for any negligence of Gabriel in his operation of the automobile.

Prior to service of the wrongful death complaint, on or about October 12, 2010, Gabriel's father entered into a "Settlement Agreement and Release" (the "Release") with Wanda I. Roman, as Personal Representative of the Estate of Valentin, and First Acceptance Insurance Company. This settlement was for the full amount of available insurance limits, and released Gabriel's father, First Acceptance Insurance Company and "their officers, agents, employees, successors and assigns" from "any and all claims" in connection with the December 10, 2008 incident. The relevant provision is as set forth, to wit:

> **III. RELEASE**
>
> In consideration of an immediate cash payments of TEN THOUSAND DOLLARS AND NO/OO ($10,000.00) to THE ESTATE OF LUIS VALENTIN, receipt whereof is hereby acknowledged by the Releasor, her heirs, personal representatives and assigns, Releasor hereby releases and discharges Releasees, its parents, employees and subsidiaries including but not limited to, LESORE GABRIEL AND FIRST ACCEPTANCE INSURANCE COMPANY, INC. including their officers, agents, employees, successors and assigns, from any and all claims, demands, damages, costs, expenses, and causes of action, whether direct or derivative, whether based on tort, contract or any other theory of legal recovery, for damages of every type and nature, including but not limited to compensatory damages and punitive damages, for injuries already sustained or that may hereafter be sustained in connection with the December 10, 2008 automobile accident which forms the basis of this claim. [Emphasis added].

A complaint for wrongful death was later filed against Gabriel's Estate. Gabriel's Estate answered and moved for judgment on the pleadings (the "Motion"). As grounds, Gabriel's Estate alleged that judgment on the pleadings

was proper based upon the clear and unambiguous language of the Release, which released both the owner of the vehicle, Gabriel's father, and the involved permissive driver, Gabriel, as his agent.

As substantial grounds for the Motion, Gabriel's Estate argued that Gabriel's father was strictly vicariously liable for Gabriel's negligence through application of the dangerous instrumentality doctrine (sometimes referred to as the "Doctrine"). Thus, by virtue of the Release, Gabriel's Estate, as an agent, was released from liability for any and all claims arising out of the accident.

In a six-page order granting the Motion, the trial court found that the Release operated to discharge the vehicle owner, Gabriel's father, and his permissive driver, Gabriel, from any and all liability arising from the accident. The Court found that under applicable Florida law, the term "agent" as used in the Release included the permissive driver.

On appeal, similar arguments were made by the parties to the Fifth District Court of Appeal relevant to the principles of agency under the Doctrine and, ultimately, its application to the Release at issue here.

In a ten-page opinion, the Fifth District Court of Appeal reversed and remanded. The Fifth District held that the dangerous instrumentality doctrine does not necessarily make the driver of a vehicle an agent of the owner for the purposes of determining whether the provisions of a release apply to relieve a negligent

driver of liability. (A:2). In so holding, the opinion cites to a number of Florida Supreme Court cases addressing the evolution of the Doctrine.[1] The Fifth District, however, declined to apply Florida law, as it relates to the Doctrine, to interpret the term "agent" in the Release.

The Fifth District explained that the Doctrine is not based upon principles of respondeat superior or agency, but upon the "practical fact that the owner of an instrumentality which [has] the capability of causing death or destruction should in justice answer for misuse of this instrument by anyone operating it with his knowledge and consent." (A:8) (quoting *Meister v. Fisher*, 462 So. 2d 1071, 1072 (Fla. 1984)). Thus, the Fifth District concluded that it was error to rely on the Doctrine to construe liability under the terms of the Release. The Fifth District ultimately dismissed the applicability of the Doctrine and concluded instead that Gabriel's Estate would have to prove the elements of agency under tort law to reach a finding that Gabriel was an agent under the terms of the Release. (A:8-10).

The Fifth District declined to entertain a rehearing or rehearing *en banc* and this appeal followed.

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[1] *See generally Rippy v. Shepard*, 80 So. 3d 305 (Fla. 2012); *Kraemer v. Gen. Motors Acceptance Corp.*, 572 So. 2d 1363 (Fla. 1990); *Meister v. Fisher*, 462 So. 2d 1071 (Fla. 1984); *Orefice v. Albert*, 237 So. 2d 142 (Fla. 1970); *Susco Car Rental Sys. of Fla. v. Leonard*, 112 So. 2d 832 (Fla. 1959); *Weber v. Porco*, 100 So. 2d 146 (Fla. 1958); *May v. Palm Beach Chem. Co.*, 77 So. 2d 468 (Fla. 1955); *Lynch v. Walker*, 31 So. 2d 268 (Fla. 1947); *Southern Cotton Oil Co. v. Anderson*, 86 So. 629 (Fla. 1920).

SUMMARY OF THE ARGUMENT

The Fifth District misapplied the Florida Supreme Court's long established precedent relevant to the dangerous instrumentality doctrine and diminished the significance of the Doctrine's origins in agency which create the basis upon which to impose strict vicarious liability on an owner due to a permissive driver's negligent acts. Instead of recognizing the importance of the agency principles to a finding of liability, the Fifth District misapplied the tenets enunciated by this Court, concluding instead that the "significance of [the Doctrine's] origins . . . has steadily diminished in importance when determining the scope and reach of the doctrine." (A:6) (citing *Susco*, 112 So. 2d at 832; *Lynch*, 31 So. 2d at 268; and *Meister*, 462 So. 2d at 1071).

It is true that the Doctrine's scope of liability exceeds that imposed under the principles of agency in common law tort. Even so, this Court has specifically held that an automobile owner's consent to the driver's use of the vehicle creates a principal-agent relationship for the purposes of determining *liability as a matter of law*. The purpose of this abridged evidentiary procedure is to preserve the public policy behind the Doctrine to hold an owner financially responsible for the negligence of a third-party who is, through the owner's consent, using an inherently dangerous instrumentality. Because this relationship is created as a matter of law through evidence of the owner's consent, it is unnecessary to engage

in any further analysis relevant to the parties' relationship in agency, bailment, lease, or otherwise.

At its core, this appeal arises out of the meaning of the term "agent" as applied in a release entered into via application of the dangerous instrumentality doctrine. In order to interpret the Release here, it is essential to construe it under Florida law as it applies to the Doctrine. The Fifth District here declined to apply the Doctrine and determined that any findings of agency must be made under the elements germane to the law of torts.

This Court has not receded from its holding on this issue. Thus, the Fifth District's conclusion that the dangerous instrumentality doctrine is not relevant to the issue of agency as applied to a release is erroneous and is in express and direct conflict with this Court's long established precedent.

ARGUMENT

It is within this Court's discretion to accept jurisdiction over an opinion which expressly and directly conflicts with a decision of this Court or another district court of appeal. *See* Art. V. § 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(1)(A)(iv). This Court's conflict jurisdiction may be found upon misapplication of prior Florida Supreme Court decisions. *See Wallace v. Dean*, 3 So. 3d 1035, 1040 n.6 (Fla. 2009) (explaining that misapplication of Florida Supreme Court precedent is "one means of supplying conflict jurisdiction").

The dangerous instrumentality doctrine in Florida is a judicially created doctrine originating out of the respondeat superior doctrine and agency principles:

> A study of the origin and application of the doctrine of vicarious liability on the part of an automobile owner shows clearly that whatever may be the limitations of its scope of application, liability is bottomed squarely upon the doctrine of respondeat superior arising from a principal and agent relationship implied in law.

May v. Palm Beach Chem. Co., 77 So. 2d 468, 472-73 (Fla. 1955); *see also Orefice v. Albert*, 237 So. 2d 142, 144 (Fla. 1970) (discussing evolution of the doctrine of respondeat superior doctrine as applied to the Doctrine); *Weber v. Porco*, 100 So. 2d 146, 149 (Fla. 1958) ("[T]his Court has consistently applied the rule of respondeat superior in recognizing" liability under the Doctrine); *Englemean v. Traeger*, 102 Fla. 756 (Fla. 1931) (noting that an owner of an automobile "as a matter of law," stands in the relation of "superior" to a permissive driver).

Since introducing this Doctrine, this Court has explained that an owner's strict vicarious liability arises from a principal-agent relationship that is *implied in law*. *See Weber*, 100 So. 2d at 149 ("When one permits another to operate his automobile under his license, he becomes as a matter of law the principal and the driver becomes his agent for the purpose."); *Orefice*, 237 So. 2d 142, 144 (Fla. 1970) (quoting *Weber* with approval); *Thomas v. Atlantic Assocs., Inc.*, 226 So. 2d 100, 102 (Fla. 1969) ("The operator in lawful possession of the car with the consent of the owner in effect operates the car under the authority of the owner's

license to use the highways pursuant to Florida statute law, as well as for the benefit of such owner whose agent the operator is, at least to the extent of properly controlling the car, looking after it, preventing damage to it and returning it safely back to such owner who entrusted it.").

Although an owner's strict vicarious liability arises out of a principal-agent relationship, it is not necessary to make an evidentiary determination that an agency relationship would exist in tort under the Doctrine. Instead, where an owner consents to the use of his automobile, the relationship is automatically implied in law. *See Weber*, 100 So. 2d at 149. As this Court has explained in one of its earliest opinions, which expanded the Doctrine to automobiles, *Southern Cotton Oil Co. v. Anderson*, 80 Fla. 441, 468 (Fla. 1920), it would be, in the words of the Court "immaterial surplusage," to require the elements of proof necessary to establish an agency relationship as required under tort law:

> Even if the declaration contains allegations that have reference to the doctrine of respondeat superior as applied to the relation of master and servant, the liability under such doctrine 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 for injuries to third persons caused by the negligent operation of such instrumentality on the highway by one so authorized by the owner. If the plaintiff alleged and endeavored to prove more than was necessary to a recovery of damages, the unnecessary matters may be regarded as immaterial surplusage, where they are not repugnant to or destructive of a right of action that is in substance and legal effect alleged and assumed to be proven, as is the case here. [Emphasis added.]

Thus, where a release is entered into between an injured party and the owner of an automobile via application of the dangerous instrumentality doctrine, construction of the release would not be through the law as applied in tort, but rather as applied under the Doctrine. *See, e.g., State ex rel. Select Tenures, Inc. v. Raulerson*, 129 Fla. 346 (Fla. 1937) (explaining that the valid laws in effect at the time a contract is made become part of the contract as if expressly incorporated therein). The Fifth District addressed this issue head on in its opinion *Ford v. Coleman*, 462 So. 2d 834 (Fla. 5th DCA 1984), wherein the district court held that a driver of an automobile in an owner's agent for the purposes of addressing release of liability under the terms of a general release. *See Sheen v. Lyon*, 485 So. 2d 422, 424 (Fla. 1986) (citing *Ford* with approval). Gabriel's Estate has cited the *Ford* opinion extensively throughout these proceedings; however, the Fifth District Court declined to apply the analysis and holding of *Ford* to the instant case. (A:8 n.4).

Valentin's Estate is using the Doctrine as a sword and a shield. Valentin's Estate clearly used the Doctrine as a means to establish liability against Gabriel's father, the owner of the automobile. Then, upon entering into a settlement agreement with Gabriel's father, which released the parties and their "agents" from liability arising out of the accident, Valentin's Estate now argues that the principles

of the Doctrine, which created liability against Gabriel's father in the first instance, should not apply to a determination of the meaning of "agent" under the terms of the Release.

Valentin's Estate has sufficiently confused the issues on appeal so as to lead the Fifth District to issue an opinion that erroneously dismisses the dangerous instrumentality doctrine's underpinnings in agency and instead utilizes the elements of a claim of agency in tort to conclude that a driver of a vehicle is not necessarily an agent of an owner for the purpose of defining "agent" under the terms of the release. As is set forth above, an owner's strict vicarious liability under the dangerous instrumentality doctrine is clearly based upon a principal-agent relationship and the Court has not receded from this position.

The Fifth District's opinion misapprehends the law as it pertains to liability of the parties under the dangerous instrumentality doctrine and conflict jurisdiction should be accepted by this Court.

CONCLUSION

WHEREFORE, based upon the above facts and authorities, the Appellant, Sean Bogle as Personal Representative of the Estate of Lickson Gabriel, respectfully requests that this Court accept conflict jurisdiction over this matter, and grant any such other and further relief as this Court may deem appropriate.

Dated this the 15 day of July, 2013.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via Facsimile and U.S. Mail on this 15 day of July, 2013, to Alexander M. Clem, Esquire, Morgan & Morgan, P.A., Counsel for Appellant, 20 North Orange Avenue, Suite 1600, Post Office Box 4979, Orlando, FL 32802-4979; and Brandon Cathey, Esquire, Swope, Rodante, P.A., Counsel for Appellant, 1234 East 5th Avenue, Tampa, FL 33605.

Respectfully submitted,

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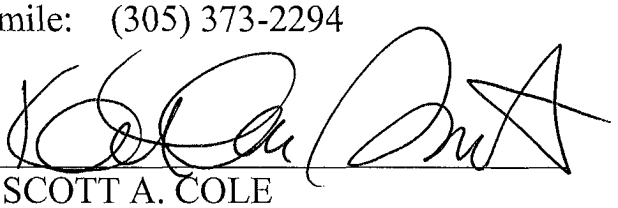
By: 

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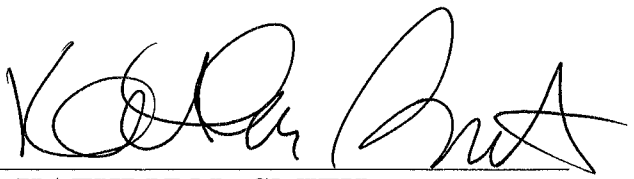
CERTIFICATE OF COMPLIANCE

Pursuant to Rule 9.210(a), Fla. R. App. P., undersigned counsel hereby certifies that this Amended Jurisdictional Answer Brief is submitted in Times New Roman 14-point font.

By: 

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