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 REPLY BRIEF ON THE MERITS
BY NOVA SOUTHEASTERN UNIVERSITY, INC.

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STATEMENT OF THE CASE AND FACTS

This is a reply brief by Nova Southeastern University, Inc. (Nova). To the extent that there is a cross-petition for review by the plaintiff Gross, this is also an answer brief. The Gross brief begins by suggesting that Nova has conceded that there is an issue of fact concerning the "buddy system" whereby interns and staff at the Family Services Agency, Inc. (FSA), were told that they should always be accompanied when they went to their cars after dark. (Gross Brief p. 3). Nothing could be further from the truth. Gross cites to p. 5 of the Nova brief for this supposed concession, but that page states only that there was disagreement between FSA's officers as to whether the "buddy system" was "mandatory" or only a "recommendation" and that Gross could not remember the specific words "buddy system." Because it makes no difference what label is used and because the facts are so crystal clear, petitioner Nova agreed at p. 5 that it would rely solely upon the testimony of Gross herself. For that reason, Nova quoted Gross' own deposition testimony at length. Gross testified that she could not recall the specific term "buddy system," but she fully agreed that she had been warned about the recent robbery in the parking lot and 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). Now, Gross even argues that she fully intended to do so on the night she was attacked and

robbed.

Gross repeatedly argues that she was not told that FSA was in a "high-crime area." Again, we rely solely upon Gross' own testimony. In her answers to interrogatories and in her deposition, she specifically used the words "high-crime area." At R. 1628 she stated:

> Q In your answer to interrogatories, you refer to 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 Any other reasons?
>
> A The attack noted by Mr. Behrman.
>
> * * *
>
> Q Because it's a high-crime area?
>
> A Because it's a high-crime area . . .

The Gross brief continually attempts to unfairly characterize her own testimony rather than dealing with the actual words. When the testimony is reviewed, as was done in petitioner's initial brief in detail, it becomes crystal clear that Gross knew full well the nature of the area she was in. Indeed, the Fourth District's

first opinion noted Gross "was aware that Mr. Wallin had previously been assaulted" and further listed all of the crimes in the area:

> Over the years, FSA had been the site of a burglary, numerous instances of trespass, and various thefts and break-ins of automobiles. (emphasis supplied).

Whether or not this constitutes a "high-crime area" in south Florida, Ms. Gross obviously knew about the danger and had superior knowledge to Nova on the subject. She was specifically told about the recent knife point robbery of the FSA president in this particular parking lot and warned about it. She was also given a written handbook containing a similar warning about not being alone in the parking lot. Now, she argues she was entitled to another warning from Nova, which did not own or control the property.

Gross argues that she was from North Carolina and had "only recently" come to Fort Lauderdale. (Br. 32-3). She suggests that as a "recent arrival" she did not know as much about the area as did Nova. Again, relying solely on Gross' own testimony, she stated that she had lived in the area for one year before she started her internship at FSA and that the rape was six months after that. (R. 1486). Thus, Gross had lived for one and one-half years in the specific area where FSA was located. Indeed, Gross wanted the FSA internship because it was close to her apartment. (R. 1603-4). To suggest that she was a "recent arrival" without knowledge of the area is simply false.

The Gross brief also suggests that the wife of a Nova official worked at FSA, attended staff meetings and probably told her husband about the parking lot robbery. This is an incredible argument. Accepting that Nova had notice of the prior robbery, Gross herself lived in the specific area, worked at FSA, talked with staff and others about the high-crime neighborhood and attended exactly the same staff meetings. She admitted she was there and was told about the robbery in the parking lot and about only going to cars while accompanied by others. (See Initial Br. at p. 26-29 quoting Gross' testimony). Gross also admitted to conversations with FSA staff member Linda Benloto about "prior crimes and safety concerns" and that "This is a bad neighborhood and these are scary people." (R. 1533).

Gross also argues that Nova controlled her conduct. Gross refuses to recognize that she was a voluntary adult student at a private university. She made the choice to attend Nova and she made the voluntary choice to attend her courses including the internship at FSA. She had the right and the option of choosing another university or another course of study. She knew full well that FSA was a not-for-profit charity (United Way) supported institution giving counseling to the poor and indeed to anyone who chose to go there. (T. 1524-5). It is not fair to characterize every poor neighborhood as a "bad neighborhood," but that was indeed Gross' characterization of this neighborhood. FSA should be

complemented rather than criticized for offering services to those needing them in this "bad neighborhood."

Gross now also seems to contend that she complied with the recommendation to walk to her car only if accompanied by someone else. In doing so, Gross again chooses to wrongly characterize her testimony rather than looking at the words. 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. (emphasis supplied).

Frankly, it really does not matter whether there was somebody else in the parking lot, but that simply was not the testimony of Ms. Gross. She was asked repeatedly as to all of the details concerning exiting the building and entering her car. Her car was parked close to the entrance and she testified over and over again that she could not remember anyone else being in the parking lot other than her assailant. (R. 1508-10). From the mouth of Ms. Gross, she left thinking there would be someone behind her, but she ended up in the parking lot alone. She could remember no one else in the lot other than the man with the gun. (R. 1510).

ARGUMENT

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 THE INTERNSHIP SITE, BUT DISREGARDS THOSE WARNINGS AND THE PROCEDURES ESTABLISHED AT THE SITE TO SAFEGUARD WORKERS FROM CRIMINAL ATTACKS.

Apparently, anticipating that this Court will conclude that she had already been warned of the dangers of the parking lot and that Nova had no duty to give her the same warning, Gross now argues that she is cross-petitioning and seeking to impose duties over and above the duty to warn. Nova contends it had no duty whatsoever as to this remote location which was owned and controlled by an independent corporation. Nova also contends it had no duty because Gross had already been warned. See, e.g., Stewart v. Boho, Inc., 493 So. 2d 95, 96 (Fla. 4th DCA 1986).

Gross now seeks, by cross-petition, the result reached by the Fourth District Court in its first opinion rather than in its second opinion. Gross does not want this Court to impose merely a duty to warn--instead, she argues that Nova had an affirmative duty to take precautions to render the parking lot safe. This is exactly what the Fourth District ruled in its first opinion, but on

rehearing abandoned that view and adopted solely a duty to warn. Both the first opinion and the second opinion are incorrect as a matter of law and the second opinion must be reversed. Both opinions are based on an expansion of the special relationship doctrine.

Gross argues over and over again that Nova controlled her conduct and that she would never have been in this "high-crime" area, but for Nova's direction. She also says, in her brief, that she was not really aware it was a high-crime area, but in her deposition testimony she admitted it quite clearly. There was absolutely no evidence that Nova controlled Gross' conduct. Certainly, Gross was given a list of internship sites and her selections included FSA because it was the closest site to her own apartment. What Gross simply refuses to candidly admit, is that she is the one who made the decision to attend Nova University and to participate in this internship. Any student in a state or private university enrolls in the courses they choose and this is a completely voluntary act. Unlike grade schools or high schools which are mandatory under the law of all states, universities are not mandatory and the adult student is a voluntary participant. If Ms. Gross had not wished to participate in the internship at FSA she could have advised the university that she wanted a different internship site or she could have chosen not to participate in an internship at all. She could have chosen not to seek a doctorate

in psychology. These were all voluntary choices on her part and she cannot now contend that her off-campus conduct was under the control of Nova Southeastern University, Inc.

The entire line of cases dealing with special relationship liability in grade schools and high schools is based upon the legal fact that the schools stand in *loco parentis* and have the right and power to supervise their students. If this Court wishes to rule that state and private universities also have the right and power to control and supervise their students while off campus, then it will be a decision of monumental impact and it will be the only such decision in the United States.

Plaintiff Gross seeks to impose a special relationship as a basis for liability against Nova. The Fourth District Court of Appeal specifically expanded the special relationship doctrine in its first opinion and expressly stated that "The issue . . . is whether a 'special relationship' exists between Nova and herself . . .". In its second opinion, the court relied specifically on the "special relationship" doctrine at least six times in the opinion and concluded: "The 'special relationship' analysis is necessary in this case . . .".

This Court should reverse and not expand the special relationship doctrine to voluntary adult university students. Nova simply did not have the ability to control Gross when she was off

the Nova campus. Gross testified she was concerned for her own safety at FSA "because I'm a single woman, and I often drove to the Agency alone." (R. 1495). Nova did not have the legal power to order Ms. Gross not to drive her car alone after dark. We doubt that this Court intends to rule that Nova could have done so. Ms. Gross is an adult and owns her own car. If universities have the power, right and duty to supervise their adult students while off campus, then a whole new day will have dawned and a vast number of students will be seeking education in other states. The liability resulting from such a ruling against universities, both public and private, would be staggering.

Nova did not control Gross' conduct. Again, relying solely upon Gross' own testimony, she stated that her night schedule at FSA was determined by her own class schedule. (R. 1488). Again, Gross made the decision as to what courses she would take. Certainly, there were required courses, but Gross made the decision to enroll and take those required courses. Adult college students simply are not children and Gross asks this Court to order Nova to treat her as a child.

Plaintiff begins her real argument in her brief by relying upon Schwartz v. Helms Bakery Ltd., 67 Cal.2d 232, 430 Pa.2d 68 (Cal. 1967). This case concerned a four year old child who ran out from behind a parked car so he could buy a doughnut from the Helms Bakery truck. The Court ruled that since the driver had made

special arrangements with the child to do so and since the truck was using the public streets as a business premises that there could be liability. The Gross brief says that the four year old child is exactly the same as Gross and that any difference between the four year old child and adult students "is a distinction without a difference". (Br. p. 21). We are surprised by this argument as this Court should be. Adults are not entitled to be treated as four year old children and it is only necessary to read the Schwartz opinion to recognize that the California court repeatedly relied upon the fact that the small and unpredictable child was entitled to extreme protection from the bakery truck driver. An entirely different set of rules were applied.

The Schwartz court analyzed the whole line of cases dealing with ice-cream trucks and similar child attracting vendors. It is ludicrous to suggest that the university system of this state should be placed in the same category as ice-cream trucks and their four year old customers.

The Gross brief also does not advise this Court of directly contrary authority concerning the Schwartz case. Schwartz was cited and thoroughly distinguished in Donnell v. California Western School of Law, 246 Cal.Rptr 199 (Cal. App. 1988), which was the case most closely on point in the entire country. Donnell involved an adult law student injured late at night by an auto burglar on the street adjoining the law school. The law school's faculty

parking lot was on the street and the student's car was parked there. Cal Western Law School knew of prior violence on the street and the student sued claiming a special relationship with the university. The California Appellate Court refused to adopt the special relationship doctrine as to adult students. The court fully analyzed the special relationship doctrine and rejected it. The court also closely analyzed Schwartz v. Helms Bakery Ltd., and expressly found it to be inapplicable. The distinction between a four year old child and an adult was found to be compelling. The Gross brief does not bring this directly contrary authority to this Court's attention despite the fact that Donnell is cited in the Gross brief.

The Donnell opinion rejected the law student's arguments that the school could have exercised "control" over the adjoining, but non-owned street, by lighting it or providing security guards. The California court held at p. 726:

> The mere possibility of influencing or affecting the condition of property owned and possessed by others does not constitute "control" of such property.

There is no question that in the Nova situation Nova had no right to do anything in the FSA parking lot. It could not have added lights or a fence had it chosen to do so. Again, Gross admits this. In her brief at p. 24, Gross states: "Nova did not have control over FSA's property".

Donnell is clearly the most directly applicable decision and

the Fourth District should have relied upon it rather than that Massachusetts trial court decision it found so compelling; Silvers v. Associated Technical Institute, Inc., Case No. 93-4253, 1994 W.L. 879600 (Mass. Super. Ct. 1994). The Silvers case was dismissed by the parties and that decision does not constitute precedent and was miscited by the Fourth District Court of Appeal both technically and on the merits. Nova's previous brief pointed out just how wrong the Silvers reliance was and the Gross brief does not justify reliance on the case.

Gross attempts to distinguish the Donnell opinion urging that the law student chose to attend a law school in a high-crime area. The Donnell opinion does not contain any such indication and Donnell is based entirely on the absence of a duty on the law school's part to protect adult students from crimes when they were off-campus. If Donnell chose to attend a school in a high-crime area, then Gross chose to attend a program in a high-crime area and did so with full knowledge because she herself testified she knew it was a high-crime area as soon as she drove through it.

The Gross brief also fails to deal with Beach v. University of Utah, 726 P.2d 413 (Utah 1986). The Utah court also specifically refused to apply the special relationship doctrine as to adult university students and basically held that adult university students were not to be treated as children. Gross now makes a directly contrary argument without attempting to analyze the case

law which is directly on point against her. This Court should not adopt the special relationship doctrine as the Fourth District has done because it will place Florida out of step with every other state which has considered the issue in a university context.

Nova's initial brief cited overwhelming law that the presence or absence of a duty to warn was a question of law and that if Gross knew of the danger, having received that information and warning from FSA, then Nova had absolutely no duty to warn her. (See Initial Br. p. 26-31 and cases cited therein). Gross knew more about the dangers of this parking lot than did Nova and Gross had been told of those dangers by FSA. As such, Nova had absolutely no duty to give her a similar second-hand warning. She had already received a first-hand warning from FSA.

In closing, crime in the streets is an unfortunate fact of modern life and commercial or non-commercial service providers in high-crime poor neighborhoods should not be saddled with the duty of protecting their users and customers from all such crime which is known and very likely to occur. If this is to be the law of Florida, then poor neighborhoods will become even more isolated and cut-off from services than they are now.

A recent case from Arkansas is instructive. In Boren v. Worthen National Bank of Arkansas, 921 S.W.2d 934 (Ark. 1996), the Arkansas Supreme Court refused to impose liability on a bank for a robbery that occurred at an automatic teller machine (ATM). This

ATM machine was located in a known high-crime area in Little Rock, Arkansas, but the Supreme Court expressed extreme hesitancy in imposing a duty on the bank owners who were willing to provide such services in this high-crime area near "a housing project" where low income residents were prevalent. (Boren at p. 942).

In this case, FSA was willing to provide counseling services to a poor neighborhood where the crime rate was high. This is an unfortunate fact of life, but Nova should not be responsible to Ms. Gross after she was thoroughly warned by FSA and made the choice to stay in this bad neighborhood and continue to provide service. Nova was a step removed from FSA and Nova should certainly not be faulted for encouraging students to experience counseling services in a poor neighborhood where, unfortunately but not unexpectedly, the crime rate is high. Nova had no duty as to this non-owned site and in any event, Ms. Gross had been more than adequately warned.

CONCLUSION

The decision of the Fourth District Court of Appeal should be reversed. The certified question of the Fourth District should be restated and answered in the negative. The summary judgment in favor of Nova should be reinstated.

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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 April, 1999.

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