IN THE SUPREME COURT OF FLORIDA

J. RUSSELL FORLAW, M.D., Petitioner, vs. WALTER FITZER, as the Personal Representative of the Estate of DIANE FITZER, Deceased, Respondant	)	Case No. 64, 258

CERTIFIED FROM THE
DISTRICT COURT OF APPEAL OF FLORIDA
FOURTH DISTRICT

BRIEF OF AMICUS CURIAE IN SUPPORT OF THE PETITION

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TABLE OF CONTENTS

TABLE OF CASES

INTEREST OF AMICUS CURIAE

The amicus curiae is a faculty member at the University of Florida College of Law where he teaches and studies the law of torts, including the law of negligence. Amicus curiae deems the proper resolution of the issue certified to the court as one of great public importance to be essential to the proper development of the law in Florida and, hence, to the welfare of the people of the state. Amicus believes this brief may augment those of the parties in properly illuminating the issues addressed to this Court.

FACTS

This case requires this Honorable Court to answer the following question certified as of great public importance by the District Court of Appeal of Florida, Fourth District in Fitzer v. Forlaw, 435 So. 2d 839, 840 (Fla. App. 1983):

> Is a Physician who prescribes Quaaludes to a known drug addict liable to a third party for the negligence of the patient in driving a car while under the influence of the drug?

PROPOSED ORDER

Because the statement of the certified question does not reveal that the defendants owed a duty of care to the deceased, Amicus Curiae requests this Honorable Court to accept the petition for certiorari and answer the question in the negative.

Nevertheless, because the facts of the case may be more favorable to the plaintiff than revealed by the certified question, the trial court ought to be permitted to test whether the facts alleged by the plaintiff's complaint would establish a duty of care under a proper statement of law. Amicus Curiae proposes that duty be tested as follows:

> A physician owes a duty of care to third persons who are injured by the negligent driving of a patient when said negligence was induced by the effects of a drug prescribed for said patient by said physician, when said physician knows or has reason to know of the impairing characteristics of the drug, knows or has reason to know that the drug will seriously impair the driving capacity of the patient, and knows or has reason to know that the patient will drive under the influence of the drug unless said physician gives the patient adequate warning of the risks or, when appropriate, said physician takes reasonable steps to prevent the patient's driving. Third persons owed a duty under these circumstances include occupants of the motor vehicle operated by said patient who do not know of his impaired condition and pedestrians and occupants of other motor vehicles who are injured by the negligent driving of said patient when said physician could reasonably have foreseen the time and circumstances under which the patient was driving under the influence of the drug at the time the injury occurred. No duty is owed to a third person unless the foregoing circumstances are present. Moreover, the duty is not breached unless the physician, in light of the factors giving rise to the duty, acted unreasonable in prescribing the drug or in failing to issue an adequate warning.

ARGUMENT

1. THE ISSUE IS DUTY

The prima facie case of negligence requires the plaintiff to plead and prove that the defendant owed the plaintiff a duty of care, that the defendant breached the duty, that the breach was the cause-in-fact and proximate cause of the harm, and the breach resulted in damages to the plaintiff.

Duty is the issue raised by the certified question. Only if a duty is owed is it necessary to consider the questions of breach, causation and damages.

Does a physician owe a duty of care to a third person hurt by the physician's patient under the facts stated in the certified question? Amicus Curiae asserts as a matter of law that the broad formulation of the certified question reveals too few facts to set a predicate for the proposition that a duty is owed.

Duty is a question of law to be decided by the judge. The majority opinion of Cardozo, J. in Palsgraf v. Long Island R. Co., 248 N.Y. 339, 162 N.E. 99 (1928) is perhaps the leading American case for that proposition. The factors that influence whether or not a duty exists are widely agreed upon by common law courts, but the famous opinion of Lord Atkin in Donoghue v. Stevenson, [1932] App. Cas. 502 [H. Lords] is perhaps the most notable. Atkin, as most

judges, gave great credit to the foreseeability of harm to the to the particular class of persons of which the plaintiff was a member, but he also demonstrated that foreseeability requires more than a hindsight appreciation that the particular adverse consequence was a probable result of the defendant's act. Referring to the equally famous opinion of Brett, M.R. in Heaven v. Pender, [1883] 11 Q.B.D. 503 (Ct. App.), Atkin said:

> I think that this [proposition that a duty to take due care arises when the person or property of one was in such proximity to the other that, if due care was not taken, damage might be done the one to the other] sufficiently states the truth if proximity is not confined to mere physical proximity, but be used, as I think it was intended to such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act.

[1932] App. Cas. at 581.

Atkin continued his speech in Donoghue, which was essentially a product liability case, to indicate that the necessary proximity would not exist unless the product was to be used immediately and without a reasonable opportunity of inspection. These points are important because they suggest no duty should be owed in respect to a time well beyond the actor's reasonable expectation of the likely duration of risk created by his acts, or if the actor had reasonable grounds to believe that a reasonable person would exercise independent control, by way of inspection or otherwise, over the instrument of harm.

Not only is duty a question of law but its existence must also be determined in respect of the particular person who is the plaintiff. That specific person need not, of course, have been in the reasonable contemplation of the defendant, as long as the plaintiff is of a class that was. The matter has never been better put than by Cardozo in Palsgraf. Said Cardozo, "The plaintiff sues in her own right for a wrong personal to her, and not as the vicarious beneficiary of a duty to another." 162 N.E. at 100. Practically the entire common law world has rejected the Palsgraf dissenting view of Andrews, J., that "duty to one" means "duty to all." Diplock, J. neatly summed up the matter in Letang v. Cooper, [1965] 1 Q.B. 232, as follows;

> A. has a cause of action against B. for any infringement by B. of a right of A. which is recognized by law. Ubi jus, ibi remedium. B. has a corresponding duty to A. not to infringe any right of A. which is recognized by law. A. has no cause of action against B. for an infringement by B. of a right of C. which is recognized by law. B. has no duty owed to A. not to infringe a right of C. although he has a duty to C. not to do so.

[1965] 1 Q.B. at 246, 247.

In sum, these general principles apply to this case: the issue is duty; duty is a question of law; principal ingredients of duty are the foreseeability of harm based upon the proximity in time, space and logic between the act of the defendant and the harm done the plaintiff, the directness and immediacy of the harm, and the likelihood or not of an intermediate protective person or circumstance; and, the

duty must be owed to the plaintiff (the deceased in this case) - the fact that the defendant owes a duty to someone else, such as the patient in this case, is not enough.

2. The Law of Similar Cases

The formulation of the certified question raises the general question of whether or not a defendant owes a duty of care for the actions of an independent third person for whom the defendant is not vicariously liable, as he would be, for example, in respondeat superior circumstances. No rule is truer, in general, than that one person owes no duty of care to others for the acts of an independent third person. See, e.g., Tarasoff v. Regents of University of California, 17 Cal. 3d 425, 131 Cal. Rptr. 14, 551 P.2d 334 (1976). Nevertheless, Tarasoff acknowledged that a duty could arise when there is a sufficient special relationship between the defendant (a physician in that case) and the person who did harm (a patient in that case) or between the defendant and the third person who was harmed by the third person. Moreover, this Honorable Court in Vining v. Avis Rent-A-Car Systems, Inc., 354 So. 2d 54 (Fla. 1978) acknowledged that a duty of care could arise on account of the negligent acts of an independant third person (in that case a car thief) when the defendant knew or ought to have known of special facts that would or ought to reveal to a reasonable person in the position of the defendant the nature of

the risk posed to plaintiff (or persons of the plaintiff's class) by the actions of the defendant.

The opinion of the District Court of Appeal, Fourth District in Hofmann v. Blackmon, 241 So. 2d 752 (Fla. App. 1970) demonstrates a proper set of circumstances in which the law should recognize that a physician owed a duty of care to a third person who was damaged by contact with the doctor's patient. There the third person was "a minor child who is a member of the immediate family [of the patient] and [who is] living with [the] patient suffering from a contagious disease." Id. at 753. Under those special circumstances under which the physician knew or ought to have known of the dangerous contagion, knew or ought to have known of the risk posed to persons with whom the patient would come into close and continuing contact, and knew or ought to have known that the patient lived with his children, duty exists under settled principles of law. The duty owed was to exercise care to diagnose the disease, to warn the patient of the danger posed to those in immediate contact, and to inform the patient of preventative steps to be taken to avoid harm.

The certified question in this case seeks to extend the holding of Hofmann v. Blackmon beyond reasonable bounds of the law. Its formulation does not reveal that the physician knew or had reason to know whether or when or under what circumstances the patient would likely be driving, does not

reveal whether or not the physician knew or had reason to know that that some responsible person could be expected to monitor the activities of the patient, and does not reveal the actual circumstances under which the patient was driving and the decedent killed, including particularly whether the occasion occurred soon or long after the drug was prescribed by the physician. Indeed, the statement literally does not reveal that the physician knew or ought to have known that the patient was a drug addict, but merely states the conclusion that he was.

The absence of these elements in the certified question make it necessary in law to answer in the negative, if the meaning of duty in law is not to be stretched beyond all bounds of what has traditionally been deemed to be the proper balance between freedom to act reasonably with impunity and the peril of being held legally responsible for unreasonable acts.

A number of cases have permitted plaintiffs to recover on fact patterns that, when generalized broadly, seem similar to those in the certified question. Gooden v. Tips, 651 S.W.2d 364 (Tx. App. 12 Dist. 1983) and Myers v. Quesenberry, 193 Cal. Rptr. 733 (Cal. App. 4 Dist. 1983) are two of these. But examination of the opinions in those two cases reveals that specific facts known to the defendant-physicians went far beyond the barebones formulation of the certified question. In Gooden the patient had been under the care of the defendant-physician for approximately twenty

years, much of the time for drug abuse. Thus, the doctor presumably knew or had reason to know a wealth of information about the patient, whether or not and under what circumstances he drove, whether or not some third person would monitor the patient, and the likely effect of the drug upon the patient.

In Myers, by contrast, the physicians, knowing of the emotional and physical debilities of the patient, "directed [her] to drive to a hospital for treatment." It was on the particular trip that the physicians "directed" the patient to make that the crash occurred. It follows that the facts of both Gooden and Myers are much more similar to those of Hofmann v. Blackmon than to the formulation of the certified question. They do not support an affirmative answer to the certified question.

Although this brief addresses this issue primarily from the point of view of tort doctrine, Amicus Curiea submits that matters of public policy are at stake and that this Court has a history of employing public policy in developing the law of torts. See, esp., Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973). Public policy cuts both ways. In general, when it is appropriate to do so, this court favors expanding liability to compensate victimes of harm. Nevertheless, it has been almost two centuries since the common law world gave up the notion of absolute liability, if indeed it ever entertained it at all, which is close to the state of the law that an affirmative answer to the certified question

would impose upon physicians who prescribe drugs to their patients. Moreover, this case raises substantial public policy considerations pertaining to the role of a physician in our society.

As a general matter physicians cannot be presumed to know everything about the habits, circumstances and characteristics of their patients, especially when nothing is known about the duration and intensity of the relationship between the patient and physician. Moreover, physicians cannot be expected to tolerate a state of law that tests their liability in respect to each drug they may prescribe designated by generic name (e.g., Quaadludes) or by chemical composition. If a open-ended duty is to be acknowledged in this case for harm caused by the side effects of Quaaludes, whether foreseen or not under the formulation of the certified question, will the issue next be relitigated in respect of drug X? Then in respect to drug Y? And so on? Clearly physicians, if they are to be responsible to third parties at all, are entitled to a state of law that applies to classes of drugs described in traditional legal terms. For example, it might be said that a physician owes patients a duty of care to warn of the impairment to motor skills likely to be caused by the qualities of a given drug that the physician knows or should know about and of the impairment likely to be caused by the operation of these qualities upon peculiar susceptibilities of the patient that the physician knows or should know about.

It is quite apparent that answering the broadly worded certified question in the affirmative could often pose an irresoluable dilemma to physicians. If a physician makes a diagnosis that drug X is required to treat a patient properly, failure to prescribe the drug will put the physician at risk of both breaching standards of medical ethics and committing medical malpractice. But, prescribing the drug will open up physician to liability to third parties if dangerous side effects contribute to harm of the sort suffered in this case, and will open them up to the defense of law suits every time something goes wrong. Amicus Curiae does not wish to develop this policy issue, except to say that it seems clear that how it is resolved might substantially affect the independence of physicians in prescribing drugs for the treatment of their patients.

3. Application to this Case

Although the law should not be mired in ruts dug long ago, tort duties should be expanded deliberately and orderly and not by convulsion. The enduring strength of the common law process is largely to be found in its stability and predictability, qualities that are best served by principled movement in the law.

The intellectual framework for expanding the notion of duty, particularly in cases involving the duty owed by one person to third persons for the actions of another inde-

pendent person, is no better demonstrated than by the judgment of Lord Diplock in Home Office v. Dorset Yacht Co. Ltd., [1970] App. Cas. 1004, (H. Lords). Amicus Curiae will not burden this brief with long excerpts or explanations but will merely sum up the technique as one of advancing from known precedents to new applications of duty by substituting for factual elements found in the known precedent, but that are missing in the new situation, new elements found in the new situation that satisfy the function served by those missing.

Vining v. Avis Rent-A-Car Systems, Inc., 354 So. 2d 54 (Fla. 1978) serves as a reasonable settled precedent. There, the defendant knew or had reason to know that a car left with key in the ignition at the particular place where the car was left was at risk of being stolen by a thief; knew or had reason to know that no other person would reasonably be expected to foil such a theft; and, knew or had reason to know that car thieves are likely to pose a special risk to motorists when getting away with stolen cars. The certified question as formulated fails to reveal facts that would substitute for any of these elements. It does not reveal that the physician knew or had reason to know that the patient drove at all, much less that he would drive while under the influence of the drug. It does not reveal that the physician knew or had reason to know that no third person would monitor the patient's actions. And, it does not reveal the proximity in time and space between the

physician's act of prescribing the drug and the injurious crash. Therefore, the certified question should be answered negatively.

Nevertheless, this court should not dismiss the plaintiff's action, but should direct the trial court judge to determine whether or not a duty was owed under the allegations in the plaintiff's complaint under the guidelines to be prescribed in this Honorable Court's opinion in this matter.

Amicus Curiea suggests that one appropriate formulation, under the principles described above, is as follows:

> A physician owes a duty of care to third persons who are injured by the negligent driving of a patient when said negligence was induced by the effects of a drug prescribed for said patient by said physician, when said physician knows or has reason to know of the impairing characteristics of the drug, knows or has reason to know that the drug will seriously impair the driving capacity of the patient, and knows or has reason to know that the patient will drive under the influence of the drug unless said physician gives the patient adequate warning of the risks or, when appropriate, said physician takes reasonable steps to prevent the patient's driving. Third persons owed a duty under these circumstances include occupants of the motor vehicle operated by said patient who do not know of his impaired condition and pedestrians and occupants of other motor vehicles who are injured by the negligent driving of said patient when said physician could reasonably have foreseen the time and circumstances under which the patient was driving under the influence of the drug at the time the injury occurred. No duty is owed to a third person unless the foregoing circumstances are present. Moreover, the duty is not breached un-

less the physician, in light of the factors giving rise to the duty, acted unreasonable in prescribing the drug or in failing to issue an adequate warning.

CONCLUSION

Amicus Curiae respectfully requests this Honorable Court to answer the certified question in the negative, and to order the trial judge to determine whether duty exists under an appropriate statement of law such as described herein.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this brief was mailed this 13th day of October, 1983 to:

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