In the Supreme Court of Florida

CASE NO. SC05-2170

CHRISTOPHER MORRISON,

Petitioner,

v.

ELEONORA BIANCA ROOS,

Respondent.

ON DISCRETIONARY REVIEW FROM THE
FIRST DISTRICT COURT OF APPEAL

PETITIONER'S REPLY BRIEF ON THE MERITS

Respectfully submitted,

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ARGUMENT

In our Initial Brief, we pointed out that the First District's decision creates an entirely new duty concept under which passengers may be held liable for injuries caused to third parties by a driver's error in operating his vehicle. Respondent's Answer Brief disagrees and asserts instead that the decision merely applied existing common law principles "to an extremely unique set of facts", and that the First District's ruling will apply "to extremely few driving situations." (Respondent's Answer Brief, pages 4 and 5).

As detailed below, existing common law principles do not support the First District's holding on passenger liability. Further, the resulting new rule is by no means limited to 'extremely few' situations; it covers virtually any circumstances under which a passenger provides input to a driver about conditions outside the vehicle as to which the passenger arguably has a better vantage point.

The circumstances under which passengers have heretofore been held liable under the common law are strictly limited to: (1) cases arising in the comparative negligence context, which merely confirm the entirely established and unexceptionable rule that individuals have a duty to use reasonable care for their *own* safety, including when riding as a passenger in a vehicle, *see, e.g.,* Bessett v.

Hackett, 66 So. 2d 694(Fla. 1953)(passenger may have duty to act for his own safety if he knows that the that the driver is not exercising that degree of care in the operation of the vehicle compatible with the safety of his passenger); (2) situations where a passenger has *control* over the vehicle (*See, e.g.*,*Price v. Halstead*,

355 S.E.2d 380 (W. Va. 1987)*Kerfoot, supra*, 501 So. 2d at 590. "Signaling driver" cases do not, as Respondent argues, provide common law support for imposition of a duty on passengers.

Respondent also seeks to rely on the common law 'undertaker' doctrine as a basis for imposing liability to third parties on information-providing passengers, but this reliance, too, is misplaced. Respondent cites, *Barfield v. Langley*, 432 So. 2d 748 (Fla. 2d DCA 1983)(a case involving an adult who undertook to care for a minor child), for the general proposition:

> It is axiomatic that an action undertaken for the benefit of another, even gratuitously, must be performed in accordance with an obligation to exercise reasonable care.

432 So. 2d at 749.

There is no action that was taken by the passenger here, however, for the benefit of other vehicles or their occupants, and no allegation of any such action.

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[1] The case law as to all three categories was assembled and discussed in full

Nor should the law deem passengers' actions in supplying information to drivers to be taken for the benefit of third parties such that a duty to third parties is created. To the extent that a passenger may "undertake" to provide input to a driver as to the passenger's perception or assessment of conditions outside the vehicle, as a matter of law such input should ***never***, standing alone, be deemed a sufficient basis for the driver's ultimate decision as to how to operate a vehicle. The sole duty must remain with the driver who may gather information from whatever sources may be around, but who ultimately must make the driving decisions based on the totality of the information he has and the information he *lacks*.

In fact, Florida cases have recognized that limitations must be set for the very broadly worded 'undertaker' doctrine. For example, in *Barfield v. Langley*, 432 So.2d 748, 749 (Fla. 2d DCA 1983)), but found that 'the action undertaken here only required the exercise of reasonable care as to the lane occupied by the signaling driver.' 469 So.2d at 963. The court accepted Severson's view that the motorcyclist, Kerfoot, **distorted a simple act of courtesy by trying to convert it into a duty of care**.

501 So. 2d at 589. Similarly, it would be an improper application of the undertaker's doctrine to distort a passenger's act of providing input to a driver into a duty of care to third parties.

Other Florida cases limiting the reach of the undertaker doctrine are: Dent v.

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in Petitioner's Initial Brief at pages 39-44.

Dennis Pharmacy, Inc., 2006 WL 783443 (Fla. 3d DCA 2006)(rejecting argument that pharmacy's actions in undertaking to provide advice to customer about driving under medication increased zone of risk to third parties); *Paszamant v. Retirement Accounts, Inc.*, 776 So. 2d 1049 (Fla. 5th DCA 2001)(refusing to employ undertaker's doctrine to create a duty that was at odds with the underlying relationship between IRA investors and company managing their accounts); *Mininson v. Allright Miami, Inc.*, 732 So. 2d 389 (Fla. 3d DCA 1999)(undertaker's doctrine inapplicable where injured person had no justified reason to rely upon defendant's maintenance of a municipal sidewalk since person had no knowledge of the terms of the lease agreement).

With regard to the factual scenario here, it is the driver who has the duty to third parties to use reasonable care in the operation of a vehicle, and, significantly, who has *control* over the vehicle. That duty with respect to operating the vehicle remains that of the driver; it is neither transferred nor re-allocated by the driver's solicitation or receipt of information from a passenger as to what the passenger may perceive.

The one case to directly consider the application of the undertaker's doctrine to facts such as those alleged here, Moya v. Warren, 544 P.2d 280 (1975), specifically found that the doctrine was inapplicable. In *Moya*, the driver of a

motorcycle (Moya) sued the passenger in a car with which he had collided while it was making a U-turn. Just prior to the maneuver, the passenger (Warren) had told the driver of his car: "It is clear, you can go." *Id.* The §324ARestatement, Torts(2d) 324 A (1965) *Collette v. Tolleson Unified School District No. 214*,

54 P.3d 828, (Ariz. App. 2003)*Calwell v. Hassan*,

925 P.2d 422, (Kan. 1996)§324A held inapplicable); Stepnes v. Adams, 452 N.W.2d 256, 259 (Minn. App. 1990)(lack of control over driver's behavior precludes applicability of §324A to companion following in vehicle behind intoxicated driver); *Cuppy v. Bunch*, 214 N.W.2d 786, 788 (S.D. 1974)(motorist

> who asked co-defendant motorist to follow him or stay behind him owed no duty to plaintiff occupants of oncoming automobile which collided with co-defendant's automobile; motorist was not capable of exercising control over co-defendant and had not

undertaken to assist him within meaning of Restatement §324A).

Neither the undertaker's doctrine, nor *McCain*, are woodenly applied to create a legal duty whenever someone acts, no matter what the circumstances. As this Court noted in Gracey v. Eaker, 837 So. 2d 348, 354 (Fla. 2002), the "recognition" of a legal duty is always the expression of a policy choice that a particular plaintiff ought to be protected from a particular type of action:

> We have previously stated that "**'[d]uty' is not sacrosanct in itself, but only an expression of the sum total of those considerations of <u>policy</u> which lead the law to say that the particular plaintiff is entitled to protection [or not**]." Rupp v. Bryant, 417 So.2d 658, 667 (Fla.1982) (quoting William L. Prosser, Handbook of the Law of Torts § 53 at 325-26 (4th ed.1971)).

See also, e.g., Stephenson v. Universal Metrics, Inc., 641 N.W.2d 158, 165, 167-170 (Wis. 2002)(while facts of case, where co-worker indicated he would drive intoxicated motorist home and then failed to prevent motorist from driving, literally fit within the framework of *Roos v. Morrison*,

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[2] Due to this extensive body of law establishing the clear legal duty of a driver in control of a vehicle, and the extremely limited legal duties of a vehicle passenger, Respondent seeks to distance itself from the facts of *this* case by relying upon a "hypothetical" situation in which a person outside the vehicle offers advice

913 So. 2d 59 (Fla. 1st DCA 2005)

WE HEREBY CERTIFY that a true and correct copy of the Petitioner's Reply Brief on the Merits was sent by U.S. Mail this 3rd day of May, 2006 to: Thomas E.

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to a driver. Respondent's Answer Brief pages 16-17. While Petitioner believes that the certified question before the Court and the allegations at bar both dictate that the inquiry here must be limited to vehicle passengers, it is also telling that Respondent cites no authorities where liability for a driver's negligence has been imposed upon an advice-giving bystander with no control over the vehicle. Moreover, any such bystander liability would itself be dependent on a variety of circumstances many of which would vary from those of vehicle passengers. In any event, the First District has posed the issue which is before this Court such that consideration of hypothetical alternative issues is beside the point.

[3] In addition to the authorities cited in Petitioner's Initial Brief, *see also, Van Brunt v. Stoddard*,

39 P.3d 621 (Idaho 2001)Van Brunt v. Stoddard, 39 P.3d 621, 627-628 (Idaho 2001)(non-party passenger who had been giving directions and just prior to collision abruptly told driver to "turn here!" could not be included on verdict form as *Fabre*-type defendant, because passenger had no control over operation of the vehicle or obligation to monitor its operation).

[4] Respondent's contention that there is "no water behind the floodgates" is premised upon the self-evidently incorrect notion that the facts of this case–*i.e.*, a passenger having a better view than the driver of some area outside the vehicle–are "extremely unique." As noted above, this scenario applies to virtually any circumstance where a passenger provides input to a driver. Deeming such a circumstance to give rise to a duty to third parties would undoubtedly spawn greatly increased litigation in this area, and indeed, the First District's opinion has already been noted in a national legal publication. *See, e.g., Backseat Advice May Lead to Hot Seat:*
Passenger Has Duty to Use Reasonable Care,
Florida Court Rules, 4 No. 42 ABA Journal E-Report (2005).Backseat Advice May Lead to Hot Seat: Passenger Has Duty to Use Reasonable Care, Florida Court

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CERTIFICATE

OF COMPLIANCE WITH FONT STANDARD

Undersigned counsel hereby respectfully certifies that the foregoing Brief on the Merits complies with Fla. R. App. P. 9.210 and has been typed in Times New Roman, 14 Point.

Rules, 4 No. 42 ABA Journal E-Report (2005).