IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
CASE NO.: 4D23-0727
L.T. CASE NOS: 50-2021-CA-012968-XXXX-MB,
50-2021-CA-012974-XXXX-MB

JOHN PHILBIN, et al.

Appellant,
vs.

UBER TECHNOLOGIES, INC. ET AL.,

Appellee.

On Appeal from the Circuit Court of the Fifteenth Judicial Circuit
In and for Palm Beach County, Florida

ANSWER BRIEF OF APPELLEE, Uber Technologies, Inc.

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STATEMENT REGARDING ORAL ARGUMENT

Appellees object to Appellant's claim this case calls for oral argument. The issue is a question of law, explored in detail in the paper record, that involves application of the appellant's pleadings to well-settled Florida law regarding the requirements for stating the causes of action. Those causes of action, which Appellant unsuccessfully attempted to plead, address concepts settled in Florida law and the authorities cited in the briefs. Also, the case below was also decided on a motion to dismiss, and accordingly all necessary elements are in the pleadings and the motion to dismiss—those elements do not require oral argument to explore or examine them. Accordingly, oral argument in this case is unnecessary.

STATEMENT OF THE CASE AND FACTS

Summary of the case

This suit arises from the serious injury of one Plaintiff[1] and the death of another Plaintiff on or about May 29 or 30, 2022 (R56, ¶12; R294, ¶12). The cause was a car crash during a ride that was not acquired via the Uber app or any way affiliated with Uber's platform. The only alleged Uber connection—was a nighttime ride to the beach in a vehicle driven by Transportation Network Company ("TNC") operator John Driver n/k/a Dimitri Naimi whichended sometime before a second, separate ride that was "accepted" in person (not via the Uber app) from the beach. (R56, ¶¶ 25-28; R296 ¶¶ 25-28). The trial court dismissed the claims against Uber.

There were two complaints, consolidated here, because they arise from the same claims. There are two Plaintiffs—one was injured, and one died—but as the pleadings reveal, neither was harmed by

[1] The named plaintiffs (Philbin and Csikos) were suing as "next friend" (for the injured minor) and "personal representative" (for the deceased minor), respectively. After dismissal, they are Appellants here. Uber will refer to them as "Plaintiffs" or "Appellants", since they are suing in representative capacities and as the citations reveal their complaints—except for the allegations relating to death or injury—include essentially identical language.

Uber, anyone associated or affiliated with Uber or anyone within Uber's control; it was an unnamed "18-year-old driver" who came onto the scene and harmed them. (R56,¶¶25-26; R296 ¶¶25-26)

The pleadings below explain that on that night, Plaintiffs connected with TNC driver Dimitri Naimi using the Uber app to transport Plaintiffs to the beach from their residence. (R54 ¶12; R294¶12). A third party they met at the beach then drove both Plaintiffs home, during which that third party's reckless driving caused their injury and death. (R56,¶¶27-28; R296 ¶¶27-28).

Despite the cause—someone else's criminal acts of reckless driving—Plaintiffs sued Uber, contending that the initial ride to the beach (which occurred without incident) made Uber responsible. Appellant's pleading purporting to make that connection are summarized below.

The first driver, an independent TNC driver, picks up and drops off the Plaintiffs-riders.

On the night of May 29, 2021, K.P. (R54, ¶12) and B.S. (R294, ¶12), with unspecified "assistance", used an Uber app to connect with a TNC driver from their residential community--the destination was Deerfield Beach. (R54¶¶12-13; R.294, ¶¶12-13). Both were minors at the time. (R56, ¶ 12; R294, ¶12).

Neither complaint alleges anything happened on the drive to the beach. Plaintiffs recount that the riders "were . . . transported by the driver, driving on behalf of Uber,[2] from outside their gated neighborhood, where they were safe, to a beach in the middle of the night . . .where they were in a zone of danger." (R54¶13; R294, ¶13).

Neither complaint alleges any specific danger that the driver or Uber were aware of or created; the pleadings rely entirely upon the absence of "adult supervision" at the destination, "thereby taking [the riders] from a zone of safety to a zone of danger." (R55¶18; R295¶). The pleadings rely entirely upon the fact the minor riders were not at home with their parents or transported with adults. (R55¶18; R295¶18). The pleading alleges that "once the [rider] was transported by the driver to the beach. . . [she] was placed in a dangerous location," where "individuals [she] barely knew, were committing crimes including using illegal drugs such as marijuana and engaging in underage drinking of alcohol. (R56, ¶24; R296 ¶24).

[2] This allegation alleges a legal conclusion regarding agency (rather than a fact)--a point Uber rebuts in the argument section of this brief; no concession is made regarding that conclusion.

There is no allegation that Uber or the driver were aware of these circumstances; there are no facts alleged about events at the beach beyond the statement above regarding unknown individuals using marijuana and alcohol.

A third party drives them home, not anyone connected to Uber.

At some point after arriving, one Plaintiff "accepted the first ride back to her residence" and brought along the other plaintiff. (R56¶25; R296 ¶25). She "took a ride with an 18-year-old driver". (R56, ¶26; R296, ¶26). "[T]he 18-year-old driver drove recklessly [and] crashed head on into another vehicle causing a serious accident." (R56,¶27; R296, ¶27). She and her companion, another minor who lived with her at the residence they previously departed, were injured in the accident—one of them died. (R56-57, ¶¶28-29; R296, ¶¶).

The "18-year-old driver" drove the car that crashed, but Appellants alleged "if not for the negligent actions of the [independent driver] and Uber the [] child would not have been able to" leave "the safe confines of her parent's house and be taken out of her parent's control and custody, and . . . placed in grave danger." (R57 ¶32; R297 ¶32).

Plaintiff's claims about Uber's link to that second ride

Plaintiff concedes "Uber's policy is not to allow underage riders to start a trip or ride in the vehicle if underage" but claimed in its pleading that "by its advertising and offering rides, and maintaining a system of ordering and supplying rides" Uber "caused its drivers, or failed to control its drivers from being nothing less than unwitting abductors of children who chose to sneak out of their houses and communities at night." (R55 ¶¶17, 20; R295¶¶ 17, 20).

Appellants alleged two claims: vicarious liability (claiming the first driver's acts were Uber's) and negligence (claiming Uber had a duty to prevent the second driver from entering the scene, after the first driver chose to drive the riders to the beach and they decided to leave sometime after that).

Count II: Vicarious liability

Below, Plaintiffs alleged that Uber was vicariously liable for the driver's actions in accepting the first ride, because "within the course and scope of his duties on behalf of Uber" the driver "decided to pick up a 14-year-old" and "transport [her] to the destination of her choice" without "an adult". (R59¶44; R299, ¶44). Plaintiffs make this allegation—that the ride was within the scope of employment—

despite alleging that Uber has a policy prohibiting underage riders. (R55¶17; R295, ¶17). Plaintiffs pled that "Uber is liable for the wrongful acts of the [Defendant Driver] who was operating on behalf of Uber." (R59, ¶46; R299 ¶46).

Appellants relied upon the driver making the decision to accept the first ride as the basis for Uber's vicarious liability. To make the connection, earlier in the pleading they alleged that "Uber hired the driver and authorized the driver to operate a motor vehicle under its brand, for the purposes of transporting passengers for the benefit of Uber, with the customer paying money directly to Uber." (R53¶9; R293 ¶9). They also allege that Uber "operates a mobile ride-sharing app" that "allows customers to find a driver to pick them up and take them to the destination of their choice." (R53, ¶7,8; R293 ¶7,8).

Appellants pled that "the driver was operating on behalf of Uber *at the time of the accident*, using the Uber application to obtain riders" even though they explain that it was the "18-year-old driver", not the driver of the first ride, that was driving at the time of the accident. (R59 ¶ 42, R299 ¶ 42, emphasis added; compare R56 at ¶¶26-28, R296 ¶¶26-28 (alleging Plaintiffs "took a ride" with the "eighteen year old", not using the Uber app)). There is no allegation in Plaintiffs'

pleadings that reconciles these two contradictory facts. There is no fact alleging Uber (or the defendant driver) had any involvement with *the second ride from the beach*, which was the ride where the Plaintiffs were injured.

Count III: Negligence

Appellants also alleged, "despite the written policy" that "the driver did not follow" he "picked up the [rider] with her friends, and transported her, at night, to a beach . . . with no responsible adult supervision" which took "the [rider] from a zone of safety to a zone of danger." (R60 ¶48; R300 ¶48). Appellants alleged "Uber failed to adequately ensure that its policy was followed" and "Uber . . . was negligent in failing to control its drivers" and "permitted its service of providing rides to become an instrumentality which is being used by children who get rides to unsafe situations." (R60 ¶¶49,50,51, R300¶¶ 49,50,51). They claimed "[t]he driver's failure to verify the age of the rider caused the [rider] to be dropped off on a dark beach in the middle of the night across county lines." (R61¶52, R301¶ 52).

Appellants alleged the minor--at some point after safely being transported to the beach with the independent driver--felt that she needed to leave and "accepted the first ride back to her residence."

(R61¶54; R301 ¶54). They link that desire to fear of "crimes including using illegal drugs such as marijuana and underage drinking" she discovered was occurring on the beach after her arrival. (R61 ¶53; R301 ¶53). There is no allegation the first driver was aware of such activities, or anything but the destination Plaintiffs describe as a "dark beach in the middle of the night." (¶52, ¶).

To leave, Plaintiffs "took a ride with an 18-year-old driver". (R61¶55; R301 ¶55). "[T]he 18-year-old driver drove recklessly and crashed head on into another vehicle causing a serious accident." (R61¶56; R301 ¶56). The first Plaintiff and her companion, the other plaintiff (another minor who lived with her at the residence they previously departed), were injured in the accident—one of them died. (R61¶¶57-58; R301 ¶¶57-58). There is no allegation of a connection between Uber and this "18-year-old driver" who "drove recklessly."

The trial court dismissal leads to this appeal.

After hearing a motion to dismiss from Uber regarding these allegations, the trial court dismissed Appellants' complaints; this appeal followed via their notice of appeal dated March 21, 2023. (R5).

SUMMARY OF THE ARGUMENT

The trial court did not err. There is neither duty nor causation as a matter of law as to the harms caused by the second driver—a third party who committed crimes and is not connected to Uber. All the relevant events happened after Uber was out of the picture, and the trial court correctly recognized Plaintiffs sought improperly to reach back and involve an unconnected party in events for which it had no control or causation.

Plaintiffs could not allege duty as a matter of law, a necessary element to any claim for negligence-vicarious or direct. First, Florida law provides that the independent TNC driver is not an employee, and thus there is no vicarious liability. Plaintiffs' pleadings also manifest that, even assuming the driver is connected to the harm, he was acting in his own interest and against Uber's policy by taking on minor passengers. Second, under the common law, there is not enough to support an agency relationship since the driver is an independent TNC driver with full discretion as to his operations and driving. Third, Florida law does not impose a general duty to control the actions of third parties—the "18 year old driver" was a third

party—or to prevent criminals from committing criminal acts (such as those alleged here by the 18 year old driver).

Plaintiffs could not allege causation as a matter of law. There is no recognized chain of causation – the ride to the beach ended without incident. A third party, at some time after the arrival at the beach—at Plaintiffs' request—drove them away from the beach. That third party, according to Plaintiffs' allegations, committed a crime (reckless driving) that caused the Plaintiffs' harms. There is no causation as a matter of law, since the harm is too remote. The allegations of causation reach too far and seek to impute independent, intervening causes to Uber that cannot be attributed as a matter of law.

ARGUMENT

I. THE TRIAL COURT CORRECTLY DETERMINED THERE WAS NO DUTY TO BREACH (Issue I, rephrased)

A. The standard of review is de novo.

1. Dismissals are reviewed de novo, and duty is a question of law.

In Florida, "establishing the existence of a duty under our negligence law is a minimum threshold legal requirement that opens the courthouse doors to the moving party, and is ultimately a question of law for the court rather than a jury." Williams v. Davis, 974 So. 2d 1052, 1057 (Fla. 2007). Thus, "[t]he existence of a duty of care in a negligence action is a question of law. Rehab. Ctr. at Hollywood Hills, LLC v. Florida Power & Light Co., 299 So. 3d 16, 19 (Fla. 4th DCA 2020).

In addition, in this Court "[t]he granting of a motion to dismiss is reviewed *de novo*." Habitat II Condo., Inc. v. Kerr, 948 So. 2d 809, 811 (Fla. 4th DCA 2007). "In reviewing a motion to dismiss, the court must take the allegations in the complaint as true", Shumrak v. Broken Sound Club, Inc., 898 So. 2d 1018, 1020 (Fla. 4th DCA 2005), and to survive dismissal "A complaint must contain the 'ultimate facts' necessary to support the claim for relief" Royal &

Sunalliance v. Lauderdale Marine Ctr., 877 So. 2d 843, 845 (Fla. 4th DCA 2004).

Under these rules, "[w]hile we must accept the facts alleged as true and make all reasonable inferences in favor of the pleader. . . conclusory allegations are insufficient." Stein v. BBX Capital Corp., 241 So. 3d 874, 876 (Fla. 4th DCA 2018); Clark v. Boeing Co., 395 So. 2d 1226, 1229 (Fla. 3d DCA 1981)(explaining "[p]leadings must contain ultimate facts supporting each element of the cause of action" and "[m]ere conclusions are insufficient.").

The trial court correctly applied these rules when dismissing.

B. There was no duty; the trial court did not err in dismissing.

1. **There is no vicarious liability.**

The relevant tortfeasor is the "18-year-old driver" who "drove recklessly", not the first driver —the independent TNC driver who Plaintiffs connected with via the Uber app, who pursuant to statute Uber does not "control, operate, direct, or manage." § 627.748(1)(e), Fla. Stat. Even assuming the independent driver, and not the reckless subsequent "18 year old driver", is the relevant tortfeasor, the TNC ("Transportation Network Company) statute provides that under Florida law Uber does not employ drivers or control them.

In Florida, a "Transportation network company" or "TNC" is "an entity operating in this state pursuant to this section using a digital network to connect a rider to a TNC driver, who provides prearranged rides" and "A TNC is not deemed to own, control, operate, direct, or manage the TNC vehicles or TNC drivers that connect to its digital network, except where agreed to by written contract, and is not a taxicab association." § 627.748(1)(e), Fla. Stat. Accordingly, Florida law provides that a TNC such as Uber is not in control, operation, direction, or management of a TNC driver.

To erase doubt, the Legislature rejected attempts such as Plaintiff's to create vicarious liability in a statute that provides as follows:

> **(18) Vicarious liability.--**
> (a) A TNC is not liable under general law by reason of owning, operating, or maintaining the digital network accessed by a TNC driver or rider, or by being the TNC affiliated with a TNC driver, for harm to persons or property which results or arises out of the use, operation, or possession of a motor vehicle operating as a TNC vehicle while the driver is logged on to the digital network if:
> 1. There is no negligence under this section or criminal wrongdoing under the federal or Florida criminal code on the part of the TNC;
> 2. The TNC has fulfilled all of its obligations under this section with respect to the TNC driver; and

> 3. The TNC is not the owner or bailee of the motor vehicle that caused harm to persons or property.

§ 627.748(18), Fla. Stat.

Here, also, Plaintiff fails to allege the relationship between Uber and the independent TNC driver is enough to trigger employment or agency. Thus, even under the common law, the Third District concluded that Uber's connection to drivers was limited:

> Uber drivers like McGillis are not employees for purposes of reemployment assistance. . . . the parties' actual practice reflects the written contract. As the Department here found, "the central issue is the act of being available to accept requests" and "[t]his control is entirely in the driver's hands." Drivers supply their own vehicles—the most essential equipment for the work—and control whether, when, where, with whom, and how to accept and perform trip requests. Drivers are permitted to work at their own discretion, and Uber provides no direct supervision. Further, Uber does not prohibit drivers from working for its direct competitors. Accordingly, we agree with the Department's assessment that, [a]s a matter of common sense, it is hard to imagine many employers who would grant this level of autonomy to employees permitting work whenever the employee has a whim to work, demanding no particular work be done at all even if customers will go unserved, permitting just about any manner of customer interaction, permitting drivers to offer their own unfettered assessments of customers, engaging in no direct supervision, requiring only the most minimal conformity in the basic instrumentality of the job (the car), and permitting work for direct competitors.
> .. . .

> And even though Uber's principal business is to provide transportation, this factor alone is not dispositive.

McGillis v. Dep't of Econ. Opportunity, 210 So. 3d 220, 225–26 (Fla. 3d DCA 2017).

While McGillis addresses unemployment compensation, it is instructive in assessing Uber's relationship to the first driver. Here, the facts Plaintiffs alleged – they connected with the driver, the driver accepted the ride, and they departed to the destination—do not show Uber had any supervisory or active involvement in the driver's activity. The Uber app, as Appellants allege, is the only connection to Plaintiffs (which they used with unspecified "assistance"), but it only provides the means for contacting the TNC driver. Neither a cell phone provider nor a credit card company could be similarly ensnared in the tort liability net plaintiffs create; Uber is similarly without sufficient ties here.

Plaintiffs rely upon the driver making the decision to accept the first ride as the basis for Uber's vicarious liability. To make the connection, earlier in the pleading Plaintiffs allege that "Uber hired the driver and authorized the driver to operate a motor vehicle under its brand, for the purposes of transporting passengers for the benefit

of Uber, with the customer paying money directly to Uber." (R53¶9; R293 ¶9). Plaintiffs also allege that Uber "operates a mobile ride-sharing app" that "allows customers to find a driver to pick them up and take them to the destination of their choice." (R53, ¶7,8; R293 ¶7,8). The App thus connects driver and rider, but does not operate the vehicle or control the driver—mutual choice occurs when the app matches them.

Further, Plaintiffs pled that "the driver was operating on behalf of Uber *at the time of the accident*, using the Uber application to obtain riders" even though they explain that it was the "18 year old driver", not the driver of the first ride, that was driving at the time of the accident. (R59 ¶ 42, R299 ¶ 42; compare R56 at ¶¶26-28, R296 ¶¶26-28 (alleging Plaintiffs "took a ride" with the "eighteen year old", not using the Uber app)). Plaintiffs' pleadings do not reconcile these two contradictory facts. There also is no fact alleging Uber (or the defendant TNC driver) had any connection to *the second ride*, which was the ride where the Plaintiffs were injured.

This limited connection is also shown by the harms alleged here. Appellants contend events after the ride are attributable to Uber, through the independent TNC driver, based solely on the

rideshare platform. Yet neither Uber nor the driver have anything to do with subsequent events, and the rider selects the destination. But even if there were something the driver did upon arrival (which, based on their allegations, can only be the act of dropping off Appellants), there is no allegation that Uber had any control over that act or anything beyond connecting driver and rider via the app for a ride. Uber was not present at or involved in any way with the trip which resulted in harm to the Plaintiffs.

Accordingly, any claim to vicarious liability, where neither Uber nor the driver have connection to the events harming Plaintiff, was correctly dismissed.

2. There is no duty – the danger was created independently by a third party.

Here, as the pleadings show, the cause of harm was reckless driving by a third party with no connection to Uber, who did the driving at some undefined time after the first ride ended. Under Florida law, that pleading defeats relief against Uber and fails to state a cause of action, because there is no duty to prevent a third party from harming the plaintiff:

> Generally, a person's duty does not extend to preventing a third party from causing physical harm to another. . . .

> .here are two exceptions to this general rule. . . . The first is the "special relationship" exception, which is inapplicable here. . . . . In the absence of a special relationship between the plaintiff and defendant, a duty to protect the plaintiff from third-party conduct will arise if the defendant is in actual or constructive control of: (1) the instrumentality of the harm; (2) the premises upon which the tort is committed; or (3) the person who committed the tort. . . . .

Waves of Hialeah, Inc. v. Machado, 300 So. 3d 739, 743 (Fla. 3d DCA 2020) (citations omitted).

In Florida, there is no duty to prevent—and no liability for—a third party's misconduct without a special relationship. See Grieco v. Daiho Sangyo, Inc., 344 So. 3d 11, 25 (Fla. 4th DCA 2022). However, that "special relationship" is not present here, and Plaintiff pled no facts to support one:

> an exception to that general rule can arise when there is a special relationship between the defendant and the person whose behavior needs to be controlled or the person who is a foreseeable victim of that conduct. . . . . **Implicit in the creation of that exception, however, is the recognition that the person on whom the duty is to be imposed has the ability or the right to control the third party's behavior.** Restatement §§ 316–319. "Thus, in the absence of a relationship involving such control, the exception to the general rule, that there is no duty to control the conduct of a third party for the protection of others, should not be applicable."

Boynton v. Burglass, 590 So. 2d 446, 448 (Fla. 3d DCA 1991).

Further examination reveals Plaintiffs did not plead facts supporting a special relationship to them *at the time of the tort*. Uber does not have a special relationship with the undifferentiated group of people who might at some point use its rider application; the rider app creates only a specific transactional relationship governed by contract, not custody or a special relationship. See Knight v. Merhige, 133 So. 3d 1140, 1145 (Fla. 4th DCA 2014)(rejecting special relationship, and explaining that 'These "relationships are protective by nature, requiring the defendant to guard his charge against harm from others.').

Imposing such a duty also requires special control related to the incident, which is absent here – Uber did not control the premises (the second car), the tortfeasor (the "18 year old driver"), or the instrumentality (his car) that caused injury. Daly v. Denny's, Inc., 694 So. 2d 775, 777 (Fla. 4th DCA 1997)("Since Capri did not own the weapon that injured the plaintiff, the tortious incident did not take place on Capri's property, and Capri had no connection with the tort-feasors, none of the above exceptions apply to the case at bar."). Any relationship between Uber and Plaintiffs as it relates to the ride they obtained from the first driver ended with that ride. No one used

Uber's platform to connect with a second TNC driver from the beach, and there is no duty regarding the *destination. Even* the first ride cannot be controlled in any manner—even assuming arguendo Uber had some relevant duty as it relates to the first driver.

3. There is no duty – the harm is outside the scope of the acts at issue

a. There is no dispute that the riders were brought safely to their destination. Nothing happened on the ride.

Plaintiffs' theme of a "zone of danger" created by the first ride fails as a matter of Florida law. As to duty, it is not enough to allege that because Plaintiffs would have been "at home" rather than outside the events occurring long after the ride ended must be tied to Uber. "The fact that harm may occur does not automatically create a legal duty." Aircraft Logistics, Inc. v. H.E. Sutton Forwarding Co., LLC, 1 So. 3d 309, 311 (Fla. 3d DCA 2009).

Under Florida law, there must be some objectively reasonable connection to the danger (not just the risk of being out in the world), which is absent here:

> The question is whether it was *objectively* reasonable to expect the danger causing Saunders's injury, not whether it was within the realm of any conceivable possibility.

Saunders v. Baseball Factory, Inc., 361 So. 3d 365, 371 (Fla. 4th DCA 2023).

Here, the trial court correctly rejected Plaintiffs' contention that the mere fact of being out of the house at night created a duty to prevent harm. That is exactly the "realm of conceivable possibility" that this Court rejected as a basis for liability in Saunders. Indeed, in Saunders, the Plaintiff claimed that he was entitled to protection from an unruly player's assault during a contentious sporting event—far closer than the possibility of a subsequent, dangerous ride home alleged here—and this Court said that was not enough. See id. Here, likewise, the harm is too far to impose a duty to prevent it, and the trial court correctly dismissed.

Further, Uber's only connection (the first ride, which occurred without incident), shows that any "zone of risk" ended before the incident. For example, in the Downs case, Plaintiff sued the dredger for injuries incurred from rocks in the water when he dived in, and the Third District explained:

> In light of the scope of the responsibilities DERM charged Coastal Systems, Coastal Systems **could not have foreseen all of the potential hazards posed for**

> **swimmers**. Downs thus cannot recover against Coastal Systems based upon a common law tort duty.

Downs v. Coastal Sys. Intern., Inc., 972 So. 2d 258, 261 (Fla. 3d DCA 2008). Here, Plaintiffs sought to impose liability for any possible harm arising after transport out of the house that night, and the trial court correctly concluded that was too much under well-settled Florida law.

b. Similarly, any malfeasance related to "screening" is beyond the scope of Uber's control. The driver's decision to take on a rider is independent, and in his own interest.

The rule regarding duty addresses the connection to the Plaintiff's specific injury—here, the reckless driving of a subsequent third party, on a different ride that happened well after the riders departed the ride arranged via the Uber app:

> to determine whether the risk of injury to a plaintiff is foreseeable under the concept of duty, courts must look at whether it was objectively reasonable to expect the specific danger causing the plaintiff's injury, not simply whether it was within the realm of any conceivable possibility." *Grieco v. Daiho Sangyo, Inc.*, 344 So. 3d 11, 23 (Fla. 4th DCA 2022). A legal duty does not exist merely because the harm in question was foreseeable—instead, the defendant's conduct must "create" the risk. *Aguila v. Hilton, Inc.*, 878 So. 2d 392, 396 (Fla. 1st DCA 2004). In other words, a duty requires one to be in a position to "control the risk.

Saunders., 361 So. 3d at 365.

Similarly, in Benitez, the Third District concluded there was no duty when the shipment Defendant unloaded injured the plaintiff while in the recipient's warehouse:

> once Lawson placed the shipment onto PMYY's forklift, PMYY became the responsible party. At that point, the shipment, and the duty to implement safety precautions, was in PMYY's sole control, not Lawson's. Leon's record testimony indicates that he strapped the load to the forklift, and then drove the forklift some distance to park it in the warehouse. The plaintiff Benitez's record testimony is contradictory, but in any event, **the record shows that Benitez proceeded to unload the shipment by himself, in disregard of any lack of straps or assistance. Any foreseeable "zone of risk" surrounding the forklift and shipment was in PMYY's sole control once the shipment was delivered**.

Benitez v. Lawson Indus., Inc., 367 So. 3d 600, 603–04 (Fla. 3d DCA 2023) (emphasis added). Here, once Appellants were dropped off, any duty ended since any control or duty ceased with the ride. Uber had no control over events at the beach, other people present, or the second ride. As in Benitez, the Appellants' claim must fail.

c. Appellant's cases do not apply, based on the cases' own language.

The Hewitt case upon which Appellants heavily rely involved Avis, the owner of the vehicle that injured the plaintiff, not a third party as here:

> Because of the **combination of special circumstances that exist in the case at bar,** *i.e.,* the high number of thefts at Avis's downtown **facility during the short span of time preceding the accident**; the general access its employees had to the vehicles' keys; **the absence of any safeguards** by management against theft; management's **failure to take prompt action despite its awareness that its employees were involved in criminal activity**; its failure to promptly report vehicle thefts to law enforcement; and the knowledge that Avis had, or should have had, of the harm that often occurs from the careless operation by thieves of stolen vehicles, we conclude the question whether the defendant's conduct created a foreseeable zone of risk, giving rise to a duty to lessen the risk by taking precautions to protect others from such risk, is one reserved for the fact finder.
>
> We conclude, for the same reasons, that although plaintiff's injuries were the immediate result of an intervening criminal act, the fact finder must also resolve the question whether such act broke the causative chain between Avis's purported negligence and plaintiff's injuries.

Hewitt v. Avis Rent-A-Car Sys., Inc., 912 So. 2d 682, 686 (Fla. 1st DCA 2005) (emphasis added).

Consequently, the Hewitt case turned upon the "special circumstances" described, including defendant Avis' ownership of the car and control of the facility from which it was stolen, along with its notice that its employees were in league with criminals to steal cars. Here, there is neither control nor knowledge that can be analogized to Avis' in relation to the harm that occurred here on the second ride.

If there were doubt about the premise of the Hewitt holding, the opinion makes clear what it addressed:

> the entry of summary judgment in her personal injury action for damages brought against Avis Rent–A–Car System, Inc., **the owner of a stolen automobile** which, while operated by a thief during a high-speed chase, collided with the vehicle plaintiff occupied as a passenger.

Hewitt v. Avis Rent-A-Car Sys., Inc., 912 So. 2d 682, 683 (Fla. 1st DCA 2005).

This Court also explained the limit to Hewitt's holding in the Demelus case, where this Court rejected holding a car dealership liable for car crashes caused by thieves who robbed those cars from the King Motor dealership in Broward:

> Furthermore, the "special circumstances" that existed in *Hewitt* simply are not present here. Although King Motor previously experienced vehicle theft, it was not nearly as rampant as in *Hewitt.* In *Hewitt,* Avis experienced thirty-seven thefts within one-and-a-half years, whereas King Motor experienced thirty-six thefts over a six-year period. More importantly, none of the prior vehicle thefts occurred in the same manner as the thefts in this incident—by breaking into the showroom and its offices and by stealing keys to the vehicles. Unlike in *Hewitt,* King Motor employees did not have "general access" to the vehicles, as there were specific key security policies in place. Furthermore, there were multiple safeguards against nighttime theft, including having a security guard, locking the showrooms and offices where the keys were kept, locking and chaining the gates to the property and obstructing vehicular egress through the placement of

> blocker vehicles. Unlike in *Hewitt,* the record does not suggest undue delay in reporting the thefts, nor were King Motor's employees involved in the theft the night of the accident that injured Demelus. Therefore, we find Demelus's reliance on the negligent access to a vehicle theory to be unpersuasive.

Demelus v. King Motor Co. of Fort Lauderdale, 24 So. 3d 759, 763 (Fla. 4th DCA 2009).

As this Court explained – and as relevant here regarding Appellants' suggestion that merely taking a ride with a TNC driver via Uber's platform earlier in the night (i.e., the plaintiffs leaving the house at all) triggered liability:

> King Motor's security practices did not create a risk of harm, let alone an unreasonable risk of harm. Second, to the extent that King Motor's security practices were deficient, such a deficiency does not constitute an affirmative act under the facts of the case. Third, King Motor's acts did not create a foreseeable opportunity for third-party criminal conduct.

Demelus v. King Motor Co. of Fort Lauderdale, 24 So. 3d 759, 764–65 (Fla. 4th DCA 2009). Here, as in Demelus, there was no connection to the "risk" that caused Plaintiff's harm since the ride ended well before the incident and subsequent events triggered the Plaintiff's injury, not any risk caused by Uber.

Similarly, the Zigman case involved, essentially, a breach in an undertaken duty. In Zigman, involving medical malpractice, the Fourth District concluded that it was not relevant that the patient was gravely injured, because the doctor's endeavors at surgery also facilitated his injury:

> The automobile accident left Zigman in immediate and extremely real danger of death as a result of a severe insult to his heart and cardiovascular system. Indeed, the impact was of such a magnitude that his descending aorta ripped at a point proximate to his heart. This record leaves not a trace of doubt that but for the fortuitous formation of a blood clot or hematoma at the site of Zigman's transected aorta, he would have bled to death prior to medical intervention. **However, in spite of numerous injuries in addition to the torn aorta, Zigman survived the accident and, moribund, he reached Dr. Cline's medical care**.
> **Dr. Cline undertook the task of repairing Zigman's aorta pursuant to a "clamp and sew" technique. The Zigmans asserted in the trial court, *inter alia,* that Dr. Cline's approach to the surgical problem was incorrect and that a resultant extensive period of interrupted blood supply to his spinal cord produced a profound paralysis** reducing him to a state of virtually total inability to function.

Zigman v. Cline, 664 So. 2d 968, 968–69 (Fla. 4th DCA 1995) (emphasis added).

Close study reveals the Zigman case fails to support Appellants here. The Zigman case thus involved someone *directly involved in the*

Plaintiff's injury (the doctor who treated him), unlike here where the injury did not exist and had no connection to Uber's activity (or the separate, earlier ride with the TNC driver that occurred without incident):

> In this case Zigman focused upon Dr. Cline's alleged mistake in choosing to operate using a "clamp and sew" technique rather than the "femero-femoral bypass method" or the "Gott shunt method," surgical methodologies which may provide the physician with more time to perform the time-sensitive repair procedure. In addition to the asserted failure to choose the best surgical alternative, Zigman urges that Dr. Cline negligently performed the operation by placing the clamp too close to the wound in the aorta, with a resulting need to switch to a different procedure and a consequent increase of the time when the blood supply to the spinal cord was interrupted. The insufficiency of blood flow, Zigman contends, was the proximate cause of the paralysis.
> Dr. Cline promoted the theory, however, that Zigman was destined to be paralyzed from the moment he miraculously emerged alive from the car accident—that the severe and complicated circumstances originating in his injuries, together with the essential surgical procedure to save his life, rendered him paraplegic. **Although Dr. Cline's experts testified that Zigman's condition, wholly the product of the accident, ordained his paraplegia, the surgery was another factor in the result. Without the operation, however, the accident would have left Zigman not a paraplegic but dead.**
> **Under any view of the case, it cannot be denied that the jury heard evidence of more than one cause of the plaintiff's injuries**.

Zigman v. Cline, 664 So. 2d 968, 970 (Fla. 4th DCA 1995)

However, even if these are allowed in the alternative, there is still no causation, since the cause of the injury and death here was separated: a) by person (a third party stranger to Uber and the plaintiff); b) by time (at some indeterminate time when plaintiffs decided to leave the beach); c) by place (occurring on a highway, not the beach where they directed the first ride end); and d) by nature (reckless driving by a third party). Such cause cannot be proximate, or legal, causation as required under Florida law. The trial court did not err in dismissing.

The Brown case Appellants cite was an early Engle progeny case that does not affect the ruling below; the quoted passage in Appellants' brief, also, is from the jury instructions provided:

> The issue for your determination on plaintiff's negligence claim, is whether the failure to exercise reasonable care on the part of R.J. Reynolds Tobacco Company was a legal cause of Roger Brown's death.... Negligence is a legal cause of loss, injury or damage if it directly and in natural and continuous sequence produces or contributes substantially to producing such loss, injury or damage so that it can reasonably be said that but for the negligence the loss, injury or damage would not have occurred. In order to be regarded as a legal cause of loss, injury or damage, negligence need not be the only cause. Negligence may be a legal cause of loss even though it operates in combination with some other cause, if the other cause occurs at the same time as the negligence and if the negligence contributes substantially to producing the loss.

R.J. Reynolds Tobacco Co. v. Brown, 70 So. 3d 707, 713 (Fla. 4th DCA 2011).

But this discussion is not instructive here because the Brown case's holding involved the preclusive effects of the Engle jury and the requirements for post-Engle proof:

> We hold that to prevail in the tobacco cases post-*Engle,* plaintiffs must prove more than mere class membership and damages. Like *Martin,* and in accordance with *Engle III*, the *Engle* findings preclusively establish the conduct elements of the strict liability and negligence claims as pled in this case. Those elements are not subject to relitigation. Nevertheless, the remaining elements of the underlying claims, *i.e.* legal causation and damages, must be proven in the second phase of trial. In so holding, we restate our approval of the trial court's method of conducting the trial in two phases. In the first phase, the trial court properly gave an instruction on legal causation as it pertained to addiction. The jury determined Mr. Brown's addiction to RJR cigarettes containing nicotine was a legal cause of his death, placing Mr. Brown in the *Engle* class. In the second phase, the trial court gave an instruction on legal causation, but this time as it pertained to the negligence and strict liability claims.

Brown, 70 So. 3d at 715.

Appellants' McCain case turned on the nature of a power company and electricity, and further, involved injury arising from FPL's wire, not (as here) a third party's conduct:

we believe the district court below erred in that it confused the duty and proximate causation elements, resulting in a mistaken assumption that Florida Power's duty was to foresee the specific sequence of events that led to McCain's injury, in light of the precautionary measures the company already had taken. .. . . This approach in effect allowed the duty element to subsume the question of proximate causation, with the result that the district court improperly attempted to resolve on appeal a factual question that should have been left with the jury. *As to duty,* the proper inquiry for the reviewing appellate court is whether the defendant's conduct created a foreseeable zone of risk, *not* whether the defendant could foresee the specific injury that actually occurred.

Here, there can be no question but that Florida Power had the ability to foresee a zone of risk. **By its very nature, power-generating equipment creates a zone of risk that encompasses all persons who foreseeably may come in contact with that equipment. The extensive precautionary measures taken by Florida Power show that it understood or should have understood the extent of the risk involved**. The very fact that Florida Power marked the property for McCain itself recognizes that McCain would be within a zone of risk while operating the trencher.

While it is true that power companies are not insurers, they nevertheless must shoulder a greater-than-usual duty of care in proportion to the greater-than-usual zone of risk associated with the business enterprise they have undertaken. . . . **Electricity has unquestioned power to kill or maim. This is the precise reason the duty imposed upon power companies is a heavy one, because the risk defines the duty**. . . . Thus, if there is any general and foreseeable risk of injury through the transmission of electricity, the courts are not free to relieve the power company of this duty.

McCain v. Florida Power Corp., 593 So. 2d 500, 504 (Fla. 1992) (emphasis added).

Thus, in McCain it was FPL's own equipment and actions (buried lines, transmitting electricity) that harmed plaintiff, and the McCain court concluded FPL had a duty even though it was not involved in the digging itself. Here, Uber had no unique control over the instrumentality of the harm—a different car, a different driver, a different time, and a crime (reckless driving). None of those is analogous to FPL laying power lines a construction worker trips upon.

Upon review, Appellants' cases do not demonstrate the trial court erred—its conclusion is consistent with Florida law and the rules applied to the facts of those cases. The trial court did not err.

II. THE TRIAL COURT CORRECTLY CONCLUDED THAT THERE COULD BE NO CAUSATION AS A MATTER OF LAW.

A. The standard of review is de novo.

On appeal after dismissal, "review is de novo". Casserly v. City of Delray Beach, 228 So. 3d 135, 136 (Fla. 4th DCA 2017).

B. There was no allegation that could support proximate cause, as a matter of law.

1. The cause was not connected enough to be "proximate" since it was unrelated to the ride or the Uber app –neither were involved in the drive or the crash at issue here.

Uber had no tie sufficient to link it to causing the deaths or injuries that arose when the person driving Plaintiff's decedents (someone's cousin) drove them recklessly away from the beach. Even the authority Appellants cite excludes extending causation here, since the decision-making (by both decedent and the driver who killed them) and resulting acts were so far out of Uber's control or consideration:

> an injury caused by a freakish and improbable chain of events would not be "proximate" precisely because it is unquestionably unforeseeable, even where the injury may have arisen from a zone of risk. The law does not impose liability for freak injuries that were utterly unpredictable in light of common human experience. Thus, as the *Restatement (Second) of Torts* has noted, a trial court has discretion to remove the issue from the jury if, "after the

> event and looking back from the harm to the actor's negligent conduct, **it appears to the court highly extraordinary that [the conduct] should have brought about the harm**." *Restatement (Second) of Torts* § 435(2) (1965).

McCain v. Florida Power Corp., 593 So. 2d 500, 503–04 (Fla. 1992).

Here, the conduct that brought about the harm is detached and distant from Uber, whose only tie is the ride-sharing app for the first ride that ended without incident. Uber had no role in the second driver's criminal activity of reckless driving, or in any events occurring after the arrival at the beach. The causation here is not legally proximate, and the trial court's dismissal should be affirmed.

2. The intervening acts of third parties broke any chain of causation.

"[P]roximate cause is not always a jury question. Courts may resolve this issue as a matter of law in certain cases such as those involving intervening negligence" and "Under the doctrine of intervening negligence, the original negligence is not regarded as the 'proximate cause' of the injury, even though the injury might not have occurred but for the original negligence, **if an independent efficient cause intervenes between the negligence and the injury and the original negligence does not directly contribute to the force or**

effectiveness of the intervening cause." Grieco v. Daiho Sangyo, Inc., 344 So. 3d 11, 23 (Fla. 4th DCA 2022) (emphasis added). In the Grieco case, the plaintiff misused a product and ignored a safety measure built into the product, making her conduct the cause of the harm. Here, someone else's acts, too, caused the harm, not Uber or its app.

Under Florida law, a third party's misconduct breaks the chain of causation. For example, in Courtney, this Court rejected the Plaintiff's claim that the gas station was liable for selling gasoline that was later ignited (rather than used as fuel) and harmed the plaintiff, stating, "if Joe Falco's intentional ignition of the gasoline was not a reasonably foreseeable consequence of the sale, Joe's conduct was an efficient, independent intervening cause which eliminated the defendant's act as the proximate cause of the injury." Courtney v. Am. Oil Co., 220 So. 2d 675, 678 (Fla. 4th DCA 1968).

Here, similarly, the reckless driving of a second driver at some time after the first ride ended breaks any connection to the harm caused to Plaintiffs.

3. The lack of proximity defeats causation.

a. Remote causation is not proximate causation: Time, space, and other connectors are absent – everything happened via an entirely new, and independent, sequence of events.

While it can be said that needing a ride home is what facilitated Plaintiff's decedents to take the ride with the person who killed them via his reckless driving, that is not enough for proximate cause. Merely being somewhere is not enough to trigger the chain of causation. See Williams v. Davis, 974 So. 2d 1052, 1056 (Fla. 2007) (explaining that as to causation "there must be a reasonably close causal connection between the nonconforming conduct and the resulting injury to the claimant") (citations and quotations removed).

The only foreseeable result from the events alleged in the events happened without incident (i.e., using Uber's app to connect with TNC driver Naimi for transportation). The ride ended with the riders departing the vehicle at the designated designation. There was no negligence from Uber here, but even if there was, the trial court correctly dismissed because "[t]he law is well settled in this state that a remote condition or conduct which furnishes only the occasion for someone else's supervening negligence is not a proximate cause of

the result of the subsequent negligence." Matthews v. Williford, 318 So. 2d 480, 481 (Fla. 2d DCA 1975)

Neither the driver, nor the app (or any conceivable Uber instrumentality) played a role in events occurring at the destination and subsequent to leaving the first car. Indeed, the destination is independent from the ride and the TNC driver—the rider selects the destination, not Uber. Likewise, the rider selects the TNC driver, not Uber. Then, following that, what the rider does at their destination is also outside Uber's control.

For example, in National Airlines v Edwards, a passenger on a hijacked plane was taken to Cuba, where food they ate injured them, and the Florida Supreme Court explained that the food in Cuba was not related to the hijacking:

> Assuming all the facts alleged in the complaint to be true, the alleged injuries for which damages were claimed and **which resulted from the active, efficient, intervening cause of consumption of Cuban food and beverages were too remote to be recoverable, and, accordingly, the complaint was properly dismissed by the trial court as the damages plead were insufficient as a matter of law**.

Nat'l Airlines, Inc. v. Edwards, 336 So. 2d 545, 547 (Fla. 1976). Here, similarly, the actions of the third party after the ride ended – on a

different ride, with a different driver, in a different place and a while after (along with that second driver's consumption of intoxicating substances) are too remote to warrant causation as a matter of law.

In another case, the plaintiff claimed that because the defendant blocked the sidewalk with a boat, she left the sidewalk and was struck by a passing truck; the appeals court held there was no causation as a matter of law, stating "we find that the trial court did not commit error since, as a matter of law, the conduct of Cruise Boat Company, Inc. in permitting the parking condition was not a proximate cause of the injury complained of by the plaintiffs." Pope v. Cruise Boat Co., Inc., 380 So. 2d 1151, 1153 (Fla. 3d DCA 1980).

There was no error in dismissing for lack of proximate cause.

b. Appellant's cases are not applicable here, as they involve connected and foreseeable chains of events.

In contrast, the case Appellants cite relates to a broken traffic signal, for which FPL was foreseeably liable – unlike here, where the events subsequent to the ride are both unforeseeable and outside Uber's control:

> In denying FPL's motion for a directed verdict, the trial court correctly reviewed the record evidence and determined that the accident was an entirely foreseeable consequence of FPL's negligence in creating a dangerous

> condition of deactivating the traffic signal. . . . In initially affirming the trial court's decision, the original district court panel determined that the accident in the instant matter was not an "unpredictable event" and presented a "classic jury issue . . . . We agree with this analysis**. If an intersection is controlled by a traffic signal, it is usually because the intersection is heavily traveled, has line of sight obstructions, or has some other physical characteristic that renders stop signs or other traffic control devices impractical. Thus, in the course of human events, it is certainly foreseeable that drivers approaching an intersection with an inoperable traffic light will fail to stop, despite the traffic law requiring drivers to treat the inoperable signal as a four-way sto**p. *See* § 316.1235, Fla. Stat. (2003). This is especially true in a case such as this in which the drivers approached an inoperable traffic signal at a busy intersection, during the rush hour, in inclement weather, and where traffic proceeded in one direction in an almost unbroken band.

Goldberg v. Florida Power & Light Co., 899 So. 2d 1105, 1118 (Fla. 2005) (emphasis added). Here, Uber had no role in the second trip during which the subject incident occurred.

Similarly, Appellants' claim to "concurrent cause" misstates the concept, which relates to causes that come together to cause *the same injury*. Here, the injury is distinct, since it involved: a) a later trip; b) with no tie to Uber or the Uber app; c) with a third party driving it; d) the third party (and others) taking substances and falling under their influence; e) the third party choosing to drive and

bring Plaintiff's decedent along for that ride; and e) a third party recklessly driving the vehicle involved in the incident.

This important difference is evident in the Cooper case, which explains that a third party causing the injury is not a bar where the Defendant's conduct contributes to the specific injury—Cooper involved an insurer's failure to provide proper coverage for an incident, and the court explained that the insurer was also liable for damage the third party caused because:

> **It was the purpose and object of the contract to obviate or protect the plaintiff from exactly that which occurred when he went unprotected**, with foreseeability and likelihood thereof, and the basis therefor, sufficiently alleged to be known to exist. On the allegations of the amended complaint it could not be held that the facts disclosed showed absence of proximate cause as a matter of law. . . . **'Foreseeable acts of third persons are not superseding causes which insulate a prior tort feasor from liability as a matter of law, where such acts combine with the tortfeasor's negligence to bring about harm to an innocent party; they are merely concurrent causes.'** The same principle as to proximate causation is applicable under the count on breach of contract, asserted by the plaintiff in the capacity of a third party beneficiary. . . . Distinguishable on the facts is Nicholas v. Miami Burglar Alarm Co., where the degree of foreseeability or likelihood of loss resulting from default was substantially inferior to that alleged to exist and to be known to exist in the instant case. In our view the second amended complaint stated a cause of action, and the defendants' motion to dismiss should have been denied.

Cooper v. IBI Sec. Serv. of Florida, Inc., 281 So. 2d 524, 526 (Fla. 3d DCA 1973) (emphasis added) (internal citations omitted).

Likewise, the limitation of Hewitt discussed earlier is applicable to Appellant's attempt to use it regarding causation, since there was active participation (i.e., owning the car and leaving it accessible) in the injury that the car Avis owned caused to Plaintiff:

> Although it was not foreseeable that the particular automobile involved in the accident would be stolen and cause injury, such facts do not break the causative chain. "[A] foreseeable zone of risk means conduct that foreseeably creates a broader zone of risk that poses a general threat of harm to others, rather than the extent to which such conduct may foreseeably cause the *specific* injury that actually occurred." *Hernandez v. Tallahassee Med. Ctr., Inc.,* 896 So.2d 839, 841 (Fla. 1st DCA), *rev. denied,* 905 So.2d 125 (Fla.2005). In other words, **if the type of harm has in the past so frequently resulted from the same type of negligence, then " 'in the field of human experience' the same *type* of result may be expected again."** *Pinkerton–Hays Lumber Co. v. Pope,* 127 So.2d 441, 443 (Fla.1961). The rule is moreover clear that foreseeability, as it relates to proximate cause, is generally left to the trier of fact, and if reasonable persons could differ as to whether the facts establish proximate cause, then the resolution of the issue must be left to the fact finder. *Deese v. McKinnonville Hunting Club, Inc.,* 874 So.2d 1282, 1287 (Fla. 1st DCA 2004).

Hewitt v. Avis Rent-A-Car Sys., Inc., 912 So. 2d 682, 686 (Fla. 1st DCA 2005) (emphasis added).

Here, the connection differs because Uber did not own or have any connection to the third party or his car involved in the later trip. In contrast, in Hewitt Avis owned the car and had custody over it—thus taking charge of the condition that might have caused the robbery.

Consequently, there is no basis in these cases for reversal. This Court should affirm.

CONCLUSION

The trial court did not err. There was no duty to breach—Uber had no duty to prevent the third-party criminal or events occurring on the second ride; the first ride occurred without incident. Uber's connection to the second ride is also too distant to support proximate cause—time, means, and a third party's criminal acts intervened to cause the Plaintiff's harm well after Uber's role (if relevant at all) ended. This Court should affirm.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing (Appellee's Answer Brief) has been furnished by E-Mail (via the Florida Courts portal) this 10th day of January 2024 to the following:

Peter Ticktin, Esq.
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CERTIFICATE OF COMPLIANCE WITH FONT AND WORD COUNT REQUIREMENTS

Pursuant to Florida Rule of Appellate Procedure 9.045, I HEREBY CERTIFY that this Answer Brief complies with the applicable font and word count limit requirements in Florida Rule of Appellate Procedure 9.210 (13,000 words or less; Bookman Old Style). The word count was done via Microsoft Word and excludes words in a caption, cover page, table of contents, table of citations, certificate of compliance, certificate of service, or signature block; it includes all other words, including words used in headings, footnotes, and quotations.

/s/ Jeffrey R. Geldens
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