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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

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

REPLY 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

The defendant relies on the statement of the case and facts as set forth in his initial brief.

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.

ARGUMENT

For convenience, the defendant will reply separately to the arguments set forth in the briefs filed by the amicus curiae and the plaintiff.

A. Reply to plaintiff's arguments.

Because there was no doctor/patient relationship between the plaintiff and the doctor, there was no cause of action by plaintiff against the doctor. The plaintiff's injuries resulted from an efficient, intervening, independent cause, the negligence of Terry Loomis in operating a motor vehicle. Because Loomis' negligence was not forseeable and the doctor's acts were not the proximate cause of plaintiff's damages, the trial court correctly granted the motion to dismiss.

None of the cases on which plaintiff relies are dispositive of the issue presented. The Florida cases cited by plaintiff are distinguishable. For instance, in Hoffmann v. Blackmon, 241 So.2d 752 (Fla. 4 DCA 1970) the court held the physician owed a duty to a minor child who was a resident member of the patient's immediate family and household to inform his parents of the nature of the patient's contagious disease and the preventive measures to protect the child from the disease. The court premised its decision on the fact that plaintiff was a member of the patient's immediate family. In this case the plaintiff was not a member of the patient's immediate family. This case does not involve a contagious disease. There was no duty on defendant's part to warn all potential plaintiffs that the patient might willfully abuse a properly prescribed drug.

Likewise, Burrough v. Board of Trustees of Alachua General Hospital, 328 So.2d 538 (Fla. 1st DCA 1976) is not applicable. In that case the court specifically commented that it was not deciding whether the complaint stated a cause of action against the physician and hospital. id. at 540.

The plaintiff's reliance on K-Mart Enterprises of Florida, Inc. v. Keller, 8 FLW 2383 (Fla. 3d DCA 1983) is misplaced. In that case the plaintiff apparently alleged negligence per se in violation of a statute. The Third District Court of appeal discussed intervening cause in light of the federal legislation which the defendant

violated. The court observed that the legislative intent underlying the statute violated was to prevent exactly the type of conduct which occurred. The court concluded the injury occurred because of violation of a statute. In this case, unlike K-Mart, there are no allegations that the defendant doctor violated a statute and that violation of that statute directly resulted in injury to the plaintiff. Chapter 397 does not "forbid doctors to 'feed' a drug dependent person's drug problem" as asserted at page 6 of the petitioner's brief. That chapter establishes a drug rehabilitation program to be approved or regulated by the Department of Health and Rehabilitative Services. It does not govern prescribing of drugs by licensed physicians.

The plaintiff's second amended complaint did not allege a violation of Florida Statute Section 898.13. The statute cited by petitioner at page 6, Section 898.13, does not even exist. See 22B Florida Statutes Annotated 438 which indicates Chapter 898 has been reserved for future expansion.

The petitioner may have had reference to Section 893.13 which prohibits sale, manufacture or delivery of a controlled substance. Dr. Forlaw did not allegedly sell, manufacture or deliver a controlled substance to Terry Loomis. He wrote a prescription. That statute does not prohibit prescription of drugs. Indeed, Section 893.13(4) specifically provides that the act does not apply to the

delivery for medical purposes of a controlled substance. Section 893.05(1) provides that a medical doctor may "in good faith and in the course of his professional practice only . . . prescribe, administer, dispense, mix, or otherwise prepare a controlled substance. . . ." The second amended complaint does not charge that the defendant doctor unlawfully and feloniously sold or delivered Quaaludes by means of a prescription issued in bad faith and not in the course of professional practice. Thus, the plaintiff's reliance on Cilento v. State, 377 So.2d 663 (Fla. 1979) is misplaced. Furthermore, that case does not stand for the proposition that a civil cause of action exists under the facts of this case. Likewise, Gallo v. State Board of Medical Examiners, 257 So.2d 97 (Fla. 3d DCA 1972) is inapplicable.

Freese v. Lemmon, 210 N.W.2d 576 (Iowa 1973) is likewise distinguishable. There the complaint alleged the doctor knew of the seizure and thus had a duty to warn of possible future seizures and to find a reason for the seizures. Here the doctor did not know of the Quaalude addiction and intended improper use.

Gooden v. Tips, 651 S.W.2d 364 (Tex. App. 1983) is factually distinguisable. There, unlike this case, the physician had treated the patient for 20 years for various medical problems, including drug abuse. There, unlike this case, the doctor knew as a result of his observation and treatment that the patient had a long history of drug abuse

and could not be expected to take the prescribed medicine in the manner intended. In this case there are no allegations that the physician knew the patient could not be expected to take the prescribed medicine in the manner intended.

B. Reply to Amicus Curiae

Vining v. Avis Rent-a-Car Systems, Inc., 354 So.2d 54 (Fla. 1977) is not controlling. That case involved liability of a car owner premised on violation of a statute. Section 316.097 prohibits a person from leaving the key in the ignition of an unattended vehicle. There the plaintiff was a member of the class intended to be protected by the statute. Here there is no violation of a statute designed to protect the plaintiff.

Likewise Angell v. Avanzini Lumber Co., 363 So.2d 571 (Fla. 2d DCA 1978) is also distinguishable. In that case, unlike this one, the facts alleged were such that the defendant anticipated the harm and was even apprehensive of his own safety under the circumstances.

Bellavance v. State, 390 So.2d 422 (Fla. 1st DCA 1980) was an appeal from a summary judgment. The appellate court specified: "The sufficiency of the allegations of negligence and causation are not before us. We therefore assume but do not decide that the complaint states a cause of action" id at 423. The court then concluded that sovereign immunity was inapplicable. The case does not

stand for the proposition for which the Academy of Florida Trial Lawyers cites it.

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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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States mail this 1st day of December, 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; Prof. Joe Little, University of Florida, College of Law, Gainesville, Florida 32611, and to Larry Klein, Esquire, Flagler Bank Building, 501 South Flagler Drive, West Palm Beach, Florida 33401.

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