SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO. 94,079

NOVA SOUTHEASTERN
UNIVERSITY, INC.,

Petitioner,

vs.

BETHANY JILL GROSS,

Respondent.
_____/

RESPONDENT'S SECOND AMENDED BRIEF ON THE MERITS

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PREFACE

This case is before the Court on a certified question from the Fourth District Court of Appeal. The parties will be referred to by their proper names or as they appeared below. The following designations will be used:

(R) - Record-on-Appeal

Additionally, the undersigned certifies that Courier, 12 point, a font that is not proportionately spaced, was used in this brief.

STATEMENT OF THE FACTS

Since Nova Southeastern University (hereinafter "Nova") is claiming that it is entitled to a summary judgment in its favor, the facts and all inferences therefrom must be viewed in a light most favorable to Plaintiff. HOLL v. TALCOTT, 191 So.2d 40 (Fla. 1966); MOORE v. MORRIS, 475 So.2d 666 (Fla. 1985). The facts are not so stated in Nova's brief, but are so stated in this brief.

Plaintiff, Jill Gross, (hereinafter "Gross") is an out-of-state 23-year-old student from North Carolina who was accepted into the doctorate program in psychology at Nova in Fort Lauderdale (R5:1461-64,1467-69). As part of Gross's graduate studies curriculum, she was required by Nova to complete a one year practicum (internship) (R9:1624). Nova provided Gross with a list of different facilities which had been approved by Nova as those at which she could satisfy her internship requirement (R8:1286;R9:1603). The list included the name of Family Services Agency, Inc. (hereinafter "FSA") - a psychological clinic in Broward County that was only 15 minutes away from Nova's campus (R9:1614). Nova had entered into a contract with FSA to send internship students there (R6:988).

No one from Nova ever went to FSA for the purpose of inspecting the facility before listing it as a Nova-approved internship site, or before assigning Gross and other interns to perform their internship at FSA (R5:843). FSA's President

testified that if Nova had expressed concern about security, he would have been more than willing to discuss that matter and come to a resolution of any problem (R8:86-87).

Gross was required by Nova to choose six facilities from the list provided her by Nova as those at which she wished to perform her internship (R9:1603). One of Gross's six choices was FSA because it was the least driving distance from her home (R9:1603). Interns were assigned by Nova to one of their six internship choices (R9:1604). Nova assigned Gross to perform her internship at FSA.

FSA is located in a high crime area (R5:875;R6:994). The building is also situated on property which has large trees that made it difficult for passing cars to observe what was occurring on the property (R3:500). The building and property were poorly lit (R9:1488), were not enclosed by a fence (R9:1490), and there was no security guard (R9:1489;R5:857). Parking existed in front of the main entrance of the building, and on each side. FSA had 35 employees and 7 interns (R6:1010).

FSA provided not only daytime, but after-hours counseling, and therefore the clinic was open until 9:00 p.m. or 10:00 p.m. in the evenings (R6:1048). Gross was scheduled for night counseling sessions during her internship (R5:883). When Gross began her internship in April, 1995, she was made aware that FSA's President had been assaulted at knife point in the parking lot that same

month (R9:1492). She was not, however, told that the area was a high crime area and was not made aware of any other criminal activity in the surrounding area (R9:1492-94). Gross did subsequently see vagrants or unsavory characters walking around the immediate area, which gave her some concern about the neighborhood, and she became suspicious that the area might be a high crime area (R9:1493-94,1497,1605,1620). However, she never saw any criminal activity on or around FSA, and the only incident she ever heard of was the attack on FSA's President (R9:1617).

Nova has conceded in its brief that there is a dispute as to whether FSA had a "buddy system" in place. FSA's Director claimed a mandatory "buddy system," which required one employee to walk another employee to their car after dark, was in place (R6:1001,1029,1070,1081). Both FSA's President and one of its mental health counselors testified that no such mandatory "buddy system" was ever in place (R5:897-98;R7:1166). Gross likewise denied that there was an enforced "buddy system" (R9:1578). The minutes of FSA's April 25, 1995 Board of Directors' meeting likewise indicate that the suggestion that personnel be accompanied to their car by a buddy was nothing more than a "suggestion for consideration" not a mandatory requirement (R6:1136). For purposes of this appeal, Nova has agreed to accept the evidence which establishes that no buddy system was in effect (Petitioner's brief p.5).

When Gross began her internship, she was given FSA's clinical manual which contained a provision to the effect that when personnel leave the clinic they should ask another employee to observe them (R6:1138). Gross had reviewed the manual, but she did not recall that provision (R9:1607-08).[1] However, she admitted that upon starting her internship, FSA's Director had recommended that she leave the building at the same time as others after dark (R9:1497). Gross always tried to make sure that when she left the clinic to go to her car she did so either at the same time someone else was leaving the building, or when people were already in the parking lot (R9:1498-99,1618). There were occasions, however, when she was prepared to leave and no one else was ready to go (R9:1500). On those occasions, she would ask others to walk out with her, and sometimes they would, and sometimes they would not (R9:1500-01). Accordingly, there were times when she would have to walk to her car by herself (R9:1500).

Six months after her internship began, at approximately 8:00 p.m. on October 2, 1995, after Gross's counseling session had concluded that evening, a "bunch" of people were leaving the clinic at the same time (R9:1504;1508). As Gross left the building some other counselors were leaving the building at the same time as Gross, and others were right behind her (R9:1508,1509). Gross

[1]/The provision obviously did not have reference to the "buddy system," which FSA's Director claimed required one employee to walk another to their car.

could not remember whether she stopped to talk to the other people leaving the building as she progressed to her car (R9:1509). Gross's car was parked only about 10 feet away from the main entrance of the building (R5:871;R9:1511). A room within the building had three windows facing where her car was parked, and she could see people inside the building (R5:818,901;R9:1511-12).

Gross got into her car and locked it, and was in the process of fastening her seat belt when she heard a knock on the window (R9:1504). A man, Jerry Washington, was standing there with a gun pointed at her head (R9:1504). He told her to roll down the window, and she did so because of the gun. He took her money and jewelry and then drove her in her car to a secluded place and raped her (R9:1505-06). He left her by the side of the road and stole her car (R9:1506). Washington was subsequently apprehended, prosecuted and convicted of armed kidnapping, armed sexual battery, armed robbery and grand theft, and he was sentenced to a long prison term (R81431;R9:1507).

In Gross's opinion, FSA should have had better lighting and a security guard (R9:1621). And Nova should not be sending its students to perform their required internship at a facility located in a high crime area (R9:1621,1624). In her opinion, the safety of Nova's students who were performing their internship at FSA was in jeopardy (R9:1621).

The evidence showed that both FSA and Nova were well aware of the fact that the area was a high crime area. After FSA's President was robbed in April, 1995, six months before Gross was abducted and raped, its Board of Directors discussed selling the property and moving to a safer location (R6:1107). FSA's President or Director consulted with a realtor about finding FSA a safer location, but did not hire the realtor at that time (R6:1107). FSA's President admitted that after April, 1995, he realized that there was a significant risk that other crimes would occur on FSA's property (R5:856). He also admitted that a security guard would have been a deterrent to crime in FSA's parking lot (R5:927). FSA's Director admitted being aware that trespassers and unauthorized persons were coming onto FSA's premises during the day and at night (R6:1064). However, FSA took no actions at that time to protect its employees or interns, such as hiring a security guard or increasing the outside lighting at that time (R6:1114). It was only after Gross was abducted and raped in October, 1995, that FSA finally hired a security guard, and also listed its property for sale in order to move to a safer location (R5:920;R6:1055).

FSA's Director made Nova aware of the security problems prior to Gross's rape (R5:798-800). Over the years, he had discussed the criminal activity occurring at FSA's premises with Dr. Katell, Nova's coordinator of the student internships, and the person in

charge of choosing the internship sites (R6:988-89). Dr. Katell's wife also worked at FSA (R6:1114), and he would come to pick her up from work (R6:995,1061). Therefore, Dr. Katell saw first-hand the nature of the area and the security problems presented.

Additionally, FSA's Director discussed with Dr. Katell the April, 1995, incident of FSA's President being assaulted with a knife and robbed in the parking lot (R5:835-39;R6:1030,1104). Dr. Katell's wife was likewise aware of that assault (R6:1126-27). She attended the FSA staff meeting the following day and was aware of the security concerns discussed at that meeting, and FSA's President testified that it was likely she discussed them with her husband (R6:1127). Yet, neither Dr. Katell, nor anyone else with Nova, took any action to protect its interns after learning of the assault on FSA's President (R6:1114).[2] Neither Dr. Katell nor anyone else at Nova ever inquired about the incident, questioned whether it was a random incident or part of a larger security problem, or questioned the safety of the premises (R5:844; R6:1115). FSA's Director testified that Nova had a duty to provide a reasonably safe environment for its students (R6:1062-63). He also agreed that Nova had the right to provide input concerning the internship program at FSA (R6:1063).

[2]/Obviously, Nova also took no action to protect its interns prior to that incident.

Plaintiff's expert testified that FSA was negligent in failing to provide adequate security (R8:1283). In his opinion, Nova was also negligent for sending its students to an internship site in a high crime area (R8:1285-87,1396). Even one of Nova's experts admitted that once Dr. Katell, the coordinator of Nova's internship program, was made aware that FSA's President had been attacked with a knife in the parking lot, he should have inquired into the situation to determined the extent of the security problems the inters were being exposed to (R7:1225). In his opinion, a security guard would have acted as a deterrent to further criminal activity on FSA's property (R7:1219).

Nova's other expert disagreed. In his opinion, the rapist would not have been deterred from this crime by better security measures (R9:1654). This testimony ignored the sworn statement of Jerry Washington, the rapist, that the poor security measures, i.e., poor lighting, lack of a security guard and lack of fencing enclosing the property, were factors influencing his decision to commit the crime (R3:496-97). He also stated that if a security guard had been present, he would never have committed the crime (R3:500-01).

Numerous statements in Nova's brief are incorrect or unsupported by the record. At page 3, Nova claims Gross chose FSA, when in fact Nova pre-approved FSA and then chose it for her from the six facilities on her list. Nova also states that Gross

testified that 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," citing to R1524, 1628-29. The only portion of Nova's statement supported by the record is that Gross was concerned about the neighborhood, which she thought was a bad neighborhood (R9:1497). She never stated she believed, prior to the rape, that the area was a high crime area. She was merely suspicious that it might be (R9:1620). In her deposition, and in her answer to interrogatories, as a result of what she had learned since the rape, she was of the opinion that the area was a high crime area (R9:1620-21). However, there is no evidence Gross knew the area was "high crime" prior to her abduction and rape. While Nova states that Gross testified that she "recognized the nature of the neighborhood" when she initially drove through it, she merely testified that she was "concerned" and "suspicious" about the character of the neighborhood at that time (R9:1605,1620). Gross never stated that FSA most commonly provided counseling services to troubled poor families and youth without charging for services. In fact, she stated that anyone was welcome to receive services at FSA (R9:1524).

While Nova states that Gross could have chosen to complete her internship in FSA's facility in Coral Springs, which it states is a residential suburban township, it cites no record reference

because there is no record support. There was no evidence that the Coral Springs facility was listed by Nova as a pre-approved internship site when Gross had to pick six sites from Nova's list. Nor was there evidence that Coral Springs is a residential suburban township. In fact, Gross' testimony was that she was not even aware that FSA had more than one location until after Nova had already assigned her to FSA's Ft. Lauderdale facility for her internship (R9:1603). That testimony supports a conclusion that the Coral Springs location was not on Nova's list of pre-approved sites given to Gross to choose from.

Nova states that immediately upon Gross starting her internship, she was "well aware" of the bad neighborhood nature of the area. In fact, her concern about the neighborhood, and the fact that she thought it was a bad neighborhood, was because of vagrants and unsavory characters she saw walking around the area, not because she knew it was a high crime area (R9:1493-94,1497,1605). While she was suspicious of whether it was a high crime area (R6:1620), no one ever told her that it was, and she had never heard of, nor seen, any criminal activity, either on FSA's premises or in the surrounding area except for hearing about the attack on FSA's President (R9:1492-93,1617).

On page four of its brief, Nova incorrectly states that Gross had previously worked at FSA's Coral Springs office. Nova has confused FSA's Coral Springs office with Nova's mental health

clinic in Coral Springs (R9:1476-177). Gross worked very briefly at the latter, not the former.

On page four of its brief, Nova states that during the daytime Gross went to a convenience store, across from FSA, which was a "suspected drug transaction area." The evidence supporting the fact that the convenience store was a "suspected drug transaction area," was the testimony of FSA's Director that he suspected that it was (R6:1053). No evidence was presented that this information was ever conveyed to Gross or that she otherwise knew of the Director's suspicion.

On page five of its brief, Nova states that Gross "participated" in a night counseling group, ignoring the fact that she was required to do so by Nova as part of the internship for her doctorate.

Probably the largest factual disagreement the parties have is whether "Gross left alone to walk to her car," as Nova claims. The only evidence in the record shows that other people were leaving the clinic at the same time Gross was. Some were "leaving at the time" and some were "right behind her" (R9:1508-09). While Gross did not have a "buddy" with her, i.e., an employee walking her to her car, the evidence shows that Gross left the building to go into the parking lot at the same time as others, and that was all FSA ever recommended she should do. There is no evidence that Gross

"somehow ended up leaving while the group was still inside," as Nova states at page six of its brief.

At page 1508 of the record, Gross was asked by Nova's counsel why she did not have a "buddy" that night and her answer was that she left with others, both those "right behind her" (R9:1508) and those "leaving at the time" (R9:1509. Gross might not have complied with a "buddy system," [Nova admits a factual issue exists as to whether one was ever in place], but she did comply with FSA's recommendation that she leave the building with other employees after dark (R9:1496-97).

STATEMENT OF THE CASE

Gross subsequently sued Nova for negligence in a number of respects, including negligence in exposing her to a foreseeable and unreasonable risk of harm by assigning her to perform her internship at a facility where criminal acts had occurred, and where other criminal acts were foreseeable, thus endangering her safety and that of the other interns. She also sued Nova for negligence in failing to warn her of the foreseeable and unreasonable risks involved (R3:417-21). Gross sued FSA for inadequate security, and that claim was subsequently settled (R3:396-401).

Nova filed an Answer denying that it was negligent, and raising the following affirmative defenses: the criminal attack did

not occur on its campus and it could not be held responsible for a criminal attack that occurred on FSA's premises; Gross was comparatively negligent; the criminal attack upon Gross constituted an unforeseeable, intervening cause as a result of the acts of a third person for whom Nova was not responsible; and apportionment of fault pursuant to §768.81 Fla. Stat. (R3:430-35).

Nova subsequently filed a Motion for Summary Judgment which contended that it had no duty to protect Gross from a criminal attack that occurred on FSA's premises (R4:640-46). At the hearing on Nova's Motion for Summary Judgment, counsel for Nova argued that Gross was attempting to impose liability upon Nova to protect its students after they left its campus (R10:1824), and that Nova could not be held liable to Gross since it did not have the right, obligation or power to control FSA's property (R10:1825). Based upon that argument, the trial court granted Nova's Motion for Summary Judgment (R10:1841). The Final Summary Judgment entered in favor of Nova found that it had no duty to Gross (R10:1788-89). Gross filed a timely appeal to the Fourth District from the Final Summary Judgment entered in Nova's favor.

Fourth District's First Opinion

The Fourth District held that under the circumstances of this case, where Nova mandatorily required Gross to perform her internship at FSA's facility, it had a duty not to expose her to an unreasonable risk of harm and to take reasonable precautions to protect her from such, in addition to having a duty to warn.

Fourth District's Second Opinion

The Fourth District held:

> ...A student can certainly be said to be within the foreseeable zone of known risks engendered by the university when assigning such student to one of its mandatory and approved internship programs. *See McCain v. Florida Power Corp.*, 593 So.2d 500 (Fla. 1992). We need not go so far as to impose a general duty of supervision, as is common in the school-minor student context, to find that Nova had a duty, in this limited context, to use ordinary care in providing educational services and programs to one of its adult students. The "special relationship" analysis is necessary in this case only because the injury was caused by the allegedly "foreseeable" acts of a third party.
>
> * * *
>
> In conclusion, we hold that appellant has stated a cause of action in negligence against Nova based on her allegations that the university assigned her, without adequate warning, to an internship site which it knew was unreasonably dangerous and presented an unreasonable risk of harm. Whether Nova breached its duty in the context of this case is a question of fact. *See Jones v. Florida Power & Light Co.*, 552 So.2d 284, 286 (Fla. 4th DCA 1989).

The Fourth District certified the following issue to this Court as being one of great public importance:

> **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?**

Nova filed a Notice to Invoke this Court's discretionary jurisdiction and Gross filed a Cross-Notice.

RESTATED CERTIFIED QUESTION

> **WHETHER NOVA HAD A DUTY TO EXERCISE REASONABLE CARE FOR GROSS'S SAFETY AND NOT EXPOSE HER TO AN UNREASONABLE RISK OF HARM, AND ALSO HAD A DUTY TO WARN HER OF THE UNREASONABLE RISKS INVOLVED.**

Gross has filed a Cross-Notice to invoke this Court's jurisdiction because it is Gross's position that Nova not only had a duty to warn, but it also had a duty to exercise reasonable care for her safety and not expose her to an unreasonable risk of harm. Those duties are two separate and distinct duties under the law. Even if Nova had warned Gross of the unreasonable risks involved, which it admits it did not do, the discharge of Nova's duty to warn would not necessarily discharge its duty not to expose Gross to an unreasonable risk of harm in the first place.

SUMMARY OF ARGUMENT

Nova clearly had a duty to warn Gross of the dangers attendant to performing her internship at FSA since it knew that facility was unreasonably dangerous and presented an unreasonable risk of harm to her. That duty is, however, a totally separate and independent duty from Nova's duty not to expose Gross to an unreasonable risk of harm and to use reasonable care for her safety. Nova created a foreseeable zone of risk by requiring Gross to perform her internship at a facility located in a high crime area, and which had no security whatsoever. Nova exposed Gross to an unreasonable risk of harm since it knew that the facility was unreasonably dangerous because it was foreseeable that criminal activity would occur on FSA's premises. Gross would never have been exposed to that danger but for Nova's conduct. Accordingly, Nova had a duty to exercise reasonable care for Gross's safety.

Whether Nova breached its duty not to expose Gross to an unreasonable risk of harm, its duty to exercise reasonable care for her safety, and its duty to warn her of the dangers involved were all questions of fact for the jury.

ARGUMENT

The issue in this appeal is whether Nova had a duty to Gross. Whether FSA was negligent or Gross was comparatively negligent are irrelevant to this appeal. The only issue is whether Nova had a legal duty not to expose Gross to an unreasonable risk of harm and/or a duty to warn her of the unreasonable risks involved.

Whether a legal duty exists is a question of law, CECIL v. D'MARLIN, INC., 680 So.2d 1138 (Fla. 3d DCA 1996), whereas whether that duty was breached is a question of fact.

At the outset it should be noted that Gross's cause of action against Nova was based upon its common law negligence, not its premises liability as a landowner.[3] Nova gave Gross a list of its pre-approved internship sites, including FSA, from which she was required to pick six facilities. Gross's contention is that Nova breached its duty to her by assigning her to perform her internship at FSA, since that facility was located in a high crime area and had no security, and since Nova knew it was unreasonably dangerous and presented an unreasonable risk of harm to her; by failing to warn her of the foreseeable, unreasonable risks presented; and by subsequently taking no action to ensure her safety upon being informed that FSA's Director had been attacked and robbed at knife point. She contended that Nova's negligence contributed to the occurrence of her abduction and rape. Gross would never have been in this high crime area but for the fact that Nova provided her with FSA's name as a Nova pre-approved choice, and but for the fact

[3]/Whether an injury occurs on or off a defendant's property is not determinative where the injury is based on negligence, rather than a physical condition of the premises. Negligence transverses property lines. BILLEN v. HIX, 260 So.2d 284 (Fla. 4th DCA 1972), aff'd 284 So.2d 209. See alsoSEABOARD RAILROAD, INC. v. MELLS, 528 So.2d 934 (Fla. 1st DCA 1988).

that Nova subsequently assigned Gross to FSA to fulfill her internship requirement.

Duty Not to Expose Gross to an Unreasonable Risk of Harm

Nova's duty exists under several alternative theories. First, this Court has held that where a defendant's conduct creates a foreseeable zone of risk which endangers the plaintiff, a duty is placed upon that defendant either to lessen the risk or see that sufficient precautions are taken to protect the plaintiff from the harm that the risk poses. McCAIN v. FLORIDA POWER CORPORATION, 593 So.2d 500, 503 (Fla. 1992) (quoting KAISNER v. KOLB, 543 So.2d 732 (Fla. 1989); see also STAHL v. METROPOLITAN DADE COUNTY, 438 So.2d 14 (Fla. 3d DCA 1983), and COUZAGO v. UNITED STATES, 105 F.3d 1389, 1395 (11th Cir. 1997). The proper way of determining whether a duty existed is to decide whether the defendant's actions created a foreseeable zone of risk, FLORIDA POWER & LIGHT CO. v. RIVIERA, 705 So.2d 1359, 1361 (Fla. 1998). Another way of framing the issue of duty is to ask whether a defendant stood in a "relationship to the plaintiff as to create any legally recognized obligation of conduct for the plaintiff's benefit." PALM BEACH-BROWARD MEDICAL IMAGING CENTER, INC. v. CONTINENTAL GRAIN CO., 715 So.2d 343, 344 (Fla. 4th DCA 1998).

The Fourth District correctly ruled that Gross "was within the foreseeable zone of known risks engendered by the university when assigning such student to one of its mandatorily and approved

internship sites." (Second Opinion p.3). Nova "created" such unreasonable zone of risk by exposing Gross to foreseeable harm at the hands of criminals within the area surrounding FSA. Restatement, Second, of Torts, §448 provides:

> 448. Intentionally Tortious or Criminal Acts Done Under Opportunity Afforded by Actor's Negligence
>
> The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime.

Comment (c) to the above rule provides:

> c. *When actor's negligence consists in creating risk of criminal action by third person.* The actor's conduct may be negligent solely because he should have recognized that it would expose the person, land, or chattels, of another to an unreasonable risk of criminal aggression.

As applied here, the issue under this theory is whether Nova's conduct in any way placed Gross in a foreseeable zone of risk which contributed to her abduction and rape. The answer is clearly "yes" because Nova exposed Gross to an unreasonable risk of harm. And the evidence shows, as the Fourth District found, that Nova knew FSA was unreasonably dangerous and presented an unreasonable risk of harm to Gross. Yet, Nova assigned Gross to that facility, which

was located in a high crime area and had no security whatsoever. Gross was required by Nova to come and go from the facility after dark because she was required to conduct counseling sessions during the evening hours. Even when Nova was made aware that violent crimes were being committed on FSA's premises (FSA's President was assaulted with a knife and robbed in the parking lot), Nova did nothing to protect Gross and its other interns. It could have insisted that FSA provide adequate security, including a security guard, or it could have transferred its interns to some other facility. It was reasonably foreseeable that Nova's conduct in the above respects could endanger Gross, and expose her to a risk of harm. Therefore, Nova owed Gross a duty of reasonable care.

Where a criminal act is foreseeable, the original tortfeasor's negligence is still considered the proximate cause of the injury. VINING v. RENT-A-CAR SYSTEMS, INC., 354 So.2d 54 (Fla. 1977); SINGER v. I.A. DURBIN, INC., 348 So.2d 370 (Fla. 3d DCA 1977). In determining foreseeability, it is not necessary to be able to perceive the exact nature and extent of the injuries or the precise manner in which those injuries occurred. It is only necessary that the tortfeasor be able to foresee that some injury will likely result in some manner as a consequence of his negligent acts. CRISLIP v. HOLLAND, 401 So.2d 1115, 1117 (Fla. 4th DCA 1981), rev. den. 411 So.2d 380 (Fla. 1981); PATERSON v. DEEB, 472 So.2d 1210, 1218 (Fla. 1st DCA 1985), rev. den. 484 So.2d 8 (Fla. 1986); CORAL

GABLES FEDERAL SAVINGS & LOAN ASS'N. v. CITY OF OPA-LOCKA, 516 So.2d 989, 992 (Fla. 3d DCA 1987), rev. den. 528 So.2d 1181 (Fla. 1988) And, it is sufficient that the resulting injury is within the scope of the danger or risk created by the original tortfeasor's negligence. GIBSON v. AVIS RENT-A-CAR SYSTEM, INC., 386 So.2d 520 (Fla. 1980).

In this case, the evidence demonstrated that further criminal acts in FSA's parking lot were foreseeable. FSA's President admitted that further crime on FSA's premises was foreseeable after he was assaulted and robbed at knife point in April, 1995 (R5:856). When FSA's Director made Dr. Katell, Nova's coordinator of the student internships, aware of that April, 1995, incident (R5:835,837-39;R6:1030) Nova did nothing. Plaintiff's expert testified that Nova was negligent for sending its students into this high crime area (R8:1285-87,1293,1396). Even Nova's expert admitted that once Dr. Katell was made aware of the attack with a knife in the parking lot, he should have done something (R7:1224-25).

Nova had a duty to exercise reasonable care in mandatorily requiring Gross to perform her internship at the FSA site, since the evidence shows that Nova knew that the facility was unreasonably dangerous and presented an unreasonable risk of harm to her. Certainly a jury could conclude that Nova breached that duty and that Gross's abduction and rape were within the scope of

danger created by Nova as a result of its assigning her to FSA to fulfill her internship requirements, since that facility had no security whatsoever and was located in a high crime area. Clearly, whether Nova breached its duty to Gross, and issues of foreseeability and proximate cause were questions for the jury to determine, not the court.

Interestingly, Nova does not even discuss the Fourth District's holding that Nova had a duty to Gross because it created a foreseeable zone of risk which endangered her when it assigned her to an internship site which it knew to be unreasonably dangerous and which it knew presented an unreasonable risk of harm to her.

Where a Party Has the Right or Authority to Direct or Control the Actions or Conduct of Another, and Actually Undertakes to Do So, He Must Do So with Due Care.

A party who has the right to, and undertakes to, direct or control the actions of another person, must do so with due care because of a legal relationship that arises between them. This is exemplified in a case involving totally different circumstances, SCHWARTZ v. HELMS BAKERY LIMITED, 67 Cal.2d 232, 430 P.2d 68, 60 Cal.Rptr 510 (Cal. 1967). The court held that when a bakery truck driver told a four-year-old child that he would wait on a street near the child's home so he could return with money to buy a doughnut, the driver had undertaken to direct the conduct of the child, and therefore had to exercise ordinary care for his benefit. The court stated (60 Cal.Rptr at 512):

> ...we explain that since the driver undertook to direct the conduct of the child, he entered into a legal relationship with him....From...such relationship the common law imposes a duty for defendants to exercise ordinary care for the safety of persons such as plaintiff, and to avoid the creation of unreasonable harm.

The fact that SCHWARTZ involved a child and this case involves an adult student is a distinction without a difference. As in SCHWARTZ, Nova clearly had the authority to, and undertook to, direct Gross's conduct. Nova gave Gross a list of its pre-approved facilities from which it required her to pick six facilities at which to fulfill her internship requirement in order to obtain her doctorate degree in psychology. FSA was one of Nova's pre-approved

facilities, and Nova subsequently assigned Gross to that facility. Nova undertook to direct and control Gross's conduct by requiring her to be at that particular location at designated times, including during the evening hours. Gross would never have been at FSA but for the fact that Nova required her to be there. Nova had a duty not to assign Gross to a facility that had no security and that was located in a high crime area, or at least it should have warned her of the risks involved. To the extent that Nova directed and controlled Gross's actions by requiring her to intern at FSA's facility, which Nova knew was unreasonably dangerous and presented an unreasonable risk of harm to her, it was required to exercise due care for her benefit.

Very simply put, if Nova was going to require Gross to be at a particular facility, coming and going in the evenings, then Nova had to exercise reasonable care for her safety. Clearly Nova had a duty, upon being apprised of the fact that violent crime had occurred on FSA's premises in April 1995, to require FSA to provide security for Gross and Nova's other students who were interning there, or to transfer them to another facility that did not present an unreasonable risk of harm to them. Nova breached its duty to Gross by placing her in a situation involving an unreasonable risk of harm to her safety and well-being, and by exposing her to the risk of having to satisfy her internship requirements in a facility

located in a high crime area, when the facility lacked security to insure her safety.

SILVERS v. ASSOCIATED TECHNICAL INSTITUTE, INC., Case No. 93-4253, 1994 WL879600 (Mass. Super. Ct. October 12, 1994), a case relied upon by the Fourth District, held that a college's placement office had a duty to exercise reasonable care not to place students with employers likely to harm them. In other words, the court held that a college has a duty to exercise reasonable care not to send students to work for employers when it is reasonably foreseeable the employers would harm the students. Likewise in this case, Nova had a duty to exercise reasonable care not to assign Gross to an intern facility in a high crime area, where the facility had no security, thus making it reasonably foreseeable that she would become the victim of the criminal activity in the area. And, once Nova learned that violent crime was occurring on FSA's premises, it had a duty to do something to ensure Gross's safety if it was going to require her to continue to come and go from those premises.

See also WHITTINGTON v. SOWELA TECHNICAL INSTITUTE, 438 So.2d 236 (La. App. 1983), where the husband of a nursing student sued the nursing school for her wrongful death as a result of an automobile accident which occurred during a nursing school field trip for senior nursing students. In order to graduate from the nursing school, the nursing students had to accumulate a certain number of hours. For participating in the field trip to a well-

known hospital, the nursing school gave the students twice the number of daily credits usually earned. The jury found independent negligence on the part of the nursing school in failing to provide a qualified driver for the field trip. The trial court entered a judgment on the jury's verdict, but failed to find that the nursing school was independently negligent. The appellate court reversed finding that the trial court had erred in failing to make that finding. The court essentially found that the students were compelled to participate in the field trip, 438 So.2d at 344, and that reasonable care must be exercised where students are required to engage in an off-campus activity and it is reasonably foreseeable that an accident or injury may occur. 438 So.2d at 247.

This case is akin to WHITTINGTON and SILVERS. Here, as in WHITTINGTON and SILVERS, Nova undertook to direct Gross's conduct by requiring her to fulfill her internship requirement at a facility that had no security, but was located in an area of high crime. The risk of harm to Gross could have been prevented if Nova had exercised reasonable care for her safety by not placing FSA, which Nova knew was unreasonably dangerous and presented an unreasonble risk of harm, on its pre-approved list of internship sites. While Nova did not have control over FSA's property, it did have control over the decision to require Gross to perform her internship at FSA. It had control over seeing that Gross was

sufficiently warned of the dangers involved. It also had control over the decision to terminate Gross's internship at FSA once it learned that violent crime was occurring on the property. Gross, on the other hand, had no control over Nova's requirement that she fulfill her internship at FSA in order to obtain her doctorate degree. Since Nova exercised control over Gross by requiring her to be physically present on FSA's property, surely it had a duty to exercise that control with reasonable care for her safety. The issue is not whether Nova had a duty to Gross, but whether it breached that duty, which was a factual issue for the jury to determine.

Special Relationship Between Gross and Nova

Under the common law, a defendant 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 a special relationship between the defendant and the person who is the foreseeable victim of such conduct. That common law duty has been codified in Restatement (Second) of Torts, §315, which has been adopted by the Florida courts. BOYNTON v. BURGLASS, 590 So.2d 446,448 (Fla. 3d DCA 1991); PALMER v. SHEARSON LEHMAN HUTTON, INC., 622 So.2d 1085 (Fla. 1st DCA 1993); GARRISON RETIREMENT HOME v. HANCOCK, 484 So.2d 1257, 1261 (Fla. 4th DCA

1985); TRIANON PARK CONDOMINIUM v. CITY OF HIALEAH, 468 So.2d 912, 917 n.2, 918 (Fla. 1985).

As applied here, Gross had a special relationship with Nova as evidenced by the fact that Nova had the right to direct Gross to fulfill her internship requirement at FSA. Accordingly, Nova had a duty to exercise reasonable care for her safety and to avoid exposing her to an unreasonable risk of foreseeable harm, and also a duty to warn of the dangers involved. Nova breached both duties.

Nova incorrectly claims that the Fourth District has expanded the special relationship doctrine to impose a duty upon a private university to ensure the safety of all its adult students at all off-campus academically-related programs. The Fourth District was very careful in not ruling that a university-adult student relationship in and of itself constitutes a special relationship. The Court's opinion found such a special relationship, and a concomitant duty, only "in the limited context of this case."

Contrary to Nova's contention, Gross has never relied upon the type special relationship between a minor student and a school, fulfilling a loco parentis role, with which RUPP v. BRYANT, 417 So.2d 658 (Fla. 1992) was concerned. Where children are of an age that school attendance is mandatory, teachers are substitute custodians for their parents and owe the children a duty of care and supervision. The Fourth District clearly did not extend this loco parentis doctrine to college students. Rather, the Court

specifically stated that it was not imposing such a duty in this case (Second Opinion, p.3). Rather, the Court found that Nova's duty resulted from the fact that Nova mandatorily required Gross, as a prerequisite to obtaining her doctorate degree, to perform her internship in a facility which it knew was unreasonably dangerous and presented an unreasonable risk of harm to her.

The cases Nova cites for the proposition that no special relationship exists between a university and its adult students simply do not apply here. Gross does not deny that a university, unlike an elementary school or high school, does not generally have a duty to protect students from injury by third persons when they are not on the university's property. But the cases Nova relies upon do not involve the present situation where Nova required Gross to perform an internship off-campus at a dangerous location, without taking any precautions for her safety or even warning her of the dangers involved. Nova argues that Gross was a voluntary university student who voluntarily participated in the internship. But she did not voluntarily choose FSA as her internship site. It was pre-approved by Nova and assigned to Gross by Nova as her internship site. Gross was mandatorily required to fulfill her internship at that location. FSA required and directed Gross to be at that facility in order to obtain her doctoral degree.

The primary case upon which Nova relied below and on appeal is DONNELL v. CALIFORNIA WESTERN SCHOOL OF LAW, 246 Cal. Rptr 199

(Cal. App. 1988). DONNELL concerns a law student who left the law school premises, which was located in an area of frequent crime, to walk to his car since the law school did not provide parking. Along the way, the law student heard a thief breaking into a car and went 100 feet out of his way to accost the thief at which time he was stabbed while on a public sidewalk. The difference between this case and DONNELL is apparent. The California student chose to attend a law school in a high crime area. While Gross chose to obtain a doctorate at Nova, it was Nova that required her to perform her internship at a facility located in a high crime area. She did so as part of Nova's required internship program in order to earn credits towards her doctoral degree. She was required to participate in this off-premises school activity at this particular location. That was not true in DONNELL.

BEACH v. UNIVERSITY OF UTAH, 726 P.2d 413 (Utah 1986) is also inapplicable. That case does not involve an injury to a student caused by a third party in a high crime area. It involves an injury to a student caused by her own intoxication while on a field trip. The student got drunk and fell down a cliff during the night. The issue was whether the university had a duty to protect the student from her own intoxication, and the Utah Supreme Court held that it did not. Obviously, the case has no application here.

Nova next relies upon two federal cases, MITCHELL v. DUVAL COUNTY SCHOOL BOARD, 107 F.3d 837 (11th Cir. 1997) and WRIGHT v.

LOVIN, 32 F.3d 538 (11th Cir. 1994), but those decisions support the Fourth District's ruling. Both cases involved §1983 actions against the State. Nova is, of course, a private university, not a State university. Even so, MITCHELL and WRIGHT hold that in order to hold the State liable under the "special danger" analysis the student must show that the State placed him in a position of danger and that his attendance was mandatory. That is exactly what was proven in this case. Nova did in fact place Plaintiff in a position of danger by requiring her to perform her internship at FSA, which had no security and was located in a very bad high-crime neighborhood. The requirement that Gross perform her internship at FSA was mandatory, not voluntary. Accordingly, Nova had a duty to exercise due care in not exposing Gross to an unreasonable risk of harm, and/or a duty to at least warn of the unreasonable risks involved. Nova breached both duties.

Nova next argues that the duty to warn of dangers on property belongs to the person in control of the property, citing cases where lessees, not the owners of the property, had a duty to warn third parties of dangerous conditions on the property based upon their right of control. Gross agrees that the entity in control of the premises, FSA, was liable. But so was Nova. By requiring Gross to conduct her internship at FSA, it exposed her to an unreasonable risk of harm, and therefore it had, <u>at least</u>, a duty to warn her of the foreseeable risks involved.

Nova cites PALMER v. SHEARSON LEHMAN HUTTON, INC. 622 So.2d 1085 (Fla. 1st DCA 1993) for the proposition that in order to be required to control the rapist's conduct, Nova had to have the ability to do so. Gross has never argued that Nova was required to control the rapist's conduct. Nova was required to exercise reasonable care for Gross's benefit and had it done so she would never have been exposed to the rapist.

In its concluding argument under this section, Nova merely points its finger at FSA and argues that FSA was the responsible party, not Nova. However, this State has adopted apportionment of fault. FSA was unquestionably at fault. But, so was Nova because it failed to exercise reasonable care in assigning Gross to an internship site that it knew was unreasonably dangerous and knew presented an unreasonable risk of harm to her safety. In addition to having a duty to warn Gross of the unreasonable risk involved, Nova had a duty to either not place her at this high crime site in the first place, or to take reasonable measures to ensure her safety. It could have done the latter by requiring FSA to hire a security guard or take other security measures, and if it did not do so, it should have transferred Gross and its other interns to another internship site.

Contrary to Nova's contention, it would not have been senseless for Nova to have "warned" Gross, since the only so-called warning (really a recommendation) that Gross received from FSA was

to make sure she left the building when other people were leaving. Gross complied with that recommendation on the night in question. In Nova's brief it takes the position that Gross should have done more than that, i.e., she should have actually had someone walk her to her car, which really refers to the "buddy system," and even Nova admits that a question of fact exists as to whether that system was ever in place. If Nova thinks that Gross should have made sure another employee walked her to her car, then it had a duty to so warn her, which it did not do, and therefore it breached its duty to warn.

Nova Had a Duty to Warn Gross

Nova had a duty to warn Gross because it exposed her to an unreasonable risk of harm as discussed, supra. In addition, Nova had a duty to warn her based upon SHURBEN v. DOLLAR RENT-A-CAR, 676 So.2d 467 (Fla. 3d DCA 1996), cited in the Fourth District's opinion. In that case, a British tourist, who was accosted and shot by criminals while traveling in a rental car, brought an action against a Miami car rental agency, and the British travel agencies with whom she had dealt, claiming they breached a duty to warn her that in certain areas of Miami, there was a risk of attack by criminals who targeted tourists in rental cars and, in particular, rental cars bearing the license plate designation on her rental car. She alleged that at the time she rented the car, there had been repeated instances of criminal activity directed at

tourists in rental cars, and that both the car rental agency and the British travel agency knew of those instances and knew that she was a tourist who did not know of the problem of crimes being targeted at tourists in rental cars in Miami. The trial court dismissed the plaintiff's complaint for failure to state a cause of action.

On appeal, the plaintiff argued that the Miami rental car agency and the British travel agencies should have realized that she would not know of the attacks or of the areas of Miami in which the attacks had occurred, and that without a warning from them she would be exposed to a risk of foreseeable criminal attack if she ventured into those areas. The plaintiff claimed that the rental car agency and the British travel agency should be liable for their failure to warn her of those dangers. The Third District agreed and reversed the dismissal of the plaintiff's complaint. The court held that the car rental agency had a duty to warn the plaintiff of foreseeable criminal conduct, particularly in light of the superior knowledge of the car rental company. The car rental company should have realized that criminals were targeting tourist car renters in certain areas of Miami and a reasonable rental company would have understood that its customers would be exposed to an unreasonable risk of harm if they were not warned. The court relied upon §302 B of the Restatement (Second) of Torts (1965):

> Section 302B. Risk of Intentional or Criminal Conduct.

> An act or omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal.

Based upon the above provision, the court held that the rental car agency had a duty to warn the plaintiff that there was a risk of attack by criminals in light of its superior knowledge of the criminal activity being directed at tourists in rental cars.[4]

Section 302B of the Restatement equally applies here regarding Nova's duty to warn Gross. Nova should have realized that its failure to warn her of the dangers involved would subject Gross to an unreasonable risk of harm because of the high risk of criminal activity in and surrounding FSA. As in SHURBEN, Nova had superior knowledge that FSA was unreasonably dangerous and presented an unreasonable risk of harm to Gross.

Gross did Not Have Superior Knowledge of the Dangers Involved

Gross did not have knowledge of the unreasonable risks of harm that was equal to or superior to that of Nova. Gross was an out-of-state student from North Carolina who had only recently come to Ft. Lauderdale. Gross was concerned about the fact that FSA appeared to be located in a bad neighborhood and she was suspicious

[4]/The court reversed the judgment as to the British travel agencies also but stated that upon remand the court should determine whether the British defendants were governed by United States or British law.

about the fact that the area was a high crime area. However, she had never seen any criminal activity on FSA's premises or in the surrounding area, and the only criminal incident ever related to her was the one assault on FSA's President. The only so-called warning that FSA gave Gross was a recommendation that she walk with someone or leave the building at the same time as others after dark. FSA did not impose this as a requirement. It did not inform Gross that the area was "high crime," or that crimes other than the assault on its President had occurred on its premises over the years. It did not inform her that it was so concerned about the security of the area that it was thinking of selling the property and moving to a new location.

In contrast to what Gross knew, and her recent arrival in Ft. Lauderdale, Nova is an institution that has been established in Ft. Lauderdale for years, and obviously knows that area well. Over the years, Dr. Katell had been told by FSA's Director about the crimes occurring on FSA's premises. Dr. Katell was also told of the assault upon FSA's President in April, 1995. His wife worked at the same FSA facility, and he came and picked her up when she got off work in the evenings. His wife attended FSA's staff meeting after its President was attacked, and therefore she was aware of the concerns FSA expressed at the meeting regarding safety, and the fact that FSA was thinking of selling the property and moving to another location because of those concerns. Based upon the

testimony of FSA's President, an inference could be drawn that Dr. Katell's wife told him everything she knew about FSA's own safety concerns. Based upon all the evidence, it cannot be said that Gross's knowledge of the danger was equal or superior to that of Nova. The evidence shows that Nova's knowledge of the danger was superior, or at least a jury question was presented as to whether it was or not.

Nova incorrectly argues that it did not have to warn Gross because FSA had given her a warning. All FSA did is tell her to leave the building at night at the same time as others, and that was it. It never informed her of the dangerous character of the neighborhood and it never told her the area was a high crime area. If Nova was not going to take action to see that FSA provided security for Gross, it at least had a duty to sufficiently warn her of the magnitude of the risk of harm with which she was presented.

Nova's argument that Gross was "already warned" by FSA, and therefore it did not have to warn her a second time, is nothing more than a comparative negligence argument. Whether FSA's warning (really nothing more than a recommendation) was sufficient was a question of fact for the jury. Whether Gross appreciated the risk involved was likewise a question of fact. LEAHY v. SCHOOL BD. OF HERNANDO COUNTY, 450 So.2d 883 (Fla. 5th DCA 1984). Additionally, even if Gross was aware of the danger, the degree to which that awareness caused her own injury was an issue for the jury to

determine under comparative negligence (apportionment of fault), as stated in FERBER v. ORANGE BLOSSOM CENTER, INC., 388 So.2d 1074 (Fla. 5th DCA 1980):

> The degree to which Ferber [the plaintiff] caused his own injuries because of his awareness of the hazardous ramp is an issue of comparative negligence to be determined by the jury.

Gross's awareness of, and understanding of, the danger and the degree to which it caused her injury, as compared to the negligence of both Nova and FSA, are all apportionment of fault issues for the jury under §768.81 Fla. Stat.

The Fourth District's Ruling Does Not Have Broad Application

The Fourth District's opinion is extremely limited. The Court specifically stated that it was not imposing upon Nova a general duty to take precautions for the safety of all its student-interns. Rather, the Court found that Nova had a duty "in this limited context" to use ordinary care for Gross's safety in light of the fact that it assigned her to an internship site that was unreasonably dangerous and presented an unreasonable risk of harm. In "this limited context," the Fourth District found, "whether Nova breached its duty in the context of this case is a question of fact." Accordingly, the Fourth District's decision does not require all universities throughout the world to protect all interns at all internship sites, as Nova contends. Rather, it imposes liability upon a university for assigning an intern to a

site which it knows is unreasonably dangerous and which it knows presents an unreasonable risk of harm, without warning. Gross's position is that under the above case law, Nova's duty was not only to warn, but Nova also had a duty not to expose her to an unreasonable risk of harm in the first instance. If it was going to do so, Nova had to not only warn her, but also take measures to ensure her safety.

CONCLUSION

Based upon the foregoing, the Fourth District's ruling that Nova had a duty to warn Gross of the dangers involved should be affirmed. This Court should, however, also find that Nova had additional duties to exercise reasonable care for Gross's safety and not to expose her to an unreasonable risk of harm in the first instance.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing was furnished by mail this 2nd day of MARCH, 1999, to: BARTLEY C. MILLER, ESQ., Panza, Maurer, Maynard & Neel, P.A., NationsBank Building, 3600 N. Federal Highway, 3rd Floor, Ft. Lauderdale, FL 33308; and JOHN BERANEK, ESQ., P. O. Box 391, 227 South Calhoun Street, Tallahassee, FL 32302.

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