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IN THE SUPREME COURT OF FLORIDA

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

Petitioner,

v.

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

Respondent.
_____/

Case No: SC 13-1325

L.T. Nos.: 5D12-1431
2010-CA-024806-O

RESPONDENT'S BRIEF ON JURISDICTION

PROCEEDING TO INVOKE DISCRETIONARY JURISDICTION
FROM THE FIFTH DISTRICT COURT OF APPEAL

Submitted by Counsel for Respondent:

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PRELIMINARY STATEMENT

Although Sean Bogle, as Personal Representative of the Estate of Lickson Gabriel, refers to the parties as "appellant" and "appellee," states that this case is "on review" from the Fifth District Court of Appeal and cites to a non-existent Rule of Appellate Procedure as the alleged basis for this Court's jurisdiction, it appears Mr. Bogle is actually petitioning this Court to exercise its discretionary jurisdiction pursuant to Rule 9.030(a)(2)(A)(iv). Accordingly, this brief will refer to Mr. Bogle as "Petitioner" and the plaintiff in the underlying action, Wanda Roman, as "Respondent." Respondent's citations to the Fifth DCA's opinion, which is attached as Appendix A to Petitioner's initial brief of jurisdiction ("IB"), shall be designated as "A: [page number]."

STATEMENT OF THE CASE AND FACTS

For purposes of assessing potential conflict jurisdiction, the only relevant facts "are those facts contained within the four corners of the decisions allegedly in conflict." Reaves v. State, 485 So. 2d 829, 830 n.3 (Fla. 1986). Despite this long-established law, the statement of facts in Petitioner's brief does not confine itself to the facts appearing in the Fifth DCA's opinion. Accordingly, Respondent will refocus on the facts as provided in the opinion of the Fifth DCA.

This case involves a tragic automobile accident that took the lives of the driver of the vehicle, Lickson Gabriel, and his passenger, Luis Valentin. Wanda Roman, acting as the personal representative of the estate of her son, Luis

Valentin, executed a release of the estate's claims against Lickson's father, Lesore Gabriel, who owned the vehicle. However, Roman pursued a wrongful death lawsuit against Sean Bogle, personal representative of the estate of Lickson Gabriel. In response to Roman's lawsuit, Bogle alleged as an affirmative defense that the release of Lesore Gabriel barred the claims against the estate of Lickson Gabriel too because the release also released Lesore's "agents." (A:2-3)

Although Roman automatically denied the allegations of the affirmative defense by not filing a reply, Bogle filed a motion for judgment on the pleadings anyway, arguing that because Roman did not file a reply, Roman admitted the allegations. Bogle also argued at the trial court and on appeal that because Lickson was driving Lesore's vehicle with Lesore's consent at the time of the accident, Lickson was the agent of Lesore as a matter of law. Bogle argued this result was required because the dangerous instrumentality doctrine, which imposes vicarious liability on vehicle owners for damages caused by the negligence of permissive drivers, was based on agency concepts. The trial court granted Bogle's motion for judgment on the pleadings. (A:3-4)

The Fifth DCA reversed for three independent reasons. First, the Fifth DCA explained that the trial court applied the wrong standard in ruling on Bogle's motion. Because Roman did not reply to the affirmative defense, it was deemed denied and therefore the trial court's order granting judgment on the pleadings had

to be reversed on that basis alone. (A:3-5)

Second, the Fifth DCA explained it was error to apply the dangerous instrumentality doctrine to interpret whether a driver was the agent of the vehicle owner. While the doctrine establishes that an owner is liable for damages caused by a permissive driver of his vehicle, it does nothing to establish whether the driver is also the owner's agent. Accordingly, even if the "origins" of the dangerous instrumentality doctrine are agency concepts, the "parentage" of the doctrine does not establish that all permissive drivers of vehicles are agents of the vehicle owner as a matter of law. Instead, the Court said Bogle would have the burden of proving the agency relationship under traditional elements of proof. (A:8-9)

Third, the Fifth DCA explained that the "origins" of the dangerous instrumentality doctrine, which served as the entire basis of Bogle's argument, were actually not agency concepts at all. The court acknowledged that while some cases of "rather ancient vintage" comment that the dangerous instrumentality doctrine is based on agency concepts, modern cases, including multiple opinions of the Florida Supreme Court, specifically Meister v. Fisher, 462 So. 2d 1071 (1984), made clear the doctrine is *not* based on agency concepts. (A:5-8)

Subsequent to the Fifth DCA's opinion, Bogle filed motions for rehearing, rehearing en banc and certification of a question of great public importance, which were denied. After jurisdiction was returned to trial court with instructions, Bogle

filed a Notice to Invoke Discretionary Jurisdiction, stating that the Fifth DCA's opinion was in direct express conflict with Meister v. Fisher. Petitioner then filed an amended Notice and his jurisdictional brief, arguing the Fifth DCA's decision conflicted with the same case law the Fifth DCA had called "rather ancient."

Bogle does not argue it was error by the Fifth DCA to reverse the trial court; he no longer argues he is entitled to judgment on the pleadings. Instead, Bogle now argues this Court should accept jurisdiction to give a different reason for reversing.

SUMMARY OF ARGUMENT

This Court cannot exercise jurisdiction because no conflict is expressed between the Fifth DCA's decision in Roman v. Bogle and the decision of this Court in Meister v. Fisher or any *modern* pronouncements of this Court. Contrary to Petitioner's argument that the Fifth DCA's decision conflicts with "long established precedent" and that it "declined to apply Florida law," the Fifth DCA applied Florida law precisely as it has been decided by this Court for decades.

This Court has repeatedly recognized, most recently in January 2012, that vicarious liability under the dangerous instrumentality doctrine "**is not** based on respondent superior or an agency conception," but on "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:7-8) (quoting Rippy v. Shepard,

80 So. 3d 305, 307 (Fla. 2012) and Meister, 462 So. 2d at 1072). Thus, the Fifth DCA correctly rejected Petitioner's argument that Florida's dangerous instrumentality doctrine is based on agency concepts and necessarily makes all permissive users of a vehicle the agents of the owner. (A:7-9)

Moreover, even if there was a conflict between the Fifth DCA opinion below and this Court regarding the origin of the dangerous instrumentality doctrine, and there is not, the Court cannot accept jurisdiction simply to provide a different reason the same result. Even if the Court ultimately adopted Petitioner's misplaced view of the law, the trial court will still be reversed because it granted judgment on the pleadings in spite of Plaintiff having denied Defendant's affirmative defenses. Accordingly, this Court cannot and should not accept jurisdiction over this case.

ARGUMENT

NO CONFLICT EXISTS ON ANY QUESTION OF LAW SUFFICIENT TO INVOKE THIS COURT'S DISCRETIONARY JURISDICTION.

This Court has discretionary jurisdiction under Article V, Section 3(b)(3) of the Florida Constitution and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv) to review only those decisions of the district courts of appeal that "expressly and directly" conflict with a decision of this Court or of another district court of appeal on the "same question of law." An express and direct conflict exists when it can be shown that two opinions cannot be reconciled. See Aravena v. Miami-Dade County, 928 So. 2d 1163, 1166-67 (Fla. 2006). Conflict

jurisdiction can also be found from the misapplication of a decision of this Court. Wallace v. Dean, 3 So. 3d 1035, 1040 (Fla. 2009). However, the Court cannot, as Petitioner advances here, exercise conflict jurisdiction where the only potentially conflicting decisions have no precedential effect because of decades of subsequent, correcting decisions. See Wainwright v. Taylor, 476 So. 2d 669, 670 (Fla. 1985).

A. The Fifth DCA's decision does not misapply Florida law or conflict with any valid decision of this Court.

Contrary to Petitioner's argument, the Fifth DCA decision does not conflict with "long established precedent" nor does it misapply Florida law. While Petitioner argues the Fifth DCA "declined to apply Florida law, as it relates to the dangerous instrumentality doctrine, to interpret the term 'agent' in the release," no Supreme Court case has ever required the dangerous instrumentality doctrine be used to interpret the term "agent" in a release. Petitioner identifies only one appellate decision that ever even suggested that approach would be appropriate – the Fifth DCA's own decision in Ford v. Coleman, 462 So. 2d 834 (Fla. 5th DCA 1984) – and incorrect language from two unrelated "ancient" Supreme Court opinions, which has long since been invalidated by this Court. (IB:7-10) Neither the Fifth DCA's own precedent[1] nor invalid language from "ancient" decisions of this Court can serve as the basis for conflict jurisdiction.

In its opinion below, the Fifth DCA described the scope and origin of the

[1] See State v. Walker, 593 So. 2d 1049, 1049-50 (Fla. 1992).

dangerous instrumentality doctrine exactly as this Court has described it for decades. The Fifth DCA acknowledged that although some cases of "rather ancient vintage" seem to designate the origins of the doctrine as flowing from agency or *respondeat superior*, establishing the "parentage" of the doctrine was unnecessary to resolve the issue in the case and this Court had over decades of jurisprudence eliminated any confusion created by those ancient cases anyway. (A:6-8)

The Fifth DCA explained that in Lynch v. Walker, 31 So. 2d 268 (1947), this Court addressed the basis of liability under the dangerous instrumentality doctrine and ultimately determined distinctions between bailment, agency, and masters and servants was of little significance because the doctrine was really based on a common and basic factor that "[w]hen an owner authorizes and permits his automobile to be used by another he is liable in damages for injuries to third persons caused by the negligent operation so authorized by the owner." (A:6-7)

Admittedly, this Court did, in the 1950s, flirt with the idea that the dangerous instrumentality doctrine was based on agency concepts. See Weber v. Porco, 100 So. 2d 146, 149 (Fla. 1958) and May v. Palm Beach Chem. Co., 77 So. 2d 468, 472 (Fla. 1955). These are the only cases cited by Petitioner that could even arguably conflict with Roman. However, by 1959, in the words of the Fifth DCA, this Court "attempted to eliminate the confusion altogether." In Susco Car Rental Sys. of Fla. v. Leonard, this Court explained:

> Some of the apparent inconsistencies in the cases result from efforts to reason within the confines of inapplicable principles, such as those of respondeat superior. Confusion can be reduced by recognition that liability under this doctrine is imposed independent of other theories of vicarious responsibility in tort law.

112 So. 2d 832, 836 (Fla. 1959) (emphasis supplied).

Most significantly, in 1984, on the same exact day the Fifth DCA decided Ford v. Coleman, this Court decided Meister v. Fisher, which left no doubt as to whether *respondeat superior* or agency concepts served as the basis for the dangerous instrumentality doctrine. The Meister Court effectively eliminated any inconsistent opinions by going all the way back to the Court's first application of the dangerous instrumentality doctrine to automobiles in Anderson v. Southern Cotton Oil Co., 74 So. 975 (Fla. 1917), and concluding the doctrine was never based on *respondeat superior* or agency concepts. It explained:

> In that case [Anderson], we held that this form of vicarious liability is not based on *respondeat superior* or an agency conception, but on 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 instrumentality by anyone operating it with his knowledge and consent.

462 So. 2d at 1072 (citing Jordan v. Kelson, 299 So.2d 109 (Fla. 4th DCA 1974)).

Then, in 2007, the Fifth DCA itself embraced Meister in Saullo v. Douglas, 957 So. 2d 80 (Fla. 5th DCA 2007), receding from Ford by bringing its own jurisprudence in line with this Court.

Accordingly, there is no question that the Fifth DCA in Roman v. Bogle

applied Florida law exactly as written and that nothing in its opinion conflicts with any current, *valid* decision of this Court from the last several decades.

B. The Court cannot accept conflict jurisdiction just to give the Petitioner a different reason for the same result.

Even if Petitioner was correct about the law regarding the dangerous instrumentality doctrine, and he is not, the Court should not accept conflict jurisdiction just to give the Petitioner a different reason for the same result. The trial court indisputably erred in granting Bogle's motion for judgment on the pleadings based solely on the allegations in his affirmative defenses, which had all been denied by Roman. (A:3-5) Petitioner does not challenge that portion of the decision or allege that it conflicts with any decision from another appellate court. Nor can he. Florida law required the trial court to treat Bogle's allegations in his affirmative defenses as false when ruling on the motion for judgment on the pleadings, but the trial court considered Defendant's allegations true. Williams v. Howard, 329 So. 2d 277, 280 (Fla. 1976). Therefore, regardless of whether the Fifth DCA was correct in its analysis and application of the dangerous instrumentality doctrine, this Court's review of that issue will not affect the outcome of the Fifth DCA's decision. Petitioner seeks a different explanation for the same decision, which is an insufficient basis for jurisdiction.

Only a conflict between "decisions" provides this Court with discretionary jurisdiction. Art. V, § 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(iv); see

also 12A Fla. Jur 2d Courts and Judges § 132 (2013) ("[I]t is a conflict of decisions, not a conflict of opinions or reasons supporting the decision, that affords such jurisdiction to the supreme court."). This Court has never accepted review to simply address one of several reasons given by the district court for an indisputably correct result. Exercising conflict jurisdiction in that circumstance would be inconsistent with this Court's oft-repeated maxim that jurisdiction only exists where the conflict is on a "point of law **upon which the decision rests**." Tippens v. State, 897 So. 2d 1278, 1281 (Fla. 2005). It would also result in an advisory opinion that exceeded this Court's jurisdiction. See Dep't of Revenue v. Kuhnlein, 646 So. 2d 717, 720-21 (Fla. 1994).

But, even if this court technically had the *right* to exercise jurisdiction under Rule 9.030(a)(2)(A)(iv) to review the Fifth DCA's decision, it should still dismiss the case. See Wainwright v. Taylor, 476 So. 2d 669, 670-71 (Fla. 1985) (declining to exercise jurisdiction because the outcome would not be different even if the Court corrected the district court's erroneous statement of law). As this Court has succinctly stated, "in the interests of judicial economy, we see no reason to consider a remand for proceedings which uncontestedly would achieve the outcome already accomplished." Id. at 670.

CONCLUSION

For the reasons stated above, this Court should decline review.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished via Electronic Mail to the following: Joseph T. Kissane, Blake Cole, Scott A. Cole, and Kathryn L. Smith (Counsel for Appellee), joe.kissane@csklegal.com, blake.cole@csklegal.com, scott.cole@csklegal.com, katie.smith@csklegal.com, mary.rigau@csklegal.com, Cole, Scott & Kissane, P.A., 4686 Sunbeam Road, Jacksonville, FL 32257, on this 5th day of August, 2013.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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