IN THE SUPREME COURT
STATE OF FLORIDA

NOVA SOUTHEASTERN UNIVERSITY, INC.,

Petitioner,

vs.

BETHANY JILL GROSS,

Respondent.
_______________________________/

S.C. CASE NO. 94,079
DCA CASE NO. 97-01335

On Review of a Decision of the
Fourth District Court of Appeal

PETITIONER'S BRIEF ON THE MERITS BY NOVA SOUTHEASTERN UNIVERSITY, INC.

JOHN BERANEK
Fla. Bar No. 0005419
STEPHANIE W. REDFEARN
Fla. Bar No. 0056022
Ausley & McMullen
P.O. Box 391
227 S. Calhoun Street
Tallahassee, Florida 32302
850/224-9115

THEODORE DECKERT
Panza, Maurer, Maynard & Neel, P.A.
3600 N. Federal Highway, Third Floor
Fort Lauderdale, Florida 33308
954/390-0100

Attorneys for Appellee
Nova Southeastern University

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STATEMENT OF THE CASE AND FACTS

Proceedings -- District Court

This is a merits brief by Nova Southeastern University, Inc. (Nova) on a certified question. The brief is directed to the opinion of the Fourth District Court of Appeal as issued August 26, 1998 and rendered November 9, 1998. The Fourth District Court actually issued two opinions in the case, the first dated May 20, 1998, and the second dated August 26, 1998. The same result was reached in both opinions -- a reversal of the trial court's summary judgment in favor of the defendant Nova in a negligence case brought by a 23-year old graduate student, Bethany Gross. Because the stated facts and the stated legal rationale[1] of the two opinions were substantially different, Nova filed a Second Motion for Rehearing directed to the second opinion. This Second Motion for Rehearing was not responded to by the plaintiff Gross, but was denied without comment by the court's order of November 9, 1998. The second opinion had the effect of withdrawing the first opinion.

The appendix to this brief contains the two opinions by the District Court along with the motion for rehearing directed to the

[1]The first opinion found liability against the university based on "a duty beyond a mere duty to warn; . . . a duty to take reasonable precautions to protect" from criminal attacks in a remote parking lot. (A.2). The second opinion deleted the first opinion's previously stated facts that the plaintiff was aware of the prior criminal attack in the parking lot and found liability could arise based solely on the university not warning plaintiff of the dangers of the parking lot. (A.4).

second opinion. The two opinions, as copied and contained in the appendix, may be found at 23 Fla. L. Weekly D1238a and 23 Fla. L. Weekly D1984a or by on-line computer retrieval. The appendix will be designated herein as (A.__) and the trial record will be designated as (R.__), which refers to the Amended Index to the record of July 2, 1997 and the Second Amended Index of July 4, 1997.

The Basic Facts

Bethany Gross was a 23 year old student who voluntarily enrolled at Nova as a graduate student to pursue her doctoral degree in psychology. Gross was sexually assaulted by a criminal in an off-campus parking lot on October 2, 1995. (R.1487). At that time she was in the midst of an eleven month psychology internship (or "practicum"), for which she was receiving graduate credit. Nova is a private university located west of Fort Lauderdale. Nova provided each doctoral candidate, with a book describing various locations at which the student could obtain necessary clinical or actual experience in their chosen fields. (R.1603). Internships are common in psychology, law enforcement, law, medicine and many other professional fields. Such internships are important to the students and further to recipients of the services as rendered by the students. Many internships, such as the particular one in question here, are designed to help the socially and economically needy.

Gross identified six of Nova's proposed practicum locations and Nova selected one of her six choices, a private, not-for-profit clinic named the Family Services Agency, Inc. (FSA). (R.1603-4). Nova does not own, operate, or control FSA or any of its facilities and Gross was aware of this when she chose it. (R.1611-1613). Nova had an arrangement with FSA to send interns there but NOVA did not do an actual inspection of the location and parking area. (R.843). FSA was commonly used by South Florida universities for internships. (R.1058-60). Other universities, including Barry University and Florida International University, had inspected the facility and sent interns there. (R.1058-60).

According to Gross, FSA was in a "bad neighborhood", a low income "high crime" location and the clinic provided counseling services most commonly to troubled poor families and youth without charging for the services. (R.1524,1628,1629). Gross testified she recognized the nature of the area as she initially drove into the neighborhood for her first interview. (R.1605,1606). Gross could have chosen between completing her practicum in FSA's facility in Coral Springs, a residential suburban township rather than FSA's central Ft. Lauderdale "bad neighborhood" facility. Gross preferred to work in Ft. Lauderdale because it was close to her home where she had lived for a year. (R.1603). Gross chose to drive her own car to her internship. (R.1614).

Immediately after starting the internship, Gross was told by

her FSA supervisor, Mr. Behrman, that the FSA Director, Bruce Wallin, had recently been robbed at knife-point in the parking lot. (R.1492,1614-1617). Gross was already well aware of the "bad neighborhood" nature of the area. She was also provided an FSA manual which, among other things, recommended procedures for workers of the internship site to take to safeguard against potential criminal attack, and she had lived in the area for a year. She routinely saw "vagrants" and other "unsavory type people" walking on or near FSA's premises. (R.1493-4). She testified these people gave her concern for her personal safety from the start of her internship. (R.1493-4, 1497, 1605). Gross did not voice her concerns to either Nova or FSA, and never requested to transfer from FSA's Ft. Lauderdale location to Coral Springs. (R. Dep. p.156-157, 161, 169). Gross had previously worked at the Coral Springs office. (R.1477). The District Court's first opinion states that an officer of FSA advised Nova of the robbery of Mr. Wallin.

In response to the crime situation, FSA implemented a "buddy system." (R.1496-7). Gross did not remember those exact words but did agree she had been told something very similar to it. According to Gross, FSA "recommended" that all of its staff and interns, including Gross, refrain from leaving the facility alone after dark. Gross testified that Mr. Behrman made this recommendation to her when he told her about the prior attack on

the director. (R.1497,1617). Gross attempted to adhere to the Behrman "recommendation." She generally would leave with someone else and would ask staff to accompany her if necessary. (R.1499-1501). According to her, she only infrequently or occasionally left the building alone after dark. (R.1502-3). She also routinely walked across the street in the daytime to a convenience store which was a suspected drug transaction area.

On October 2, 1995, six months after starting at FSA, Gross participated in a domestic violence counseling group which ended at 8:00 p.m. (R.1504-6). It was dark outside, and despite FSA's express recommendation not to leave the building alone (the buddy system), Gross left alone to walk to her car. A criminal (Mr. Washington), having nothing whatsoever to do with Nova or FSA, forced his way into the car, robbed Gross at gunpoint, and later raped her. Gross then requested a transfer to another internship site. (R.1618).

There was disagreement between FSA's personnel as to whether the "buddy system" was "mandatory" or "recommended." When Gross started at FSA, she was given FSA's manual which provided that when leaving the clinic at night, they should all ask another employee to watch them entering their cars and leaving the premises. (R.438). The words "buddy system" were not used in the manual and counsel for Gross argued below that there were issues of fact over the "buddy system." In this brief we will fully accept and rely

upon only the testimony of Gross herself on this issue. There is absolutely no question -- Gross was warned about the recent attack on the FSA director as she admitted in her deposition. Although she could not recall the term "buddy system", she fully agreed she had been told to always leave the building with someone else. She testified: "It was recommended that we walk with someone or leave the agency with someone after dark." (R.1497,1508). From Gross' point of view there was no issue of fact; she was told by FSA of the risk of criminal attack, and was also told by FSA to be accompanied by someone else when she went to her car.

On the night of her attack, Gross had not forgotten these warnings. She did not intend to be in the parking lot alone. (R.1508). She thought a "bunch" of other people were leaving at the same time and she fully intended to walk with them but somehow ended up leaving while the group was still inside. (R.900,1508). There simply is no question from this record -- Gross was warned by FSA which owned, occupied and controlled the premises and the parking lot. She recognized those warnings and even carried mace on her key chain. (R.1495).

Gross filed suit against both FSA and Nova on December 14, 1995. (R.1-12). This complaint and a later amended complaint claimed common law negligence against Nova. (R.90-121). FSA settled with Gross for $900,000, leaving Nova as the sole defendant. (R.1821).

After over a year of discovery Nova moved for summary judgment on January 22, 1997 (R.640-646). Nova asserted that it owed no duty to Gross as a matter of law because it did not own, operate, or control the parking lot or premises where Gross was assaulted. (R.643-644). It contended it had no "special relationship" with its adult students requiring that it protect or warn them of the criminal conduct of others at remote locations which are neither owned, operated or controlled by the university. It further contended that Gross had been warned of any dangers at FSA by FSA. The circuit court heard Nova's Motion for Summary Judgment and on March 20, 1997, issued its Final Summary Judgment, which found as a matter of law that Nova did not have a duty to Gross because it "did not own, operate, or control the premises where Plaintiff was abducted and later assaulted." (A.3).

On April 16, 1997, Gross filed her appeal to the Fourth District Court. (R.1811-1814). Two opinions resulted.

The First Opinion of May 20, 1998

The first opinion describes the facts specifically noting that the Director of FSA, Mr. Wallin, had been accosted in FSA's parking lot by a knife-carrying man. (A.1). The fifth paragraph of the opinion notes that Gross had been aware of Mr. Wallin's previous assault. (A.1). The opinion notes that Gross "framed her lawsuit" based on whether a "special relationship" existed similar to the kind of relationship which exists between a public grade school and

a minor student. The opinion discusses the law of special relationships in detail and concludes that this legal concept should be expanded to include a university and its adult students. The opinion states that this "adult student relationship must be placed alongside the other recognized special relationships." (A.1). The opinion then concludes that this special relationship required the imposition of a duty beyond the duty to warn and that this was the duty to take reasonable precautions to protect students while at remote internship sites. Under the first opinion, a warning to Gross would not have been enough to avoid liability and the opinion recognized that Gross had already been warned of the previous attack in the parking lot.

The Second Opinion of August 26, 1998

After motions for rehearing, the court withdrew the first opinion and issued a second opinion. (A.3,4). This opinion deletes the specific reference to the knife point attack on the FSA Director, Mr. Wallin, and deletes the fact that the plaintiff had been made aware of this recent attack which occurred in the FSA parking lot. The second opinion says that Nova (not Gross) had been made aware of a number of "criminal incidents" at or near FSA's parking lot. The opinion goes on to discuss the law of special relationships and concludes that "the `special relationship' analysis is necessary to this case. . . ." Again, the special relationship doctrine was applied to Nova.

The opinion as initially issued states that the most analogous case in the entire United States is Silvers v. Associates Technical Institute, Inc., No. 93-4253, 1994 WL 879600 (Mass. Sup. Ct. Oct. 12, 1994). This case was incorrectly cited using "Sup." to indicate a Massachusetts Supreme Court decision when in fact it is a trial court decision by the Superior Court, a Massachusetts trial court. The correct citation is "Mass.Super.Ct." The opinion concludes, based upon the Silvers case, that a jury could find liability based upon Nova's failure to warn of the dangerous situation in the parking lot at FSA. The court certified a question to this effect based solely on a failure to warn. Nova, as petitioner, seeks review and reversal of the decision and reinstatement of the circuit court's summary judgment.

SUMMARY OF ARGUMENT

The Fourth District Court of Appeal has expanded the "special relationship" doctrine derived from grade school and high school cases to impose liability on a university to its adult students under circumstances where no other court in Florida or across the country has done so. The Fourth District has certified a question of great public importance on this issue and petitioner, Nova Southeastern University, Inc., respectfully suggests that the decision is factually and legally in serious error. Further, important public policy considerations applicable to both public and private universities have been disregarded.

The decision exposes a university to liability for failure to warn an adult student of criminal conduct at a remote, independently-owned, off-campus internship site, despite direct warnings given by the internship site. Universities, both public and private, will now be responsible for adult students at such independently-owned off-campus locations even when the owner of those locations has already given warnings and recommended security precautions to adult students. Such students, who voluntarily choose to attend college or graduate school and participate in internship programs must now be treated similar to minor students in grade schools or high schools who attend classes and school functions under mandatory school statutes. The case law in the latter situations holds that school teachers and staff serve in a

loco parentis capacity and have both the duty to protect and the right to supervise minors surrendered into their care by their parents. Adult students do not attend colleges and universities under mandatory school laws and the universities do not stand in a loco parentis position as to their students, particularly in their off-campus activities.

The Fourth District has now expanded the law of special relationships to include adult students who voluntarily pursue post-secondary education. Under the District Court's ruling, an adult student is now entitled to at least two warnings if there is suspected criminal conduct at an off-campus internship site. The adult student is entitled to a warning from the university and a warning from the owner and occupier of the off-campus site. The District Court has erroneously disregarded the uncontested facts from the plaintiff's own mouth that she had been warned by the owner/occupier of the off-campus site. Even if this Court does not reverse as to expansion of the special relationship doctrine, the opinion should still be vacated because of the error in disregarding the fact that the plaintiff had superior knowledge over and above the university as to the dangers of the site in question.

The Fourth District has also seriously erred in relying upon an unreported out-of-state trial court decision as binding precedent in Florida. Further, this Massachusetts trial court decision is wrong as a matter of Florida law and should not have

been adopted by the District Court of Appeal.

The trial court's summary judgment in favor of Nova Southeastern University, Inc. was completely correct and should be reinstated.

ARGUMENT

The following question was certified to be of great public importance by the Fourth District Court of Appeal:

> **WHETHER A UNIVERSITY MAY BE FOUND LIABLE IN TORT WHERE IT ASSIGNS A STUDENT TO AN INTERNSHIP SITE WHICH IT KNOWS TO BE UNREASONABLY DANGEROUS BUT GIVES NO WARNING, OR INADEQUATE WARNING, TO THE STUDENT, AND THE STUDENT IS SUBSEQUENTLY INJURED WHILE PARTICIPATING IN THE INTERNSHIP.**

This Court has jurisdiction pursuant to Article V, Section 3(b)(4) of the Florida Constitution and may address all questions raised in the case. Although the certified question confers jurisdiction, Nova respectfully requests that the Court refrain from answering the question as stated as it does not accurately represent the issues presented by the facts of this case. As the Court has routinely done in such circumstances, the question should be properly restated. See Resha v. Tucker, 670 So. 2d 56, 57 (Fla. 1996); Thomason v. State, 620 So. 2d 1234, 1235 (Fla. 1993); Lawton v. Alpine Engineered Products, Inc., 498 So. 2d 879, 880 (Fla. 1986); Fisher v. Shenandoah Gen Constr. Co., 498 So. 2d 882, 883 (Fla. 1986) and Cleveland v. City of Miami, 263 So. 2d 573, 576 (Fla. 1972).

In particular, the certified question here fails to mention the newly expanded "special relationship" doctrine and fails to address the fact that Gross admitted she was warned of the criminal activity at the internship site but disregarded the warnings plus

the prescribed safety measures on the night in question.[2] Accordingly, Nova submits the question should be restated to include the following two questions:

I. WHETHER FLORIDA LAW SHOULD BE EXPANDED TO RECOGNIZE UNIVERSITY LIABILITY BASED ON A "SPECIAL RELATIONSHIP" ENTAILING A RIGHT TO SUPERVISE AND A DUTY TO CONTROL BETWEEN A UNIVERSITY AND ITS ADULT STUDENTS ENGAGED IN OFF-CAMPUS INTERNSHIPS AT INDEPENDENT SITES.

II. WHETHER A UNIVERSITY HAS A DUTY TO WARN AN ADULT STUDENT ASSIGNED TO AN INDEPENDENTLY OWNED REMOTE INTERNSHIP SITE ABOUT CRIMINAL ACTIVITY AT THE INTERNSHIP SITE IF THE STUDENT KNOWS OF THE CRIMINAL ACTIVITY BASED ON PROMPT WARNINGS GIVEN BY INTERNSHIP SITE, BUT DISREGARDS THOSE WARNINGS AND THE PROCEDURES ESTABLISHED AT THE SITE TO SAFEGUARD WORKERS FROM CRIMINAL ATTACKS.

Nova suggests that both questions be answered in the negative.

I. Schools and Special Relationships

The first opinion found Nova had a duty to make the parking lot at the FSA location safe based upon an expansion of the special relationship doctrine. The court held it was time for a change and that the university-adult student relationship should be "placed alongside" the other already recognized "special relationships." The second opinion abandoned the duty to make safe and retreated to

[2] The first opinion recognized these facts (plaintiff's knowledge) but the second opinion deleted them despite the plaintiff's own sworn admissions. (A.7-10). The second opinion could not have reached the conclusion of liability based solely on a duty to warn if the facts from the first opinion had been used. This was argued extensively in Nova's second motion for rehearing which quoted the admissions in plaintiff's deposition and which was unresponded to below. (A.5).

only to a duty to warn. The second opinion still relied upon the expanded special relationship doctrine stating that the "special relationship" analysis is "necessary" to this case. The other special relationships recognized in the opinion were employer-employee, landlord-tenant, landowner-invitee and school-minor student.

No reported cases, either state or federal, have ever held that the special relationship doctrine is applicable to adult college students who attend universities by their own choice. This is contrasted with minors who attend grade school or high school under mandatory school attendance statutes. Indeed, the entire body of case law dealing with the "special relationship" doctrine as applicable to grade schools and high schools is based upon the fact that grade school and high school is mandatory and students have no choice about attending. The parents of those children are required to place their children in the hands of teachers who step into the shoes of the parents and fulfill a loco parentis role. Thus, public school teachers under mandatory schooling have both the duty to protect school children and the right to supervise their conduct. Courts have been clear on this issue -- plaintiffs cannot have one without the other. If there is no right to supervise then there is no corresponding duty to protect.

There is no such thing as mandatory higher education in Florida. Gross was a voluntary student and although she was

required to take an internship to obtain her chosen degree, she did so of her own free will. She chose to attend Nova and she chose to become a psychologist and further chose to participate in an internship. A first grader has no choice about taking a course in reading but an adult graduate-student does have a choice about what career path to follow and the corresponding courses he or she will take. If a college student seeks a doctorate in any professional field, they are required to take courses in that field. This is a voluntary choice by the student, and the Fourth District wrongly characterized Gross as being the victim of mandatory decisions by Nova.

As this Court held in Rupp v. Bryan, 417 So. 2d 658 (Fla. 1982), at p. 666:

> [T]he genesis of this [public school] supervisory duty is based on the school employee standing partially in place of the student's parents. Mandatory schooling has forced parents into relying on teachers to protect children during school activity.

This Court went on to state that the problem could be expressed in "terms of Hohfeldian correlatives" noting that "a correlative duty exists only to the extent that the school and its employees have the authority to control the behavior of a student." Obviously, in the present circumstances, Nova had no right or duty to control and supervise the personal conduct of Ms. Gross when she was off campus. Without the right to control as a substitute parent there simply is no special relationship and no duty to protect or warn.

Under general tort law, there is absolutely no duty to protect another person from the criminal conduct of a third party on property not owned or controlled by the defendant. Trianon Park Condominium Ass'n v. Hialeah, 468 So. 2d 912 (Fla. 1985); Boynton v. Burglass, 590 So. 2d 446 (Fla. 3d DCA 1991). Absent a special relationship, no duty or liability exists. This is the overwhelming law across the country. The Fourth District recognized this but sought a way to change the law and allow the plaintiff a cause of action against Nova by enlarging the doctrine of special relationships. In doing so, the Fourth District was in error as a matter of law and as a matter of public policy.

There were absolutely no reasons to expand the tort law of Florida because Gross already had a complete and adequate remedy against the alleged wrong-doer, FSA. This decision will also have tremendous adverse consequences to Florida universities and the entire system of graduate internships. This decision will apply to both private and public universities and to internships all over the world. The decision is dangerously close to requiring universities to make independent investigations as to the crime rate in all internship sites. This was clearly inferred in the first opinion which criticized Nova for not inquiring further from FSA about the first attack. This goes too far.

Although the Fourth District's second opinion states that no "general duty of supervision" is being imposed, the court has put

the cart before the horse. There can be no duty to warn and protect unless there is a right to supervise personal conduct off the campus of the university. All existing case law, such as Rupp, so holds.

The case most closely resembling the Nova situation is Donnell v. California Western School of Law, 246 Cal. Rptr. 199 (Cal. 4th Dist. 1988). Cal Western operated a law school which did not provide a parking area for students near the law library building. It was well known by the university that law students often remained in the library until midnight and were forced to walk a considerable distance to their cars in the dark. To get to a parking lot the students traveled a city-owned sidewalk that ran directly along the side of the university building. Cal Western had chosen not to have the campus police be responsible for the area and did not provide lighting on the side of the building despite the probability of criminal conduct on the street with students as victims. Donnell was a law student who was attacked on the street while going to his car and sued the university for negligence in its failure to provide security. The sidewalk was not owned by the university. The court refused to adopt the special relationship doctrine and refused to hold that the university had a duty to warn. Donnell is directly applicable to this case and the Fourth District Court of Appeal simply chose to disregard it and to instead rely upon Rupp v. Bryan, supra, Shurben

v. Dollar Rent-A-Car, 676 So. 2d 467 (Fla. 3d DCA 1996) and one Massachusetts trial court decision.

The State of Utah has also considered the question of whether a special relationship exists in a university setting. In Beach v. University of Utah, 726 P. 2d 413 (Utah 1986), a female student in a biology class at the University of Utah was required to attend a field trip off-campus over a weekend. A local rancher held a lamb roast and the student, who was 20 years old, gained access to alcohol and was injured when she became intoxicated. She claimed that a large modern university had a relationship with its students which imposed a duty to prevent students and others from violating liquor control laws whenever those students were involved in a university activity. (Beach at 417-418). The Utah Supreme Court disagreed and held that no "special relationship" existed between the university and its adult students. The court concluded that the students were not juveniles, and that Beach had a constitutional right to vote and would have been sentenced as an adult had she committed a crime. The court further noted that colleges and universities are educational institutions, not custodial institutions, and that creating a special relationship would "require the institution to babysit each student, a task beyond the resources of any school." (Beach at 419). Again, the Fourth District Court of Appeal chose not to even recognize or discuss the Beach decision.

Another case of direct application from the federal court is <u>Wright v. Lovin</u>, 32 F.3d 538 (11th Cir. 1994) which was a Section 1983 action against a county school superintendent. <u>Wright</u> concerned a 15-year old attending summer school classes. The student left the summer school session in a car in violation of school rules and was killed in an auto accident. The student's mother brought a section 1983 action against the school asserting that a custodial relationship tantamount to a "special relationship existed between the school and the student" so as to support a claim that the school violated the student's substantive due process rights.

The Eleventh Circuit Court of Appeal held that no special relationship existed between the school and the student because this was not a mandatory school attendance situation. Instead, classes were being voluntarily attended during a summer session. The court held that this was a consensual relationship and that the special relationship doctrine had no application whatsoever.

Another federal case closer to home is <u>Mitchell v. Duval County School Board</u>, 107 F.3d 837 (11th Cir. 1997). In <u>Mitchell</u>, a 14-year old student had attended an evening school function and was waiting for a ride home by his father. He was standing on a driveway near the school parking lot and was shot and killed by non-student third party assailants who were attempting to rob him. The Eleventh Circuit "summarily" rejected the plaintiff's arguments

for application of the "special relationship" doctrine relying upon the Wright decision. The court stated at p. 837: "The Wright court rejected the argument that a student attending a voluntary program has a special relationship with his school sufficient to impose a constitutional duty on the school to protect the student from injuries by third parties."

The Fourth District has failed to recognize that the duty to warn of dangers on property is to be legally assigned to the person or entity in actual physical control of that property. As to leased property, this is clearly the law of Florida. In Fitzgerald v. Cestari, 569 So. 2d 1258 (Fla. 1990), a seven year old child was visiting neighbors who were living in a leased home. The sliding glass doors in the home were part of the original construction and were in violation of the building code because they did not contain safety glass. The child, Brandi, ran into a glass door which shattered and cut her badly. Suit was brought against the homeowner/lessor. This Court ruled that only the lessee had the duty to warn the child and stated at p. 1261:

> It therefore follows that the duty to warn Brandi of the hidden danger the closed door may have presented rested solely upon the lessees, who were in control of the premises. See Bovis v. 7-Eleven, Inc., 505 So.2d 661 (Fla. 5th DCA 1987) (lessees of the premises have duty to warn third parties of dangerous conditions on premises because such duty rests on right to control premises rather than on legal ownership of the dangerous area).

Just as in Fitzgerald, here the entity "in control of the premises" was FSA and not Nova and the duty to warn "rested solely upon" FSA.

Further, as in Fitzgerald, Nova was entitled to this ruling as a matter of law.

As previously indicated, no case in Florida has ever held that the "special relationship" doctrine applies against a university to an adult student. However, the doctrine has been the subject of litigation in other areas outside of a school context. In Palmer v. Shearson Lehman Hutton, Inc., 622 So. 2d 1085 (Fla. 1st DCA 1993), the First District Court considered the doctrine stating the following general guidelines:

> Under the common law, a person has no duty to control the tortious or criminal conduct of another or to warn those placed in danger by such conduct unless there is a special relationship between the defendant and the person whose behavior needs to be controlled or the person who is a foreseeable victim of such conduct. Boynton v. Burglass, 590 So. 2d 446 (Fla. 3d DCA 1991). See also Trianon Park Condominium Ass'n, Inc. v. City of Hialeah, 468 So. 2d 912, 918 (Fla. 1985). Implicit in the special relationship exception to this general rule is the concept that, when relying on a special relationship between the defendant and the person whose conduct needs to be controlled, the defendant must have the right or ability to control the third person's conduct. Garrison Retirement Home Corp. v. Hancock, 484 So. 2d 1257 (Fla. 4th DCA 1985). Kury was not in the employ and control of Hutton at the time the alleged injuries occurred, and Hutton had not employed him for several years. Because Hutton had no ability to control Kury's conduct at the time the alleged injuries occurred, this special relationship exception is not satisfied as between Hutton and Kury.

Although the above legal principles were directly argued to the Fourth District Court of Appeal, none were commented upon. Instead, the District Court chose to rely solely upon Rupp v. Bryan, supra, Shurben v. Dollar Rent-A-Car, supra and Silvers v.

Associated Technical Institute, Inc., supra.

We have already demonstrated that the Rupp case applies the special relationship doctrine only in a situation where there is mandatory schooling and the defendant thus has corresponding rights concerning both supervision and protection of a minor who needs protection. In short, the school authorities stand in place of the parents, and this is the basis for the entire special relationship doctrine in the context of both grade schools and high schools.

The Dollar Rent-A-Car case is entirely distinguishable and the opinion does not even mention the "special relationship" doctrine. In that case, a British tourist sued a car rental agency, and others, after she was accosted and shot while traveling in a rental car in Miami. The tourist alleged that the car rental agency had actual knowledge of repeated criminal attacks on tourists in rental cars in certain areas of Miami; that the rental car she was given bore a license plate which identified the car to the criminals as a rental; and that the car rental agency knew that plaintiff was a British tourist who did not know any of the foregoing information. 676 So. 2d at 468. The trial court granted the car agency's motion to dismiss finding no duty on its part.

The Third District Court of Appeal assumed the alleged facts as true and reversed holding that the rental agency had a duty to warn the tourist of the risk of attack by criminals who were actually targeting identified rental vehicles in certain areas.

The agency's actual knowledge of a specific foreseeable criminal risk; the tourist's lack of knowledge of the risk, plus the license plate which attracted criminals all resulted in a duty to warn under existing law. In the instant case, however, it was Gross, the plaintiff, who had superior knowledge of the danger of criminal activity at the internship site. As explained more fully below, a defendant has <u>no duty to warn</u> when the plaintiff's knowledge of a danger is equal to or superior to the defendant. If the British tourist had been previously warned by a Miami police officer of all the facts concerning criminals targeting tourists in certain areas in cars with special rental tags, then there would have been no duty by the rental agency to also warn her. Indeed, the Third District also ruled that the agency had no obligation to make any independent investigation of crime.

The single case which the Fourth District found most analogous and compelling was the <u>Silvers</u> case. The <u>Silvers</u> "opinion" is a Massachusetts trial court order which simply denied a motion for summary judgment. Such an order is not even appealable. The order was also incorrectly cited as a Massachusetts <u>Supreme</u> Court decision by the Fourth District's opinion, thereby giving it much greater weight than was appropriate. This was pointed out on rehearing and the court sent a correction to West Publishing Company, but the incorrect citation still appears in the Florida Law Weekly version. (A.2,3). Furthermore, <u>Silvers</u> is a non-

published order, which can only be found after researching costly on-line legal databases such as Westlaw in search of trial court orders. The case, which was not cited by any party, should not have been relied upon by the Fourth District in any way whatsoever. Florida trial court decisions do not have the force of precedent in this state -- certainly orders denying summary judgments from another state are no better. Nova also respectfully submits that Silvers is simply wrong as a matter of Florida law and further that it should not have been used as a precedent to overrule a Florida trial court decision.

The facts of Silvers, which were not detailed by the Fourth District, were as follows. The defendant, Associated Technical Institute, Inc., is a post-secondary vocational school which provides graduates with "placement support services," including referrals to employers with openings in the students' fields of study. After the plaintiff had completed her studies at the school, she consulted the placement office about employment opportunities. The school referred her resume to an employer who had contacted the school requesting a female technician for a communications switching complex. The school did not know at that time that the employer had previously been convicted for indecent assault and battery. After being contacted by the employer, plaintiff accepted the job. During the course of employment, plaintiff alleged that the employer sexually harassed and raped

her. The plaintiff sued the school for failing to use reasonable care in performing its supposed contractual obligation to assist her employment efforts.

The trial judge denied the vocational school's motion for summary judgment which argued it had breached no duty to the plaintiff. The trial judge wrote an order in which he stated his personal reasoning that the prospective employer's request for a female employee should have raised a warning flag that the employer was potentially engaging in employment discrimination based on sex and that this was in violation of Massachusetts statutory law. The trial judge held that this fact alone created an issue as to whether the school had used reasonable care to protect the plaintiff from being raped.

The Fourth District should not have relied on this Massachusetts trial court order to justify its decision in the instant case. Obviously the case is easily distinguishable and is not "closely analogous." Gross was thoroughly warned and had actual notice of criminal activity at FSA, but disregarded these warnings on the night in question. These warnings, in and of themselves, abrogated any duty that might have conceivably existed on the part of Nova to warn Gross of the criminal activity at the internship site.

Additionally, the Massachusetts trial court decision is incorrect as a matter of law, and will open a pandora's box of

litigation if adopted by this Court, as it was by the Fourth District. Sexual discrimination in employment (hiring a female rather than a male) has nothing to do with criminal sexual offenses such as rape. The employer in Silvers forced the employee to have sexual intercourse. Under Florida law, discrimination in hiring practices is entirely distinguishable from sexual assault and rape. Discrimination in favor of or against a male or a female does not put anyone on notice of a propensity to commit sexual crimes such as rape.[3] The Silvers decision, if adopted by this Court, would effectively require colleges, universities and vocational schools to conduct extensive background investigations. Interns are hired by the various internship sites such as FSA and may then be hired by permanent employers with the assistance of the university placement services. Every prospective employer and every employee of every employer would have to be subjected to criminal activity background searches. The results of these searches would have to be given to every student who desired to utilize the internships or placement services. This goes too far.

Silvers, an unpublished order, is clearly a needle in the haystack found through costly on-line research that is not readily available to all Florida practitioners. Appellate courts are not bound by the orders of trial courts in the same state, much less

[3]There are many jobs for which a sexual preference would be perfectly proper such as a clerk in a woman's lingerie shop or a gynecological nursing assistant to a doctor.

those of other states. If this Court approves the practice of citing to unpublished out-of-state trial court orders as precedent, it will drastically change the practice of law and the entire concept of citing precedent to courts. Such a decision will create insurmountable obstacles for many Florida practitioners and their clients, not to mention the workload of the courts.

There was simply no need to expand the law to give the plaintiff a tort remedy herein. Plaintiff has already sued FSA and settled her case for a substantial amount. FSA had the obvious and clear duty of directly supervising and making its own property safe. As a part of this larger duty, FSA in fact warned Gross of the knife-point robbery of one of its own employees within a month of when Gross started working there. FSA also gave Gross a manual calling attention to this problem and further specifically instructed her to always be accompanied by another person when she went to her car. Indeed, Gross herself fully recognized this and almost always was accompanied when she went to her car. She simply neglected to do so on the night in question. This case is different than almost all other cases because here there was a party standing between Nova and Gross, and that party (FSA) had the ability and duty to fully protect Gross. Gross has already successfully sought her remedy against FSA and there is simply no reason to expand tort law to now give Gross an additional remedy against Nova. The only warning which Nova could have given would

have been to repeat the same warning that FSA had already given to Gross. It simply makes no sense to require a university such as Nova to give adult students a second warning over and above the warning already given. There was no special relationship, the incident occurred on property over which Nova had no control and the doctrine of "special relationships" should not have been applied herein.

II. A Duty to Warn

The District Court's second opinion is based upon a "special relationship" and a resulting duty to warn. The District Court's first opinion recognized that Gross had been advised of the prior attack in the FSA parking lot and the opinion even goes so far as to list all of the other "criminal conduct" in the area which included trespass, auto break-ins and suspected drug activity across the street. For reasons the court has not chosen to explain, the facts were changed in the second opinion and the court deleted the fact that Gross had already been warned about the prior knife-point attack in the parking lot.

The facts are quite clear, based on Gross' testimony alone, she was fully warned of the prior crime in the parking lot and told she should be accompanied when going to her car at night. As pointed out in the second motion for rehearing, Gross testified as follows in her deposition of December 18, 1996:

> Q.: Prior to October of 1995, [were] you aware of any criminal activity on the premises of FSA in Fort

Lauderdale?

***

A.: Yes.

Q.: What activity were you aware of?

A.: I was aware that the director of the agency was assaulted at knife point.

Q.: Tell me what you know about that incident?

A.: I just know that it happened.

Q.: How did you learn about that?

A.: Mr. Behrman [FSA official] told me.

Q.: Do you recall when?

A.: I don't recall the exact date.

Q.: Was it before October of 1995?

A.: Yes.

(R.1492).

In addition to informing Gross of the previous attack, Gross was also advised to use the "buddy system" to protect herself while working at FSA. As Gross testified:

Q.: Quite simply, were you told that you should go with a fellow employee when you were leaving the premises going out to your car?

A.: It was recommended.

Q.: Okay. Tell me what was recommended.

A.: It was recommended that we walk with someone or leave the agency with someone after dark.

Q.: Who made that recommendation to you?

A.: Mr. Behrman.

Q.: And when do you recall him making that recommendation to you?

A.: I don't recall the exact date.

Q.: Was it before October of 1995?

A.: Yes.

Q.: And did you follow Mr. Behrman's advice on any occasions prior to October of 1995?

A.: Yes.

Q.: And why was that? Why did you follow his advice?

A.: Because it was a bad neighborhood.

(R.1496-7).

Other FSA agents and/or employees also discussed the danger of criminal attack in the neighborhood with Gross, including an employee named Linda Benlolo. In the words of Gross:

Q.: Would you recall Linda ever talking to you about any prior crimes or any safety concerns she may have had?

A.: Possibly.

Q.: Tell me what you recall about those conversations.

A.: I believe I remember her making a comment about the neighborhood and the type of people we would see in the neighborhood.

Q.: What was the comment?

A.: I don't remember the exact comment. I just remember her saying something about it, I think.

Q.: What was the gist of the comment?

A.: This is a bad neighborhood and these are scary people.

(R.1533).

Indeed, Gross herself was able to quickly identify the area in question as a "high crime area" and "bad neighborhood" filled with "scary people," a fact which gave her concern for her safety:

> Q.: Did the people walking around across the street or in the general area give you concern for your personal safety?
>
> A.: Yes.
>
> ***
>
> Q.: When you drove through the neighborhood and got to the FSA site, were you ever concerned at that time for your safety and well-being?
>
> A.: I was concerned about the neighborhood that it was in.
>
> ***
>
> Q.: What were your concerns at that initial time of the interview about the neighborhood?
>
> A.: There appeared to be a lot of suspicious people walking around the premises.
>
> ***
>
> Q.: In your answers to interrogatories, you asserted the area or the location where FSA was located where you were assigned as being a high-crime area.
>
> A.: Uh-huh.
>
> Q.: When did you first come to the realization that it was a high-crime area?
>
> A.: I became suspicious that it was a high-crime area when I first saw it.
>
> Q.: And is that because of the suspicious people walking about?

A.: Yes.

Q.: Any other reasons?

A.: The attack noted by Mr. Behrman.

Q.: These people that were walking about that you believe were suspicious, were they actually in the parking lot of FSA or were they out on the street?

A.: They were everywhere.

(R.1495, 1605, 1606, 1620, 1621).

In addition to the above, as previously indicated, Gross testified that she was fully aware of the bad nature of this neighborhood when she first drove through it on her way to her initial interview. (R.1605-6).

In ruling that Nova had a duty to warn Gross of the danger of criminal activity at her internship site, the Fourth District overlooked the fact that Gross already knew of the danger after having been informed by officials at the site. In Florida, when a plaintiff has knowledge of a danger which is equal to or superior to that of a defendant, the defendant has no duty to warn. Stewart v. Boho, Inc., 493 So. 2d 95, 96 (Fla. 4th DCA 1986)(stating that where plaintiff has knowledge of a danger which is equal to or superior to a defendant's knowledge, the defendant has no duty to warn of it); Hunt v. Slippery Dip of Jacksonville, Inc., 453 So. 2d 139 (Fla. 1st DCA 1984)(ruling that a defendant's knowledge of a danger must be superior to that of a plaintiff in order to create a duty on the part of a defendant to warn); Miller v. Wallace, 591

So. 2d 971, 973 (Fla. 5th DCA 1991)(finding that a defendant has no duty to warn where the plaintiff has knowledge of the danger which is equal or superior to the defendant's knowledge). Accordingly, based upon well settled Florida law, Nova did not have a duty to warn Gross of the danger of criminal activity at the internship site. The District Court erred in basing its decision on a duty to warn by Nova. This Court should find as a matter of law that Nova had no duty to warn.

Nova's knowledge of the danger was substantially less than that of Gross. Gross had received a face to face warning from the people who knew what they were talking about. Gross reviewed the FSA manual and Gross actually carried out the "buddy system" until she made a mistake on the one night in question.

Because Gross' superior knowledge of the danger affects whether Nova had a **duty**, this does not create an issue of comparative negligence for a jury. To the contrary, the existence of a duty is for the court to decide based upon the circumstances in a particular case. See e.g. McCain v. Florida Power Corp., 593 So. 2d 500, 502 (Fla. 1992)(holding that since "duty" is a question of law, an appellate court may rule based upon its own legal conclusion that no duty exists).

Gross knew much more about the dangers of the parking lot crime at FSA than did Nova, and there is a complete absence of a duty as to Nova. We are certain that the plaintiff will argue that

perhaps an additional warning from Nova would have made a greater impression on her than did the warning from FSA. Such an argument should not be accepted by this Court. Nova could have done nothing more than to tell Gross that it had been advised that there had been a previous robbery in the parking lot. This would have been second-hand hearsay. Gross needed no reminder or reenforcement of the warning nor of the recommendation that everyone be accompanied when they went to their cars. She fully intended to comply with the "buddy system" on the night of her assault. In her deposition at R. 1508 Gross testified:

> Q Why was it that you did not have a buddy when you left on October 2nd?
>
> * * *
>
> A There was a bunch of people leaving the agency at the time and when I came out I was also leaving and I figured there are people coming out with me like right behind me that someone would be along right behind me and that I wouldn't be in the parking lot alone.

When a danger is obvious and when a plaintiff is warned and fully appreciates it, there is simply no duty on the part of a remote defendant to make inquiry and further warn the plaintiff.

CONCLUSION

The trial court's summary judgment was entirely proper and should be reinstated. The decision of the Fourth District Court of Appeal should be vacated in its entirety.

The expansion of the special relationship doctrine should be rejected as a matter of law. Alternatively, and at the very least,

plaintiff's superior knowledge abrogated any duty to warn by Nova.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy has been furnished by mail to **TOD ARONOVITZ**, Aronovitz & Associates, P.A., 150 W. Flagler Street, Suite 2700 - Museum Tower, Miami, Florida 33130; **EDNA L. CARUSO**, Caruso, Burlington, Bohn & Compiani, P.A., Suite 3-A/ Barristers Bldg., 1615 Forum Place, West Palm Beach, Florida 33401; this ___ day of January, 1999.

____

JOHN BERANEK
Fla. Bar No. 0005419
STEPHANIE W. REDFEARN
Fla. Bar No. 0056022
Ausley & McMullen
P.O. Box 391
227 S. Calhoun Street
Tallahassee, Florida 32302
850/224-9115

THEODORE DECKERT
Panza, Maurer, Maynard & Neel, P.A.
3600 N. Federal Highway, Third Floor
Fort Lauderdale, Florida 33308
954/390-0100

Attorneys for Petitioner
Nova Southeastern University

pld\novasc.brf