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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.

Respondent.

CASE NO. 64,258

4 D.C.A.
CASE NO. 81-393

A CERTIFIED QUESTION OF GREAT PUBLIC IMPORTANCE FROM THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT

# BRIEF ON THE MERITS OF THE PETITIONER, J. RUSSELL FORLAW, M.D.

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# PREFACE

This is a certified question of great public importance from the District Court of Appeal, Fourth District. The petitioner, J. Russell Forlaw, M.D. was the defendant before the trial court and the appellee before the District Court of Appeal, Fourth District. The respondent, Walter Fitzer, as the personal representative of the Estate of Diane Fitzer, deceased, was the plaintiff before the trial court and the appellant before the Fourth District Court of Appeal. In this brief the parties will be referred to as plaintiff and defendant or "doctor".

The following symbols will be used in this brief:

(R. ______) record on appeal

(A. ______) appendix

## STATEMENT OF THE CASE AND FACTS

On April 19, 1979 Terry Loomis struck and fatally injured 12 year old Diane Fitzer as she was riding her bicycle on the shoulder of Military Trail just north of Lantana, Florida. Loomis had no automobile liability insurance. At the time of the accident he was under the influence of both Quaaludes and alcoholic beverages.

The plaintiff filed suit against J. Russell Forlaw, M.D., the doctor who allegedly prescribed Quaaludes for Loomis, seeking damages for the wrongful death of Diane Fitzer. The plaintiff alleged in the second amended complaint:

> 1. This is an action for damages which exceed the sum of Two Thousand Five Hundred ($2,500.00) Dollars.
>
> 2. Plaintiffs, WALTER FITZER and GAYLE FITZER, were the parents of DIANE FITZER, deceased, at all times material herein.
>
> 3. Defendant, J. RUSSELL FORLAW, M.D., is a physician licensed to practice medicine in the State of Florida and was so at all times material herein.
>
> 4. That at all times material herein, Defendant, J. RUSSELL FORLAW, M.D., practiced medicine in Boynton Beach, Palm Beach County, Florida and held himself out as a physician specially qualified in the field of family medicine.
>
> 5. At all times material hereto, the Defendant, J. RUSSELL FORLAW, M.D., was and is an employee of a professional association existing under the laws of

the State of *Florida*, styled COX, VAN DER HEUVEL AND WEATHERFORD, P.A.

6. At all times material to this Complaint, the Defendant, J. RUSSELL FORLAW, M.D., was acting within the course and scope of his employment with the professional association, COX, VAN DER HEUVEL and WEATHERFORD, P.A.

7. On or about December 7, 1978, a patient by the name of Terry Loomis, came under the care and treatment of Dr. J. RUSSELL FORLAW, advising the physician that he had just returned from San Francisco and had problems and wanted specifically a drug called Quaaludes for sleep. The patient, Mr. Loomis, advised Dr. FORLAW that he felt "hyper" and said that if he could not get relief, "he would kill himself". The patient, Mr. Loomis, told DR. FORLAW that nothing else worked, only Qualludes, and due to the fact that Mr. Loomis was "very adamant about it", DR. FORLAW prescribed the drug to him, giving him a prescription for thirty-six (36) in the amount of 150 mg. per unit. On March 16, 1979, the patient, Mr. Loomis, returned and another prescription for Quaaludes of 300 mg. per unit, number 50 was prescribed. Once again, the patient specifically requested the drug Quaalude.

8. At all times material hereto, the medical literature was repleted with articles and information with respect to Quaalude and/or methaqualone abuse. The physician community which included DR. J. RUSSELL FORLAW, knew or should have known that Terry Loomis presented a classical profile of a patient who would abuse and/or was abusing the drug Quaalude, and that he was habituated to this medication at the time the drug was prescribed in March of 1979. The Defendant was negligent and otherwise departed from the standard of care in this and like communities, in that he:

a. Negligently failed to perform a physical examination of the patient known as Terry Loomis;

b. Failed to properly diagnose the patient's true condition as being a person who would abuse the drug, Quaalude, and that he presented a classical profile of a drug abuser;

c. He undertook the care and treatment of Terry Loomis for a mental or emotional condition for which he was not properly qualified to diagnose or treat, and failed to otherwise determine or follow up with psychiatrists, who were reportedly treating Dr. Loomis:

d. Failed to adequately advise and warn Terry Loomis of the fact that the drug, Quaalude was a habituating drug, and that the operation of a motor vehicle would be hazardous while under the influence of the drug Quaalude.

Additionally, the defendant failed to warn or advise Terry Loomis not to operate a motor vehicle after ingesting the prescribed drug.

e. Failed to warn or advise Terry Loomis not to drink intoxicating liquids or beverages while using the prescribed drug, and failed to consult with the physician to whom he referred Terry Loomis concerning the patient's care, treatment and medication.

9. As a direct and proximate result of the foregoing negligence of the Defendants, the patient, Terry Loomis operated a motor vehicle while under the influence of the drug Quaalude, and as a result of the abuse of that medication, struck and killed the Decedent, DIANE FITZER.

> 10. As a result of the foregoing negligence, the natural parents of the Decedent, WALTER FITZER and GAYLE FITZER, suffered the loss of support, services and companionship of their daughter. These losses are permanent and continuing in nature and Plaintiffs will continue to suffer from them in the future. The Plaintiff, WALTER FITZER, as Administrator of the Estate of DIANE FITZER, deceased, is authorized by Florida law to assert claims in behalf of himself as natural parent and in behalf of his wife, GAYLE FITZER, as natural parent of the deceased.
>
> 11. At all times material herein the Defendant, knew or should have known that the administration of a drug such as Quaalude to the patient, Terry Loomis under the circumstances described herein would with reasonable forseeability, cause harm to innocent persons such as deceased, DIANE FITZER.
>
> 12. WALTER FITZER, as Administrator of the Estate of DIANE FITZER, deceased, is authorized pursuant to Florida Law to assert claims in behalf of the Estate of DIANE FITZER, which has lost the earnings of the Decedent over her natural life span, and has become obligated for the payment of medical bills and funeral expense resulting from the injury and death of DIANE FITZER.
>
> WHEREFORE, the Plaintiff, WALTER FITZER as Administrator of the Estate of DIANE FITZER, deceased, demands judgment for damages in excess of the minimal jurisdictional limits of this Court against J. RUSSELL FORLAW, M.D. and COX, VAN DEN HEUVEL and WEATHERFORD, P.A. along with a trial by jury of all issued so triable by right along with taxable costs. (R. 42-45)

The trial court granted the defendant's motion to dismiss the second amended complaint and dismissed the complaint with prejudice. (R. 47-48; 49; 51; 56). The

trial court entered final judgment for the defendant. (R. 52) Plaintiff appealed to the Fourth District Court of Appeal. (R. 54; 57).

The Fourth District Court of Appeal reversed. (A. 1-2) The court denied a timely motion for rehearing, but certified the case to this court as passing on a question of great public interest. (A. 3-5; 6)

## CERTIFIED QUESTION

> 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.

We respectfully submit the issue presented in this case is more correctly stated:

> IS A PHYSICIAN WHO PRESCRIBES DRUGS TO A PATIENT LIABLE TO AN UNIDENTIFIABLE THIRD PARTY FOR THE INTERVENING NEGLIGENCE OF THE PATIENT WHILE UNDER THE INFLUENCE OF THE DRUG.

## ARGUMENT

It is respectfully submitted that there can be no liability to an unidentifiable third person arising out of the physician's treatment of the patient. The result of the decision of the Fourth District Court of Appeal is to create a "dram shop" act for physicians. The legislature has not enacted dram shop legislation applicable to vendors of alcoholic beverages, except under very limited circumstances. There is no reason or basis to overrule the

common law and impose similar liability to a third party against a physician.

There was no doctor/patient relationship between the plaintiff and the doctor. The plaintiff's injuries resulted from an efficient, intervening, independent cause, the negligence of Terry Loomis in operating a motor vehicle. The plaintiff failed to allege that Loomis' negligence was forseeable. The doctor's acts in prescribing quaaludes to Loomis were not the proximate cause of plaintiff's damages. The trial court correctly granted the motion to dismiss. The decision of the Fourth District Court should be quashed and the final judgment for the defendant reinstated.

The Fourth District Court of Appeal, citing F.S. § 768.125, analogized the doctor's liability in this case to that of a tavern owner who knowingly serves alcohol "to a person habitually addicted." The court's analogy must fail for several reasons. At common law there was no cause of action against the seller of alcoholic beverages for injuries caused by the intoxicated recipient to a third party. Annot., 97 ALR 3d 528. Since Florida has not passed a Dram Shop Act or Civil Damages Act, the common law remains in effect with regard to sale of intoxicating liquors. United Services Automobile Association v. Butler, 359 So.2d 498 (Fla. 4th DCA 1978).

In Reed v. Black Ceasar's Forge Gourmet Restaurant, 165 So.2d 787 (Fla. 3d DCA 1964), the court held that a bar owner was not liable to a third party for the

sale of intoxicants and the damages resulting therefrom. The rationale underlying the common law rule is that the consumption of the alcoholic beverage, not its sale, is the proximate cause of the plaintiff's injuries.

Effective May 24, 1980 the legislature enacted F.S. § 768.125 and broadened the liability of sellers of alcoholic beverages. That Statute provides:

> 768.125 Liability for injury or damage resulting from intoxication.--A person who sells or furnishes alcoholic beverages to a person of lawful drinking age shall not thereby become liable for injury or damage caused by or resulting from the intoxication of such person, except that a person who willfully and unlawfully sells or furnishes alcoholic beverages to a person who is not of lawful drinking age or who knowingly serves a person habitually addicted to the use of any or all alcoholic beverages may become liable for injury or damage caused by or resulting from the intoxication of such minor or person.

In Lonestar Florida, Inc. v. Cooper, 408 So.2d 758 (Fla. 4th DCA 1982), the court held no cause of action exists against a bar owner under Section 768.125 or at common law for dispensing alcoholic beverages to a drunk patron who later drunkenly and negligently injures another. In Di Teodoro v. Lazy Dolphin Development Co., 418 So.2d (Fla. 3d DCA 1982), the court observed that no liability to a third party exists for serving liquor to one under the influence of alcohol.

In Migliore v. Crown Liquor of Broward, Inc., 425 So.2d 20 (Fla. 4th DCA 1982) the Fourth District Court of

Appeal discussed the liability to a third party of a vendor of alcoholic beverages. Migliore was a passenger in an automobile which was struck by a car driven by an intoxicated minor. Migliore contended that Crown Liquor, the vendor of the beverages, was liable to him because it sold intoxicating beverages to a minor in violation of Section 562.11. The Fourth District Court of Appeal held that in the absence of a dram shop act or Civil Damages Act, the dispenser of intoxicating beverages is not liable. In that case[1] the court observed that the prerogative of modifying the common law rule must be left to the legislature. Legislation in derogation of the common law must be strictly construed.

Similarly in Barber v. Jensen, 428 So.2d 770 (Fla. 4th DCA 1983) the Fourth District Court of Appeal held a vendor who sold intoxicating beverages to a minor could not be held liable to a third person injured by the minor.

The basis for the common law rule of no liability was that drinking the liquor, not furnishing the liquor, was the proximate case of the injury. The same rationale is applicable in this case. Ingesting the pills with alcohol and negligently operating a vehicle while under the influence of the drugs was the proximate cause of plaintiff's injury. The legislature has not seen fit to abrogate common law rules of no liability to third persons

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1 Review was granted by this court and is pending in case no. 63,337.

with respect to furnishing of drugs. It is not the prerogative of the courts to do so. If there is any liability on the part of physicians for such acts, the legislature should set the parameters of liability. It has not done so.

Quaaludes are a form of methaqualone. Chapter 893, Florida Statutes (1983) governs drug abuse prevention and control. Quaaludes are a controlled substance under that chapter. Neither the common law or any of the provisions of Chapter 893 or Chapter 768 impose liability to a third person and against a physician for knowingly prescribing a controlled substance to a person habitually addicted. The Fourth District Court of Appeal has simply created "law" where none exists.

The ramifications of the decision of the Fourth District Court of Appeal may be far reaching. In the never ending search for the "deep pocket," it is quite probable that the treating physician of any negligent tortfeasor will also be a defendant in any third party liability action against the tortfeasor. A physician who prescribes valium or an antihistamine to a patient can be liable to a third person for injuries inflicted by a patient taking the drugs. Carrying the rationale even further, a physician may be held liable for the negligence of an uncontrolled or insulin dependent diabetic or a heart patient who injures a third party in an automobile accident. Myriad possible lawsuits may arise out of this decision by the Fourth District Court

of Appeal. The decision of the court is wrong and is contrary to all applicable case law.

The central issue in this case is whether a physician can be liable to a third party for the intervening negligence of the patient. We are not aware of any Florida decision which imposes liability under similar circumstances. The case factually most similar is Nance v. James Archer Smith Hospital, 329 So.2d 377 (Fla. 3d DCA 1976). Franklin Clayton had taken LSD. His grandmother and two companions drove him to the hospital. The hospital advised her it did not have proper testing facilities and that Franklin should be taken to Jackson Memorial Hospital, which had the proper testing facilities. Franklin, his grandmother and two friends drove to Jackson Memorial Hospital. En route Franklin jumped out of the car, went berserk and fatally stabbed plaintiff's decedent. Plaintiff brought a wrongful death action against the hospital, charging it was negligent in refusing to admit Franklin Clayton because he was an emergency case and a danger to himself and others. The trial court directed a verdict for the hospital. Plaintiff appealed. The Third District Court of Appeal affirmed, stating:

> The question of proximate cause in a negligence action is one for the court where there is an active and efficient intervening cause. Kwoka v. Campbell, Fla. App. 1974, 296 so.3d 629. Further, where the negligence of another, constituting an independent intervening efficient cause of the accident, was not reasonably foreseeable, no liability may

> be fastened on the defendant. Rawls v. Ziegler, Fla. 1958, 107 So.2d 601.
>
> The record is replete with evidence that Franklin, during the time he was present at the defendant Hospital, did not exhibit any behavior which could be termed erratic or threatening and we conclude there was no reasonably foreseeability that Franklin would engage in the violent behavior which resulted in the death of plaintiff's husband.
>
> 329 So.2d at 378

In this case the complaint did not state a cause of action against the doctor because there was an efficient, intervening, independent cause which was not set in motion by the alleged initial wrong and which was not forseeable. In Florida a defendant is not liable for injuries to a plaintiff when there is an independent intervening cause unless that independent, intervening cause was a forseeable and probable consequence of the defendant's wrongful actions. Crislip v. Holland, 401 So.2d 1115 (Fla. 4th DCA 1981); Cone v. Inter-County Telephone & Telegraph Co., 40 So.2d 148 (Fla. 1949)

Plaintiff failed to allege it was forseeable that Loomis would negligently operate an automobile while under the influence of Quaaludes. There were no allegations the defendant should have forseen that Loomis would abuse the drug, use alcoholic beverages while taking the drug and operate an automobile while under the influence of the drug and alcohol. Furthermore, plaintiff did not allege the prescription was given with knowledge of Loomis' intent to

use the drug for improper purposes. The complaint did not state a cause of action against the doctor.

Courts of other states have held there is no liability in similar situation. For instance in Soto v. Frankford Hopsital, 478 F.Supp. 1134 (E.D. Pa. 1979), the court dismissed a complaint for failure to state a cause of action against several physicians. The plaintiff was rendered unconscious due to inhalation of carbon monoxide emanating from a leak in a defective gas heater. She was admitted to the hospital. The doctors misdiagnosed her condition; thus she took no steps to repair the defective gas heater. Three weeks later her husband died from carbon monoxide inhalation. Plaintiff alleged the doctor's failure to warn her was the proximate cause of her husband's death. The court held there was no liability under the circumstances.

In Garcia v. Hargrove, 176 N.W. 2d 566 (Wis 1970) an action against a seller of intoxicating beverages, the court held the seller was not liable for personal injuries sustained by the plaintiff in an automobile accident where the driver of the automobile had become intoxicated at the defendant's establishment. The court refused to abrogate the common law rule that it is not a tort to sell intoxicating liquor to able-bodied men. The court concluded that reasons of public policy dictated that liability not be extended to the furnisher of intoxicating beverages for injury caused by the acts of an intoxicating person. The

court stated the specific public policy considerations were: (1) causation in liquor cases would rarely be direct and would usually be remote; (2) it would be difficult to extend liability to all suppliers of liquor and illogical to adopt a rule that would subject a licensed commercial liquor vendor to liability and not a friend, employer, or acquaintance who gave liquor away, (3) extension of liability would subject every vendor or dispenser of liquor to exposure every time he provided a person with a drink and would multiply litigation in a claims conscious society, and, (4) permitting a cause of action against the defendant would only erode the responsibility of the intoxicated person for his own torts and would impose an unjust burden on suppliers of liquor. Those same public policy considerations are applicable here and mandate reverse of the decision of the Fourth District Court of Appeal.

At common law a person owed no duty to control the conduct of another or to warn those endangered by such conduct. Prosser, Law of Trots (5th Ed. 1971) § 56; Restatement 2nd Torts § 314. The courts have carved out some exceptions to this rule of no liability in cases where the defendant stands in a special relationship either to the person whose conduct needs to be controlled or to the forseeable victim of that conduct. Restatement 2d Torts § 315. In this case there was no special relationship between the defendant doctor and the person whose conduct needed to be controlled, Loomis, nor was there a special

relationship between him and the decedent. Furthermore, the pleadings failed to allege a special relationship giving rise to a duty to control Loomis' conduct.

The plaintiff relied on § 315 of the Restatement 2nd Torts and Tarasoff v. The Regents of the University of California, 551 P.2d 334 (Ca. 1976) and its progeny as the basis for defendant's liability. Plaintiff's reliance on Tarasoff is misplaced. That decision turned on the fact that the patient had specifically confided to his doctor his intention to kill the plaintiff's decedent. The court held that in view of that fact, the harm was forseeable. In this case there is no allegation the patient had threatened to abuse the prescribed drug, to negligently operate a car while under its influence and to present a danger to plaintiff's decedent. In Lipari v. Sears, Roebuck & Co., 497 F.Supp. 185 (D. C. Neb. 1980) the court observed that the California courts have had a tendency to narrow the Tarasoff decision to apply only to identifiable third parties. In Lipari the court cited Tarasoff, holding a psychotherapist liable to foreseeable victims of a patient whom he knows or should know poses an unreasonable risk of harm to others. Tarasoff and Lipari are based on adoptions of the special relationship analysis of the Restatement 2nd Torts, § 315. For a discussion of this special relationship, see Tarasoff at Pages 343-345.

The Tarasoff decision and its progeny are concerned with foreseeable victims of the patient's known dangerous propensities. The Tarasoff rationale was restricted by the California Supreme Court in Thompson v. County of Alameda, 167 Cal. Rptr. 70, 27 Cal.3d 741, 614 P.2d 728 (1980). In Thompson, the plaintiff sued a county, alleging negligence in releasing from custody a juvenile delinquent who was known to have dangerous and violent propensities toward young children. Within 24 hours of release he sexually assaulted and murdered the plaintiff's son, who resided in the community into which the juvenile was released. In holding that the plaintiff failed to state a cause of action, the court emphasized that in Tarasoff the victim was foreseeable and identifiable. Thompson at Page 734.

The Thompson court declined to impose blanket liability on the county for failure to warn the plaintiffs and the parents of other neighboring children. The decision was based on policy considerations and foreseeability. The court concluded that public entities and employees had no affirmative duty to warn of the release of an inmate with a violent history who has made nonspecific threats of harm directed at nonspecific victims. Id. at Page 735.

In this case, there were no threats of violence to any class of people. Furthermore, the drugs were prescribed for sleep, not for daytime activity. Once a decision was

made to prescribe drugs to Loomis, the doctor did not have a blanket duty to warn the entire public at large. Thompson supports this rationale.

In Leedy v. Hartnett, 501 F.Supp. 1125 (M.D. Penn. 1981), the court refused to hold liable a hospital for injuries inflicted upon third persons by a patient known to be violent when he drank. The court held that in order to keep Tarasoff within workable limits, those charged with the care of potentially dangerous people must know whom to warn. Id. at Page 1130. In Leedy, the court refused to recognize a cause of action because the patient posed no greater threat of danger to the plaintiffs than he did to the public at large. Id.

This case should be resolved likewise. The decision to release a known violence-prone person is not critically distinguishable from the decision to prescribe quaaludes to an alleged drug addict. The decedent was no more threatened by Terry Loomis than the public at large. In Leedy, it was known the patient was violence-prone when drunk; here no violent propensities were known at all. Indeed, there were no specific dangers known to the doctor for which he should be held liable under the Tarasoff doctrine.

## CONCLUSION

The certified question should be answered in the negative. The decision of the Fourth District Court of

Appeal should be quashed and the final judgment for defendant reinstated.

Respectfully submitted,

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By: Marjorie Gadarian Graham
Marjorie Gadarian Graham

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States mail this 11th day of October, 1983, to EDNA L. CARUSO, ESQ., Suite 1007, Forum III, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401; to, MONTGOMERY, LYTAL REITER, DENNEN & SEARCH, P.A., Post Office Drawer 3626, West Palm Beach, Florida 33402; and to, Prof. Joe Little, University of Florida, College of Law, Gainesville, Florida 32611.

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