IN THE SUPREME COURT OF FLORIDA

CASE NO. 67,160

NOVA UNIVERSITY, INC., JANET STEVENS, CHARLES STEVENS, et. al.,

Petitioners,

vs.

JOSEPHINE C. WAGNER, et. al.,

Respondents.

ON PETITION TO REVIEW A CERTIFIED QUESTION OF THE FOURTH DISTRICT COURT OF APPEAL

REPLY BRIEF OF PETITIONERS JANET STEVENS, CHARLES STEVENS AND CHICAGO INSURANCE COMPANY

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Preface

With this Court's reaffirmance, in Snow v. Nelson, 10 F.L.W. 21 (Fla. August 30, 1985), of the specific acts rule of Gissen v. Goodwill, 80 So.2d 701 (Fla. 1955) which substantially limits parents' liability for their children's torts, many of the respondents' arguments against the Stevens became moot. The Stevens have conceded in this appeal that they stood in loco parentis toward Dana and Roland. The respondents recognized this concession and repeatedly endorsed it. The respondents not only relied upon the Stevens' concession, but independently argued that the facts showed that the Stevens stood in loco parentis. (Respondents' Brief at 31 - 35). Having agreed and argued that the Stevens were functioning as parents, the respondents cannot also argue that the Stevens were not really acting as parents and should be bound, instead, by a duty other than the one specifically applicable to parents set forth in Gissen v. Goodwill. Gissen v. Goodwill, to the exclusion of every other duty upon which the respondents rely, defines the Stevens' duties, if any, to the respondents.

Gissen is not only substantively determinative of the merits of this appeal, but is procedurally critical as well. Despite the fact that respondents deferred their discussion of Gissen v. Goodwill to page 35 of their 42 page brief -- and even then failed to distinguish the case in any meaningful way -- the present proceeding was generated entirely by that case. Gissen v. Goodwill was the only authority relied upon by the District Court, and provided the only basis for

for the certified question which invoked this Court's jurisdiction. The proper application of the rule in Gissen v. Goodwill thus provides the only purpose for our being here. Gissen is not, as the respondents seem to treat it in their Answer Brief, a mere ancillary concern. Trushin v. State, 425 So.2d 1126, 1130 (Fla. 1982).

Respondents also critize the statement of facts in the Stevens' brief because it included facts in addition to those contained in what respondents optimistically refer to as the Stevens' "stipulation". The respondents do not disagree with the accuracy or relevance of our facts; they merely state that this Court should not consider them because those facts are not properly before the Court.

The Stevens' so-called "stipulation" admitted the truth of all allegations in the plaintiff's opening statement at trial. That stipulation, however, was limited by its terms to the arguments contained in the Memorandum of Law that the Stevens filed in support of their Motion for Summary Judgment. The Motion itself stated, just as specifically, that the Stevens were generally relying upon "the pleadings and all discovery of record in this case". The Stevens' limited stipulation had relevance only to the arguments contained in the Memorandum. That stipulation may not be used against the Stevens in proceedings for which it was not prepared. Cf, Troup v. Bird, 53 So.2d 717, 721 (Fla. 1951).

The appellants (respondents here), despite their alleged reliance on our "stipulation", prepared a 4800 page appellate record for the District Court. The contents of that record are critical to the proper application of the Gissen rule in this appeal. That record is now before this Court. The Stevens cited fully to that record,

over the appellants' objections, in their brief before the District Court and have cited to it here. The time the respondents have spent in this case in an effort to convince this Court not to consider the record they prepared, on which we have repeatedly relied, and which both lower courts have had before it, would have been better spent in an attempt to show exactly how our factual statements about Roland and Dana are not dispositive of this appeal.

Restatement (Second) of Torts, § 319

Among the arguments mooted by the reaffirmance of the Gissen rule was respondents' assertion that § 319 of the Restatement created an alternative duty owed by the Stevens to the Wagners. Section 319 provides that,

> One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.

First, it is not § 319 of the Restatement, but Gissen v. Goodwill which, in Florida, defines the tort liabilities of natural parents, as well as those, like the Stevens, who concededly stand in loco parentis. Thus, even if the Restatement were controlling, it is §316 not § 319 that would be applicable here. Section 316 specifically relates to parents and persons in loco parentis and effectively codifies the Gissen rule. Why the respondents chose to rely on § 319 of the Restatement and not upon the more clearly applicable § 316, as a source of the Stevens' duties, is explained by the fact that many cases interpreting § 316 require, like Gissen, that parents be on notice of their child's particular harmful acts. See, e.g., Parsons

v. Smithey, 504 P. 2d 1272 (Ariz. 1973); Pesek v. Discepolo, 475 N.E.2d 3 (Ill. App. 1985); Moore v. Crumpton, 295 S.E.2d 436 (N.C. 1982).

The respondents, perhaps anticipating some criticism for carefully minimizing Gissen, and selecting § 319 over § 316, justified their tactical choices by characterizing the defendants' activities as a "commercial, profit-making enterprise". While this may be true as to Nova University, it is certainly not descriptive of the Stevens who shared a home with Dana and Roland, lived their private lives, and raised their own young children alongside the two boys. Furthermore, there is no logic in a test of parental responsibility for a child's torts which draws distinctions based upon whether the parents happen to be nurturing their own or someone else's children, or whether they are receiving money from a private or government source to defray child care expenses.

Secondly, if § 319 is held applicable to the Stevens, its key phrase "know or should know" must still be interpreted in light of the rule in Gissen and Snow, because of the Stevens' in loco parentis status. If § 319 is interpreted as it should properly be, in conjunction with the principles of Gissen and Snow, a child must have previously committed the particular act that caused injury, before the child's caretaker may be charged with knowledge of the likelihood of a reoccurrence of that activity. Under Gissen and Snow, and under § 319 as so construed, respondent's pleadings and proofs fail to establish that either Dana or Roland ever manifested anything remotely approaching the homicidal propensities that caused the death of one of the respondent's children, and the near death of the other.

The cases cited by respondents at pages 21-23 of their brief for the propositions that Florida recognizes a § 319-type cause of action are all distinguishable on an assortment of legal and factual gounds. We need only mention two -- that none of the cases involved a child's custodian acting in loco parentis, and none were based upon the rule in Gissen. The Stevens' duties, if any, as we have argued, and as we will hereafter show, must be considered in the context of the holdings of Gissen and Snow.

The cases cited by respondents at page 25 of their brief in an attempt to show that the Stevens' duties are set forth in those cases, have no apparent relevance to any of the issues in our case. In each of those cases, the foreseeable victims were either passengers of common carriers, or tenants, or business invitees, to whom the defendants already owed certain well established duties, particularly the duty of keeping its premises or conveyance safe and free of hazards. In the present case, by contrast, the Stevens owed no prior relational duty to the Wagner children precisely because the children's status as potential victims, not to mention their existence, was unknown to the Stevens. Respondents' application of these cases to the Stevens' situation simply begs the question of whether the Stevens could foresee injury, and thus owed a duty to the respondents.

Gissen v. Goodwill, Snow v. Nelson, and Foreseeability

In the context of their § 319 arguments, respondents make several other erroneous legal assertions that merit a response. Primary among them is the statement that the so-called "general duty/special duty" dichotomy is no longer a part of Florida's jurisprudence. In Point

III of their initial brief, the Stevens did not explicitly argue the "general duty/special duty" issue, although in a sense Nova and Flynn, the Stevens' co-respondents, in their initial briefs, did.[1] Nevertheless, the Stevens argued in Point I, and to a lesser extent in Point III of their initial brief, the virtually identical position -- cast, however, in the language of proximate causation -- that they owed no duty to the Wagner children because they were, as a matter of law, unforeseeable plaintiffs.

Whether conceptualized in a context of "duty" or as a problem in proximate causation and the "unforeseeable plaintiff", the common issue is still the old Palsgraf-ian one of determining when, if ever, a violation of a duty to one plaintiff will create a cause of action in another. Respondents argue, in this regard, that because the Stevens had a general duty of supervision over Dana and Roland they necessarily owed a special duty to the respondents, as well.

This Court has, in principle, disagreed with formulations of this sort. Although a discussion of the cumulative impact of Trianon Park Condominium Association, Inc. v. City of Hialeah, 468 So.2d 912 (Fla. 1985), Everton v. Willard, 468 So.2d 936 (Fla. 1985), Duvall v. City of Cape Coral, 468 So.2d 961 (Fla. 1985), City of Daytona Beach v. Huhn, 468 So.2d 963 (Fla. 1985), and Rodriguez v. City of Cape Coral, 468 So.2d 963 (Fla. 1985), upon the general duty/special duty doctrine is beyond the scope of this reply brief, the decision

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[1]We hereby incorporate Nova's and Flynn's arguments on this issue into our initial and reply briefs, and adopt their arguments as our own. Nova's initial brief was served upon us the same day we served ours, and Flynn's was served one week later; otherwise, we would then have incorporated their arguments, by reference, in our initial brief.

in Everton v. Willard reveals that the doctrine is far from defunct in this State.

Everton v. Willard held that a police officer is immune from suit for injuries caused by a drunk driver whom the officer, in his discretion, had not taken into custody. In discussing the parameters of a police officer's responsibilities for his discretionary acts, this Court stated:

> A law enforcement officer's duty to protect the citizens is a general duty owed to the public as a whole. The victim of a criminal offense, which might have been prevented through reasonable law enforcement action, does not establish a common law duty of care to the individual citizen and resulting tort liability, absent a special duty to the victim.

Id at 938. A clearer reaffirmation of the "general duty/special duty" doctrine would be hard to imagine.

Everton v. Willard also rejected the reasoning of Irwin v. Town of Ware, 467 N.E.2d 1292 (Mass. 1984) upon which respondents rely (Respondent's brief at 20, n. 11), and approved the reasoning of Cairl v. Minnesota, 323 N.W.2d 20 (Minn. 1982) which respondents attempt to distinguish because it relied upon the allegedly outmoded "general duty/special duty" doctrine. (Respondent's brief at 26). Cairl involves facts very similar to those in the present case.

While we recognize that the "general duty/special duty" doctrine, as such, finds its clearest expression in Florida in governmental tort cases, there is no reason why the doctrine should not be equally applicable to quasi-public institutions, like Nova's Living and Learning Center. The Center was thoroughly infused with a public purpose and discharged the thoroughly governmental function of receiving and rehabilitating delinquent and dependent juveniles.

Even absent the "general duty/special duty" doctrine, the Stevens had no duty to the Wagners under traditional principles of tort law. Traditional tort law recognizes no responsibility to unforeseeable plaintiffs or, as an alternative formulation of this same rule, for the consequences of unforeseeable risks or hazards. Respondents argue that the discussion of these issues contained in Point I of the Stevens' initial brief was beyond the scope of this appeal. However, as the Stevens read the question certified by the District Court, the issue before this Court is far more one of foreseeability and proximate cause than of "duty".

The District Court inquired of this Court whether the petitioners' alleged knowledge of one type of violence -- in this case Dana's and Roland's inconsequential fighting and minor assaultive acts -- put them on notice of the boys' capacity for homicidal violence. The District Court assumed that a duty would always exist to curb a child's particular acts if those acts were foreseeable. The District Court was simply inquiring about the legal quantum of foreseeability necessary to trigger this duty. This Court has, we suggest, already answered the Fourth District Court of Appeal's question, in Snow v. Nelson by saying that knowledge of the specific and particular injurious prior conduct is required.

As many commentators have observed, it is possible to state every issue of duty in terms of proximate cause. See, e.g., Prosser & Keeton, Torts, (5th ed.), at 274. And it is, in turn, possible to state every issue of duty and proximate cause in terms of foreseeability:

> [T]he obligation to refrain from ... particular conduct is owed only to those who are foreseeably endangered by the conduct and only with respect to those risks or hazards whose likelihood made the conduct unreasonably dangerous. Duty, in other words, is measured by the scope of the risk which negligent conduct foreseeably entails.

Harper & James, Torts, §18.2, at 1018. As Judge Cardozo stated succinctly in Palsgraf v. Long Island R. Co., 162 N.E.99,100 (N.Y. 1928), "The risk reasonably to be perceived defines the duty to be obeyed". Thus, while Point I of the Stevens' initial brief speaks in terms of proximate causation, and foreseeability, that Point was necessarily discussing "duty" as well.

Whether the catchword is "duty" or "proximate cause", it is apparent that the respondents and the Stevens disagree over the requirements of one concept common to both, namely, "foreseeability". Respondents argue that it is not necessary that the specific results of the Stevens' alleged failure to control Dana and Roland be foreseeable in order for the Stevens to be liable. All that need be foreseeable, they say, is that some harm in some manner to somebody would flow from the boys' elopement. That argument, however, confuses the risk or hazard from the boys' elopement, which must have been foreseeable to the Stevens, with the manner in which the risk or hazard caused injury, which need not have been foreseeable. The Stevens' position is that no harm to anyone was foreseeable from Dana's and Roland's elopement, so that the issue of the manner in which the boys caused harm is never reached.

Furthermore, the respondents' argument clearly does not state the law under Gissen and Snow. Respondents would have us ignore the

particular acts rule, and all "complications of detail", and resort to a test of foreseeability based upon vague and ambiguous prior acts. See, Prosser & Keeton, at 299.

Respondents, predictably, want to obscure such "details" as the fact that Dana and Roland had run away repeatedly but never hurt anyone while at large; that both boys attended public schools each day travelling freely on their own to and from the Center without causing any harm to persons on the street; that Dana and Roland had never, anywhere, stomped on anyone with their feet, strangled anyone, rendered anyone unconscious, broken anyone's skull or bones, or in fact ever been involved in anything more dangerous to life and health than those cursory and minor altercations that are a predictable part of any male adolescent group living situation. The respondents' do not deny the accuracy of those little "details". They merely argue, as we have noted, that these "details" are not properly before this Court.

The rule in Gissen demands that strict attention be paid to these "details". In fact, Gissen and Snow are meaningless unless they require a careful determination of whether the "details" of a child's prior acts, predict, foretell and are duplicated in, his later tort. This determination, in a case as factually clear as the present one, can be made by this Court as a matter of law. The rule in Gissen and Snow, by requiring a strong factual identity between prior and subsequent acts, ideally lends itself to a legal, or judicial, resolution of the issue of foreseeability. In the final analysis, by demanding a marked degree of similarity between a child's prior and subsequent acts, Gissen and Snow have had a significant impact

upon the tests of foreseeability and duty. Those cases have narrowed the class of foreseeable plaintiffs to whom parents will owe a duty, and have increased the number of risks and hazards which will be unforeseeable to parents, as a matter of law.

Respondents run afoul of the unforeseeable plaintiff rule in another respect. Respondents argue that the Stevens violated a duty to them because they, allegedly, failed to enforce Nova's house rules concerning eloped residents. First, as the Stevens argued in Point II of their initial brief, Dana's and Roland's tortious acts occurred immediately after Dana's father took the two boys into custody in order to return them to the Center, but then negligently failed to deliver them into the Stevens' custody. The Stevens' alleged failure to apprehend the boys earlier clearly had nothing to do with the unforeseeable intervening negligence of Dana's father.

But the more basic failing in the respondents' arguments is that they are again, but in a somewhat different form, seeking a free ride on a duty the Stevens owed, if to anyone, to Nova, or the boys' parents, or the boys themselves. An argument similar to the one the respondents make was rejected in the following way in Excelsior Ins. Co. of New York v. State, 69 N.E.2d 553, 555 (N.Y. 1946), a case also involving an elopement of a young resident of a treatment center:

> Regulations of the State Mental Hygiene Department, it is true, required the Wassaic authorities "to lock up all * * * matches" to search the clothing of patients for prohibited articles at regular intervals, and to keep elopers "under close and constant observation." From that standpoint, the State may have been negligent in not assuring compliance with the regulations and in not making certain

> that the boy did not elope. But such conduct, while perhaps a wrong in relation to its ward and to the institution itself, could not be regarded as a wrong to the community or to third persons such as claimants herein. Even if the State acted negligently with respect to Flood or the institution, that fact does not entitle claimants herein to sue "as the vicarious" beneficiaries of the breach of duty owed to others. Palsgraf v. Long Island R. Co., supra, ...

Accord, Flaherty v. State, 73 N.E.2d 543 (N.Y. 1947).

Restatement (Second) of Torts, §324A

Respondents also seek to impose a third duty upon the Stevens in addition to those of § 319 of the Restatement, and the in loco parentis doctrine. Section 324A of the Restatement codifies the general doctrine of assumed duty. If the Stevens are, as respondents suggest, at the center of three concentric circles of duty, then the most specific duty of the three should define the Stevens' legal responsibilities to the exclusion of the other two. The most specific duty is clearly that set forth in Gissen and Snow.

Section 324A, if it survives the "concentric circle" test, is nevertheless inapplicable on its face. Section 324A, as cited by the respondents (Brief at 39), provides:

> One who undertakes, gratituously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if (a) his failure to exercise reasonable care increases the risk of such harm ....

First, the phrase "should recognize as necessary for the protection of a third person...", leads full circle back to the particular acts test of foreseeability in Gissen and Snow.

Secondly, under § 324A, the Stevens' alleged failure to supervise the boys must be shown to have increased the risk of harm to the Wagners. This simply cannot, as a matter of law, be shown here. Dana and Roland were not prisoners. Not only did they elope at prior times and not hurt anyone, but they were allowed to leave the Center each day and travel unsupervised between the Center and a local public school. Between them, they would have taken hundreds of unsupervised and uneventful trips back and forth to public school. Absolutely no inference of increased risk can be drawn from the Stevens' alleged failure to secure the more speedy return of the boys under these circumstances.

Lastly, the increased risk requirement in § 324A requires careful scrutiny of the effect of the unforeseeable intervening negligence of Dana's father on the risk which the Stevens allegedly created. This issue was fully addressed in Point II of the Stevens' initial brief. Suffice it to say that it was Dana's father who promised the Stevens that he would return the boys to the Center in order to preempt a trip by the Stevens, or the police, to his home to pick up the boys. The father, then, in utter disregard of his promise, dropped the boys off some distance away from the Center. The boys committed their homicidal assault on the Wagner children literally on the heels of their unforeseeable abandonment by Dana's father.

CONCLUSION

Gissen v. Goodwill and Snow v. Nelson define the Stevens' duties in this case. Neither the pleadings nor the proofs allege any prior act by Roland or Dana remotely similar to the extraordinary behavior they exhibited toward the Wagner children. The risk or hazard to the Wagner children was simply, and as a matter of law, an unforeseeable consequence of the boys' elopement. The Stevens did not proximately cause the Wagner's injuries, or have any duty toward them under these unforeseeable circumstances. For the reasons stated here and in our initial brief, the decision of the District Court should be disapproved and the Summary Judgment in the Stevens' favor reinstated.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief was mailed this 19th day of September, 1985 to JOHN P. KELLY, ESQUIRE, Fleming, O'Bryan & Fleming, P.O. Drawer 7078, Fort Lauderdale, Florida 33338; G. WILLIAM BISSETT, ESQUIRE, Preddy, Kutner & Hardy, 66 West Flagler Street, Miami, Florida 33130; and JOEL EATON, ESQUIRE, Podhurst, Orseck, Parks, Josefsberg, Eaton, Meadow & Olin, 25 West Flagler Street, Miami, Florida 33130.

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