

**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**

**JURISDICTIONAL BRIEF OF  
PETITIONERS**

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## **STATEMENT OF THE ISSUES**

This Court should accept jurisdiction to review the following issue arising out of a certified conflict:

Whether the Probate Code bars a plaintiff's cause of action—arising out of a decedent's tort—brought more than two years after the decedent's death where the plaintiff seeks to recover from an insurance policy and not from the decedent's estate, its personal representative, or its beneficiaries. *See* A13 (certifying conflict with *Pezzi v. Brown*, 697 So. 2d 883 (Fla 4th DCA 1997)); *see also In re Estate of Arroyo v. Infinity Indem. Ins. Co.*, 211 So. 3d 240, 249-50 (Fla. 3d DCA 2017) (agreeing with *Pezzi*); *Wilson v. Sayer*, 706 So. 2d 16 (Fla. 2d DCA 1997) (same).

Additionally, this Court should review the following issue that is inextricably intertwined with the certified conflict:

Whether a dismissal based on a nonclaim statute, statute of limitations, statute of repose, or other similar grounds “exonerates” an active tortfeasor (the decedent here), such that a passive tortfeasor (the decedent's employer here) may be shielded from vicarious liability for the active tortfeasor's tort.

## **STATEMENT OF THE CASE AND FACTS**

### **A. Facts Recited by the First District**

Petitioners, the plaintiffs below, were injured in an automobile collision with Thomas Morton, Jr., who was driving the vehicle of his employer, The Lewis Bear Company (“LBC”). A6. They sued Morton and LBC for negligence and vicarious liability, respectively, within the limitations period established by section 95.11(3)(a), Florida Statutes

(2013). A6, 9. After learning that Morton had died, the plaintiffs amended their complaint to substitute the personal representative of Morton's estate for Morton and to clarify they were seeking to recover not from the estate's assets but only from the insurance policy. A6.

### **B. Other Record Facts<sup>1</sup>**

In answering the complaint, the estate and LBC admitted Morton's negligence. *E.g.*, R131 ¶11; 131 ¶15; 142 ¶15; 163 ¶11. Aside from answering the complaint, however, the estate has not participated in this litigation. Only LBC moved for summary judgment and defended on appeal the trial court's judgment. R6-9, 48-59; A13. Furthermore, liability for the collision is protected by LBC's insurers. R247, 261, 290, 296, 323, 328, 333.

### **C. Procedural History**

In moving for summary judgment, the corporation, LBC, argued that the claims against it were barred by the Probate Code. A6. That code provides: "2 years after the death of a person, neither the decedent's estate, the personal representative, ... nor the

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<sup>1</sup> Although record facts outside the opinion's four corners are not pertinent to whether this Court *may* decide this case, they are pertinent to why this Court *should* decide this case. *See infra* pp. 9-10, 12-13.

beneficiaries shall be liable for any claim or cause of action against the decedent.” § 733.710(1), Fla. Stat. (2013). In response, Plaintiffs relied on:

- (i) another provision of the Probate Code, section 733.702(4)(b), which permits “[t]o the limits of casualty insurance protection only, any proceeding to establish liability that is protected by casualty insurance,” and
- (ii) the Fourth District’s *Pezzi* decision, which held that sections 733.702 and 733.710, read *in pari materia*, permit a cause of action against a tortfeasor’s estate more than two years after the tortfeasor’s death, so long as the plaintiff seeks to recover from an insurance policy.

A7-8. The trial court granted summary judgment to LBC, concluding that Plaintiffs’ claims were time-barred under *Buettner v. Cellular One, Inc.*, 700 So. 2d 48 (Fla. 1st DCA 1997). A6.

#### **D. The First District’s Decision**

The First District affirmed and addressed two issues:

- (i) whether the Probate Code barred the plaintiffs’ causes of action—arising out of Morton’s tort—that were brought more than two years after Morton’s death, where the



plaintiffs sought to recover from an insurance policy; A7-11, and

- (ii) whether Morton was “exonerated” such that LBC could not be vicariously liable, A11-12.

On the first issue, the First District determined “the trial court incorrectly relied on *Buettner*” but “reache[d] the right result.” A12 n.3. The First District concluded that “section 733.710 bars an action against a decedent’s casualty insurer if not filed with two years of the decedent’s death.” A7 (capitalization altered).

Although Plaintiffs were *not* seeking to recover from the estate, its personal representative, or its beneficiaries, the First District began its analysis by noting that a “purpose[]” of Florida’s Probate Code “is to promote the timely settlement of a decedent’s estate.” A7. Though conceding that section 733.710(1) does not list casualty insurers among the parties shielded from liability for an untimely claim, the First District held—without examining the insurance policies—that “an insurer cannot be liable for such claims until a creditor seeks and perfects a claim against the decedent tortfeasor through the entry of a judgment establishing the decedent’s liability.” A9. Citing Florida’s non-joinder statute, section 627.4136(1), the

First District then concluded a plaintiff cannot hold an insurer liable for a decedent's negligence without first filing a claim against an estate; ergo, the plaintiffs "had to file their claim ... to establish the liability of Morton and his estate within two years of [his] death." A10.

The First District acknowledged its decision conflicted with the Fourth District's 1997 *Pezzi* decision and this Court's dicta in *May v. Illinois National Insurance Co.*, 771 So.2d 1143 (Fla. 2000)—each which the First District rejected because neither addressed section 733.702(5). That provision states that "[n]othing in this section shall extend the limitations period set forth in [section] 733.710." A8, 10-11.

On the second issue, the First District, relying on its prior decision in *Buettner*, determined LBC could not be vicariously liable for Morton's negligence because Morton had been "exonerated" purportedly by the judicial determination that the claims against his estate were time-barred. A11-12.

### **SUMMARY OF ARGUMENT**

This Court may—and should—review the First District's decision interpreting and applying the *Probate Code* to shield a corporation and its insurers from liability. The decision certifies

conflict with the Fourth District’s *Pezzi* decision, thereby providing this Court with discretionary jurisdiction per se. The decision also conflicts with the decisions of other DCAs expressly adhering to *Pezzi*’s holding and with this Court’s own dicta approving of *Pezzi*. The First District’s rejection of the 24-year-old *Pezzi* decision has created an unsustainable conflict in an issue that will now arise frequently in litigation: what limitations period applies to a cause of action arising out of a decedent’s tort? This Court’s intervention is required to resolve this uncertainty and maintain a uniform body of Florida law.

This Court also may—and should—review the second issue regarding whether Morton’s purported “exoneration” absolves Morton’s employer (LBC) of vicarious liability. This issue is inextricably intertwined with the certified-conflict issue. Once this Court accepts jurisdiction of the certified-conflict issue, it may address all other issues in this case regardless of any independent ground to review them. In any event, an independent ground exists to review this second issue: The First District’s decision below—applying its prior *Buettner* decision—expressly and directly conflicts with *JFK Medical Center, Inc. v. Price*, 647 So. 2d 833 (Fla. 1994).

*Buettner*'s rationale—which no other DCA has adopted—also has been rejected by other courts, and thus this Court should provide its own guidance on whether the discredited *Buettner* decision is binding on Florida's trial courts. And there is a compelling practical reason for this Court to review the “exoneration” issue: LBC—the corporate party vicariously liable for Morton's negligence—is the only party below that moved for summary judgment or defended on appeal the trial court's judgment.

### **ARGUMENT**

**I. This Court may—and should—accept jurisdiction to review the conflict amongst the DCAs in interpreting the Probate Code.**

**A. This Court may accept jurisdiction on two independent grounds: certified conflict, and express and direct conflict.**

The First District certified conflict with the Fourth District's *Pezzi* decision. A13. This certification “provides [this Court] with jurisdiction per se.” *State v. Vickery*, 961 So. 2d 309, 312 (Fla. 2007); Art. V, §3(b)(4), Fla. Const.<sup>2</sup>

Though the certified conflict alone grants this Court

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<sup>2</sup> During oral argument below, LBC conceded it “suspect[ed]” the First District would have to certify conflict with *Pezzi* in order to affirm the trial court's judgment.

jurisdiction, it also has jurisdiction because the First District's decision "expressly and directly" conflicts with the decisions of two DCAs that have adhered to *Pezzi*. Art. V, §3(b)(3), Fla. Const. See *Wilson*, 706 So. 2d at 16 (reversing a summary judgment in favor of an estate "based on the indistinguishable authority of *Pezzi*"); *Estate of Arroyo*, 211 So.3d at 249-50 (relying on *Pezzi* to conclude a consent judgment is enforceable against an insurer, even where the plaintiff failed to file a timely claim against the estate). This Court also has approved of *Pezzi* in dicta. *May*, 771 So. 2d at 1155, 1157 n.13, 1159.

**B. This Court should accept jurisdiction to ensure that Florida courts uniformly interpret the Probate Code.**

The First District's decision, interpreting the Probate Code, contravenes precedent that has been binding on all Florida trial courts for nearly a quarter century. See *Pezzi*, 697 So. 2d at 885 ("[B]y virtue of section 733.702, plaintiffs could hold neither the estate nor the personal representative, individually, liable for plaintiffs' damages. *Plaintiffs could recover only to the extent of the applicable liability insurance....*Section 733.710, by its own terms, does not bar a cause of action against a decedent....The limitation on liability pursuant to section 733.710 is specific to the decedent's estate, the

personal representative, and the beneficiaries; *the limitation does not extend to the decedent's insurance policy.*" (emphasis added)); *Pardo v. State*, 596 So. 2d 665, 666 (Fla. 1992) ("[I]n the absence of interdistrict conflict, district court decisions bind all Florida trial courts.")

Although the legislature has amended sections 733.702 and 733.710 since *Pezzi* was decided, it never has repudiated *Pezzi's* interpretation of these statutes. See, e.g., *Gulfstream Park Racing Ass'n, Inc. v. Dep't of Business Reg.*, 441 So.2d 627, 628 (Fla. 1983) ("When the legislature reenacts a statute which has a judicial construction placed upon it, it is presumed that the legislature is aware of the construction and intends to adopt it, absent a clear expression to the contrary."). Brushing aside 24 years of legislative acquiescence, the court below changed the meaning of the Probate Code—as least in the First District.

In the First District, the Probate Code's deadlines may bar a cause of action arising out of a decedent's tort where the injured party seeks to recover from an insurance policy and not from the decedent's estate or the estate's personal representative or beneficiaries. In contrast, in the Second, Third, and Fourth Districts, the Probate

Code’s deadlines do *not* apply to bar such a cause of action. And in the Fifth District, the litigants and trial courts will be left to wonder. Only this Court can prevent this uneven application of the Probate Code that inevitably will result in inconsistent adjudications of similarly situated litigants.

**II. This Court may—and should—accept jurisdiction to review the “exoneration” issue.**

**A. This Court may accept jurisdiction of the “exoneration” issue on two independent grounds: its power to consider all issues in a case, or an express and direct conflict.**

“[O]nce this Court has jurisdiction of a cause, it has jurisdiction to consider all issues appropriately raised in the appellate process.” *Savoie v. State*, 422 So.2d 308, 312 (Fla. 1982). Thus, if this Court accepts jurisdiction of the certified-conflict issue, it also may accept jurisdiction of the second issue: whether a dismissal on timeliness grounds “exonerates” an active tortfeasor such that a passive tortfeasor—like an employer or owner of a vehicle—is not vicariously liable. This issue was “appropriately raised in the appellate process,” is “dispositive”, and practically speaking, is intertwined with the certified-conflict issue. *See id.*

This Court also may accept jurisdiction of the second issue under an alternative, independent ground: express and direct conflict. Art. V, § 3(b)(3), Fla. Const. The First District’s decision expressly and directly conflicts with a 1994 decision of this Court recognizing that a dismissal on non-merits grounds does *not* “exonerate” an active tortfeasor such that continued litigation against the passive tortfeasor is barred. *See JFK*, 647 So. 2d at 834 (“[A] voluntary dismissal of the active tortfeasor, with prejudice, entered by agreement of the parties pursuant to settlement, is not the equivalent of an adjudication on the merits that will serve as a bar to continued litigation against the passive tortfeasor”). The First District’s decision and *JFK* cannot be reconciled. *See Ford Motor Co. v. Kikis*, 401 So. 2d 1341, 1342 (Fla. 1981) (a discussion of “the legal principles which the court applied supplies a sufficient basis” for express-and-direct-conflict jurisdiction).

**B. This Court should accept jurisdiction of the “exoneration” issue.**

Other state supreme courts have rejected the rationale employed by the First District on the second issue. *See, e.g., Methodist Healthcare-Olive Branch Hospital v. McNutt*, No. 2020-IA-



00199-SCT, 2021 WL 3471047 \*6 (Miss. Aug. 6, 2021) (en banc) (dismissal of active tortfeasor on statute of limitations was not a merits adjudication that would preclude vicarious liability claims); *Cameron v. Osler*, 930 N.W. 2d 661, 664 (S.D. 2019) (rejecting the First District’s *Buettner* decision). Moreover, the primary authorities on which the First District in *Buettner* relied either do not support its holding (e.g., *Bankers Multiple Line Ins. Co. v. Farish*, 464 So. 2d 530 (Fla. 1985)), or have been questioned as wrongly decided by this Court and the First District itself (*Walsingham v. Browning*, 525 So.2d 996 (Fla. 1st DCA 1988)). See *Bankers Multiple Line*, 464 So. 2d at 531-32 (using “exoneration” to refer to a jury verdict on culpability); *Crosby v. Jones*, 705 So. 2d 1356, 1359 (Fla. 1998) (“[T]he authorities cited in *Walsingham* did not support the district court’s holding in that case.”); *Lewis v. Allstate Ins. Co.*, 667 So.2d 261, 263 & n.4 (Fla. 1st DCA 1995) (concluding “the expiration of the statute of limitations as to the active tortfeasors ... did not operate as an adjudication on the merits” and noting that, although it had reached a different result in *Walsingham*, the continued viability of that case “is in doubt following the decision in *JFK Medical Center*”).

Furthermore, LBC’s—not the estate’s—liability is truly at issue. LBC is the policyholder and an insured. LBC moved for summary judgment and defended the appeal. *See supra* p. 2. The First District applied the *Probate Code*’s limitations periods—designed to protect the estate and its personal representative and beneficiaries—to insulate the *corporate* LBC and its *insurers* from liability. In deciding this case, this Court should not ignore reality: The assets of Morton and his estate are neither at risk nor being protected by the First District’s interpretation of the *Probate Code*. Instead, that interpretation protects the assets of a corporation (LBC) and its insurers.

In sum, the second issue, as a practical matter, is inextricably intertwined with the certified-conflict issue, and it warrants this Court’s review.

### **CONCLUSION**

This Court may—and should—accept jurisdiction to review the First District’s decision.

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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 2,494 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 September 28, 2021, and an electronic copy has been furnished to the following counsel of record:

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