IN THE SUPREME COURT OF FLORIDA

CASE NO: 64,258

J. RUSSELL FORLAW, M.D.,

Petitioner,

v.

WALTER FITZER, as the personal representative of the Estate of DIANE FITZER, deceased.

Respondent.

BRIEF ON THE MERITS OF THE RESPONDENT

MONTGOMERY, LYTAL REITER,
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CITATIONS OF AUTHORITY

PREFACE

This proceeding involves an issue certified to this Court by the Fourth District Court of Appeal by being one of great public importance. Petitioner was the defendant in the trial court and Respondent was the plaintiff. Herein the parties will be referred to as they stood in the lower court or by their proper name. The following symbols will be used:

(R)-Record-on-Appeal

(A)-Petitioner's Appendix

(RA)-Respondent's Appendix (attached hereto)

STATEMENT OF THE CASE AND FACTS

Plaintiff accepts Dr. Forlaw's Statement of the Case and Facts with the following correction. Dr. Forlaw states that Loomis had no automobile liability insurance. The record absolutely and unequivocally fails to support this statement.

QUESTION CERTIFIED

> 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?

Dr. Forlaw has taken the liberty of restating the certified question. It should be noted that Dr. Forlaw requested the Fourth District to certify the question as he has restated it in his brief before this Court. The Fourth District refused to do so (A5). In DAVIS v. MANDAU 410 So.2d 915 (Fla. 1981), this Court stated that where another

issue rather than the one certified by the District Court of Appeal was urged, this Court did not have jurisdiction to decide the issue. In the present case, Dr. Forlaw is attempting to present an entirely separate issue, which the District Court refused to certify, and which this Court does not have jurisdiction to hear.

ARGUMENT

Dr. Forlaw has failed to address the real issue before the Court by making a rather emotional plea that the Fourth District has created " a dram shop act for physicians". Most of his brief is devoted to citing cases holding that tavern owners cannot be liable under §768.125 F.S. for selling alcoholic beverages except under certain circumstances. The doctor argues that if tavern owners cannot be liable for selling liquor, he should not be liable for dispensing drugs.

Dr. Forlaw not only mischaracterizes, but oversimplifies, this case. It has nothing to do with liability under a dram shop act or liability having any semblance thereof. Accordingly, the cases cited by Dr. Forlaw are not material to the issue before the Court.

Contrary to Dr. Forlaw's contention, the Fourth District did not analogize a doctor's liability to that of a tavern owner who knowingly serves alcohol to a person habitually addicted. The Fourth District drew no analogy. Rather, in Dr. Forlaw's brief filed with the Fourth District

Court of Appeal he argued that his liability was similar to that of a seller of alcoholic beverages, and therefore because tavern owners could not be liable under §768.125 F.S. he should not be liable. (See portions of Dr. Forlaw's brief filed with the Fourth District Court of Appeal, RA1-2). In response thereto, and in rejection of that argument, the Fourth District pointed out in its decision: "indeed, even the statute immunizing tavern owners from liability to third persons [upon which Dr. Forlaw relied] has an exception in the event the alcohol is normally served 'to a person habitually addicted. . .'". Therefore, even accepting Dr. Forlaw's analogy to §768.125 F.S., there would be liability since it was alleged that Dr. Forlaw had knowingly prescribed drugs to a drug addict.

It was Dr. Forlaw who analogized this case to §768.125. The Fourth District merely observed that the analogy did not apply. Dram shop acts impose liability on those selling or furnishing intoxicating liquors to a person who becomes intoxicated and injures another or his personal property. Wrongful death acts and dram shop acts are distinguishable, both as to scope and purpose. A recovery for wrongful death in no way precludes an action separate and apart under a dram shop act. 45 Am.Jur.2d Intoxicating Liquors, §564. This case is a wrongful death action and has nothing to do with dram shop liability. For that reason, Plaintiff does not feel that Dr. Forlaw's dram shop argument requires a response of any greater length.

The real issue is whether Dr. Forlaw, in prescribing Quaaludes to a known drug addict, is liable to a third person for the negligence of the addict in driving a car while under the influence of the Quaaludes. Did Dr. Forlaw have a duty to the public and thus to Plaintiff under the allegations of the Second Amended Complaint?

Plaintiff's Complaint alleges liability based upon Dr. Forlaw's actions in (1) prescribing Quaaludes to a known drug addict and; (2) failing to warn the drug addict not to drive a motor vehicle while under the influence of the drug and not to drink intoxicating liquors while using the drug.

Several Florida cases have concerned a doctor's liability to third persons. In HOFMANN v. BLACKMON, 241 So.2d 752 (Fla. 4th DCA 1970) an action was brought by a minor child against a physician for negligently failing to diagnose tuberculosis in his father, resulting in the child contracting the disease. The trial court entered a partial summary judgment for the doctor and the child appealed. The Fourth District reversed, holding that the physician had a duty to properly diagnose the tuberculosis and warn the family of the nature of the contagious disease and the precautionary steps to be taken.

In BURROUGH v. BOARD OF TRUSTEES OF ALACHUA GENERAL HOSPITAL, 328 So.2d 538 (Fla. 1st DCA 1976) the plaintiff filed an action against a physician and hospital for injuries sustained in an automobile accident. The plaintiff alleged that the defendants were negligent in permitting the

driver of the other car involved in the accident, who was a patient under treatment for alcoholism and depression, to leave the hospital on a day pass when they knew or should have known that she would attempt to operate an automobile and that she could not do so safely. The trial court entered summary judgment in favor of the defendants and the plaintiffs appealed. The First District reversed, but stated that the sufficiency of the allegations of negligence and causation were not before the court and therefore the court would assume, but not decide, that the complaint stated a cause of action.

A recent analogous case is K-MART ENTERPRISES OF FLORIDA, INC. v. KELLER, 3rd DCA, Case No. 81-2121, decision filed September 27, 1983, 8 FLW 2383. In that case, K-Mart sold a rifle to Knuck in violation of the Gun Control Act. Six weeks later Knuck gave his brother, who was both an ex-heroin addict who was taking pills and an alcoholic who had been drinking heavily, a box of ammunition and the rifle. Knuck's brother shot his wife, and took his sister and her young child hostage. In a confrontation with police, policeman Keller was shot by Knuck's brother. The Third District Court of Appeal upheld a jury verdict for Keller against K-Mart. The court pointed out that K-Mart's actions were negligence per se in the sale of firearms to Knuck, in violation of the statute. Nonetheless, K-Mart claimed that it was insulated from liability based upon intervening, unforeseeable circumstances and therefore its

conduct was not the cause of Keller's injuries. The Third District disagreed and held that the shooting of Keller was the type of harm or "within the risk" designed to be prevented by the Gun Control Act so that K-Mart's non-adherence to the statute constituted a legal cause of plaintiff's injuries.

The present case is analogous to the KELLER case. There is a real drug problem in today's society. Unfortunately, doctors are a source of drugs for many drug dependent people. Florida law provides a program for the treatment and rehabilitation of drug dependent people, such as Loomis, Chapter 397, F.S., and forbids doctors to "feed" a drug dependent person's drug problem. Doctors have a responsibility in present day society to know whom they are prescribing drugs to, and to make sure it is for medical reasons. Dr. Forlaw's sale or delivery of Quaaludes by means of a prescription issued in bad faith and not in the course of his professional practice (i.e., not for medical purposes) constitutes a violation of §898.13 making it unlawful for any person to sell, manufacture or deliver a controlled substance. CILENTO v. STATE, 377 So.2d 663 (Fla. 1979). A doctor in this state can have his medical license revoked, or can be prevented from prescribing controlled substances, where he has been found guilty of prescribing narcotics for drug dependent persons. GALLO v. STATE BOARD OF MEDICAL EXAMINERS, 257 So.2d 97 (Fla. 3d DCA 1972). The

doctor can also be criminally prosecuted for dispensing Quaaludes to a drug addict. CILENTO v. STATE, supra.

In the present case, Dr. Forlaw's actions in prescribing Quaaludes for the drug addict were in violation of a state statute, which was designed to protect not only addicts, but the public in general. Dr. Forlaw's violation of §898.13 F.S. was a legal cause of the minor plaintiff's death, as was K-Mart's actions in causing the plaintiffs injuries in the KELLER case by violating the Gun Control Act.

In addition to the allegations in Plaintiff's Complaint that Dr. Forlaw prescribed Quaaludes for an apparent drug addict, there are also allegations that he failed to warn the drug addict not to drive an automobile and not to drink alcohol while under the influence of the Quaaludes. A number of out-of-state cases have held that a physician is liable to a third party for negligence in failing to warn a patient not to drive a vehicle, when the patient inflicted injuries on a third person while driving a vehicle under the influence of a drug prescribed by the physician. In KAUIER v. SUBURBAN TRANSPORTATION SYSTEM, 398 P.2d 14 (Wash. 1965) the Washington Supreme Court held that where the standard of care in administering a drug required the doctor to warn a patient of possible side effects, and where the physician had failed to warn a bus driver of the possible side effects of drowziness from a drug he had prescribed, a jury question was presented as to the physician's liability to a bus

passenger, when the driver lost consciousness after use of the drug. The court found that the intervening act of the bus driver in driving the bus while drowsy was not necessarily an intervening cause which would insulate the physician from liability, if the jury found that the harm resulting to the plaintiff was in the field of danger which would reasonably have been foreseeable by the doctor when he administered the drug.

In FREESE v. LEMMON, 210 N.W.2d 576 (Iowa 1973) the plaintiff alleged that the defendant-physician knew the motorist had suffered an earlier seizure, was negligent in failing to diagnose the cause of the first seizure (epilepsy), and in failing to warn the motorist not to drive an automobile. The Iowa Supreme Court held that the claim stated a cause of action against the physician for injuries sustained by a pedestrian who was struck when the motorist suffered a seizure and lost control of the automobile.

In WHARTON TRANSPORT CORP. v. BRIDGES, 606 S.W. 2d 521 (Tenn. 1980) a truck driver employed by Wharton Transport Corporation was involved in a traffic accident injuring members of the Rains family. Wharton Transport sued the doctor, who had certified the driver as fit, for indemnity after settling the claims of the Rains family. At the conclusion of the evidence, the trial court directed a verdict for the physician on the ground that Wharton Transport had failed to establish that a negligent examination by the doctor was the proximate cause of the

accident, and that no duty ran from the doctor to the Rains family. The Supreme Court of Tennessee reversed finding that injuries suffered by the Rains family were reasonably foreseeable to the physician, and that he knew the purpose of the examination and its importance in highway safety and that the failure to properly conduct the examination would increase the risk of harm to members of the motoring public.

In GOODEN v. TIPS, 651 S.W. 2d 364 (Tex. App. 1983) the court held that plaintiff's complaint which alleged that a physician was negligent in prescribing Quaaludes for his patient and yet failing to warn her not to drive an automobile while under the influence of such drugs, and that such negligence was the proximate cause of injuries suffered by the plaintiff when he was struck by a car driven by the patient, was sufficient to state a cause of action against the physician. The court stated that a physician has a duty to use reasonable care to protect the driving public where the physician's negligence in diagnosis or treatment of a patient contributes to the plaintiff's injuries. The court held that the harm resulting to the plaintiff was a reasonably foreseeable consequence of the physician's failure to warn his patient not to drive. The physician knew, or in the exercise of ordinary care should have known, that the medication could seriously impair the patient's ability to drive a motor vehicle. Thus, the harm resulting to the plaintiff, held the court, was in the general field of danger which should reasonably have been foreseen by the

doctor, and the doctor was under a duty to take whatever steps were reasonable under the circumstances to reduce the likelihood of injury to other motorists.

In MYERS v. QUESENBERRY, 192 Cal. Rptr. 583 (Cal. App. 1983) the court held that a complaint brought against the defendant physician by a pedestrian struck when the physicians' patient lost control of her car while driving to the hospital on the physicians' directions, stated a cause of action against the physician for negligently failing to warn the patient against driving in an uncontrolled diabetic condition. The court stated:

> To avoid liability in this case, Quesenberry and Beaumont should have taken whatever steps were reasonable under the circumstances to protect Myers and other foreseeable victims of Hansen's dangerous conduct. . . . What is a reasonable step to take will vary from case to case. . . . When a physician furnishes medicine causing drowsiness, he probably should warn his patient not to drive or engage in other activities which are likely to cause injury. . . . Similarly, if a physician knows or should know of a patient's condition will impair her mental faculties and motor coordination, he probably should warn her accordingly.

As indicated in the above cases, when a physician prescribes a drug for his patient which the physician knows, or should have known, has an intoxicating effect, he has a duty <u>to the public</u> to warn that patient not to drive while under the influence of the drug. Those cases apply to the facts of this case and directly support upholding the plaintiff's complaint. In addition, there is the added

factor that the patient, Loomis, was a drug addict. This fact is even more reason why Dr. Forlaw either should not have prescribed the Quaaludes at all, or should have admonished Loomis not to drive a car, and drink alcoholic beverages, while under the influence of the Quaaludes.

There is one case that goes a step further than the above cases and requires a warning to potential victims, rather than to the patient himself. In TARASOFF v. REGENTS OF THE UNIVERSITY OF CALIFORNIA, 551 P.2d 334 (Cal. 1976) the patient of the defendant psycho-therapists killed a woman two months after he had confided to them of his intention to kill her. The woman's parents brought an action against the psycho-therapists to recover for the murder of their daughter by the psychiatric patient. The Supreme Court of California found that the complaint stated a cause of action. The court noted that under the Restatement of Torts 2d §315, when the avoidance of foreseeable harm requires a defendant to control the conduct of another person, or to warn of such conduct, liability is imposed if the defendant bears some special relationship to the dangerous person or to the potential victim. The court held that the relationship of the psycho-therapist (or doctor) to his patient satisfied that requirement. Accordingly, the court held that when a psycho-therapist determines, or should determine, that his patient presents a serious danger of violence to another person, he incurs an obligation to use reasonable care in protecting the intended victim

against such danger, by controlling the conduct of the patient or warning the intended victim..

Dr. Forlaw argues that TARASOFF is inapplicable because LIPARI v. SEARS, ROEBUCK & CO., 497 F. Supp. 185 (D.C. Neb. 1980) and THOMPSON v. COUNTY OF ALAMEDA, 167 Cal. Rptr. 70, 27 Cal.3d 741, 615 P.2d 728 (1980) have limited the TARASOFF decision to identifiable or foreseeable third persons. Dr. Forlaw argues that the minor Plaintiff in the present case was not an identifiable victim and stood in no different position than the public at large.

It is not Plaintiff's contention that this is a case that comes within the TARASOFF ruling. This is not a case where a warning must have been given to the potential victim, the minor Plaintiff. This is a case where the warning should have been given to the patient, Loomis. A distinction must be drawn between the TARASOFF case, where there may be a duty to warn an identifiable or foreseeable victim, and the present case where there is a duty to the public to warn the patient. This distinction was clearly pointed out in MYERS v. QUESENBERRY, supra:

> The fact Myers was a foreseeable but not readily identifiable victim of Hansen's driving does not preclude him from stating an action against the doctors for negligently failing to warn not to drive in an irrational and uncontrolled diabetic condition. This case is unlike those case where the exercise of reasonable care requires warnings directed toward potential victims rather than to actors likely to engage in foreseeably dangerous conduct. In those cases, as a precondition for imposing liability, potential victims must be

> readily identifiable as well as foreseeable.

The above cases support the Fourth District's decision in this case. The cases cited by Dr. Forlaw are inapplicable. The Doctor relies upon NANCE v. JAMES ARCHER SMITH HOSPITAL, 329 So.2d 377 (Fla. 3d DCA 1976), but that case is distinguishable because there the court granted a directed verdict, after evidence was presented, finding that the record was replete with evidence of no foreseeability. The present case, has been concluded at the pleading stage, and Plaintiff has been prevented from presenting evidence altogether. As the above cases demonstrate, when a physician prescribes a drug which has adverse side effects, it is foreseeable that the patient's driving will present a danger to others.

Dr. Forlaw argues that the Plaintiff failed to allege that it was foreseeable that Loomis would negligently operate an automobile while under the influence of Quaaludes. The Plaintiff alleged facts in his Complaint sufficient to establish foreseeability. In Paragraph 7 and 8 of the Complaint it was alleged that the Doctor knew or should have known that the patient was a drug abuser since he presented a classical profile of a patient who was abusing Quaaludes. In Paragraph 11 it was alleged that Dr. Forlaw knew or should have known that prescribing Quaaludes to Loomis would, within reasonable foreseeability, cause harm to innocent persons. Plaintiff was not required to allege that it was foreseeable that what actually happened

in this case was likely to occur. In CRISLIP v. HOLLAND, CITY OF FORT PIERCE & FLORIDA UTILITIES CONTRACTORS,INC., 401 So.2d 1115 (Fla. 4th DCA 1981) the court stated:

> In order for injuries to be a foreseeable consequence of a negligent act, it is not necessary that the initial tortfeasor be able to foresee the exact nature and extend of the injuries or the precise manner in which the injuries occur. Rather, all that is necessary in order for liability to arise is that the tortfeasor be able to foresee that some injury will likely result in some manner as a consequence of his negligent acts. Leib v. City of Tampa, 326 So.2d 52 (Fla. 2d DCA 1976); Broome v. Budget Rent-A-Car of Jax., Inc., 182 So.2d 26 (Fla. 1st DCA 1966); Railway Express Agency v. Brabham, 62 So.2d 713 (Fla. 1952); 57 Am.Jur.2d, Negligence, Sec. 157, pages 518-519. See also, Southern Express Co. v. Williamson, 63 So. 433 (Fla. 1913).
>
> An action for negligence is predicated upon the he existence of a legal duty owed by the defendant to protect the plaintiff from an unreasonable risk of harm. The extent of the defendant's duty is circumscribed by the scope of the anticipated risks to which the defendant exposes others. In order to prevail in a lawsuit, the plaintiff must demonstrate that he is within the zone or risks that are reasonably foreseeable by the defendant. The liability of the tortfeasor does not depend upon whether his negligent acts were the direct cause of the plaintiff's injuries, as long as the injuries incurred were the reasonably foreseeable consequences of the tortfeasor's conduct. Concord Florida, Inc. v. Lewin, 341 So.2d 242 (Fla. 3d DCA 1976). If the harm that occurs is within the scope of danger created by the defendant's negligent conduct, then such harm is a reasonably foreseeable consequence of the negligence. The question of foreseeability and whether an intervening cause is foreseeable is for the trier of fact.

> Gibson v. Avis Rent-A-Car System, 386 So.2d 520 (Fla. 1980). (Emphasis added)

Likewise in K-MART ENTERPRISES OF FLORIDA, INC. v. KELLER, supra, the Third District stated:

> . . . [a] tortfeasor need not be able to foresee--as it is necessarily impossible to foresee--the exact concatenation of events which has in fact ended in damage to another. . . . Is only required that the general "type of result" . . . which has occurred fall within the scope of the danger or "risk" created by the negligent act in question.

SOTO v. FRANKFORD HOSPITAL, 478 F. Supp. 1134 (E.D. Pa. 1979), relied upon by Dr. Forlaw, is also not applicable. SOTO deals with an injury to a third person because of a defective gas heater, not because of the patient's foreseeable conduct causing physical harm to another. GARCIA v. HARGROVE, 176 N.W. 2d 566 (Wisc. 1970) is inapplicable because it concerns the liability of the seller of intoxicated beverages, which is not the case before this Court.

As a "scare tactic" Dr. Forlaw argues that the Fourth District's decision will allow physicians of any negligent tortfeasor to become a defendant in a lawsuit against the tortfeasor. For example, Dr. Forlaw states that a physician will be held liable for the negligence of a diabetic or heart patient who injures a third party in an automobile accident. Under the above case law, the physician may be responsible if he fails to advise his patient that he should not be driving an automobile or that he should not drive while under the influence of certain medications taken for

the diabetes or heart condition. A physician certainly will not have blanket liability, as Dr. Forlaw contends. Rather, physicians are merely required to take whatever steps are reasonable under the circumstances to protect foreseeable victims of a patient's dangerous conduct. MYERS v. QUESENBERRY, supra; TARASOFF v. REGENTS OF UNIV. OF CALIFORNIA, supra. They will be liable for failing to do so.

There is a tremendous drug problem in our society today, particularly in Florida. Under the above case law, and the Fourth District's decision, physicians in this state may be responsible to third persons when they prescribe Quaaludes to a drug addict, particularly where they fail to admonish the drug addict not to drive while under the influence of the drug, and the third person is subsequently injured or killed by the actions of the drug addict in driving a motor vehicle. As the Fourth District aptly analyzed the case, it is a matter of foreseeability. Foreseeability was present in this case, and Dr. Forlaw has cited no cases that would support a contrary ruling.

RESPONSE TO BRIEF OF AMICUS CURIAE

The Amicus Curiae primarily complains that the question certified is too broadly worded. The Amicus Curiae contends that liability for the side effects of other drugs will have to be relitigated in the future. The Amicus Curiae argues

that physicians should be faced with a proposition of law that applies to classes of drugs, and suggests that physicians have a duty to warn of the impairment to motor skills likely to be caused by the quantities of any drug that a physician knows or should have known about. Plaintiff agrees. The Certified question is more narrow only because the particular facts in this case happen to concern prescribing Quaaludes to a drug addict who subsequently drives an automobile while under the influence of the drug.

The Amicus Curiae argues that the Fourth District's decision will make physicians liable to third parties for dangerous side effects of drugs. That is simply not true. In TARASOFF the court emphasized that it was not requiring perfect performance, but only that reasonable degree of skill, knowledge and care ordinarily possessed and exercised by members of that professional or specialty under similar circumstances. Dr. Forlaw and other physicians will be held liable only for those injuries which are the forseeable consequence of their negligence. Foreseeability presents questions of fact for the jury.

The Amicus Curiae also argues that there are no allegations in Plaintiffs' Complaint that the physician knew that the patient drove a car, much less that he would drive while under the influence of the drug. In none of the cases cited supra, such as KAUIER, GOODEN, and MYERS, were there allegations that the physician had reason to know the

patient was going to drive while under the influence. Rather, that is not required under the CRISLIP and KELLER cases, supra, where it is only necessary that the tortfeasor be able to foresee that some injury will likely result in some manner as a consequence of his negligent act. In the present case, it was alleged that Dr. Forlaw knew or should have known that prescribing Quaaludes to Loomis, the drug addict, would, within reasonable foreseeability, cause harm to innocent persons. These allegations were sufficient.

The Amicus Curiae concludes by arguing that this Court should not dismiss the Plaintiff's action but should direct the trial judge to determine whether a duty is existing under guidelines to be set forth in this Court's decision. It is suggested that this Court should not only set forth guidelines, but should determine that a duty was owed by Dr. Forlaw to the deceased minor.

CONCLUSION

This Court should answer the certified question in the affirmative.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been mailed to: MARJORIE GADARIAN GRAHAM, ATTY, P. O. Drawer E, West Palm Beach, FL 33402, this 7th day of NOVEMBER, 1983.

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