

IN THE SUPREME COURT
OF FLORIDA

CASE NO. 67,160

NOVA UNIVERSITY, INC., et al.,)
)
 Petitioners,)
)
 vs.)
)
 JOSEPHINE C. WAGNER, etc.,)
 et al.,)
)
 Respondents.)

ON APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL
PURSUANT TO FLA. R. APP. P. 9.030(2)(A)(V)

REPLY BRIEF

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FILED

SID J. WHITE

SEP 23 1985

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By _____
Chief Deputy Clerk

TABLE OF CONTENTS

	<u>PAGE</u>
Table of Authorities	iii
Argument	1
I. THE CONTROLLING AND IMPORTANT PUBLIC POLICY ISSUE IN THIS CASE NEEDS TO BE SQUARELY AD- DRESSED BY THE FLORIDA SUPREME COURT	1
II. THE SNOW DECISION REQUIRES THE QUASHING OF THE OPINION BELOW AND THE AFFIRMING OF THE TRIAL COURT'S SUMMARY JUDGMENT.	5
Conclusion	12
Certificate of Service	13

TABLE OF AUTHORITIES

	<u>PAGE</u>
<u>Beauchene v. Synanon Foundation, Inc.</u> , 88 Cal. App. 3d 342, 151 Cal Rptr. 796, (Cal. 1 Dist. 1979)	1
<u>Cansler v. State</u> , 234 Kan. 554, 675 P.2d 57 (Kan. 1984).	2
<u>Dober v. Worrell</u> , 401 So.2d 1322 (Fla. 1981)	3
<u>Furr v. Spring Grove State Hospital</u> , 454 A.2d 414 (Md. 1983)	1
<u>Gissen v. Goodwill</u> , 80 So.2d 701 (Fla. 1955)	5,9,10
<u>Hedlund v. Superior Court</u> , 34 Cal.3d 695, 194 Cal. Rptr. 805, 669 P.2d 41 (Cal. 1983)	1
<u>Padgett v. School Board of Escambia County</u> , 395 So.2d 584 (Fla. 1st DCA 1981).	3
<u>Rum River Lumber Co. v. State</u> , 282 N.W. 2d 882 (Minn. 1979)	2
<u>Semler v. Psychiatric Institute</u> , 539 P.2d 121 (44 Cir. 1976).	2
<u>Snow v. Nelson</u> , 450 So.2d 269 (Fla. 3d DCA 1984)	5,7,8,9, 10,11,12
<u>Vu v. Singer Company</u> , 538 F.Supp. 26 (N.D. Cal. 1981) <u>aff'd</u> , 706 F.2d 1027 (9th Cir. 1983)	1

I. THE CONTROLLING AND IMPORTANT PUBLIC
POLICY ISSUE IN THIS CASE NEEDS TO BE
SQUARELY ADDRESSED BY THE FLORIDA SUPREME
COURT

Respondents clearly do not want the Court to reach the real issue in this case - the duty owed by a non-security residential rehabilitation center to control the behavior of residents for the protection of the public at large. No attempt has been genuinely made to distinguish the cases or legal analysis used by the courts of other jurisdictions on virtually identical facts. See Beauchene v. Synanon Foundation, Inc., 88 Cal. App. 3d 342, 151 Cal. Rptr. 796 (Cal. 1 Dist. 1979); Vu v. Singer Co., 538 F.Supp. 26 (N.D. Cal. 1981), aff'd, 706 F.2d 1027 (9th Cir. 1983); Furr v. Spring Grove State Hospital, 454 A.2d 414 (Md. 1983). Instead, an unpersuasive resort to overly generalized tort law concepts and not even analogous Florida cases has been used to put some wind in respondent's sails.

However, whatever tack respondents take, they still must ultimately reach the issue so readily identified by the courts of California and Maryland. To suggest that the foregoing cases have been modified or discredited by Hedlund v. Superior Court of Orange Co., 34 Cal. 3d 695, 194 Cal. Rptr. 805, 669 P.2d 41 (1983) misreads the case entirely. As was stated in the Initial Brief, Hedlund merely extends the Tarasoff duty to warn, which respondents acknowledge is not the issue herein, to foreseeable bystanders or close relatives of a specifically identified victim. Nor can respondents create a duty by resort to Restatement

(Second) of Torts, §319 or the concept of a vague "duty assumed by assumption of the undertaking itself."

Restatement (Second) of Torts §319 has had a limited application by the courts of this nation. No case can be found wherein an appellate court has applied Section 319 to a half-way house or similar rehabilitation program in order to find a basis for liability to the public at large. Rather, the cases that have applied the Restatement provision have done so in unique factual circumstances, such as the escape of a publicly-declared criminal or insane person from confinement, usually under maximum security conditions, or the premature discharge of such a person from involuntary confinement. See, e.g., Cansler v. State, 234 Kan. 554, 675 P.2d 57 (Kan. 1984); Semler v. Psychiatric Institute, 539 P.2d 121 (44 Cir. 1976); Rum River Lumber Co. v. State, 282 N.W. 2d 882 (Minn. 1979). It is beyond dispute that the Living and Learning Center was not a security institution; hence, the reliance upon Section 319 is immaterial to the issues in this appeal. To say that the Living and Learning Center should have been a security institution is a little like saying that a motorcyclist should be liable for his own injuries in a motorcycle accident because he was not driving an automobile.

Likewise, it is difficult, if not impossible, to see how NOVA should be found liable on account of some vague duty assumed by the Stevens couple. The complaints fail to allege any semblance of vicarious liability of NOVA for the Stevens' acts, other than identifying them as "appointed agents and employees."

Both respondent and the lower appellate court place emphasis on the Stevens' alleged failure to bring Dana and Roland back to the Living and Learning Center on the day of their heinous crimes. As explained by the Stevens in their Brief, any connection between the alleged failure to bring the boys back to the Center and the crimes they committed goes beyond the limits of even remote proximate causation as a matter of law. If the crimes were committed two hours after the boys left the Center, or two weeks later in a different state while the boys were living some place else, should the analytical approach to this case be any different? Or what if the crimes were committed as they returned from public school? At best, this is a catch-all, fall-back argument by respondent, which was not even pled below, and which was raised for the first time on appeal. See Dober v. Worrell, 401 So.2d 1322 (Fla. 1981). Moreover, the assumed duty analysis is relevant only to any duty assumed to Roland and Dana, not to the public at large. At all times the Stevens were acting only to benefit Dana and Roland, not to benefit the public at large. See e.g. Padgett v. School Board of Escambia County, 395 So.2d 584 (Fla. 1st DCA 1981) (School board, by undertaking to install flashing lights at school crossing, thereby assumed duty with respect to students utilizing the crossing.) NOVA certainly did not undertake or assume any duty to the public at large.

The only real and genuine issue in this case is whether a duty was owed in the first instance by NOVA to the Wagner children, who were complete strangers to NOVA and not even on

NOVA's property at the time of the unforeseeable brutal acts. The Court should not only follow the lead of its sister courts of other states, but also without hesitation affirm this state's public policy in favor of juvenile residential rehabilitation over the only other alternative - punitive incarceration.

II. THE SNOW DECISION REQUIRES THE QUASHING
OF THE OPINION BELOW AND THE AFFIRMING OF
THE TRIAL COURT'S SUMMARY JUDGMENT

Obviously, the Fourth District certified the question on account of the weak logical underpinnings to its reversal of the trial court's final summary judgment solely based upon the appellate court's application of Goodwill v. Gissen, 80 So.2d 701 (Fla. 1955). Just as in both Goodwill v. Gissen, supra and Snow v. Nelson, 10 F.L.W. 454 (August 30, 1985), there was no evidence in this case that the children who committed the torts were in the habit of engaging in the particular act (murder or attempted murder) that constituted the tort upon the Wagner children. Evidence of bicycle theft, horseplay with others, prior leaves of absence from the residential treatment center, or even alleged violent propensities do not lead to the inescapable conclusion that Roland and Dana would commit murder or attempt murder. As "problem" as these youths may have been, their past histories no more foreshadowed the murder of Peter Wagner, and attempted murder of Christy Wagner than did Miss Goodwill's or Master Nelson's past behavior foreshadow their vicious and malicious acts. If the victims of the acts had been killed in Snow and Gissen, the legal result would be no different. It is not the severity of the behavior that controls, but rather the evidence of the prior happening of the particular act that caused the injury. There simply is no evidence in this 4827-page record that either Dana or Roland viciously - stomped, strangled, or attempted to murder another person.

Realizing that the record is incapable to sustaining a parental liability cause of action, plaintiffs rely on a red herring argument to the effect that certain "stipulations" were made below. As previously stated, NOVA UNIVERSITY and INSURANCE COMPANY OF NORTH AMERICA never stipulated to plaintiffs' opening statement as the facts upon which to predicate a motion for summary judgment. Therefore, the appendix to the respondent's answer brief is immaterial to the alleged liability of NOVA. It is apodictic that statements of opposing counsel do not constitute genuine and material evidence to defeat a summary judgment motion.

NOVA UNIVERSITY and INSURANCE COMPANY OF NORTH AMERICA predicated its motion for summary judgment on "the pleadings" and "proof" on file (R,1483-84). An accompanying memorandum of law, in the course of legal argument, had asked the court, merely for the purpose of analyzing the issue, to admit the truth of the well-pled allegations of the complaints. This was legal argument, pure and simple; it was not, and never was intended to be, a "stipulation" of the complaints.¹ It would be fundamentally unfair to constructively deem that such a statement was a stipulation. It would chill the ability of counsel to make effective

¹These defendants' memorandum read, "The issue before the Court is whether the Plaintiffs can state a cause of action against the Defendants, assuming that all the essential allegations of the complaints can be proven in a plenary trial. For the purpose of this motion only, all the allegations of the complaint are admitted, save the use of the word "escape" since the uncontroverted proof is that the Nova Living and Learning Center was not a security institution. (R,1485). Note that the co-defendants in a separate memorandum had asked the court to assume the truth of the opening statement.

and complete argument in legal memoranda. Moreover, such an overly technical approach appears futile in light of the fact that the case had been ripe for trial and a voluminous record was before the court. In fact, the appellate record in this cause consists of every bit of discovery taken and all exhibits listed in plaintiffs' pretrial catalogue, 4827 pages in all.

However, even assuming that these defendants, NOVA and INA, had made a binding admission, the Court then must apply the holding of Snow v. Nelson, supra to the operative allegations of the complaint:

18. That on numerous occasions while, DANA WILLIAMSON and ROLAND MENZIES, both minors, were residents of the Nova Living and Learning Center, said defendants exhibited a propensity, tendency or proclivity (a) to behave in a physically violent manner, often abusing and injuring other residents of the Nova Living and Learning Center, (b) to behave in an uncontrollable manner, often carrying to extremes of physical violence activities which began or were intended in the spirit of frivolity, (c) to oppress both physically and verbally, children small and younger than themselves, and (d) to escape or run away frequently from the Nova Living and Learning Center, often overnight, and while so at large, often committing offenses which would be considered crimes, if committed by adults.

19. That at all times material hereto, the Defendants, CHARLES W. STEVENS and JANET C. STEVENS, his wife, and the Defendant, NOVA UNIVERSITY, INC., had sufficient opportunity to observe the aforesaid violent and ungovernable propensities, tendencies or proclivities of the Defendants, DANA WILLIAMSON and ROLAND MENZIES, both minors, and actually observed same on numerous occasions and knew or, in the exercise of reasonable care, should have known that said minor Defendants had a propensity to commit acts which could normally be expected

to cause harm to others; but that despite such knowledge, the Defendants, CHARLES W. STEVENS and JANET C. STEVENS, his wife, and the Defendant, NOVA UNIVERSITY, INC., while having the opportunity and ability to control the minor Defendants, failed and refused to exercise reasonable means of controlling said minor Defendants, or appreciably reducing the likelihood of injury to others.

All that the foregoing allegations claim are "a propensity, tendency, or proclivity" of Roland and Dana toward socially undesirable behaviors. Just as this Court found in Snow v. Nelson, supra, however, "there is no allegation that [Roland and Dana] had previously engaged in the particular act," i.e., murder or attempts to murder. 10 F.L.W. at 454. "Propensity" means "an innate inclination; tendency; bent." "Tendency" means "a demonstrated inclination to think, act, or behave in a certain way." "Proclivity" means "a natural propensity or inclination; predisposition." On the other hand, "habit" means "a constant, often unconscious inclination to perform some act, acquired through its frequent repetition; an established trend of the mind or character; an addiction." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (1969). In fact, the recognized and accepted synonyms of "habit" do not include "propensity, tendency, or proclivity" because the foregoing do not denote or connote the concept of constancy or well established activity implied in the use of the word "habit." Id. at 590.

Therefore, all the complaint alleged was a generalized inclination of Dana and Roland toward socially unacceptable behavior or, giving the pleader the benefit of the doubt, violent

behavior. Nevertheless, this is a far cry from allegations of the habit of, or even a prior engagement in, the particular act in controversy, murder and attempted murder. Therefore, even if the complaint were deemed admitted, as apparently the Fourth District found, the effect is entirely immaterial to the controlling issue.

Of course, the foregoing does not suggest that the sufficiency of the pleadings is at issue here. The lower court entered a final summary judgment after the case had been mistried. The court file and the record before this Court is voluminous. The only evidence that plaintiffs can rely upon is making an argument for the genuine existence a parental liability cause of action is evidence of prior horseplay with others, running away, property crimes, and, in general, that Dana and Roland were "bad kids." As co-petitioners stated in their Brief at 8:

The record, in short, is totally devoid of any evidence that Dana or Roland ever killed a person, attempted to kill a person, choked a person, stomped on a person, rendered a person to seek medical treatment, or, during any period of elopement, as much as touched another person in any aggressive way.

Neither the allegations of the complaint nor the voluminous record before this Court pass muster under this Court's recent explanation of the Gissen rule in Snow v. Nelson, supra. Finally, no recognition has been given by respondent to the impropriety of a carte blanche application of the in loco parentis concept, a legal fiction, to an institution of learning. No case in Florida has made such a broad ruling on the liability of

schools and universities until the recent opinion by the Fourth District. The improper reading of the Gissen case and Snow case, together with a failure to understand the full implications of its use of the in loco parentis doctrine, create a classic case of "bad law."

The same policy reasons that led this Court to reaffirm the thirty-year old Gissen rule in Snow v. Nelson require quashing the Fourth District's opinion and affirming the final summary judgment. The certified question is conceptually impossible of being resolved within the context of the Gissen-Snow rule. The question inquires as to knowledge of generalized, vaguely-defined behavior ("violence") rather than particular acts. Indeed, broadly read, the question parallels the issue decided in Snow v. Nelson, supra. In that case, this Court held that the parents' knowledge of certain prior violent behavior of their child, to wit, his "propensity to be rough with smaller children, sometimes pushing or hitting them," did not create a "duty to exercise control to avoid injury to another caused by subsequent violence which is more severe," to wit, injury caused by the swinging of a croquet mallet. The Court found that no duty existed on the part of the parents even though the evidence at trial had established, among other things, that the parents had seen their son play the game that involved the use of a croquet mallet previously and thought he had played it frequently. Snow v. Nelson, 450 So.2d 269, 271 (Fla. 3d DCA 1984). This Court affirmed the Third District because, notwithstanding the parents' knowledge of the

foregoing, there was "no allegation that the child had previously engaged in the particular act, swinging a croquet mallet, which caused the injury." Snow v. Nelson, 10 Fla. L.W. at 1054.

Therefore, under the reasoning this Court employed in Snow, the question certified must be answered in the negative since it does not comport with a standard of knowledge of a child's particular act or the child's habit of a particular act.

CONCLUSION

In light of this Court's pronouncement in Snow v. Nelson, the certified question must be answered in the negative, the district court's opinion quashed, and the case remanded with directions to affirm the trial court's final summary judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Petitioners Nova University, Inc. and Insurance Company of North America was furnished by mail this 19th day of September, 1985, to: RUBIN & RUBINCHIK, P.A., 500 Center Court Building, 2450 Hollywood Boulevard, Hollywood, Florida 33020; HARRY A. GAINES, ESQ., Penthouse 1003, Nortrust Building, Miami, Florida 33131; JOEL D. EATON, ESQ., Podhurst, Orseck, Parks, Josefsberg, Eaton, Meadow & Olin, P.A., 25 West Flagler Street, Suite 1201, Miami, Florida 33130; JOSEPH H. LOWE, ESQ., Marlow, Shoft, Ortmeier, Smith, Connel & Valerius, 1428 Brickell Avenue, Miami, Florida 33131; and G. WILLIAM BISSET, ESQ., Preddy, Kutner & Hardy, P.A., 66 West Flagler Street, Miami, Florida 33130.

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