IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

CASE NO. 3D01-121

ALAMO RENT-A-CAR, INC.,

APPELLANT,

VS.

GERRIT DIEPERINK, INDIVIDUALLY
AND AS PERSONAL REPRESENTATIVE OF
THE ESTATE OF **TOSCA DIEPERINK**,

APPELLEE.

ANSWER BRIEF OF GERRIT DIEPERINK

ON APPEAL FROM THE ELEVENTH JUDICIAL CIRCUIT,
IN AND FOR MIAMI-DADE COUNTY

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INTRODUCTION

Alamo is in the business of renting cars, usually to tourists. In the early to mid-1990s, Alamo's many tourist customers faced a specific risk: tourists in rental cars were being targeted for criminal attacks in a particular area of Dade County. Alamo knew of this risk. Indeed, police had asked Alamo to warn its customers of this very risk. Yet Alamo decided against warning its customers.

Alamo now claims that it had no duty to warn its customers of the hazard. But this Court rejected Alamo's argument in *Shurben v. Dollar Rent-A-Car*, 676 So. 2d 467 (Fla. 3d DCA 1996). Alamo has stated no basis for overturning *Shurben* or the verdict. The judgment should be affirmed.

STATEMENT OF THE CASE AND FACTS

Alamo seeks a directed verdict that under the facts of this case it had no duty. However, Alamo's brief fails to describe the facts of the case. We therefore provide a description of the evidence at trial.

THE PROBLEM: CRIMINALS TARGET TOURISTS IN RENTAL CARS IN A SPECIFIC AREA OF DADE COUNTY

At the heart of this lawsuit is an undeniable fact: in the early to mid 1990s, criminals were targeting tourists in rental cars in a particular area of Miami for criminal attacks.

The attacks on tourists were centered in the "Northside" area. (T. 351-52, 459). This is the area west of I-95, and north of State Road 112. (T. 351-52). The Florida Department of Law Enforcement's chief of investigations for Southeast Florida explained that tourists "would get lost and find themselves in that area and they would become victims." (T. 353). It was on these areas off the highways that the crimes generally took place, rather than on the highways themselves. (T. 359-60).

This Northside area had the highest incidence of tourist crimes in the three years prior to the shooting of Mrs. Dieperink, even though the area contains no tourist attractions. (T. 459, 486-87). Indeed, this area had far more tourist crimes than the Miami Airport area, even though the airport area hosts many more tourists. (T. 547-51). By one estimate, there were 83 tourist crimes per year in the Northside area, but only 17 tourist crimes per year in the much busier airport area. (*Id.*). Police records showed that 65% of all tourist crimes against Alamo customers in the City of Miami and the unincorporated areas of Dade County occurred in the small Northside area. (T. 468, 497).

But even these statistics may understate the number of tourist crimes. Most of the time, when tourists are the victims of crime, they get scared and won't stop to call the police. (T. 338). "They get in the car and go." (T. 338). So there are more tourist crimes than the statistics indicate. (T. 338).

WHY CRIMINALS TARGET TOURISTS IN RENTAL CARS

The high incidence of crimes against tourists in rental cars was not an accident. Criminals specifically targeted tourist in rental cars for several reasons.

First, criminals targeted tourists because of the belief among criminals that tourists are likely to have more money and valuables. The former director of security for Alamo explained that "Tourists would be expected to be carrying jewels, cameras and cash." (R. 1271-71). "They probably have more cash than anyone would expect would be the case. Other valuables, cameras, luggage." (T. 478-79).

Second, criminals targeted tourists because tourists are easier targets for crime. "They are just an easier mark than someone who knows the community." (T. 478-79). Alamo's own executive admitted that tourists are "potential easy marks for crimes." (R. 1322). Tourists are less likely to be familiar with their surroundings. (R. 1272).

Third, criminals perceive that they are less likely to be prosecuted if they commit crimes on tourists. (T. 582). Tourists may be less likely to come back and prosecute a case and testify against criminals. (T. 478-79).

CRIMINALS CAN EASILY IDENTIFY TOURISTS IN RENTAL CARS

There was abundant testimony that criminals can easily spot tourists in rental cars.

One of the most obvious clues that reveals that a person is a tourist in a rental car is the vehicle itself. Criminals can spot rental cars. "Because of the car, the model of the car, brand new cars. Most of the time I would say no tinted windows, and is very easy to tell." (T. 323).

At one time rental cars had identifying labels on them—special license plates and bumper stickers. In 1993, laws were passed requiring the removal of these identifying materials. (T. 360-62). However, the evidence established that this change had no effect on the ability of criminals to spot tourists. The head of security for Hertz Rent-A-Car testified that he has "never subscribed to the theory that the thief has to have a Y plate or a Z plate or a bar code on the car as to how they identify that this is a car to rob. I've never—I think privately most robbery detectives will tell you that as well." (DSR2-3).[1] Alamo's director of security was even more pointed on the subject:

> Q. Does removing the identification features on rental cars, does that warn tourist that in certain areas of Miami criminals are targeting tourists for crime?
>
> A. By removing any identification? No.

1DSR refers to Dieperink's supplemental record.

> Q. All that does is make it more difficult to distinguish the rental car as a rental, correct?
>
> A. I don't think it does for the criminal element, but for the average person, yes.

(R. 1270).

Another strong clue that the people in a vehicle are tourists is if they appear to be lost. Alamo's director of security explained that "Many times when a tourist gets into an area that they instinctively know they shouldn't be, they get what I call the deer in the headlights look about them. And street criminals spot that in an instant." (R. 1270; *see also* DSR3). The clue is even stronger if the people in the vehicle are holding up a map. (T. 362).

And a combination of the various factors makes it even more obvious that people are tourists. The FDLE chief of investigations testified that in addition to the make of the car, identifying tourists is "not real difficult if you see a man and a woman, particularly if they happen to be looking at a map." (T. 362-63). Alamo's director of security was particularly blunt: "If that automobile doesn't fit the profile of that neighborhood and if the occupants have the deer in the headlights look, they're victims." (R. 1270).

GOVERNMENTAL KNOWLEDGE OF THE PROBLEM OF CRIMINAL ATTACKS ON TOURISTS IN RENTAL CARS, AND ATTEMPTS TO ADDRESS IT

The problem of criminal attacks on tourists in rental cars attracted attention, and various governmental agencies addressed the issue. In 1993, Governor Chiles directed the Florida Department of Law Enforcement to create a task force to combat tourist robberies in Dade County. (T. 350-51). Due to the high number of tourist attacks in the Northside area, the task force focused its attention there. (T. 354).

The Dade County government also started a program to curtail attacks on tourists in the Northside area. Under the program, called Tourist Related Abatement Program (TRAP), police patrolled the two main corridors in the Northside area to look after anyone who appeared to be lost or confused, particularly tourists. (T. 388). Officers would stay near the exit ramps of State Road 112, at 27th, 22nd and 12th Avenues, "and make sure that tourists didn't inadvertently come off the road and head north on those avenues unless they wanted to." (T. 358-59).

ALAMO'S KNOWLEDGE OF THE PROBLEM OF CRIMINALS TARGETING TOURISTS IN ALAMO RENTAL CARS

Alamo was fully aware of the pattern of attacks on tourists in rental cars, and the increased risk of criminal attack faced by tourists, who comprise as much as 95

percent of Alamo's customers in Florida. (R. 1379-80).

Alamo officials attended meetings with the Miami-Dade Police at which tourist crimes were discussed. (T. 385-86, 402). As a result of those meetings, Alamo knew that criminals were targeting tourists in the Northside area. (T. 402; *see also* R. 1374-75).

Alamo was informed of the problem in other ways. The Alamo employee in charge of Miami operations was on the board of the Miami Visitors and Convention Bureau. (R. 1371-73). Alamo was the only rental car company to have a representative on the board. (*Id.*). Crimes against tourists were discussed at meetings of the Bureau. (*Id.*).

In addition to these private sources of information, Alamo knew of the danger because there was much public discussion of the problem of crimes against tourists. (R. 1268-69). It was publicized on TV and the print media that tourists were getting lost in certain areas of Miami and being victimized by criminals. (*Id.*). Alamo's director of security knew about it. (*Id.*).

Alamo had even been sued as a result of a criminal attack on a tourist in a rental car in the Northside area. On July 9, 1992, a woman named Stellas rented a car in Orlando, with the plan of returning it in Miami. (T. 474). She got lost in the Northside area, and was brutally attacked. (T. 474). She filed a lawsuit against Alamo, and the case eventually went to this Court and the Supreme Court of

Florida, on the issue of whether an intentional tortfeasor should be included in the jury's apportionment of fault. *Stellas v. Alamo*, 673 So. 2d 940 (Fla. 3d DCA 1996), *reversed,* 702 So. 2d 232 (Fla. 1997).

THE GOVERNMENT RECOMMENDS THAT ALAMO WARN ITS CUSTOMERS OF THE RISK OF CRIME IN THE NORTHSIDE AREA, BUT ALAMO IGNORES THE RECOMMENDATION

But Alamo was not simply told of the problem in general terms. Representatives of the Miami-Dade Police Department specifically recommended that Alamo warn its customers of the risk of criminal attacks in the Northside area.

A Miami-Dade Police lieutenant conducted an analysis of tourist-related crimes in Dade County, and concluded that renters were at a particularly high risk in the Northside area. (T. 384-87). The analysis revealed that most of the attacks occurred on either 22nd or 27th Avenue. (*Id.*). As a result of this analysis, he recommended that Alamo warn its customers of the risk of criminal attacks in the Northside area:

> Q . ***Did you make any recommendations to the rental car companies about cautioning renters about specific areas of Miami-Dade where criminals were targeting tourists?***
>
> A . ***Yes. It was my specific encouragement that they should caution the renters not to exit off the corridors of 22nd Avenue or Northwest 27th Avenue off of State Road 112.*** The best landmark that they could use if they were confused would be to go to the toll booth which would be just east of those two locations and ask

for directions.

(T. 386-87).

Alamo did not follow the police department's recommendation. Alamo never warned its renters that, in certain areas of Dade County, criminals were targeting tourists. (DSR5). "I don't recall that there was anything relating to specific areas." (R. 1247). "I think they just warned them of the general dangers of a large city and that type of thing, but they could not exclude specific areas." (DSR7). "We didn't tell them where not to go." (R. 1377).

¿ ¿ ¿ ¿

The facts described on the previous pages are the backdrop to the incident giving rise to the present lawsuit. Alamo had actual knowledge that criminals in a particular section of town were targeting tourists in rental cars—that is, targeting its customers, in the product which Alamo provided. The government recommended that Alamo warn its customers of the hazard, yet Alamo did nothing to warn its customers. This conscious decision by Alamo led to the tragic death of Tosca Dieperink.

THE DIEPERINKS VISIT AMERICA, AND RENT A CAR

Gerrit and Tosca Dieperink were from a small town in the Netherlands. (T. 690). Gerrit Dieperink had been to Miami once before 1996, but he was here only a

day. (T. 706). The couple had visited the United States a few times, but had never rented a car. (T. 694).

The couple flew into Tampa airport. (T. 696). On February 18, 1996, they rented a car there from Alamo. (T. 696). The car was a Chevy Corsica, Alamo's most popular rental car in 1995 and 1996. (R. 1303). The Dieperinks' plan was to rent the car in Tampa, and return it in Miami. (T. 696). The Alamo rental agreement specifically stated that the car was to be returned to Miami, and Alamo admitted that the car was supposed to be returned in Miami. (T. 699, 736).

The Dieperinks move around Miami, and get lost

At one point during their time in Dade County, the Dieperinks sought to go to a location in Northwest Miami, at 6300 N.W. 84th Avenue. (T. 707, 751). Mr. Dieperink was to go to a business meeting. (T. 710). He was going to drop his wife off at a shopping center near the location of the business meeting. (T. 710).

Mr. Dieperink took State Road 112 west. (T. 753). He was confused about the distinction between Streets and Avenues, and took the 27th Avenue exit, into the Northside area. (T. 753, 718). They drove around a while, but could not find the place that they were looking for. (T. 708-10). Mr. Dieperink then decided to ask for directions at the Shell gas station. (T. 710). The gas station was at the corner of N.W. 79th Street and 27th Avenue, in the Northside area. (T. 350).

The Shell station

The Dieperinks pulled into the gas station to ask for directions. (T. 712). Mr. Dieperink got out of the car, and his wife stayed in the front seat. (T. 712). The owner of the gas station approached him and immediately said, “You must be lost because this is not a good area.” (T. 713). The station owner later explained that crimes “very, very often” occur at his gas station. (T. 331-32).

The station owner later said that the moment he saw Mr. Dieperink, he knew that he was a tourist. (T. 326-27). “Because, first of all, he was lost. He had a map. . . . It was a white car, brand new car. They didn’t look from around here. So that’s why right away gave me the idea that they were tourists.” (T. 326-27). The station owner said that tourists who appear to be lost “very often” come to his gas station. (T. 322).

The station owner asked whether he could be of help. (T. 712). Mr. Dieperink told the station owner where they were trying to go, and the owner gave him directions. (T. 713).

An armed man then came up to Mr. Dieperink and the gas station owner. (T. 714).The station owner tried to diffuse the situation and said to the armed man, “Those are good people, let them go, they’ve done nothing wrong.” (T. 714). The station owner then gave body language indicating that Mr. Dieperink should leave.

(T. 714). Mr. Dieperink returned to the car to leave with his wife. (T. 714).

After Mr. Dieperink started the engine, the armed man went to the door on Mrs. Dieperink's side of the car. (T. 715). The armed man tried to open the car door, but the door was locked. (T. 715). The armed man then stepped back. (T. 715). Mr. Dieperink looked forward, to see in front of him before he started to drive away. (T. 715). He heard a big, deep sound of broken glass. (T. 715). His wife then said, "Gerrit, he hit me." (T. 715). He looked at his wife, and saw that she had a small hole in her chest. (T. 716). The armed man had shot her through the window. (T. 716).

Tosca Dieperink died of the gunshot wound. She was 41 years of age. (T. 737). She was survived by her husband and three teenage children. (T. 737).

The shooting was not at all foreseeable to Mr. Dieperink, and was entirely foreseeable to Alamo

A police detective confirmed that the murder of Tosca Dieperink was not a random act, but was the result of criminals targeting tourists in rental cars. The Dieperinks were singled out because "[t]hey were identified as tourists." (T. 417). The Dieperinks "appeared to be tourists and they were targeted for that reason. One of the perpetrators made it clear that they chose this car because it appeared to be a tourist car." (T. 473). A police detective testified that although the vehicle that the Dieperinks rented from Alamo did not have a tag or sticker which identified the car

as a rental car, the perpetrators were still able to identify it as a rental car. (T. 476).

Mr. Dieperink testified that he had no knowledge that tourists were being targeted by criminals in certain areas of Miami. (T. 695). He had not received any safety tips of any sort from Alamo. (T. 700). He was not warned by Alamo that criminals were targeting tourists in rental cars in a particular area of Miami. (T. 701). He learned that he was in a dangerous part of town only when the gas station owner told him that he was. (T. 756).

Mr. Dieperink testified that if Alamo had warned him that in certain areas of Miami criminals were targeting tourists in rental cars, he would not have entered that area with his wife. (T. 756). He did not intend to be in that area; his meeting was on 84th Avenue, not on 27th Avenue, where the shooting occurred. (T. 751).

THE LAWSUIT, TRIAL, AND VERDICT

Mr. Dieperink subsequently filed a lawsuit against Alamo, alleging that Alamo was negligent in failing to warn him that criminals in a particular area were targeting tourists in rental cars such as the one that Alamo provided to him. (R. 1-20). A jury found for the Plaintiffs, and awarded damages of $5,220,210. (R. 3900).

SUMMARY OF THE ARGUMENT

Alamo's argument that it did not have a duty to warn its customers of dangers off its property was rejected in *Shurben v. Alamo Dollar Rent-A-Car*, 676 So. 2d 467 (Fla. 3d DCA 1996), where this Court held that a rental car company with actual knowledge of a pattern of attacks on its customers had a duty to warn its customers of the risk. The *Shurben* holding has subsequently been affirmed by this Court.

The duty imposed by the *Shurben* opinion is firmly grounded in the "special relationship" doctrine, which provides that a defendant has a duty to warn a plaintiff where there is a special relationship between the two. In *Shurben*, as in this case, such a special relationship existed. The rental car company lent its customer a vehicle which increased the likelihood that the customer would be the victim of a violent crime. Alamo knew this, and the Dieperinks did not. Under these circumstances, Alamo had a duty to warn. The duty to warn is also supported by other legal principles: the "creation of danger" doctrine, and the zone of risk.

Requiring Alamo to warn its customers that they faced a heightened danger of criminal attack in a specific area does not constitute impermissible discrimination. There is nothing improper in warning people of a hazard in a particular area.

ARGUMENT

UNDER *SHURBEN V. DOLLAR RENT-A-CAR* AND GENERAL TORT PRINCIPLES, ALAMO HAD A DUTY TO WARN THE DIEPERINKS OF THE RISK OF CRIMINAL ATTACK THEY FACED IN A PARTICULAR AREA OF MIAMI

Alamo rented a car to the Dieperinks, knowing that the vehicle that Alamo was providing increased the Dieperinks' risk that they would be the victim of a very specific type of crime—a crime targeting people in rental cars in a certain area of Miami. A government official had recommended that Alamo warns its customers of the risk, but Alamo failed to provide the warning.

Facts very much like those of the present case have come before this Court before, and the Court held that the car rental company has a duty to warn its customers of the risk. Alamo has provided no basis for not following this precedent. The final judgment should be affirmed.

A. Affirmance is required by *Shurben*, in which this Court held that a car rental company has a duty to warn its customers of areas in which criminals are targeting tourists in rental cars

Alamo's brief relies on some basic principles of tort law to argue that it did not have a duty to warn the Dieperinks of the dangers facing them, since the shooting did not occur on Alamo's premises. Later in this brief, we will explain that Alamo is wrong. Under basic principles of tort law—including the "special relationship" test—a defendant can have a duty to warn of dangers off its premises.

Pursuant to this principle, the jury could properly impose liability upon Alamo.

But more fundamentally, this Court has already rejected Alamo's specific argument. In a case very similar to the present case, this Court has held that a car rental company has a duty to warn its customers of the risk of criminal attacks on tourists in rental cars in a specific area. The case of *Shurben v. Dollar Rent-A-Car*, 676 So. 2d 467 (Fla. 3d DCA 1996), requires that the final judgment be affirmed.

Shurben involved very similar facts. A European tourist rented a car, and while traveling in Dade County was shot. She sued the car rental company, alleging that it had a "duty to warn her that in certain areas of Miami, there was a risk of attack by criminals who targeted tourists in rental cars, and in particular, rental cars bearing the license plate designation on her rental car." 676 So. 2d at 468. The plaintiff alleged that the rental car was identifiable to criminals (through its license plate), that there had been repeated attacks on tourists in rental cars in "certain areas of Miami," that the rental company knew of the attacks, and that the rental company knew that the plaintiff was a tourist without knowledge of the crimes directed at tourists, or the license plate designation. The trial court dismissed the complaint, but this Court reversed.

This Court held that under the facts alleged, the rental car company "had a duty to warn [the customer] of foreseeable criminal conduct, particularly in light of

the superior knowledge of the car rental company." 676 So. 2d at 468. The Court explained that "Based on the knowledge it had on hand, Dollar should have realized that criminals were targeting tourist car renters in certain areas of Miami and that a reasonable rental company in possession of those facts would understand that its customers would be exposed to unreasonable risk of harm if not warned." *Id.* The Court then added a footnote: "Although we need not express an opinion on the point, it would appear that such a duty would also arise as to any out-of-town customer who the rental company should realize has no knowledge of local conditions." *Id.* n.1.

The car rental company in *Shurben* argued that "only persons who have the occupation or *control* of the premises may be subject to liability for a person's injuries caused by conditions on the property. . . . [T]he legal duty owed to [its customer], as an invitee, terminated when she left the premises." (2SR247). This is essentially the same argument that Alamo makes here: "Alamo had no duty to warn the Dieperinks about crime in an area it did not control or undertake a particular responsibility to control." (Initial brief, at 4). This Court rejected the "control" argument in *Shurben*, and that opinion is controlling precedent.[2]

2There is only one difference between the facts in *Shurben* and the facts of the present case, but it does not change the analysis. In *Shurben*, the rental car had a license plate which identified the vehicle as a rental car, while in this case there was no such license plate. But Alamo's argument is based on whether it had control

B. Affirmance is required by cases decided by this Court since *Shurben*

But *Shurben* does not stand alone in support of our position. This Court since *Shurben* has noted the *Shurben* holding, and followed its logic.

In *Sunshine Birds and Supplies v. United States Fidelity and Guaranty Co.*, 696 So. 2d 907, 911 n.7 (Fla. 3d DCA 1997), this Court noted that "Florida courts have consistently imposed a limited duty to prevent the foreseeable intentional or criminal acts of third parties." The Court then cited to *Shurben*, explaining its holding that a "rental car company had [a] duty to warn tourists about local areas of high crime of which it had knowledge."

Only last year, this Court *en banc* had the opportunity to consider a claim that relied on *Shurben*, and in the process reaffirmed the principles of *Shurben*. The case of *Poleyeff v. Seville Beach Hotel Corp.*, 782 So. 2d 422 (Fla. 3d DCA 2001), was a wrongful death action brought by the survivors of two people killed in a riptide. The defendants were an adjacent hotel and a company which rented one of the people a beach chair and umbrella.

The Court *en banc* ruled that the defendants had no duty to warn, relying on the general principle that "an entity which does not control the area or undertake a

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on the premises, not on whether the vehicle had a license plate. In any event, the evidence established that criminals could spot the Dieperinks' vehicle as a rental car, even without an identifying license plate.

particular responsibility to do so has no common law duty to warn, correct, or safeguard others from naturally occurring, even if hidden, dangers common to the waters in which they are found." 782 So. 2d at 424. However, the Court noted that a duty to warn of "conditions beyond the defendant's own premises" may arise under "special circumstances." The court cited *Shurben* as an example of these special circumstances, noting that *Shurben* concerned the "responsibility to warn its customers against using the leased vehicle itself in a high crime area." 782 So. 2d at 424 n.4.

The Court in *Poleyeff* found it significant that the harm to the plaintiff in *Shurben* resulted from the vehicle which the car rental company had provided to the plaintiff. The Court applied that principle to the facts of the *Poleyeff* case: "A similar duty might arise in the present context if, for example, [the rental company] rented a water craft for use in an area of the ocean in which it was aware that rip currents were present." *Id.* In other words, while a business has no general duty to warn its customers of hazards off the premises, the business has a duty to warn if the defendant's conduct—the rental of a car, or a water craft—exposes the customer to a risk of which the business is aware, but of which the customer has no knowledge.

The *Poleyeff* opinion, therefore, fully supports the *Shurben* opinion, and further supports affirmance of the final judgment that Alamo seeks to overturn.

Here, the Plaintiff did *not* claim that Alamo had a duty to warn of generalized hazards facing tourists. Contrary to Alamo's suggestion, our lawsuit was not based on a claim that Alamo had a duty to "warn about every place where a customer may encounter crime." (Initial brief, at 4). Rather, the heart of the lawsuit was that Alamo rented the Dieperinks a vehicle, and that vehicle increased the danger that the Dieperinks would be the victims of crime. Alamo knew that the Dieperinks faced heightened danger in a certain area, but Alamo did not warn the Dieperinks of that danger.

Alamo had a duty to warn the Dieperinks of the threat they faced as a result of driving in a certain area in the vehicle which Alamo had rented to them. The final judgment should be affirmed.[3]

C. The imposition of a duty is supported by the "special relationship" doctrine

As explained on the previous pages, the conclusion that Alamo had a duty to warn the Dieperinks is fully supported by the *Shurben* opinion and cases decided since then. Alamo nevertheless repeats its mantra that without control of the

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3Alamo also relies on *Publix Super Markets v. Jeffery*, 650 So. 2d 122 (Fla. 3d DCA 1995), but that reliance is misplaced. *Jeffery* stands for the proposition—completely irrelevant to the present case—that where "the owner of a commercial shopping center leases parts of the center to several commercial tenants, but retains the sole responsibility under the lease of maintaining the common areas . . . [,] the obligation of keeping the parking lot safe for such invitees against criminal attacks by third parties is generally imposed on the owner and not the tenant." *Id.* at 124.

premises, there can be no duty. The obvious implication of Alamo's brief is that the *Shurben* opinion—which imposed a duty without control of the premises—is inconsistent with basic principles of tort law.

This is simply not true. The imposition of a duty on Alamo to warn its customers of the increased risk they faced in certain areas as a result of renting a car is fully supported by basic tort principles, including the "special relationship" doctrine.

The Fourth District recently explained the circumstances in which an entity has the duty to prevent or warn of the misconduct of third persons. *Michael & Philip, Inc. v. Sierra*, 776 So. 2d 294 (Fla. 4th DCA 2000). The general rule under the common law is that there is no such duty. However, the courts have carved out exceptions to this general proposition. "[T]he duty to protect strangers against the tortious conduct of another can arise if, at the time of the injury, the defendant is in actual or constructive control of: (1) the instrumentality; (2) the premises on which the tort was committed; or (3) the tortfeasor." *Id.* at 297-98 (citations omitted).

The court continued: "As a further exception to the general rule of non-liability for third-party misconduct, Florida has adopted the 'special relationship test' set forth in the Restatement (Second) of Torts, Section 315." *Id.* at 297-98. That section of the Restatement provides:

> There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless: (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other which gives to the other a right to protection.

The Fourth District explained that "This test is met when there is a 'special relationship' between the defendant and the plaintiff, such that the plaintiff is entitled to protection." *Id.* at 297-98.

The Restatement provides several examples of "special relations" that give rise to a duty to aid or protect. Some relations are standard: the duty of common carriers to passengers, innkeeper to guests, possessor of land to invitees, and one with custody of another person. Restatement (Second) of Torts § 314A. But the Restatement states that "The relations listed are not intended to be exclusive, and are not necessarily the only ones in which a duty of affirmative action for the aid or comfort of another may be found." *Id.* comment b.

The Supreme Court has specifically approved the special relationship doctrine. "The special relationship doctrine creates a duty between parties, which would not exist but for the relationship." *Nova Southeastern University v. Gross*, 758 So. 2d 86, 88 (Fla. 2000). The Supreme Court was affirming the Fourth District's opinion in *Gross v. Family Services Agency*, 716 So. 2d 337 (Fla. 4th DCA 1998). In that case the Fourth District specifically noted that the

Shurben opinion was supported by the special relationship test:

> *Shurben v. Dollar Rent-A-Car*, 676 So. 2d 467 (Fla. 3d DCA 1996), demonstrates that Florida courts have been especially sensitive in finding the requisite special relationship to exist. There, the Third District found that the plaintiff, a British tourist who was shot while vacationing in Miami, stated a cause of action against a car rental company for failing to warn her about the risk of crime in certain areas. The plaintiff's claim was based on allegations that Dollar Rent-A-Car knew that criminals were targeting tourist car renters in certain areas of Miami and that a reasonable rental car company in possession of those facts would understand that its customers would be exposed to unreasonable risk of harm if not warned.

716 So. 2d at 339.

Accordingly, the duty imposed by this Court in *Shurben* is entirely supported by basic principles of tort law, and in particular the special relationship doctrine. *Shurben*—and the judgment against Alamo—rest on a sturdy foundation.

D. Other tort principles support the imposition of a duty on Alamo

There are other tort principles which support the imposition of a duty on Alamo to warn its customers of the dangers of a tourist driving a rental car in certain areas.

Creation of danger. Under a draft of the Restatement (Third) of Torts § 18(a), "A defendant whose conduct creates a danger can fail to exercise reasonable care by failing to warn of the danger if the defendant knows or has reason to know

of that danger and that those encountering the danger will be unaware of it, and if a warning might be effective in reducing the possibility of harm." The Reporter's Notes to this section relies on the *Shurben* decision. *See also* Restatement (Second) of Torts § 302B. Here, Alamo created the danger which resulted in the death of Mrs. Dieperink. Since Alamo indisputably knew of the danger, and the Dieperinks did not, Alamo had a duty to warn of the risk.

Zone of risk. The zone of risk doctrine also supports the duty. Under this doctrine, "'Where a defendant's conduct creates a *foreseeable zone of risk*, the law generally will recognize a duty placed upon defendant either to lessen the risk or see that sufficient precautions are taken to protect others from the harm that the risk poses.' Thus, as the risk grows greater, so does the duty, because the risk to be perceived defines the duty that must be undertaken." *McCain v. Florida Power Corp.*, 593 So. 2d 500, 503 (Fla. 1992) (citations omitted). Courts have applied the zone of risk standard to determine whether a landowner has a duty off the premises. "Although a landowner is most commonly liable for injuries that occur on its premises, a landowner may be liable for a dangerous condition that results in injury off its premises. Generally, where a landowner creates a foreseeable zone of risk, a landowner has a duty either to lessen the risk or take sufficient precautions to protect invitees from the harm the risk poses." *Gunlock v. Gill Hotels Co.*, 622 So. 2d 163, 164 (Fla. 4th DCA

1993).[4]

Here, Alamo's providing the Dieperinks with a rental vehicle, without warning them of the danger which this posed to them in certain areas, created a foreseeable zone of risk, giving rise to a duty.

E. It is not discriminatory to warn people that they are being targeted by criminals

Alamo's argument that it had no duty to warn its rental car tourist customers that they were being targeted by criminals in a specific area of Miami has been rejected by this Court in *Shurben* and by cases decided since *Shurben*. Alamo's argument is contrary to the special relationship doctrine, and other tort principles.

In the face of this overwhelming adverse authority, Alamo's closes its brief with the argument that it would"discriminate" if it warned of crime in one area. Alamo argues that "Because crime is foreseeable in all areas, there is no just basis to discriminate, by requiring warnings only as to some areas. . . ." (Initial brief, at

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4*See also* Peter Lopez, Comment, *Foreseeable Zone of Risk: An Analysis of Florida's Off-Premises Liability Standard*, 55 U. Miami L. Rev. 397, 398 (2001) ("Florida has adopted the 'foreseeable zone of risk' standard, under which the courts will inquire as to whether the landowner has created a foreseeable zone or risk beyond the boundaries of his property. If so, he may be liable for injuries to off-premises invitees."); *Wakefield v. Winter Haven Management*, 685 So. 2d 1348 (Fla. 2d DCA 1996); *Johnson v. Howard Mark Productions*, 608 So. 2d 937 (Fla. 2d DCA 1992); *Holiday Inns v. Shelburne*, 576 So. 2d 322 (Fla. 4th DCA 1991); *Thunderbird Drive-In Theatre v. Reed*, 571 So. 2d 1341 (Fla. 4th DCA 1990); *Holley v. Mt. Zion Terrace Apartments*, 382 So. 2d 98 (Fla. 3d DCA 1980).

17).

This argument is factually wrong. While crime may be to some extent foreseeable in all areas, the evidence at trial established that for tourists in rental cars crime was far more foreseeable in one specific area, the Northside area of Dade County. (T. 459, 486-87). There were more than four times as many crimes on tourists in the Northside area than in the Airport area, even though there are many more tourists near the Airport. (T. 547-51). It was for this reason that governmental task forces focused on crime in that area. Northside was the *only* area in the entire State of Florida for which the governor appointed a task force to attack crimes on tourist. (T. 546).

It is not in the slightest bit discriminatory to warn tourists in rental cars that they are being targeted for criminal attack in one particular area. Alamo had a duty to warn its customers about a high rate of crime in a specific area which targeted people driving in rental cars. This was true whether the area was Northside, or Miami Beach. This is the holding of *Shurben*.

CONCLUSION

The final judgment in this case, based on Alamo's breach of its duty to warn, is fully supported by the *Shurben* opinion, subsequent opinions, and basic principles of tort law, including the special relationship test. Alamo has stated no basis for overturning *Shurben*, and no basis for overturning the final judgment. We therefore respectfully request that the final judgment be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

We hereby certify that a copy of this document was sent by U.S. Mail on May 3, 2002, to Daniel S. Pearson, Esq., and Christopher N. Bellows, Esq., Holland & Knight LLP, 701 Brickell Avenue, Suite 3000, Miami, FL 33131.

We hereby certify that this brief is in Times Roman 14 point, and in compliance with the type requirements of the Florida Rules of Appellate Procedure.

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