In the Supreme Court of Florida

CASE NO. SC05-2170

CHRISTOPHER MORRISON,

Petitioner,

v.

ELEONORA BIANCA ROOS,

Respondent.

ON DISCRETIONARY REVIEW FROM THE
FIRST COURT OF APPEAL

RESPONDENT'S ANSWER BRIEF ON THE MERITS

Respectfully submitted,

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STATEMENT OF CASE AND FACTS

Respondent accepts Petitioner's Statement Of The Case And Facts in Petitioner's Initial Brief On The Merits except Petitioner's assertion that the First District recognized that its opinion "…will create liabilities never before imposed on motor vehic le passengers…" The First District properly applied three principles of common law to an extremely unique set of facts which was a case of first impression. Their certification of their ruling as a question of great public importance was because of their concern that Morrison and future defendants found liable under these unique facts may not have insurance to pay any judgment. Their concern was not that they were creating new law.

SUMMARY OF ARGUMENT

The amended complaint states a negligence cause of action against Christopher Morrison. Christopher Morrison initially had no duty to see if his driver's path of travel behind him was clear. Once he agreed or volunteered to do so however, he then had a legal duty to exercise reasonable care in executing this task. Christopher Morrison's superior position to that of the driver to see what was behind the SUV, establishes the proximate cause needed to make his negligence a liability. His superior position to see the path of travel of the vehicle was known by him and the driver. It is this unique fact which establishes a cause of action against this passenger and limits this legal ruling to an extremely few driving situations.

Christopher Morrison is not immune from this duty simply by being a passenger in a vehicle. The amended complaint adequately alleges Christopher Morrison's breach of this duty and Eleonora Bianca Roos's injuries and damages related to that negligence.

ARGUMENT

The Amended Complaint States A Cause Of Action For Negligence Against Christopher Morrison

The issue presented to both the trial court and to the First District Court of Appeal was whether Respondent's amended complaint stated a valid cause of action against Morrison. Whether the amended complaint should be dismissed for failing to state a valid cause of action is a question of law. City of Gainesville v. State Department of Transportation, 778 So. 2d 519, 522 (Fla. 1st DCA 2001). While the circuit court's Order Granting Motion To Dismiss Amended Complaint and the Final Order Of Dismissal are not specific as to their grounds, it can reasonably be assumed that the circuit court determined that no legal duty was imposed on Christopher Morrison on the facts alleged. The existence, vel non, of a duty is a question of law and is appropriate for appellate review. Gracey v. Eaker 837 So. 2d 348 (Fla. 2002). The standard of review as to whether a complaint states a valid cause of action is de novo. City of Gainesville v. State Department of Transportation, 778 So. 2d 519, 522 (Fla. 1st DCA 2001). In determining this, the trial court and all appellate reviewing courts are obligated to treat all allegations in the amended complaint as true and look no further than the

four corners of the amended complaint. Id.; Singer v. Florida Paving Company, Inc., 459 So. 2d 1146 (Fla. 3d 1984).

The First District Court of Appeals' lengthy, analytical and well reasoned opinion concludes that the allegations of the amended complaint "…were more than sufficient to withstand a motion to dismiss." Roos v. Morrison, 913 So. 2d 59, 64 (Fla. 1st DCA 2005). The lower court also recognized that this valid cause of action "…will not 'open the floodgates' to all passengers facing potential liability for their actions immediately prior to a collision." Id.

The two very unique facts of the amended complaint which establish Morrison's duty and causation are that Morrison had a superior vantage point to see what was behind the SUV than did the driver and that he affirmatively undertook the task with its accompanying legal duty to determine if it was safe to back up the vehicle. Id. at 63.

Three recognized principles of Florida common law, when applied to the very unique facts of this accident as alleged in the amended complaint, imposed the duty to exercise reasonable care on Christopher Morrison. The amended complaint adequately alleges his breach of this duty and its proximate cause of Eleonora Bianca Roos's injuries and damages.

First, ". . . (i)t 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." Barfield v. Langley, 432 So. 2d 748 (Fla. 2d DCA 1983). In Barfield, the court held that while Charlotte Langley had no duty to take care of Jason Barfield, who was a neighbor's child, once she agreed to do so, ". . . she had a duty as a matter of law to exercise a reasonable degree of care in protecting him from reasonably foreseeable harm." Id. at 749.

Secondly, passengers of vehicles are not immune from liability for all actions they take while riding in a vehicle driven by another. Loftin v. Bryan, 63 So. 2d 310 (Fla. 1953). Generally, a passenger is entitled to trust the vigilance and skill of the driver and the driver's negligence is not imputed to the passenger. Florida East Coast Railway Company v. Keilen, 183 So. 2d 547 (Fla. 3d DCA 1966). Florida appellate courts have recognized factual situations where a passenger has a duty of reasonable care. For example, a passenger has the duty to make a reasonable attempt to rectify the driving of one he knows or should know is not exercising reasonable care compatible with and essential for the passenger's safety and where there is sufficient time and opportunity to give warning or protest before an accident. Id. at 550.

Thirdly, Kerfoot v. Waychoff, 501 So. 2d 588 (Fla. 1987) establishes that under certain circumstances, one who indicates to a driver that the driver can proceed safely can be held liable for an ensuing accident. Id. at 589. In Kerfoot, this court stated that the relevant factors for whether liability will attach to the person who directs another driver to proceed are that person's superior position when compared to the driver to see whether the driver's path of travel is clear and whether the driver was reasonable in his interpretation of what the hand motion or signal meant. Id. at 589.

In Kerfoot, this Court was asked to answer the following certified question of great public importance: "Does an automobile driver who, by signals, relinquishes his right of way to another vehicle, owe any duty to reasonably ascertain whether traffic lanes, other than his own, will safely accommodate the other vehicle?" The Supreme Court agreed with the Fourth District Court of Appeal and answered the question in the negative. By doing so, it held that there was no affirmative duty on drivers who yield to other drivers to determine whether adjacent traffic lanes will allow safe passage. The court, however, limited its decision to the specific facts in Kerfoot.

Those specific facts of Kerfoot were that, the driver who waved to the other driver to pass in front of him could not have seen whether the traffic

lane adjacent to his own would safely allow the other driver to cross it and complete his left hand turn. The court stated that the signaler's ability to foresee potential danger is a factor giving meaning to a signal. Id. at 590.

Two subsequent district court of appeal cases interpret and apply Kerfoot to other factual situations are enlightening. In Tellechea v. Coca-Cola Bottling Co. of Miami, Inc., 530 So. 2d 1083 (Fla. 3d DCA 1988), a summary judgment rendered in defendant's favor was reversed because two disputed material facts precluded such summary judgment. One such disputed material fact was the apparent meaning and appropriate interpretation of the signal. The second disputed material fact was whether the signaler was in a position to determine if the adjacent lane was clear of motor vehicles. The Third District Court of Appeal held that if the meaning and interpretation of the other's signal was that the right lane was clear and the signaler could determine that from his vantage point, because he was seated high in a truck and had a right side view mirror, then the signaler could be held to be actionably negligent. Id. at 1084.

The First District Court of Appeal in WED Transportation Systems, Inc. v. Beauchamp, 616 So. 2d 146 (Fla. 1st DCA 1993), in upholding a jury verdict against the signaling driver, pointed out that ". . . the most prevalent factor in the court's determination of no liability in Kerfoot was that the

signaling driver, Severson, was in an almost impossible position to determine if the adjacent lane was clear of motor vehicles." Id. at 589. The facts in WED Transportation Systems, Inc., raised jury questions on a bus driver's ability to ascertain potential danger when he signaled for an automobile to make a left turn in front of him.

Kerfoot, Tellechea and WED Transportation focus in part, as they clearly should have, on the interpretation of a wave from a driver in the immediate opposing lane of traffic. Does that hand signal only mean, "You can pull in front of me" or does it mean, "It's okay for you to turn in front of me and continue through the lane next to me because I can see that there is no traffic coming and you cannot." In Roos's amended complaint clear, affirmative and non-ambiguous words spoken by Christopher Morrison indicated to his driver that it was safe for him to back up. Consequently, no issue concerning the interpretation of his "signal" could be raised even on a motion for summary judgment.

Additionally, Kerfoot, Tellechea or WED Transportation do not limit those who could be liable for warning or signaling drivers to proceed only to drivers of other vehicles. Utilizing the legal rationale of WED Transportation, if the signaler was a passenger in the other vehicle instead of

its driver, and all other facts were the same, a legal duty of reasonable care in directing the driver would be imposed on that passenger.

Petitioner at both the circuit court and the appellate court level contended that Halenda v. Habitat For Humanity International, Inc., 125 F. Supp. 2d 1361 (S.D. Fla. 2000) was precisely on point with the amended complaint and supported its position that a passenger has no duty of reasonable care when telling his driver about traffic or other roadway conditions. Under the specific facts in Halenda, that passenger had no duty because she was in no better position than the driver to see the vehicle's intended path of travel. In Halenda, the at-fault vehicle was driven by Jack Walters. His wife, Lois, was seated to his right in the front passenger seat. They attempt to pass a tractor-trailer on a two-lane road. When they are out in the opposing travel lane ". . . both he and Lois looked down the road and noted that the westbound lane was clear . . . . and at that point Lois said, 'It was clear.' " Id. at 1364. Mr. Walters then tried to pass the tractor-trailer but quickly realized there was a car in front of it and that the Halenda vehicle was coming in the other direction. Since there was no room to squeeze between the tractor-trailer and the small car, he accelerated trying to pass the small car. At that point, the trailer he was towing with his Suburban fish-tailed, disengaged and struck the Halenda vehicle.

Without referring to Kerfoot and its progeny, the Southern District Court of Appeals correctly held that under these facts the passenger had no duty of reasonable care because she was not in a superior position to the driver to see the intended path of travel.

Jagneaux vs. Louisiana Farm Bureau Casualty Ins. Co., 771 So. 2d 109 (La. App. 3 Cir. 2000), is an out-of-state case whose facts are on point to those alleged in the amended complaint. In Jagneaux, a summary judgment in favor of a passenger on a negligence claim was reversed. In this case, a teenager was driving an enclosed cab tractor with a friend of his sitting on the arm rest. Mud had covered up each of the side windows. When they got to a stop sign, the driver's view of the intersecting traffic was obstructed. The driver asked his passenger to check for traffic. The passenger opened the door, stepped out of the cab onto the tractor's diesel tank to get a better view of the road. He then signaled to the driver that it was clear to move forward. There was some dispute as to exactly what the passenger did and said and what the driver heard and said. It was clear, however, that the driver relied on the passenger's statement to pull forward, which caused the accident. The Louisiana appellate court made clear what limited precedent its reversal would have when it stated ". . . . (i)n granting summary judgment, the trial court expressed concern that every guest

passenger in an accident would face liability if this case were allowed to proceed." Id. at 112. The court went on to state that the passenger acted beyond the role of a guest passenger when he agreed to check for traffic which the driver could not see. Id. at 112. In doing so, the passenger assumed a legal duty to exercise reasonable care in checking for traffic. Id. at 112.

Consequently, on facts extremely similar to the amended complaint, this Louisiana appellate court held that a valid negligence cause of action by a third party against a passenger exists when the following facts exist: (1) the passenger is in a position to see the intended path of travel of the vehicle when the driver's view is obstructed; (2) the passenger represents to the driver that his intended path of travel is clear; (3) the driver relies on the passenger's representation knowing that the passenger is in a superior position than he is to see the intended path of travel; and (4) the driver moves his vehicle, the path of travel is not clear and a collision occurs.

Two other out-of-state cases, while similar had one distinguishable fact which precluded the passenger from being similarly held liable. In Moya v. Warren, 88 N.M. 565, 544 P. 2d 280 (New Mexico 1975), a front passenger was helping his driver to determine when their path of travel was clear to complete a U-turn. After the passenger said, "It is clear, you can

go," the driver pulled out and an accident happened. A directed verdict in favor of the passenger was upheld because, like in Halenda, the passenger was in no better position than the driver to see the intended path of travel.

Gandy v. Terminal R.R. Ass'n of St. Louis, 623 S.W. 2d 49 (Mo. App. 1981), affirmed a directed verdict in favor of a passenger whose driver was backing a tractor-trailer across two sets of railroad tracks at a freight yard. Before doing so, the driver told the passenger, ". . . (w)ell, watch in case that train decides to start up down there and I will watch the left, the front, and my rearview mirrors." Id. at 50. The passenger, however, said nothing in response. The driver began backing up after he determined it was safe to proceed. The driver could not see to the south where a train had been stopped. Once on the second set of tracks, that train struck the trailer which caused injury to the driver. The passenger did not warn the driver of the oncoming train.

In upholding the directed verdict in defendant's favor, the court held that there was no evidence that the passenger agreed to the driver's request to watch the train to the south nor was there any evidence that the passenger actually attempted to keep a lookout. Id. at 52. The court stated that "(a)ppellant's request for assistance did not raise a duty in Jones (the passenger) to help." Id. at 52. Gandy is clearly distinguished from the facts

of the amended complaint which allege that Christopher Morrison either began looking to the rear on his driver's request for help or gratuitously began doing so after realizing his driver could not see behind him.

Respondent, at the circuit and appellate court levels, presented an analogous fact pattern where liability would clearly be placed on the defendant. Petitioner has yet to address this analogy.

The analogy is as follows: The driver of a tractor-trailer is attempting to back up into a store's parking lot in order to offload. A bystander is there. This bystander obviously has no affirmative duty to do anything to aid the tractor-trailer in backing up. However, at the request of the tractor-trailer driver or on his own volition, the bystander voluntarily assumes the task of looking where the tractor-trailer was intending to back up and telling the driver whether it was clear. The bystander stands at the rear of the trailer to the driver's side. The bystander was in a position superior to the driver to see where the trailer was backing up and both the driver and the bystander knew this. The driver could not see where he was backing up. The driver relied on the words of the bystander to continue backing up. While the bystander had no affirmative duty to assume this endeavor, once he did assume it he has the duty to exercise reasonable care in doing so. The bystander, however, fails to exercise reasonable care and does not see a child

exit the store and stand behind the trailer. The bystander continues to tell the driver that his path of travel was clear. The trailer then strikes the child causing injuries.

A complaint filed by that child's parents against the bystander alleging such facts would state a viable negligence cause of action against the bystander for his negligence in causing the child's injuries. The bystander had a legal duty which he breached and in doing so caused injury.

The facts as alleged in Respondent's amended complaint are on point with the facts of this analogy except for one. Christopher Morrison was a passenger instead of a pedestrian standing outside the vehicle when he told the driver it was clear to back up. This single different fact is without legal significance. There is no Florida case which holds that legal duties imposed on people evaporate when they enter a motor vehicle as a passenger. On the facts pled in the amended complaint, Christopher Morrison had a legal duty to exercise reasonable care every bit as much as this bystander in the Respondent's analogy did.

Petitioner has contended that the First District Court of Appeals' ruling will open the floodgates and that all passengers of vehicles at-fault in accidents will be subject to liability claims. If there was water behind these supposed floodgates, this would not be a case of first impression. The

specific facts of the accident which injured Eleonora Bianca Roos on July 4, 2002 are so unique that affirming the First District's opinion would have zero relevancy for over 99.9% of motor vehicle accidents which occur. Only in the extremely rare instances where a passenger is in a superior viewing position than the driver, and agrees to look and see the path of travel which the driver cannot, negligently does not see what is there and an accident causing injuries occurs, would this court's opinion have any relevancy. Petitioner must concede that this is a case of first impression in Florida. There is no water behind any such floodgate.

Jagneaux has been the established law of Louisiana since 1995. Petitioner has referenced no detrimental public policy issues which have arisen in Louisiana over the last 10 years because of that opinion.

With Jagneaux and Roos being the only two appellate cases dealing with theses facts, it can be safely assumed that there is no water behind Petitioner's floodgate. The subsequent legal implication of any appellate decision including Ross v. Morrison, 913 So. 2d 59 (Fla. 1st DCA 2005) is always limited to the specific facts of the decided case.

CONCLUSION

A person's status as a passenger does not immunize them from liability when their breach of a legal duty causes injury to another. When Christopher Morrison assumed the task of determining whether it was clear for his driver to back up, knowing his driver could not see behind the vehicle, Christopher Morrison was legally obligated to exercise reasonable care in doing that task. Consequently, Christopher Morrison is liable for a breach of that duty which causes injury. The amended complaint states a negligence cause of action against Christopher Morrison. There are no public policy concerns that would warrant ignoring the proper application of the common law on the extremely unique facts presented by Respondent's amended complaint.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was served upon **Elizabeth Russo, Esquire, Russo Appellate Firm, P.A.**, 6101 Southwest 76th Street, Miami, FL 33143 and **J. Stephen O'Hara, Jr., Esquire,** 4811 Beach Boulevard, Suite 303, Jacksonville, Florida 32207, by U.S. Mail, this 14th day of March, 2006.

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CERTIFICATE OF COMPLIANCE
WITH FONT REQUIREMENTS

I HEREBY CERTIFY that the font requirements of the Florida Rules of Appellate Procedure have been complied with in this pleading.

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