

# ***Farwell v. Keaton: Boys Will Be Boys: The Expansion of the Duty to Rescue***

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## **Introduction**

As shown in literary and artistic works such as *Romeo and Juliet* and *West Side Story*, young love can be volatile, dangerous, and even deadly. Rivals emerge who fight over “the girl.” Gangs battle other gangs, divided by class and race. The kid from the other side of the tracks is taught a lesson: “Stay over on your side, away from our women.” Yet, an even more important lesson emerges: gang members must have each others’ backs. It is important to stick together. Loyalty to your group is of the utmost importance.

Although these situations can bring about much literary creativity, in real life, these situations can be disastrous. That was the case for a young man named Ricky Farwell. He lost his life in such a battle. Ricky and his friend, two “preppy frat boys” who were dressed nice, with clean clothes, pointy shoes, and short hair,<sup>1</sup> went out for a night on the town in Detroit, where they attempted to talk to two girls. When the girls ran to their friends for help, six boys, wild teenagers from the “wrong side of the tracks” with leather jackets and slicked back hair,<sup>2</sup> severely beat up Ricky. Even worse, Ricky’s friend left him in the back seat of his car overnight, with no medical attention. Tragically, Ricky died a few days later. It is a sad story indeed, but Ricky’s death was avenged, so to speak, by the Michigan Supreme Court’s fashioning of an entire new duty in tort based on his story. “A friend in need is a friend indeed” was elevated from credo to rule of law. This is the story of *Farwell v. Keaton*, “one of the most celebrated affirmative duty cases”<sup>3</sup> and the revolution in tort law that it created.

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<sup>1</sup> Interview with Plaintiff’s attorney Kenneth M. Davies of Detroit.

<sup>2</sup> *Id.*

<sup>3</sup> Peter F. Lake, *Recognizing the Importance of Remoteness to the Duty to Rescue*, 46 DePaul L. Rev. 315, 353 (1997).

## The Incident

On August 26, 1966 Richard Murray Farwell, an 18-year-old from Detroit who was nicknamed Ricky, went out with his friend David Siegrist, who was 16-years-old at the time.<sup>4</sup> The two boys drove to Trail R Lot Rental,<sup>5</sup> a Detroit agency that rented trailers. Siegrist was returning a car he had borrowed from Jim Rehberg, a friend who was employed by the rental agency.<sup>6</sup> The boys were planning to wait until Rehberg finished work and then planned to drive around and stop at several restaurants and drive-ins, which was typical for them to do.<sup>7</sup> Although it is not entirely clear, it appears that Farwell's car was earlier left at the rental lot.<sup>8</sup> While the boys were waiting for Rehberg, Siegrist left Farwell to purchase beer.<sup>9</sup> When Siegrist returned, he shared his beer with Farwell. Siegrist later estimated that they consumed "four or five" apiece.<sup>10</sup>

At around nine o'clock p.m., two teenage girls walked by the entrance to the rental lot. The boys tried to engage them in conversation. When the girls would not reciprocate, Ricky got out of the car in which they were sitting to follow the girls. Siegrist followed. After walking down the street, they came to a restaurant, where the girls complained to their friends that Ricky and Siegrist were following them. Six boys – Terry Inland, Robert Brock Jr., Donald Keaton, his brother Daniel Keaton, David Traskos and a boy called "Stoney" – chased Siegrist and Ricky. Siegrist and Ricky ran back to the rental lot.

When they reached the rental lot, Siegrist was able to escape the group by running into the office of the rental agency. Unfortunately, Ricky was not, and the other boys caught up with

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<sup>4</sup> Unless otherwise noted, all facts come from *Farwell v. Keaton*, 51 Mich. Ct. App. 585, 215 N.W. 2d 753 (Mich. Ct. App. 1974).

<sup>5</sup> Certificate of Death for Richard Murray Farwell.

<sup>6</sup> Appellant's Brief on Appeal at 1.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 8.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

him and “proceeded to beat and ‘stomp’ him.”<sup>11</sup> According to David Traskos, one of the six boys who chased after Farwell and Siegrist, Daniel Keaton was kicking Ricky in the head while another boy, “Stoney” was “pounding him in the stomach.”<sup>12</sup> David Traskos then turned around and started to walk off because he did not feel it was right to beat up a boy lying on the ground who was not fighting back.<sup>13</sup>

Meanwhile, Siegrist asked those inside the office of the rental lot to help Ricky, shouting “There’s a fight!”<sup>14</sup> While inside, Siegrist grabbed a pipe, which he brought outside with him in case a fight between the two groups erupted.<sup>15</sup> Three boys came outside with Siegrist, where they were confronted by the group of boys that had been chasing Siegrist and Ricky. Although they stood face to face, no violence ensued and the groups went their separate ways. At trial, David Traskos testified that Siegrist and his group came “out with bottles, pipes. I figured there was going to be a fight. Terry [England] said to ‘drop it’ and everybody dropped everything. Terry was the leader of the guys.”<sup>16</sup>

Although things seemed to be in order, it would soon be discovered that tragedy had happened. After the group had left, Siegrist, Rehberg, and the other two boys looked for and called out for Ricky Farwell. They did not immediately see him, and Rehberg figured he had run away. They finally spotted Ricky underneath his own car in the parking lot, where he had hidden to get away from the boys who were assaulting him. When they found him, Ricky was attempting to get up from underneath his car.<sup>17</sup> Siegrist and the others took Ricky into the rental

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<sup>11</sup> *Id.* at 2.

<sup>12</sup> Appellant’s Appendix, Testimony of David Traskos, at 22a.

<sup>13</sup> *Id.*

<sup>14</sup> Appellant’s Appendix, Cross Examination of James Rehberg, at 19a.

<sup>15</sup> Appellant’s Brief on Appeal at 7. David Traskos testified that the pipe Siegrist was holding was two or three feet long and he supposed it was a water pipe.

<sup>16</sup> Appellant’s Appendix, Cross Examination of James Rehberg, at 19a.

<sup>17</sup> Appellant’s Appendix, Testimony of David Siegrist, at 30a.

office, where Siegrist gave him a plastic bag filled with ice for his injuries and which Siegrist then applied to Ricky's head.<sup>18</sup>

At around ten o'clock p.m., at Ricky's urging, Siegrist and Ricky left the rental office to drive around in Ricky's car. During the next two hours (from 10 p.m. to midnight), they visited four drive-in restaurants, with Siegrist driving. The boys first went to McDonald's, where they stayed for a long time.<sup>19</sup> Then, the boys went to Big Boy Drive In, where they stayed for a short while. After that, they went to Daly Drive In and then to White Castle. During this time, Ricky expressed his desire to retaliate against the boys who assaulted him. En route from Daly's to White Castle, Ricky said he wanted to lie down, at which time he climbed into the back seat. Ricky fell asleep in the back seat.<sup>20</sup>

At around midnight, Siegrist stopped by Jim Rehberg's girlfriend's house and asked a friend, Joe Regal, to follow him to Ricky's grandparents' house.<sup>21</sup> Siegrist drove to Ricky's grandparents' house, with Regal trailing. Siegrist parked the car in the driveway and tried to wake Ricky. Siegrist was not able to rouse Ricky, and Ricky only once made a sound -- like he was in a deep sleep. Siegrist did not notify Ricky's grandparents and left Ricky in the car's backseat. Siegrist then left with Joe Regal, who dropped Siegrist off at home.

The following morning, Ricky's grandparents found Ricky in the backseat and took him to Northwest Grace Hospital.<sup>22</sup> When he was first admitted to the hospital, Ricky had an abrasion on his forehead, bruising on his right hand, was unconscious, had no reaction to light, his neck and lower body was stiff, and his reflexes were clonic.<sup>23</sup> Three days later, Ricky died of a

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<sup>18</sup> Appellant's Brief on Appeal.

<sup>19</sup> Appellee's Appendix at 2b.

<sup>20</sup> While the defendant contended that Ricky "fell asleep," the plaintiff argued that Ricky had in fact lost consciousness at this time. However, to Siegrist, Ricky seemed to just have fallen asleep.

<sup>21</sup> Appellee's Appendix at 2b.

<sup>22</sup> Certificate of Death for Richard Murray Farwell.

<sup>23</sup> Appellant's Appendix, Testimony of Ann Kropf, at 24a-25a. According to [www.dictionary.com](http://www.dictionary.com), "clonic" describes "An abnormality in neuromuscular activity characterized by rapidly alternating muscular contraction and relaxation."

massive epidural hemorrhage, caused by trauma to the head due to the assault.<sup>24</sup> An autopsy was performed by Dr. John J. Hanlon, who ruled Ricky's death a homicide.<sup>25</sup> Richard Murray Farwell was buried September 2, 1966 at Grand Lawn Cemetery in Detroit Michigan.<sup>26</sup> Ricky was 18-years-old.

## **The Trial**

Ricky's father, Richard M. Farwell Jr., a divorced, wealthy owner of an interior decorating business was devastated at the loss of Ricky, who was still in high school with a promising future.<sup>27</sup> Richard Farwell was a well-dressed man, who was "styling it up" at the time, and one observing him "could easily tell that he had some money."<sup>28</sup> Richard and Ricky had a "typical, loving father-son relationship" despite the fact that Ricky lived with his grandparents because his father "wasn't around all that much."<sup>29</sup> The loss of Ricky sent Richard on a mission. For him, it was not about the money, since he had plenty of that.<sup>30</sup> Richard was angry at David Siegrist for abandoning his son when Siegrist knew Ricky was ill.<sup>31</sup> Richard wanted to do anything he could to show Siegrist that what he did was wrong.<sup>32</sup> With that in mind, Richard Farwell sought out the counsel of Kenneth M. Davies and "asked for help in pursuing whatever means possible under the law to punish Siegrist for abandoning his friend."<sup>33</sup>

Ricky's father brought a wrongful death action against the assailants who attacked Ricky and against David Siegrist. The suit was brought in the Wayne County Circuit Court with the Honorable Robert E. Cunningham, District Judge for the 50<sup>th</sup> District Court presiding over the trial. Proceedings occurred on April 10 and 12, 1972, nearly six years after Ricky died. Attorney

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<sup>24</sup> Certificate of Death for Richard Murray Farwell.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

Kenneth M. Davies represented plaintiff Richard M. Farwell Jr., Administrator of the Estate of Richard Murray Farwell, Deceased. Ricky's father came to court everyday throughout the trial.<sup>34</sup> David Siegrist was represented by William G. Jamieson of Martin, Bohall, Joselyn, Hasley, Rowe & Jamieson, P.C., while the other defendants were represented by Virginia E. Hetmanski of Detroit. The defendants were also represented by a *guardian ad litem*, since some were under the age of 18.<sup>35</sup>

Although the attackers were named as defendants, the trial and the subsequent appeals focused almost exclusively on Siegrist. Ken Davies confided that he made a conscious choice to vehemently argue against Siegrist rather than the other boys because Siegrist had insurance and the other boys did not.<sup>36</sup> He said that this was not only because he wanted to be able to obtain an award for Richard Farwell but also because Ken Davies had taken this case on a contingency and wanted to be able to get paid when the trial and appeals were over.<sup>37</sup> He also said that it would be a stronger argument to focus solely on Siegrist's moral reprehensibility.<sup>38</sup>

At trial, Ken Davies, on behalf of the plaintiff, based his case against Siegrist on the theory that if Siegrist had taken Ricky to a hospital, or had notified someone of Ricky's injuries and whereabouts, Ricky would not have died.<sup>39</sup> As a result of his failure to do so, he was liable. As Ken Davies put it, "Siegrist should not have left his friend. That was morally wrong and he should be civilly responsible. In this case, moral duty and legal obligation overlapped."<sup>40</sup> He continued, "A lot of what happens at trial is the theater in the courtroom. You need to give the jury a theme that appeals to common sense. My theme was that this was morally wrong."<sup>41</sup>

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<sup>34</sup> Interview with Plaintiff's attorney Kenneth M. Davies of Detroit.

<sup>35</sup> Appellant's Appendix on Appeal at 1a. (On October 4, the court appointed a guardian ad litem for David Siegrist, who was a minor).

<sup>36</sup> Interview with Plaintiff's attorney Kenneth M. Davies of Detroit.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Farwell v. Keaton*, 396 Mich. 281, 240 N.W.2d 217 (Mich. 1976).

<sup>40</sup> Interview with Plaintiff's attorney Kenneth M. Davies of Detroit.

<sup>41</sup> *Id.*

Plaintiff made the argument that Ricky died as a probable result of a delay in receiving medical attention, since he laid in the car alone all night and was not taken to the hospital until the following morning. To prove this, plaintiff brought in Dr. Gurdjian, a neurosurgeon who attended to Ricky when he was brought in to the hospital. The neurosurgeon stated that “if a person in Farwell’s condition is taken to a doctor before, or within half an hour after, consciousness is lost, there is an 85 to 88 per cent chance of survival.”<sup>42</sup> After being pressed to state an exact time when Ricky lost consciousness, Dr. Gurdjian stated, “to guess exactly when he became completely out, would be both very difficult and unethical.”<sup>43</sup> This important issue of when Ricky actually lost consciousness seems to have been overlooked by the court. If Ricky could have been saved only if he got treatment within a half an hour after he lost consciousness, then assuming he lost consciousness when he laid down in the backseat, even if Siegrist had notified Ricky’s grandparents about Ricky’s whereabouts and condition, it would have made no difference. On those facts, Siegrist should not have been liable for failing to notify the grandparents because it would not have mattered since Ricky still would have likely died. Ricky needed to be taken to the hospital shortly after he climbed into the backseat and fell asleep. Yet, this is not what the jury and ultimately the court mandated that Siegrist should have done. The holding mandated that Siegrist should have taken further action upon returning Ricky to his grandparents’ house, hours after the window of time to save Ricky had passed.

Still, the plaintiff focused on how Ricky could have been saved. Dr. Gurdjian testified that if someone is brought in with head injuries and is still conscious, the doctor would try to detect injury using an echo encephalogram and the medical staff would monitor the injured individual’s pulse, respiration and blood pressure. If these three indicators were out of the ordinary, the patient likely had a blood clot, and the staff would give him medical treatment, including surgery to alleviate the pressure on the brain. Dr. Gurdjian testified that by the time

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<sup>42</sup> *Farwell v. Keaton*, 396 Mich. 281, 285, 240 N.W.2d 217 (Mich. 1976).

<sup>43</sup> Appellee’s Appendix at 10b.

Ricky had been brought into the hospital his fate was more or less “doomed.”<sup>44</sup> It was simply too late; yet if he had been brought in sooner, the staff could have monitored him and provided medical assistance. Therefore, if the injuries were reported sooner, and Ricky had been taken to the hospital shortly after losing consciousness, Ricky could have likely survived the beating.

The defense’s line of questioning, however, pointed Dr. Gurdjian in a different direction. When the defense attorney, Mr. Jamieson, asked whether “there is a possibility that regardless of the speed that he had been brought out immediately after the blow, or blows, it might not have helped,” Dr. Gurdjian responded, “Yes, sir, that is true. As I said before, he might have died anyway.”<sup>45</sup> Although the debate about when Ricky could have been saved was ultimately up to the jury, the sequence of events pointed in the direction of no liability for Siegrist, since any behavior of his at the time he reached the grandparents’ house would not have made any difference. Hence, it could be argued that the jury was unreasonable in finding to the contrary.

Further proof at trial included a statement that Siegrist made to Ricky’s father the day after the incident at the home of Ricky’s mother, Mrs. Evangeline Grenier. Ricky’s father asked Siegrist “why he left Ricky ... in the driveway of his grandfather’s home.”<sup>46</sup> According to Ricky’s father, Siegrist “told him that he knew Farwell was badly injured and that he should have done something.”<sup>47</sup> Ricky’s father testified that Siegrist said “Ricky was hurt bad, I was scared.”<sup>48</sup> Ricky’s father then asked, “Why didn’t you tell somebody, tell his grandparents?”<sup>49</sup> Siegrist replied, “I know I should have, I don’t know.”<sup>50</sup> Evangeline Grenier, Ricky’s mother, also testified that Siegrist told her at the funeral home that he was sorry. What may have been a mere hindsight apology to the parents of one Siegrist’s friends at the time of the friend’s death became proof of Siegrist’s liability at trial.

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<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Farwell v. Keaton*, 396 Mich. 281, 289 240 N.W.2d 217 (Mich. 1976).

<sup>47</sup> *Id.* at 285.

<sup>48</sup> *Id.* at 289

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

On the other hand, Pamela J. Festian, despite being a plaintiff's witness, offered testimony in support of Siegrist. During cross-examination, Festian testified that Siegrist said, "He didn't realize [Ricky] was medically bad off is what he said. He thought that [Ricky] was more drunk than anything else and that he'd be okay the next day." Similarly, the defense offered testimony that "revealed that only a qualified physician would have reason to suspect that Farwell had suffered an injury which required immediate medical attention."<sup>51</sup> Furthermore, Ricky "never complained of pain and, in fact, had expressed a desire to retaliate against his attackers."<sup>52</sup> Siegrist even testified that "Farwell wanted to go out to the drive-ins."<sup>53</sup> These facts indicated that because Siegrist has no way of knowing Ricky needed immediate medical assistance, he should not be held liable.

After plaintiff's proofs were concluded, defendant David Siegrist moved for a directed verdict "on the grounds that he had no duty to obtain medical assistance for Farwell as a matter of law."<sup>54</sup> The motion for the directed verdict was also based on the "proposition that plaintiff failed to establish that any conduct on the part of Siegrist proximately caused Farwell's death."<sup>55</sup> The motion was denied.

Honorable Robert E. Cunningham instructed the jury "to determine whether Siegrist had voluntarily undertaken to render aid and, if he had, whether he acted reasonably in discharging that duty."<sup>56</sup> The instructions to the jury are as follows:

I charge you, members of the jury, that defendant David Siegrist had no duty with respect to securing medical attention for plaintiff's decedent until and unless David Siegrist knew or should have known plaintiff's decedent sustained such a substantial and serious injury that he required immediate medical attention. I charge you, members of the jury, that defendant David Siegrist shall not be held responsible for the intentional or negligent acts of any of the other defendants in inflicting injury upon plaintiff's decedent.

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<sup>51</sup> *Id.* at 295.

<sup>52</sup> *Id.*

<sup>53</sup> *Farwell v. Keaton*, 51 Mich. Ct. App. 585, 591, 215 N.W. 2d 753 (Mich. Ct. App. 1974).

<sup>54</sup> *Id.* at 588.

<sup>55</sup> *Id.*

<sup>56</sup> *Farwell v. Keaton*, 396 Mich. 281, 284, n.1, 240 N.W.2d 217 (Mich. 1976).

Ladies and Gentlemen of the jury, a volunteer is one who undertakes to render assistance to another. The law did not require the Mr. Siegrist be a volunteer. But if you find that the defendant Siegrist volunteered and became aware or should have become aware that the deceased Farwell was injured and required medical attention, but despite this, the defendant Siegrist acted unreasonably and abandoned Farwell in his driveway without telling anyone and that as a result of not getting immediate medical attention, the Farwell boy died, you should find in favor of the plaintiff against the defendant Siegrist and apply the measure of damages I shall give you.<sup>57</sup>

The jury deliberated for three days and returned a unanimous verdict of 6-0 for plaintiff and against Siegrist in the amount of \$15,000 to be awarded to Ricky's family<sup>58</sup> against defendant David Siegrist.<sup>59</sup> David Siegrist paid the award to Ricky's family out of his parents' homeowners' insurance policy.<sup>60</sup> The jury returned a verdict of no cause of action in favor of defendants Robert Brock Jr. and Daniel Keaton. A default judgment was entered against defendants Terry Inland<sup>61</sup> and Donald Keaton, who never appeared. It seems that although the award was against Siegrist alone, perhaps he could have pursued contribution from defendants Inland and Donald Keaton, but not from Brock and Daniel Keaton.<sup>62</sup> In practical terms though, since the other defendants had no assets or insurance, it was unlikely that Siegrist would have sought contribution, especially since Siegrist's insurance was paying the judgment. Although Ken Davies did not know why Inland and Donald Keaton did not show up, he said that one

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<sup>57</sup> Appendix of Defendant-Appellee's Application for Rehearing. Ken Davies, plaintiff's attorney, noted that although he tried to convince the jury to rule on moral grounds, he feels that they were instructed properly and that Siegrist did have a duty not to abandon his friend after Siegrist began to help Ricky. It was clear from my interview with him that Ken Davies most certainly believed in, and still to this day believes in, the position of his client.

<sup>58</sup> Appellant's Appendix at 7a contains a breakdown of the award as follows: Mr. and Mrs. Clifton Farwell (Ricky's grandparents), \$1709.39; Kenneth M. Davies' attorney fees and reimbursement for costs, \$6877.86; Lisa Farwell (Ricky's sister), \$500.00; Evangeline M. Grenier (Ricky's mother), \$5126.06; Richard M. Farwell, Jr. (Ricky's father), \$5274.06.

<sup>59</sup> Appellant's Appendix at 4a. Ken Davies noted that because of the small amount, he believed that the verdict was not about compensation in the mind of the jury but more about the moral reprehensibility of Siegrist's failure to help Ricky.

<sup>60</sup> Interview with Plaintiff's attorney Kenneth M. Davies of Detroit.

<sup>61</sup> This result is confusing because on April 6, 1972 a Motion for Withdrawal of Terry Inland as party defendant was granted. See Appellant's Appendix on Appeal at 4a.

<sup>62</sup> The trial court specifically noted that "the defendant take nothing from defendants Daniel Keaton and Robert Brock, Jr. See Appellant's Appendix on Appeal at 5a.

possibility was that they were in jail.<sup>63</sup> He also stated, “People have choices. Some chose to defend themselves even when they know they have done something wrong. Others choose to run away. Those two chose to run away.”

After the verdict was announced, defendant David Siegrist moved for a judgment notwithstanding the verdict based upon the grounds that “the trial court erred when it failed to direct a verdict in his favor and that the verdict was inconsistent with the weight of the evidence.”<sup>64</sup> That motion was denied.

### **The Court of Appeals Decision**

After the trial decision was handed down, defendant David Siegrist appealed to the Court of Appeals of Michigan,<sup>65</sup> arguing that the trial court erred in denying defendant’s motions for a directed verdict and judgment notwithstanding the verdict. The case was heard by a three-judge panel consisting of Presiding Judge McGregor, Judge Gillis and Judge O’Hara, a former Supreme Court Justice sitting on the Court of Appeals by assignment. Plaintiff Richard M. Farwell, Jr., was once again represented by Kenneth M. Davies of Detroit, while defendant was represented again by William G. Jamieson. The opinion was rendered on March 4, 1974 and was released for publication in March 25, 1974.

The three judges, in a unanimous decision written by Judge McGregor, overruled the trial court. The concise opinion of just a few pages, most of which was a repetition of the facts, held that Siegrist had no duty to obtain medical treatment and there was no liability on his part.<sup>66</sup> The opinion began with the court stating that it will view all of the evidence from trial in the light

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<sup>63</sup> Interview with Plaintiff’s attorney Kenneth M. Davies of Detroit. Ken Davies said that he remembered the other attackers being prosecuted but could not recall if any of the other defendants served jail time. He recalled that Richard Farwell, Ricky’s father, would have wanted them prosecuted to the full extent of the law and would have seen to it that that happened. He said, “Maybe a couple did go to jail. I honestly don’t know.”

<sup>64</sup> *Farwell v. Keaton*, 51 Mich. Ct. App. 585, 588, 591, 215 N.W. 2d 753 (Mich. Ct. App. 1974).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 591-92.

most favorable to the plaintiff, “and decide whether the law imposed a duty upon defendant Siegrist to obtain medical assistance for Farwell.”<sup>67</sup>

The court then noted that this case involved the important distinction between misfeasance and nonfeasance.<sup>68</sup> The court turned to Prosser on Torts for clarification of the distinction: “In determination of the existence of a duty, there runs through much of the law a distinction ... between ‘misfeasance’ and ‘nonfeasance’ – that is to say, between active misconduct working positive injury to others and passive inaction or a failure to take steps to protect them from harm.”<sup>69</sup> The court then stated that although a cause of action generally arises when injury is caused by another’s misfeasance, nonfeasance does not give rise to a cause of action because although one is obligated not to create an unreasonable risk to others, one is not similarly required to help someone who has been injured by another or himself.<sup>70</sup> Still, “if one voluntarily assumes the duty of lending aid, he is required to do so with reasonable prudence and care.”<sup>71</sup> It is from this set of rules that the court fashioned its analysis of the case.

The court stated that plaintiff’s argument failed because it misapplied the foregoing rules to the factual situation of this case.<sup>72</sup> The court held that based on the evidence adduced at trial, even in a light most favorable to the plaintiff, there was not enough evidence to support the view the defendant Siegrist assumed a duty, voluntarily or otherwise, to obtain medical assistance for Ricky Farwell.<sup>73</sup> The court drew this conclusion from evidence at trial showing that there was no way that Siegrist could have known that Ricky was injured in such a way that his injuries required immediate medical attention or could result in Ricky’s death if left untreated.<sup>74</sup> Testimony at trial showed that no one but a trained physician could have even suspected the

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<sup>67</sup> *Id.* at 588-89.

<sup>68</sup> *Id.* at 589.

<sup>69</sup> *Id.* (quoting Prosser, Torts (4<sup>th</sup> ed.), § 56, pp. 338-339).

<sup>70</sup> *Id.* at 589-90.

<sup>71</sup> *Id.* at 590.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

“extent or severity” of Ricky’s injuries. Siegrist simply had no way of knowing that the injuries could be fatal.

Furthermore, other evidence at trial showed that Siegrist had even more reason to believe that Ricky was not potentially fatally injured. According to Siegrist’s testimony, Ricky told him that he wanted to continue with their plan to go to the drive-in restaurants, that they visited four different drive-ins over the span of two hours, and that Ricky never complained of pain.<sup>75</sup> Even more convincing, Ricky asserted an interest in retaliating against those who had assaulted him.<sup>76</sup> The court further noted that although Ricky did climb into the back seat of the car, from all outer appearances, it was just to go to sleep.<sup>77</sup> That behavior was not so outrageous as to alert Siegrist, especially after a long night of excitement and drinking beer, that he had a duty to obtain medical assistance on behalf of Ricky. Ricky was also apparently asleep when Siegrist left him.<sup>78</sup> From Siegrist’s point-of-view nothing was so out of the ordinary that Siegrist should have been concerned that Ricky was seriously injured to the point of fatality.

The court held that those facts “in no way indicate that Siegrist knew, or should have known immediate medical attention was imperative. Absent such knowledge, Siegrist was under no legal duty to obtain such aid.<sup>79</sup> The court then held as a matter of law that Siegrist was under no duty to obtain medical treatment and the trial court erred in denying defendant’s motions for a directed verdict and judgment notwithstanding the verdict.<sup>80</sup>

Plaintiff also put forth the argument that Siegrist’s act of giving Ricky a bag of ice for his head while at the trailer rental office was an assumption of the duty to render temporary medical assistance.<sup>81</sup> The court held that even if that gratuitous act had given rise to a duty, “that duty was abandoned when the young men decided to embark upon the journey from restaurant to

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<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 591.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* (citing 65 C.J.S. Negligence § 63(103) p. 857).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

restaurant.”<sup>82</sup> The court saw the act of going to the restaurants not as Siegrist’s abandonment of a duty he had previously voluntarily assumed, but rather as the point at which Siegrist’s duty to assist Ricky had been completed.

The court then turned to the Restatement of Torts, 2d, for instruction on the abandonment of a voluntarily assumed duty: “The fact that the actor gratuitously starts in to aid another does not necessarily require him to continue his services. He is not required to continue them indefinitely or even until he has done everything in his power to aid and protect the other.”<sup>83</sup> The Restatement further states that the actor can discontinue giving aid at any time, “unless, by giving the aid he has put the other in a worse position than he was in before the actor attempted to aid him. His motives in discontinuing the services are immaterial.”<sup>84</sup> The court then looked to Prosser’s Torts, which instructs that liability in cases involving the abandonment of an assumed duty or negligence arising from that abandonment has generally been based on the acts of the defendant having “made the situation worse, either by increasing the danger, or by misleading the plaintiff into the belief that it has been removed or depriving him of the possibility of help from other sources, as where he is induced voluntarily to forego it.”<sup>85</sup>

The court drew upon that guidance to hold that since there was no evidence that Siegrist’s furnishing of the bag of ice to Ricky caused Ricky to forego other medical treatment or worsened Ricky’s condition, Siegrist’s abandonment of the duty, occurring when the boys drove to the restaurants, did not give rise to liability on defendant Siegrist’s part.<sup>86</sup> Therefore, the trial court’s judgment was overruled<sup>87</sup> and Siegrist was not liable for any damages to Ricky’s estate or to Ricky’s father.

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<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 591-92 (citing the Restatement Torts, 2d, § 323, comment c, at p. 137).

<sup>84</sup> *Id.* at 592 (citing the Restatement Torts, 2d, § 323, comment c, at p. 137).

<sup>85</sup> *Id.* (citing Prosser, Torts (4<sup>th</sup> ed.), § 56, p. 347).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* (costs were assessed to Appellants).

## **The Supreme Court of Michigan Decision**

After the Court of Appeals of Michigan overturned the trial court's decision, plaintiff Richard M. Farwell, Jr. appealed to the Supreme Court of Michigan.<sup>88</sup> Defendant was again represented by William G. Jamieson of Martin, Bohall, Joselyn, Halsey, Rowe & Jamieson, P.C., of Detroit. However, plaintiff-appellant had changed counsel and was now represented by James C. Bruno of the firm Young, O'Rourke, Bruno & Bunn of Detroit. Oral arguments occurred on May 6, 1975 and the decision was decided April 1, 1976. It had been almost ten years since Ricky had passed away.

The 1976 opinion is a plurality opinion, with a 3-2 (and 2 absent) vote. Justice Levin authored the opinion of the case, with which Chief Justice T.G. Kavanagh and Justice Williams concurred. Justice Fitzgerald authored the dissenting opinion and Justice Coleman concurred in the dissent. Two justices, Justice Lindemer and Justice Ryan, did not participate in the decision, most likely because they had both only recently joined the Michigan Supreme Court.<sup>89</sup>

## **The Majority Opinion**

Justice Levin began his opinion with a new version of the facts, which differed slightly from that of the Court of Appeals.<sup>90</sup> In section II of its opinion, the court stated that the issues brought upon appeal were as follows: "A. Whether the existence of a duty in a particular case is always a matter of law to be determined solely by the Court?" and "B. Whether, on the facts of this case, the trial judge should have ruled, as a matter of law, that Siegrist owed no duty to Farwell?"<sup>91</sup>

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<sup>88</sup> Unless otherwise noted, all citations in this section are from *Farwell v. Keaton*, 396 Mich. 281, 240 N.W.2d 217 (Mich. 1976).

<sup>89</sup> See Bios, available at <http://www.micourthistory.org/resources/lblindemer.php> and <http://www.micourthistory.org/resources/jlryan.php>.

<sup>90</sup> Because Chief Justice T.G. Kavanagh and Justice Williams concur in the opinion and do not write opinions of their own, making it a 3-person majority, I will refer to Justice Levin's opinion as the opinion of the court.

<sup>91</sup> *Farwell v. Keaton*, 396 Mich. 281, 286, 240 N.W.2d 217 (Mich. 1976).

In response, the Supreme Court held that it was for the jury to determine whether Siegrist attempted to aid Farwell, and that if aid had been attempted, a duty had arisen which required Siegrist to act as a reasonable person.<sup>92</sup> The court held that the evidence had been sufficient to establish that Siegrist had breached his legal duty of reasonable care after coming to Farwell's aid,<sup>93</sup> that Siegrist had a duty to obtain medical assistance, or at the very least, to notify someone about Ricky's condition and whereabouts.<sup>94</sup> Perhaps the most remarkable portion of the case is where the court further held that since the boys were "companions on a social venture," their status created a legally recognized special relationship between the two and, as a result, Siegrist had an affirmative duty to come to Farwell's aid.<sup>95</sup>

Turning to the details, the court addressed whether the issue of duty was a question for the jury.<sup>96</sup> The court first defined duty in general by citing Prosser on Torts: "A duty, in negligence cases, may be defined as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another."<sup>97</sup> The court stated that although the existence of a duty is typically a question of law, when factual circumstances give rise to a duty, the determination of the existence of those facts is a question for the jury.<sup>98</sup>

Next, the court discussed the existence of a duty in this case.<sup>99</sup> The court focused on the duty to "avoid affirmative acts which may make a situation worse."<sup>100</sup> The court again turned to Prosser for clarification on this issue: "If the defendant does attempt to aid him, and takes charge and control of the situation he is regarded as entering voluntarily into a relation which is attended with responsibility."<sup>101</sup> According to Prosser, "[s]uch a defendant will then be liable for a failure

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<sup>92</sup> *Id.* at 287.

<sup>93</sup> *Id.* at 288.

<sup>94</sup> *Id.* at 289, 291.

<sup>95</sup> *Id.* at 291-92.

<sup>96</sup> *Id.* at 286-287 (Section A. of the opinion).

<sup>97</sup> *Id.* at 286 (quoting Prosser, Torts (4<sup>th</sup> ed.) § 53, p. 324).

<sup>98</sup> *Id.* at 287.

<sup>99</sup> *Id.* at 287-290 (Section B. of the opinion).

<sup>100</sup> *Id.* at 287.

<sup>101</sup> *Id.* (quoting Prosser, *supra*, § 56, pp. 343-44).

to use reasonable care for the protection of the plaintiff's interests. Where performance clearly has been begun, there is no doubt that there is a duty of care."<sup>102</sup>

According to the Restatement once aid has begun, the defendant has a duty not to make the victim worse off. That implies that if the defendant merely fails to make the victim better off, there is no liability. This is an important distinction, one which the court seems to ignore altogether. The court seems to say that by not improving Ricky's situation, Siegrist made his situation worse. Again, this is debatable because Siegrist's alteration of Ricky's situation was taking him out from under a car and leaving him in the backseat of a car in his grandparent's driveway. This could be considered improving his situation rather than making it worse. Indeed, it is almost as if the court is saying that Siegrist should have left Ricky bleeding under a car in a rental lot. The court adopts a more liberal view of duty that goes beyond the limits of the Restatement. Still, the court could have been sending the message that it need not address this issue because Siegrist clearly made Ricky worse off or that because they were "companions on a social venture" this distinction makes no difference. Ultimately, the court stated that the determination of whether the defendant, in light of all the evidence, attempted to aid the victim is a question for the jury. If the jury finds that the defendant did begin to aid the victim, then the defendant had a duty to behave as a reasonable person.

To this end, the court held that there was "*ample* evidence to show that Siegrist breached a legal duty owed to Farwell."<sup>103</sup> The court cited Siegrist's knowledge that Farwell had been in a fight, and Siegrist's initial attempt to relieve Farwell's pain by applying an ice pack to Farwell's head. The court further noted that Siegrist was present when Farwell crawled into the back seat and lay down and that Siegrist tried to rouse Farwell and was not able to wake him.

Perhaps the most damaging piece of evidence for Siegrist was the aforementioned conversation between Siegrist and Ricky's father the day after the incident. When Ricky's father

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<sup>102</sup> *Id.* (quoting Prosser, *supra*, § 56, pp. 343-46).

<sup>103</sup> *Id.* (emphasis added).

asked why Siegrist had left Ricky in the driveway, Siegrist replied, “Ricky was hurt bad, I was scared.”<sup>104</sup> Ricky’s father then asked Siegrist why Siegrist did not inform anyone as to Ricky’s condition, to which Siegrist replied, “I know I should have, I don’t know.”<sup>105</sup> By these two statements, Siegrist not only admitted that he knew Ricky was badly hurt, but also that, looking back, he knew that he should have notified someone of Ricky’s condition. Although the import of these statements is debatable (hindsight being 20-20), more than any other piece of evidence, these statements seem to be the basis for the court’s decision.

The court again emphasized that the question at trial, whether Siegrist acted reasonably under all the circumstances, was ultimately for the jury. The court cited its own case, *Davis v. Thornton*, 384 Mich. 138, 142-143 (1970), for this proposition: “The law of negligence is that an actor is held to the standard of a reasonable man. The determination of the facts upon which the judgment of reasonableness is based is admittedly for the jury.” The court then reiterated that the jury at trial found that Siegrist did not act as a reasonable man would in those circumstances and that Siegrist’s negligence was the proximate cause of Farwell’s death.

In section III, the court explored what has become the most prominent and intriguing issue in this case. The court noted that courts throughout the country have been slow to recognize a general duty to give aid to someone in peril. Although the court put most of its analysis in footnotes, these footnotes prove to be the heart of the case. For example, the court turned once again to Prosser: “The law has persistently refused to recognize the moral obligation of common decency and common humanity to come to the aid of another human being who is in danger.” Prosser continues, “The remedy in such cases is left to the ‘higher law’ and the ‘voice of conscience,’ which, in a wicked world, would seem to be singularly ineffective either to prevent the harm or to compensate the victim.”<sup>106</sup> Basically, according to Prosser, Siegrist was not liable

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<sup>104</sup> *Id.* at 288-89.

<sup>105</sup> *Id.* at 289.

<sup>106</sup> *Id.* at 290, n.3 (quoting Prosser, *Torts* (4<sup>th</sup> ed.), § 56, pp. 340-41).

because there is no duty to aid others and Siegrist would only have to deal with his own internal conscience. Harper & James in *The Law of Torts*, made a similar statement:

At the other end of the spectrum are cases where the peril to the plaintiff has come from a source in no way connected with defendant's conduct or enterprises or undertakings, past or present, but where the defendant has it in his power by taking some reasonable precaution to remove the peril. Here the law has traditionally found no duty, however reprehensible and unreasonable the defendant's failure to take the precaution may be... *There is no legal obligation to be a Good Samaritan.*<sup>107</sup>

But the court's analysis did not end there. The court noted that although the courts have been slow to recognize a general duty to render aid to a person in peril, a duty to aid had been based on the existence of a "*special relationship* between the parties."<sup>108</sup> Examples of special relationships where courts have found a duty to render aid to another person in peril include carrier-passenger,<sup>109</sup> employer-employee,<sup>110</sup> innkeeper-guest,<sup>111</sup> jailer-prisoner,<sup>112</sup> and in maritime law, master-crewmen.<sup>113</sup>

The court then turned to specific cases in other courts that have arguably addressed this issue. The Supreme Court of Minnesota, in *Depue v. Flatau*, 100 Minn. 299, 111 N.W. 1 (1907), held that "if the defendants knew their dinner guest was ill, it was for the jury to decide whether they were negligent in refusing his request to spend the night and, propping him on his wagon with the reins thrown over his shoulder, sending him toward home." Additionally, the Sixth Circuit held in *Hutchinson v. Dickie*, 162 F.2d 103, 106 (C.A. 6, 1947) that a host had an affirmative duty to try to rescue a guest who had fallen off of his yacht. The Sixth Circuit based this holding on the fact that the yacht owner had control over the only "instrumentality of rescue"

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<sup>107</sup> *Id.* at 290, n. 3 (quoting Harper & James, *The Law of Torts*, § 18.6 p. 1046) (emphasis added).

<sup>108</sup> *Id.* at 290, n.4.

<sup>109</sup> *Id.* at 290, n. 4 (citing *Yu v. New York, N.H. & H.R. Co.*, 145 Conn. 451, 144 A.2d 56 (Conn. 1958) ("Carriers have a duty to aid passengers who are known to be in peril.")).

<sup>110</sup> *Id.* (citing *Anderson v. Atchinson T. & S.F.R. Co.*, 333 U.S. 821, 68 S. Ct. 854, 92 L. Ed. 1108 (1948) ("employers similarly are required to render aid to employees."); *Bessemer Land & Improvement Co. v. Campbell*, 121 Ala. 50, 25 So. 793 (Ala. 1898); *Carey v. Davis*, 190 Iowa 720, 180 N.W. 889 (Iowa 1921)).

<sup>111</sup> *Id.* (citing *West v. Spratling*, 204 Ala. 478, 86 So. 32 (Ala. 1920)).

<sup>112</sup> *Id.* (citing *Farmer v. State*, 224 Miss. 96, 79 So. 2d 528 (Miss. 1955)).

<sup>113</sup> *Id.* (citing *Harris v. Pennsylvania R. Co.*, 50 F.2d 866 (C.A. 4, 1931) ("Maritime law has imposed a duty upon masters to rescue crewmen who fall overboard.")).

and that “to ask of the host anything less than that he attempt to rescue his guest would be ‘so shocking to humanitarian considerations and the commonly accepted code of social conduct that the courts in similar situations have had no difficulty in pronouncing it to be a legal obligation.’”<sup>114</sup> The court used the combination of these two holdings to conclude that Siegrist indeed owed a duty to Farwell.

The court concluded with perhaps the most controversial portion of the holding. The court stated that Farwell and Siegrist were “*companions on a social venture*. Implicit in such a common undertaking is the understanding that one will render assistance to the other when he is in peril if he can do so without endangering himself.”<sup>115</sup> The court stated that Siegrist either knew or should have known that Farwell was badly injured and unconscious and that if Siegrist left him, Farwell would remain in the back seat of the car until someone found him the next morning. The court held that in those circumstances, Siegrist had a duty to obtain medical assistance or to at least notify someone of Farwell’s condition and whereabouts. To hold otherwise “would be ‘shocking to humanitarian considerations’ and fly in the face of ‘the commonly accepted code of social conduct.’”<sup>116</sup> The court turned one last time to Prosser, to hold that, “[C]ourts will find a duty where, in general, reasonable men would recognize it and agree that it exists.”<sup>117</sup>

Therefore, the court reversed the Court of Appeals decision and reinstated the verdict of the jury. With Chief Justice T.G. Kavanagh and Justice Williams concurring in Justice Levin’s opinion, this opinion ultimately prevailed because it accounted for the three-person majority opinion of the five-justice court.

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<sup>114</sup> *Id.* at 291 (quoting *Hutchinson v. Dickie*, 162 F.2d 103, 106 (C.A. 6, 1947)).

<sup>115</sup> *Id.* (emphasis added).

<sup>116</sup> *Id.* at 291-92 (quoting *Hutchinson v. Dickie*, 162 F.2d 103, 106 (C.A. 6, 1947)).

<sup>117</sup> *Id.* at 292 (quoting Prosser, *supra*, § 53, p. 327).

## The Dissent

Justice Fitzgerald authored the opinion of the dissent, with which Justice Coleman concurred.<sup>118</sup> The dissent began by framing the issue as follows: “whether the defendant, considering his relationship with the decedent and the activity they jointly experienced in the evening of August 26-27, 1966, by his conduct voluntarily or otherwise assumed, or should have assumed, the duty of rendering medical or other assistance to the deceased.”<sup>119</sup> The dissent stated that, “[w]e find that defendant had no obligation to assume, nor did he assume, such a duty.”

In an opinion mirroring the Court of Appeals decision, the dissent stated that they would hold that defendant Siegrist did not voluntarily assume the duty of caring for Farwell’s safety and that the circumstances of the evening did not impose a duty on Siegrist.

The dissent questioned the role that the jury played in rendering this decision. Rather than state that no jury could reasonably find Siegrist at fault, the dissent argued that this was not a decision for the jury in the first place. The dissent stated that it agreed with the plaintiff that negligence is a question for the court “only when the facts are such that all reasonable men must draw the same conclusion.”<sup>120</sup> The dissent continued, “However, this principle becomes operative only after the court establishes that a legal duty is owed by one party to another.”<sup>121</sup> Because Michigan recognizes that a question of duty is for the court and not a jury to decide, the dissent argued that the Court of Appeals “properly decided as a matter of law that defendant owed no duty to the deceased.”<sup>122</sup> In other words, this case should never have been in the province of the jury because the court itself should have initially held that Siegrist did not owe a duty to Farwell.

In addition, the dissent questioned the conclusion that Siegrist had acted unreasonably. For example, the dissent noted that even though Siegrist could not wake up Farwell at his grandparent’s house, only a qualified physician could have known that Farwell’s injuries required

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<sup>118</sup> *Farwell v. Keaton*, 396 Mich. 281, 292, 240 N.W.2d 217 (Mich. 1976) (Fitzgerald, J., dissenting).

<sup>119</sup> *Id.* at 292.

<sup>120</sup> *Id.* at 297.

<sup>121</sup> *Id.* at 297-98.

<sup>122</sup> *Id.* at 298.

immediate medical attention. Furthermore, Farwell never complained of pain and had even expressed the desire to retaliate against those who assaulted him, which supports Siegrist's assumption that Ricky was not seriously injured. The dissent further noted that during oral argument, counsel for plaintiff argued that this unsuccessful attempt to rouse Farwell indicated that Siegrist volunteered to aid Farwell. Yet, in the dissent's view, this was not an affirmative act that would indicate that he had assumed the responsibility to aid Farwell.

The dissent also noted that there was no way for Siegrist to know that Farwell had gone to sleep in the back seat of the car as a result of his injuries. The dissent even speculated about what Siegrist was probably thinking at the time, stating, "[t]he altercation combined with the consumption of several beers could easily permit defendant to conclude that decedent was simply weary and desired to rest."<sup>123</sup> Again, it is notable that Ricky did not have visible injuries other than minor cuts and bruises and Ricky did not complain of pain or injury throughout the night. The dissent stated that although it may have been more "prudent" to make sure Farwell was safe inside his grandparent's house prior to leaving, the fact that he did not do the most "prudent" thing does not necessarily mean that Siegrist acted unreasonably in letting Farwell sleep in the backseat of his own car.

The dissent then addressed the majority's assertion that Farwell and Siegrist had a special relationship which gave rise to a duty. The dissent distinguished the cases cited by the majority and argued that "[n]o authority is cited for this proposition other than the public policy observation that the interest of society would be benefited if its members were required to assist one another."<sup>124</sup> Hence, the dissent argued that the majority's foundation for this proposition is weak and that "[t]his is not the appropriate case to establish a standard of conduct requiring one to legally assume the duty of insuring the safety of another."<sup>125</sup>

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<sup>123</sup> *Id.* at 296, n.2.

<sup>124</sup> *Id.* at 296.

<sup>125</sup> *Id.*

The dissent further argued that if a special relationship were to be the basis for the legal duty to insure the safety of one another, this should not be the seminal case for that proposition and the majority was not framing the relationship correctly in the first place. Rather, this special relationship would most likely take the form of “‘co-adventurers’ who embark upon a hazardous undertaking with the understanding that each is mutually dependent upon the other for his own safety.”<sup>126</sup> Under this standard, plaintiff’s argument that Farwell relied on Siegrist would fail. “A situation where two persons are involved in an altercation provoked by the party ultimately injured, the extent of which was unknown to the other, whose subsequent conduct included drinking beer and a desire to retaliate against his attackers would not fall within this category.” It is notable that the dissent seemed to be blaming Ricky for “provoking” the fight (by chasing after the girls) and arguing that he should suffer the consequences for his actions. The dissent’s recasting of the facts is powerful indeed because although it is debatable whether Ricky provoked the fight, Ricky’s post-altercation behavior still proves that Siegrist had no way of knowing Ricky was seriously injured.

Based upon the above arguments, the dissent concluded that the Court of Appeals properly held that, as a matter of law, Siegrist did not owe a duty to Farwell. The dissent would affirm that judgment.

### **The Failed Attempt at Rehearing**

In his last effort, defendant-appellee Siegrist filed an application for rehearing with the Supreme Court of Michigan on June 23, 1976. The application was filed based on the arguments that the majority misapplied and altered the law, and the alteration of law should occur only with the entire bench sitting to render the decision. As noted above, two justices, Justice Lindemer and Justice Ryan, did not participate in the decision, most likely because they had both only

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<sup>126</sup> *Id.* at 296, n.4.

recently joined the Michigan Supreme Court.<sup>127</sup> Siegrist urged that “[t]his misapplication has resulted in a drastic abrogation of pre-existing common law tort concepts, which change in tort law should be passed upon by the entire court.”<sup>128</sup>

Siegrist’s application then turned to the misapplication of law by the Court. First, Siegrist disputed the Court’s opinion that there was “ample evidence to show that Siegrist breached a legal duty owed to Farwell”<sup>129</sup> because that mere act of applying an ice pack to Farwell’s head was hardly “ample evidence.” Siegrist also argued that his apology to Ricky’s parents “constitutes an after-the-fact feeling of moral duty and moral misjudgment,”<sup>130</sup> Lastly, Siegrist disputed the existence of a special relationship based on the fact that the Court fashioned a completely new and novel relationship. Siegrist concluded the application by requesting rehearing by the entire court because the floodgates would be opened for litigation if this extremely broad duty between “companions” were recognized.<sup>131</sup>

Plaintiff’s brief response to defendant’s application for a rehearing argued that there was, in fact, no drastic change in law that would necessitate rehearing.<sup>132</sup> Farwell stated that the opinion of the Court was “clear and logical” and it need not be disturbed. Farwell argued that the drastic change in the law that Siegrist feared simply did not happen, but rather, the Court restated the Common Law. Farwell supported the Court’s holding that a “social relation can support a legal duty to give aid when the need is apparent and it can be given without placing oneself in danger.”<sup>133</sup> Farwell continued, “[i]t is difficult to believe that the law can be otherwise.”<sup>134</sup>

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<sup>127</sup> See Bios, available at <http://www.micourthistory.org/resources/lblindemer.php> and <http://www.micourthistory.org/resources/jlryan.php>.

<sup>128</sup> *Id.* at 3.

<sup>129</sup> *Id.* at 4.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 5-6.

<sup>132</sup> Response to Application for Rehearing, *Farwell v. Keaton*, 396 Mich. 281, 240 N.W.2d 217 (1976), available in Michigan Supreme Court Records & Briefs, vol. 10, Docket No. 55669-55763.

<sup>133</sup> *Id.* at 2 (Plaintiff-Appellant relied on, as did the Court, *Hutchinson v. Dickie*, 162 F.2d 103 (6<sup>th</sup> Cir. 1947) and *Depue v. Flatau*, 100 Minn. 299 (1907) for support of this proposition).

<sup>134</sup> *Id.*

Ultimately, the Court denied rehearing. The judicial saga of *Farwell v. Keaton* had officially run its course and concluded with the jury's verdict being reinstated.

### **The Theory of the Case**

Although the majority was not altogether clear which theories of tort law it was relying on, its analysis originated with the general rule of tort law that a person has no duty to come to the aid of another.

It is first notable that Justice Levin began his opinion with a new statement of the facts, differing from the Court of Appeals decision. Perhaps Justice Levin rewrote the facts because he recognized the power of language and the impact of the way facts are presented in a case. As one commentator, Gretchen Craft, stated, "the reader [of *Farwell v. Keaton*] may think that the court's account is unfeeling and cold. In fact, the details provide just enough information to evoke pity and dismay at the actions of a well-intentioned but foolish friend."<sup>135</sup> Similarly, "the juxtaposition of Siegrist driving from one hamburger joint to the next while his friend lay dying in the back seat is almost morbidly comic, but the court's removed presentation minimizes that reaction. The court's tone provides relief from the pain contained within the opinion. Private suffering is not disguised, but dignified."<sup>136</sup> Therefore, Justice Levin's brevity in his recitation of the facts can be seen as more than pure accident but as an attempt to cast the facts in a light that would substantiate the court's holding. According to Craft, Levin's succinctness was a function of the desire to explain the situation honestly and openly, without condemning Siegrist but also without letting him completely off the hook.

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<sup>135</sup> Gretchen A. Craft, *The Persistence of Dread in Law and Literature*, 102 Yale L.J. 521, 533-34 (1992).

<sup>136</sup> *Id.*

Turning to the legal theory of the case, in his case note, Joseph John Vogan explores the legal theory behind *Farwell* and analyzes the alternatives to such an outcome.<sup>137</sup> Vogan explains that the general rule of no duty to aid basically derives from the distinction between misfeasance and nonfeasance. While misfeasance is action that causes actual harm to the plaintiff, nonfeasance is passive inaction (or lack of action) which results in harm but rarely in liability. The failure to render assistance to someone falls within the latter category of nonfeasance (because it is a failure to take action), and therefore, liability is rarely imposed.

Still, Vogan recognizes that this distinction is not always obeyed by courts and he advances several theories to explain why some cases bend (or break) the rules. Vogan looks specifically at cases where courts have held that a special-relationship exists between the parties warranting an application of a duty to aid. Vogan advances three reasons why courts have found that certain special relationships give rise to a duty.

First, under what Vogan refers to as the “consideration” theory, a duty is imposed because the relationship affords the defendant some special benefit from the plaintiff. A second explanation for these cases rejects the argument that legal duties are not dictated by moral duties, arguing that judicial perceptions or moral obligations, rather than logic, dictate rulings in these cases.<sup>138</sup> Proponents of this theory argue that judges have decided, through their rulings, that human life is more valuable than a mere inconvenience to the rescuer, so much so that liability should be imposed. The third theory addresses the problem of an unlimited class of potential rescuers, arguing that courts “have been willing to depart from the general rule in cases where the balance clearly is in favor of liability. In cases where the class of defendants is limited and reasonably discrete, the benefits of imposing a duty to aid easily outweigh the costs.”<sup>139</sup>

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<sup>137</sup> See Joseph Van Vogan, *Negligence – Duty to Aid – Special Relationship Between Companions Engaged in a Common Undertaking*, 23 Wayne Law Review 1339 (July 1977).

<sup>138</sup> *Id.* at 1344.

<sup>139</sup> *Id.* at 1344-45.

But what does this all have to do with *Farwell*? Vogan turns to *Farwell* and uses these three theories to explain why the *Farwell* court departed from the general “no duty to aid” rule. Vogan argues that the court in *Farwell* did not violate the general rule against affirmative duties, but rather “expanded the class of exceptions by including social companions engaged in a common undertaking” in the group of special relationships.<sup>140</sup> Yet, according to Vogan, the court did not sufficiently explain why this relationship was special. By relying on *Hutchinson v. Dickie* and *Depue v. Flatau*, the court seemed to be analogizing the relationship between Farwell and Siegrist to the relationship of a social host and guest. The court also held that there is an implicit understanding between those engaged in a common undertaking that they will have a duty to each other.

Vogan states that although, in his opinion, *Farwell* did not follow the first theory of consideration,<sup>141</sup> *Farwell* is justifiable by either of the other two theories: that judges rule by morals rather than logic or that courts should apply the duty when the class of potential rescuers is limited. Vogan states that the moral justification theory could explain the holding in *Farwell* because the court used humanitarian language (“shocking to humanitarian considerations” and “the commonly accepted code of social conduct”<sup>142</sup>) to justify its holding.<sup>143</sup> Because the court was so moved by Siegrist’s moral reprehensibility, it stretched the special categories to include this case. This theory may indeed be correct because, as noted earlier, at trial plaintiff’s counsel Ken Davies based his theory of the case on the moral reprehensibility of Siegrist’s inaction.

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<sup>140</sup> *Id.* at 1345.

<sup>141</sup> *Id.* at 1346. Vogan states that the “consideration” theory does not apply because the defendant neither derived nor expected to derive economic benefit. I am not entirely sure I agree, although the benefit I think the defendant will derive may not necessarily be “economic benefit.” In my analysis, I think the court may have been arguing that because there is an implicit understanding that those engaged in a common undertaking will have duty to one another, defendant could have received consideration in the form of the knowledge that if he was in peril, his friend would be there to help him. Although Vogan and I disagree on this point, I believe that the rest of his analysis fits well with *Farwell*.

<sup>142</sup> *Farwell v. Keaton*, 396 Mich. 281, 291-92, 240 N.W.2d 217 (Mich. 1976).

<sup>143</sup> Another commentator agrees with this observation. See Peter F. Lake, *Recognizing the Importance of Remoteness to the Duty to Rescue*, 46 DePaul L. Rev. 315, 356 (1997) (“Perhaps [the holding in *Farwell*] represents the power that humanitarian notions, often relegated to secondary concerns in the tough talk of the common law, have over cases that do not fit neatly into Restatement categories.”).

Similarly, the decision may be justified under the “limited defendants” approach because the court noted (several times) that the defendant was the only one who knew of plaintiff’s situation, thus distinguishing Siegrist from the world of potential rescuers.<sup>144</sup> Furthermore, the court also focused on the fact that defendant could have prevented the loss of Farwell’s life with very little inconvenience to himself, and that in this situation, it was feasible to impose liability because “companions engaged in a common undertaking” are a limited and discrete class. Therefore, *Farwell* may be explained by these alternative theories of tort law.

Vogan suggests that the extension of the special relationship doctrine to companions engaged in a common undertaking should be seen as a “balance of many competing factors [such as moral justifications for liability, compensatory functions of tort law, preventative functions of tort law, tort law’s goal of administrative economy], and special relationship is best understood as a means for achieving that balance.”

*Farwell* also brings up issues about the distribution of duty within a society to better meet the needs of that society. Specifically, *Farwell* illustrates the delicate balancing of personal interest in one’s own resources and the loss of life as a result of selfish use of those resources. In his book review of Marshall S. Shapo’s book on the same subject, William C. Powers, Jr.<sup>145</sup> reveals alternative theories of tort law’s requirement of the duty to act.<sup>146</sup> Powers states that “[i]t is not difficult to understand why individuals should have a duty to use their resources reasonably to benefit others: a duty of reasonable aid encourages individuals to use their resources reasonably for the common good. What is difficult to understand is why individuals should ever be free from a duty to act reasonably...”<sup>147</sup> From this perspective, Powers tries to

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<sup>144</sup> Joseph Van Vogan, *Negligence – Duty to Aid – Special Relationship Between Companions Engaged in a Common Undertaking*, 23 Wayne Law Review 1339, 1346, n.53 (July 1977).

<sup>145</sup> Interestingly, Powers is one of the reporters for the Restatement 3d of Torts, in which *Farwell* is specifically included. See discussion, *infra*.

<sup>146</sup> William C. Powers, Jr., *Book Review: A Methodological Perspective on the Duty to Act*, 57 Texas L. Rev. 523 (1979). This law review is actually a book review of Marshall S. Shapo, *The Duty to Act: Tort Law, Power & Public Policy*, 1977.

<sup>147</sup> *Id.* at 525-26.

explain cases relying on an affirmative duty to aid persons in peril. He notes that in these cases, “a duty to act encourages efficient short-term use of time, energy and safety.”<sup>148</sup> Yet, Powers argues that practical concerns, such as how to administer a duty to act, may make formality more advantageous. In other words, Powers argues that because of problems inherent to administering an affirmative duty to act, society would be better off making a formal rule that there is no duty to act. Because members of society may not know how, why and to whom an affirmative duty to act applies, those members of society would be better knowing that there is no duty to act at all.

Furthermore, imposing a duty to aid those in peril conflicts with the goal of independence and with individuals being able to choose how to allocate their own personal resources. Requiring individuals to aid those in peril may encourage short-term efficiency, but it “undermines the long-term benefits [such as personal security and investment] of persons owning their time, energy, and safety to use as they wish. A plausible resolution of these competing concerns is to make a formal distribution through a general no-duty rule and then ameliorate the rule with formal exceptions.”<sup>149</sup>

Powers argues that the special relationship cases are unique in that “if autonomy supports a general no-duty rule, it is less significant when an individual has voluntarily entered into a relationship or has voluntarily started to render aid.”<sup>150</sup> This statement can help to explain the holding in *Farwell*. Although the law values Siegrist’s autonomy and respects his control over the use of his time and energy; by embarking on a social venture with Farwell, his autonomy is less important when faced with the prospect of his companion’s death. Plainly stated, the law finds the value of Farwell’s life to be more important than the value in Siegrist’s autonomy. Siegrist therefore has a duty to aid to Farwell.

Other commentators have questioned the *Farwell* court’s failure to explore Sections 324 and 314 of the Restatement (Second) of Torts. In his article, *Recognizing the Importance of*

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<sup>148</sup> *Id.* at 528.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 535.

*Remoteness to the Duty to Rescue*,<sup>151</sup> Peter F. Lake notes that although the *Farwell* court did not cite to section 324, the court's "statement of the applicable rules with respect to aid given to a helpless person significantly mirrored that section and its indeterminacies."<sup>152</sup> Section 324(a) states that a rescuer must "exercise reasonable care to secure the safety of the [helpless individual] while within the [rescuer's] charge."<sup>153</sup> Additionally, section 324(b) states that if a rescuer stops aiding the victim, liability can be found, "if by so doing...the other [is left] in a worse position than when the [rescuer] took charge of him."<sup>154</sup> Lake, however, criticizes the court's reliance on this idea of leaving the injured individual in a "worse position," stating that *Farwell* may not have actually been in a worse position. Lake says that the court did not analyze *Farwell*'s position correctly because *Farwell*'s original position (under the car in the rental lot) was no worse than his ultimate position (in the backseat of the car in the driveway), thus Siegrist did not make *Farwell*'s position any worse. Lake skeptically notes that the court more likely looked at *Farwell*'s intervening position (cruising to different restaurants where someone other than Siegrist could have provided medical assistance) and compared that to *Farwell*'s ultimate position (in the backseat of the car in the driveway) to hold that Siegrist left *Farwell* in a worse position.<sup>155</sup> Rather than reject the "worse position" requirement entirely, the court chose a starting point in the fact pattern that fit the objective of upholding the duty in this situation. Even through all of this legal analysis, it is difficult to determine what exactly motivated the court to hold Siegrist liable.

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<sup>151</sup> Peter F. Lake, *Recognizing the Importance of Remoteness to the Duty to Rescue*, 46 DePaul L. Rev. 315, 353 (1997).

<sup>152</sup> *Id.* at 354.

<sup>153</sup> *Id.* at 355.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* See also, Peter F. Lake, *Revisiting Tarasoff*, 58 Alb. L. Rev. 97, N. 136 (1994) ("Farwell is a relatively weak case under the Restatement 324 (and traditional applications of "assumed duty" doctrine), particularly because it is by no means clear that the decedent was made worse off by the actions of the defendant (other than that the decedent was worse off for the failure of defendant to use reasonable efforts for his benefit.").

## The Michigan Supreme Court Justices

The composition of the Michigan Supreme Court at the time the opinion was handed down may shed some light onto what motivated these justices. The 1976 opinion is a plurality opinion, with a 3-2 (and 2 absent) vote. Justice Levin authored the opinion of the case, with which Chief Justice T.G. Kavanagh<sup>156</sup> and Justice Williams concurred. Justice Fitzgerald dissented and Justice Coleman concurred in his dissent. Two justices, Justice Lindemer and Justice Ryan, did not participate.<sup>157</sup> Perhaps a look into the personalities and histories of the justices will shed more light on those who crafted the opinion in *Farwell v. Keaton*.

The Supreme Court of Michigan heard and ruled on *Farwell* in 1975-1976, a time of great turbulence and tragedy for members of the Michigan Supreme Court. First, in 1974 Justice Thomas Brennan left the court to devote himself to Cooley Law School. He was replaced with Justice John W. Fitzgerald. Second, in 1975, the court experienced a “quite traumatic” change in leadership. In order to ease tensions both in and outside of the court, four justices voted to replace former Chief Justice Thomas M. Kavanagh with Chief Justice Thomas Giles Kavanagh.<sup>158</sup> Although ultimately a wise decision, it was difficult for the court because of the upheaval of Thomas Matthew Kavanagh, who had served three terms as Chief Justice. Similarly, although the Order Granting Application for Leave to Appeal in *Farwell* was granted by a court which included Chief Justice Thomas M. Kavanagh and Justice John B. Swainson,<sup>159</sup> by the time the opinion was handed down, both of those justices were no longer part of the court. Shortly after Thomas M. Kavanagh was relieved of his duties as Chief Justice, he was diagnosed with colon cancer. The disease spread rapidly and Justice Thomas Matthew Kavanagh died while he

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<sup>156</sup> I note at the outset that the Michigan Supreme Court actually had two Justice Thomas Kavanaghs, with no relation to each other: Thomas Matthew Kavanagh (also known as “Thomas the Mighty” because he was Chief Justice for many years, until his death in 1975) and Thomas Giles Kavanagh, who participated in *Farwell v. Keaton*. Thomas Giles Kavanagh was nicknamed “Thomas the Good.”

<sup>157</sup> See Bios, available at <http://www.micourthistory.org/resources/lblindemer.php> and <http://www.micourthistory.org/resources/jlryan.php>. They most likely did not participate because they both only recently joined the Michigan Supreme Court.

<sup>158</sup> Coleman oral history, available at <http://lib0131.lib.msu.edu/dmc/court/public/all/Coleman/ASO.html>.

<sup>159</sup> Appellant’s Appendix at 17a. The Order was granted on June 27, 1974.

was still a member of the court. This was a shocking and distressing loss to the court, as the members of the court felt lost without their former leader. Soon after Thomas Matthew Kavanagh's death, Justice John B. Swainson withdrew from the court under accusations by federal authorities for various crimes, including bribery. Although he was ultimately found not guilty, Justice Swainson's withdrawal rocked the court to its very foundation. In a short span of time, the Michigan Supreme Court had experienced one justice's retirement and replacement with another, a traumatic shift in leadership, the death of one of the court's most beloved members, and the resignation of another justice amid rumors of bribery.

It was during this time that the court heard *Farwell* and made its ruling. It is possible that the upheaval that the court was experiencing played into their decision in the *Farwell* opinion. Although this is pure speculation, at least a tenuous connection exists between the court experiencing loss and betrayal by friends and colleagues and the court manifesting an opinion requiring a duty to one's social companions. Again, there is no proof on this theory, but it is possible that when faced with the question of whether two friends should have a special relationship in which they depend on each other, the Michigan Supreme Court at the time could have drawn upon its experiences of the past few years to answer that question in the affirmative.

Additionally, although Justices Kavanagh and Swainson had been replaced, their replacements had apparently not arrived on the court in time to hear the case. Thus, like other cases of this time, the *Farwell* decision was rendered by only five justices, a highly unusual occurrence for a state supreme court. This raised skepticism about the court's decisions' precedential value. Justice Ryan noted that there was a concern in the Michigan bar and court system whether a decision by five justices, with for example, a three person majority, would be binding as precedent on future Supreme Court and lower Michigan courts' decisions. With the addition of Justices Lindemer and Ryan (post-*Farwell*), there was "a sense of relief [that] there would be no need to deal with these questions about the constitutionality of the Court's decisions

as to whether a majority, a real majority, was deciding cases when the Court was divided.”<sup>160</sup> Similarly, Justice Ryan noted that he himself had been critical of the Supreme Court before his arrival, especially after hearing the reputation of the justices as “personally at one another’s throats, if that can be measured by the rhetoric in the opinions.” Justice Ryan hoped that by joining the Court, he could “try to be a contributor in an effort to restore to the Supreme Court the appearance of dignity and importance and solidarity and collegiality that most of us thought a Supreme Court should have.”

Also, the decision in *Farwell* was most certainly split along political party lines. Although the Court of Appeals judges in Michigan are not often characterized by party, the justices on the Michigan Supreme Court were appointed and then had to run for election (or reelection) as a member of a political party. Turning to *Farwell*, Justice Levin, author of the court’s opinion, was an Independent. In 1972, Justice Levin successfully ran as an Independent, rather than a Republican or a Democrat, for the Michigan Supreme Court. In his entire time on the bench, Justice Levin did not associate himself with a political party and had never been nominated by a political party, but rather had won reelection by incumbency.<sup>161</sup> Similarly, although he began his career as a Democrat, Justice Thomas G. Kavanagh became an Independent in 1976, when the Democratic Party withdrew its support. Justice G. Mennen Williams, the other concurring justice, was a Democrat. This contrasts with Justice John w. Fitzgerald, author of the dissent, and Justice Mary S. Coleman, concurring in the dissent, who were both Republicans.

Although it is not entirely clear what this party divide means, and why the parties were drawn to their sides of the opinions, it is important to explore. Perhaps the progressive, society-driven nature of the Democrats and the Independents drove them to extend the duty of members of society to assist others. Perhaps they felt that justice would be better served by extending a

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<sup>160</sup> <http://lib0131.lib.msu.edu/dmc/court/public/all/Ryan/ASU.html#topic7>

<sup>161</sup> Fitzgerald oral history available at <http://lib0131.lib.msu.edu/dmc/court/public/all/Fitzgerald/ASQ.html>

duty to social companions. On the other hand, the Republican dissent sharply criticized the majority for abandoning precedent and extending the duty much farther than other courts had. Moreover, the majority enacted this drastic change without citing any authority other than public policy, which the dissent argued weakened the need for this change. Similarly, Republican values such as self-sufficiency, individual responsibility, freedom, and autonomy would have contrasted with the sort of coerced communitarianism that the majority seems to impose. Other differences between the ideological standpoints of the Democrat/Independent majority and the Republican dissent certainly can account for the harsh divide in the court's opinion.

Interestingly, had Justices Lindemer and Ryan been present for the decision, it could have come out the other way, considering that both Lindemer and Ryan were Republican justices.<sup>162</sup> Although there really is no way to tell, had the decision remained divided along party lines, the two additional Republican justices would have made the vote 4-3 in favor of Siegrist, thus, denying a duty to rescue or the duty to social companions. Hence, party lines may have led to the 3-2 decision in favor of Farwell. If that connection is too tenuous for the reader, perhaps a look into the justices' individual personalities will reveal more about the crafters of the *Farwell* decision.

**Justice Charles L. Levin,<sup>163</sup> author of the majority opinion**

Justice Charles L. Levin, nicknamed Chuck, served on the Michigan Supreme Court from 1973 through 1996. He was born into a family deeply rooted in Michigan's political scene in 1926 in Detroit, Michigan. Two of his cousins were Congressmen for Michigan and Levin's father, Theodore Levin was Chief Judge of the U.S. District Court of the Eastern District of Michigan.

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<sup>162</sup> See <http://lib0131.lib.msu.edu/dmc/court/public/all/Lindemer/AST.html#topic1> and <http://lib0131.lib.msu.edu/dmc/court/public/all/Ryan/ASU.html#topic7>.

<sup>163</sup> Unless otherwise noted, all information about Justice Levin is available at <http://www.micourthistory.org/resources/cllevin.php>.

Charles Levin graduated from the University of Michigan Law School in 1947 and in 1966, Justice Levin was elected to fill a vacancy on the Michigan Court of Appeals. Justice Levin retired from the Court in 1997. It has been said about Justice Levin that “he comes to the Bench blessed with a solid education, and ... he possesses two of the necessary qualities of a good judge; intelligence and compassion.”<sup>164</sup> Chief Justice Thomas G. Kavanagh said about Justice Levin, “he is a first-class lawyer technically, and above that, Chuck has a great respect and affection for jurisprudence, the science of the law, and he is dedicated to it, and he is a very hard working man.”<sup>165</sup>

**Justice Thomas G. Kavanagh,<sup>166</sup> concurring in Levin’s opinion**

Chief Justice Thomas G. Kavanagh served on the Michigan Supreme Court from 1969 through 1984. He was born into a family of active Democrats in Bay City, Michigan on August 14, 1917.<sup>167</sup> At his father’s urging, Thomas attended law school and he received his L.L.B. from the Detroit College of Law in 1943.<sup>168</sup>

In 1964, Justice Kavanagh was elected to the Michigan Court of Appeals as a Democrat. In 1968, he was elected to the Michigan Supreme Court by the Democratic Party. After having become Chief Justice in 1975, the Democratic Party withdrew its support of Chief Justice Kavanagh, due in large part to his dissent in the “one man-one vote case.”<sup>169</sup> Kavanagh also stated that the Democrats withdrew their support because he refused to endorse other Democratic judges, insisted on campaigning only for himself, and refused to oppose his fellow incumbent judges in the election.<sup>170</sup> Although the Democratic Party nominated someone else in 1976, Chief

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<sup>164</sup> John Feikens, as quoted at <http://www.micourthistory.org/resources/cllevin.php>

<sup>165</sup> Kavanagh oral history available at <http://lib0131.lib.msu.edu/dmc/court/public/all/Kavanagh/ASR.html>

<sup>166</sup> Unless otherwise noted, all information about Justice Kavanagh is available at <http://www.micourthistory.org/resources/tgkavanagh.php>.

<sup>167</sup> Kavanagh oral history available at <http://lib0131.lib.msu.edu/dmc/court/public/all/Kavanagh/ASR.html>

<sup>168</sup> *Id.*

<sup>169</sup> See *In re Reapportionment of Michigan Legislature*, 387 Mich. 442; 197 N.W.2d 249; (1972).

<sup>170</sup> Kavanagh oral history available at <http://lib0131.lib.msu.edu/dmc/court/public/all/Kavanagh/ASR.html>

Justice Kavanagh won reelection, apparently as an Independent, “by a landslide,” due to “overwhelming support from the State Bar and the general public.”<sup>171</sup>

Chief Justice Kavanagh stated, “the members of the Court through sheer happenstance and the vicissitudes of politics, ambition, age, health, and geography had been thrown together like survivors sharing a single life raft, and it was our task and our duty to work together for the common benefit.”<sup>172</sup> Chief Justice Thomas Giles Kavanagh died on February 20, 1997.

**Justice G. Mennen Williams,<sup>173</sup> concurring in Levin’s Opinion**

As may be indicated by his middle name, G. Mennen Williams was born into a wealthy Detroit family in 1911. His grandfather founded the Mennen line of shaving lotions, thus, begetting G. Mennen Williams the nickname of “Soapy.” Williams graduated from Princeton in 1933 and entered University of Michigan Law School. In defiance of family tradition, Williams gave allegiance to the Democratic Party.

After working in a law firm and serving in the United States Navy during World War II, Williams returned to Michigan in 1946. He served as Governor for 12 years. After that, he served as Assistant Secretary of State for African Affairs for five years, and then served as United States Ambassador to the Philippines. Upon his return to the United States in 1970, Williams was elected to the Michigan Supreme Court, where he served until 1987.

**Justice John W. Fitzgerald,<sup>174</sup> author of the dissent**

Justice Fitzgerald came from a prominent family, the only family in Michigan to have produced a top ranking officer in both the legislative and judicial branches, while also having members in the executive branch.<sup>175</sup> John W. Fitzgerald was born in 1924 to a father who was

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<sup>171</sup> See <http://www.micourthistory.org/resources/tgkavanagh.php>

<sup>172</sup> *Id.*

<sup>173</sup> Unless otherwise noted, all information about Justice Williams is available at <http://www.micourthistory.org/resources/gmwilliams.php>.

<sup>174</sup> Unless otherwise noted, all information about Justice Fitzgerald is available at <http://www.micourthistory.org/resources/jwfitzgerald.php>.

<sup>175</sup> Fitzgerald oral history, available at <http://lib0131.lib.msu.edu/dmc/court/public/all/Fitzgerald/ASQ.html>

the Governor of Michigan and his grandfather who was a State Representative.<sup>176</sup> Fitzgerald received his undergraduate degree from Michigan State University and his law degree from the University of Michigan Law School.

Fitzgerald was elected to the Court of Appeals in 1964. He was appointed to the Michigan Supreme Court in 1974. When asked about the process of crafting opinions and making decisions in the Michigan Supreme Court, Justice Fitzgerald offered some thoughts, which are indicative of the process he went through when deciding to dissent in *Farwell v. Keaton*:

Oh, yes, [everything in the Court will be delayed] until you've had an opportunity to think it over. This is one of the reasons that partly contributes to delays on the Supreme Court. Not only on the Supreme Court, but the Court of Appeals also, to a much lesser degree, that if you get an opinion that you didn't write, from one of the other justices, you're allowed generally about as much time as you need to consider, "Do I want to sign this?", or "Don't I want to sign this? Do I want to write a dissent? Do I want to just sign it and concur only in the result?" The members of the court are very courteous, almost courteous, I would say, to a fault in allowing people as much time as they want to consider whether they're going to sign an opinion and it does, occasionally, lead to delays.<sup>177</sup>

**Justice Mary S. Coleman,<sup>178</sup> concurring in the dissent**

Justice Mary S. Coleman served in the Michigan Supreme Court from 1973 through 1982. Coleman attended college at the University of Maryland and was twice voted "Miss University of Maryland." After graduating from college at the age of 20, she attended George Washington University for law school, where she was one of only 30 women in a school of over 1000 students.<sup>179</sup>

Justice Coleman served as a Probate and Juvenile Court Judge from 1961 until 1973. Throughout the rest of her career, Justice Coleman continued to be a champion for children's

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<sup>176</sup> Interestingly, his son is also in the Legislative branch; see <http://lib0131.lib.msu.edu/dmc/court/public/all/Fitzgerald/ASQ.html>

<sup>177</sup> Fitzgerald oral history, available at <http://lib0131.lib.msu.edu/dmc/court/public/all/Fitzgerald/ASQ.html>

<sup>178</sup> Unless otherwise noted, all information about Justice Coleman is available at <http://www.micourthistory.org/resources/mscoleman.php>.

<sup>179</sup> Coleman oral history, available at <http://lib0131.lib.msu.edu/dmc/court/public/all/Coleman/ASO.html>

causes.<sup>180</sup> Justice Coleman was elected to the Michigan Supreme Court in 1972, as the first woman to serve on the Court. Later, she became the first woman to serve as Chief Justice. When asked what the decision-making process was like on the Michigan Supreme Court, Justice Coleman stated,

This mixture of backgrounds, experiences and philosophies brought various considerations to bear upon each case. I viewed this as a positive process to a majority opinion, whether I agreed with it or not. I still enjoy an amazingly comfortable feeling when I think of the vigorous arguments we had over issues in case conferences, but without any diatribes or vicious personal entanglements. I like to think that this level of collegiality was a product of dignity, civility and legal scholarship. I cherish almost every minute I served on the Court - even the many challenging events which had to be met and resolved. Life needs some spice.

Justice Coleman held the position of Chief Justice from 1979 to her retirement in 1982. She died in November of 2001.

Indeed, this unique mixture of personalities and ideologies certainly contributed to the various opinions in *Farwell v. Keaton*. Although the justices may not have agreed about the outcome, it is clear from the various opinions of the justices that collegiality and intellectual rigor was a part of every contended decision in the Michigan Supreme Court.

### **The Aftermath**

Although from a tort law perspective, *Farwell v. Keaton* was a landmark case, it did not receive heavy coverage in the media. Only one newspaper article even discussed the opinion.<sup>181</sup> On April 7, 1976, the Detroit News ran an article entitled “‘Samaritan rule’ upheld: You have to help, high court rules” by George Bullard. In the brief article, Bullard summarized the facts of the incident and the Supreme Court decision.

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<sup>180</sup> *Id.*

<sup>181</sup> I performed extensive research to find newspaper articles about the incident itself, the trial, the Court of Appeals decision, the Supreme Court decision, and the aftermath for the litigants. With the help of Shelley Lavey, Library Director of the Detroit Free Press, I was able to locate one article.

Although the case did not get much local publicity, it has had a lasting impact in shaping tort law. *Farwell* is now recognized by analysts as standing for the groundbreaking view that in certain settings companions owe each other a duty to rescue and also as an example of the traditional rule that once you begin to assist or aid a person in peril, you have a duty to do so with due care.<sup>182</sup> The authors of American Law Reports, casebook and textbook authors and the Attorney General of Michigan have recognized *Farwell* for its innovative approach to the duty to rescue and for its creation of a novel special relationship. Yet, these academics do reserve some doubts as to the holding's soundness and some express that the holding is limited in its reach even if otherwise accepted as good law.

For example, *Farwell v. Keaton* has been included in several torts textbooks.<sup>183</sup> In *Tort Law and Alternatives*,<sup>184</sup> by Marc A. Franklin and Robert L. Rabin, the case appears second in the book's analysis of the "Duty Requirement: Physical Injuries." The book contains an almost complete excerpt of the Supreme Court opinion, with the dissent included, along with questions focusing the student in on important points of the case and conflicting case law. The authors note that the majority opinion found an obligation of care on two independent grounds: "(1) that Siegrist voluntarily came to the assistance of Farwell and (2) that Siegrist, in any event, had an affirmative duty to aid Farwell on the basis of their pre-existing relationship."<sup>185</sup>

Most notably, the authors contrast *Ronald M. v. White*, 169 Cal. Rptr. 370 (Cal. Ct. App. 1980), where plaintiff was one of a group of several minor boys who had been driving in a car,

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<sup>182</sup> For example, *Farwell* has been included twice as a case note in the Michigan Revised Judicature Act of 1961. Mich. Comp. Laws § 600.2922 (2003). First, *Farwell* is cited under the heading "Sufficiency of evidence." *Id.* at case note 40. The two notes under this heading describe the evidence in the case (ice pack to the head, evidence of common social undertaking, proof defendant knew of decedent's peril after the beating, evidence that defendant could render assistance without endangering himself) as being sufficient for the jury's finding of negligence. In addition, the case is cited under the heading "Questions for jury – negligence of defendant" for the proposition that the question of whether defendant attempted to aid decedent was proper for the jury. *Id.* at case note 43.

<sup>183</sup> In my search of approximately 20 torts textbooks, *Farwell* was included in roughly half of the textbooks.

<sup>184</sup> Marc A. Franklin & Robert L. Rabin, *Tort Law and Alternatives* (7<sup>th</sup> ed. 2001). Interestingly, when I spoke with attorneys Kenneth M. Davies and James C. Bruno, neither of them knew that this case that they had worked on had appeared in any textbook.

<sup>185</sup> *Id.* at 141.

while some of the group had been drinking and taking drugs. Plaintiff sued those in the group who had not been drinking or taking drugs for their failure to prevent the driver's negligence from injuring others in the group. The court affirmed summary judgment for the defendants. The authors pose the question, "Is *Farwell* distinguishable?" This question is an important one because the case, with very similar facts, seems to limit, if not ignore *Farwell* altogether. Yet, perhaps other public policy came into play simply because *White* involved driving and perhaps the court did not want to allow passengers to dictate the decisions of drivers. Similarly, the group in *White* could be distinguished from *Farwell* because the activity on their "social venture" was different.

Other textbooks' discussions of *Farwell* indicate that although the case has a groundbreaking holding, the legal theory behind the holding has not altogether been accepted. For example, in *The Law of Torts* by Dan B. Dobbs, *Farwell* is called "[a] well-known Michigan case," but is then compared with several cases which have similar facts but holdings that are inconsistent with *Farwell*. In another textbook, *Torts and Compensation*, Dobbs and his co-authors dispute *Farwell's* satisfying the requirement of the Restatement 2d of Torts section 324(b) that the defendant leave the victim in a worse position. In *Studies in American Law*, Vincent Johnson and Alan Gunn state that "Later cases have narrowly interpreted *Farwell*." Lastly, in *Torts Cases, Problems, and Exercises*, Russell Weaver and his co-authors describe *Farwell* as an outlier of tort law, stating, "[t]he following case illustrates just how far a court can go in recognizing a 'special relationship' upon which to impose a duty of care." Hence, although legal scholars have not entirely heralded the holding in *Farwell*, they have at least found it groundbreaking enough to describe a possible new duty and special relationship in tort law.

*Farwell* has also been cited in two American Law Reports for its significance in the areas of duty based on special relationships and the duty to rescue. First, in *Duty of One Other than*

*Carrier or Employer to Render Assistance to One for Whose Initial Injury he is not Liable*,<sup>186</sup> the holding in *Farwell* is used to explain the rule that particular relationships may give rise to duty.<sup>187</sup> The A.L.R. states that the “fact that decedent and defendant were companions on social venture, and then involved in common undertaking, implied understanding that one companion would render assistance to other in peril if he could do so without endangering himself.”<sup>188</sup> Another A.L.R., *Duty and Liability of One Who Voluntarily Undertakes to Care for Injured Person*,<sup>189</sup> cites *Farwell* as the controlling authority in Michigan recognizing the duty of reasonable care when one voluntarily assumes the care of an injured person.<sup>190</sup> In another annotation about personal injury,<sup>191</sup> *Farwell* is cited for the proposition that “special relationships often also exist in a variety of other factually unique situations... Other special relationships include... on occasion... a social host and guest.”<sup>192</sup> The accompanying footnote describes the factual situation leading to the case and states that “[t]he plaintiff was entitled to recover based in part on the existence of a special relationship, which arose because of the nature of the social venture.”<sup>193</sup>

Additionally, in 1980 when the Michigan House of Representatives had a question on tort law, and the House asked the Attorney General for his opinion, he turned to *Farwell* for guidance.<sup>194</sup> The House asked the Attorney General for his opinion on issues arising from the situation where the parents of a public school pupil, who has severe allergies, have given the school permission to administer allergy medication to the child in case of emergency. Specifically, the House wanted to know whether the school administrators, teachers, or

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<sup>186</sup> Jonathan M. Purver, Annotation, *Duty of One Other than Carrier or Employer to Render Assistance to One for Whose Initial Injury He is not Liable*, 33 A.L.R.3d 301 (2003).

<sup>187</sup> *Id.* at heading 4.

<sup>188</sup> *Id.*

<sup>189</sup> O.H. Webster, Annotation, *Duty and Liability of One Who Voluntarily Undertakes to Care for Injured Person*, 64 A.L.R.2d 1179 (2003).

<sup>190</sup> *Id.* at § 2.

<sup>191</sup> Matthew Bender & Company, Inc., a member of the LexisNexis Group, Annotation, 22-108 *Personal Injury – Actions, Defenses, Damages*, § 3 (2003).

<sup>192</sup> *Id.* at 3.01, ¶ 2.

<sup>193</sup> *Id.* at n.95.

<sup>194</sup> *Office of the Attorney General of the State of Michigan Opinion No. 5679*, 1979-80 Op. Atty Gen. Mich. 709 (1980).

employees are *compelled* to give the medication to the child. The Attorney General relied upon *Farwell* to state that although failure to attend to an injured person is not actionable, once a person begins to render assistance, he or she “assumes the obligation of exercising due care in rendering such assistance.”<sup>195</sup> The Attorney General then quoted *Farwell* stating, “[t]here is no obligation to be a Good Samaritan.”<sup>196</sup> Based on *Farwell* as his only source, the Attorney General rendered his opinion as follows: “It is therefore my opinion that under the factual circumstances described, school administrators, teachers, and designated employees are under no duty to assume responsibility for the administration of medication.”<sup>197</sup> Although the Attorney General relies on *Farwell* as the basis for his opinion, he limited *Farwell*’s holding and found it inapplicable to the situation in question.

*Farwell* has even been found important enough to find its way into the draft of the Restatement 3d of Torts,<sup>198</sup> which has yet to be finalized and adopted. Specifically, *Farwell* is mentioned in section 41 “Duty to Another Based on Special Relationship with the Other,” which replaces sections 314A and 344 of the Restatement 2d of Torts. After noting that at common law, courts have been expanding the no-duty rule in special situations, the draft of the Restatement cites *Farwell* for the duty among social companions. Yet, the drafters also note, “In the absence of significant concurrence on these other relationships, the Institute takes no position on whether they should be accepted as sufficient to impose an affirmative duty.”<sup>199</sup>

Hence, although its holding has not universally been accepted, *Farwell* still has had a far-reaching impact.

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<sup>195</sup> *Id.* at 9.

<sup>196</sup> *Id.* at 9-10. (For this portion of the opinion, please refer to the section of this paper accompanied by footnotes 67-68).

<sup>197</sup> *Id.* at 10.

<sup>198</sup> Rest. 3d Council Draft No. 4 (Nov. 13 2003) Ch. 7 Affirmative Duties, section 41.

<sup>199</sup> *Id.* at reporter’s note for comment 1.

## The Treatment of *Farwell* in the Courts

*Farwell* has been cited in over forty cases throughout the state and federal judicial systems, receiving both positive and negative treatment. *Farwell* has been cited for numerous propositions gleaned from the majority opinion. Similar to the academic field, various courts have recognized *Farwell* for its holding in relation to duty and special relationships while some have limited its holding and questioned its basis.

*Farwell* has been cited for the definition of duty. In *Farwell*, the court stated that, “[a] duty, in negligence cases, may be defined as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another.”<sup>200</sup> Several cases have quoted that entire sentence exactly, or at least have closely approximated that quote.<sup>201</sup>

Similarly, *Farwell* has been cited for its discussion of the duty to render aid and the duty to avoid affirmative acts which make the plaintiff’s situation worse. For instance, in *McGee v. Chalfant*, 248 Kan. 434, 441 (Kan. 1991), an action in which an injured woman sued the parents and the tavern that provided alcohol to the minor drunk driver who hit her, the court cited *Farwell* for the holding that liability would be imposed for failure to obtain assistance for a severely injured person. Similarly, *Dumka v. Quaderer*, 151 Mich. Ct. App. 68, 74-75 (Mich. Ct. App. 1981) cited *Farwell* for both the duty to render reasonable care under the circumstances<sup>202</sup> and also the duty to avoid affirmative acts which make the victim’s situation worse.<sup>203</sup>

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<sup>200</sup> *Farwell v. Keaton*, 396 Mich. 281,286, 240 N.W.2d 217, 219 (Mich. 1976) (quoting Prosser, Torts (4<sup>th</sup> ed.) § 53, p. 324).

<sup>201</sup> See, e.g., *Union Oil Co. of Cal. v. Professional Realty Investments, Inc.*, 1995 U.S. App. Lexis 37037, 25 (6<sup>th</sup> Cir. 1995); *Harrison v. Director of Dep’t Corrections*, 194 Mich. Ct. App. 446, 456 (Mich. Ct. App. 1992); *Sierocki v. Hieber*, 168 Mich. Ct. App. 429, 433 (Mich. Ct. App. 1988); *Dumka v. Quaderer*, 151 Mich. Ct. App. 68, 72 (Mich. Ct. App. 1985); *Meyers v. Garlock*, 121 Mich. Ct. App. 146, 148 (Mich. Ct. App. 1982); *Meyers v. Robb*, 82 Mich. Ct. App. 549, 553 (Mich. Ct. App. 1978).

<sup>202</sup> See also, *James v. O’Neal*, 838 P.2d 31, 36 (Okla. Civ. App. 1992); *Benedict v. General Motors Corp.*, 1997 U.S. Dist. Lexis 9230, 26-27 (W.D. Mich. 1997).

<sup>203</sup> See also, *Lindsey v. Miami Development Corp.*, 689 S.W.2d 856, 860 (Tenn. 1985) (citing *Farwell*, the Supreme Court of Tennessee states “Without regard to whether there is a general duty to aid a person in distress, there is a clearly recognized legal duty of every person to avoid any affirmative acts which may make a situation worse.”)

*Farwell* has been cited often for its holding that a special relationship exists where companions are on a social venture or a common undertaking. Although different courts use different terms for this portion of the *Farwell* holding, the general trend is the same. For instance, in *Stiver v. Parker*, 975 F.2d. 261, 270 (6<sup>th</sup> Cir. 1992), the court held that “a special relationship may arise between social companions ‘engaged in a common undertaking.’”<sup>204</sup> Other cases have investigated the idea of a “common undertaking” to distinguish the facts in those cases from *Farwell*.<sup>205</sup> Several other courts have rejected the idea that there was a special relationship of the kind found in *Farwell*.<sup>206</sup> The Ohio Court of Appeals even classified the opinion in *Farwell* as holding “that such a duty existed because of special relationship between the parties as *drinking companions*.”<sup>207</sup>

Moreover, *Farwell* has been cited for the proposition that once a volunteer begins to render aid, he or she must exercise reasonable care,<sup>208</sup> including rendering aid in a non-negligent fashion.<sup>209</sup> The Seventh Circuit cited *Farwell* for the proposition that “a failed rescue might under settled common law principles give rise to liability, on the theory that a clumsy rescue

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<sup>204</sup> quoting *Farwell v. Keaton*, 396 Mich. 281, 292, 240 N.W.2d 217 (Mich. 1976). See also *Coats v. Uhlmann*, 87 Mich. App. 385, 391 (Mich. Ct. App. 1978) (“social companions owe affirmative duty to come to each other’s aid.”).

<sup>205</sup> See, e.g., *Ross v. Glaser*, 220 Mich. App. 183, 204 (Mich. Ct. App. 1996) (dissent cites *Farwell* and distinguishes present case because father was not engaged in common undertaking with son when he gave his son a gun that the son used to kill plaintiff’s decedent); *Bell & Hudson, P.C. v. Buhl Realty Co.*, 185 Mich. App. 714, 717-18 (Mich. Ct. App. 1990); *Madley v. Evening News Assoc.*, 167 Mich. App. 338, 342 (Mich. Ct. App. 1988) (court rejected argument that newspaper and delivery boy were “social companions engaged in a common undertaking” of the kind in *Farwell*).

<sup>206</sup> *Antcliff v. State Employees Credit Union*, 95 Mich. App. 224, 232 (Mich. Ct. App. 1980) (citing *Farwell*, the court points out that “this is not a case in which... a special relationship between a defendant and a plaintiff imposes a duty of care over and above the usual duty.”); *Webstad v. Stortini*, 83 Wn. App. 857, 873 (Wash. App. 1996).

<sup>207</sup> *Hager v. Griesse*, 1986 Ohio App. Lexis 6209 (Ohio Ct. App. 1986) (emphasis added).

<sup>208</sup> *Wynn v. State Automobile Mutual Insurance Co.*, 856 F. Supp. 330, 338 (E.D. Mich. 1994) (quoting *Farwell*, 51 Mich. App. at 590, “if one voluntarily assumes the duty of lending aid, he is required to do so with reasonable prudence and care.”); *Branca v. Waldman*, 1998 Mich. App. Lexis 375, 1-2 (Mich. Ct. App. 1998) (citing *Farwell* to hold that if “defendant voluntarily takes control and charge of the situation and attempts to render aid to the imperiled plaintiff, the defendant must exercise reasonable care for the protection of the plaintiff.”).

<sup>209</sup> *Jackson v. Joliet*, 715 F.2d 1200, 1202-03 (7<sup>th</sup> Cir. 1983) (Seventh Circuit cites *Farwell* for the holding that “if you do begin to rescue someone you must complete the rescue in a nonnegligent fashion even though you had no duty of rescue in the first place.”).

attempt may have interfered with a competent rescue by someone else.”<sup>210</sup> In *Swartz v. Huffmaster Alarms Systems, Inc.*, 145 Mich. App. 431, 438 (Mich. Ct. App. 1985), the court stated that the decision in *Farwell* “appeared to rest heavily upon defendant’s initial attempt to come to the aid of his companion and the ultimate abandonment of that rescue attempt.”

The Michigan Court of Appeals even used *Farwell* to establish the outer limits of liability. In *Turner v. Northwest General Hospital*, 97 Mich. App. 1, 4 (Mich. Ct. App. 1980), plaintiff’s decedent was a security guard at hospital who was shot while on duty. In the plaintiff’s action against the hospital for negligence the court states, “[t]he case goes beyond the outer limit of liability established in...*Farwell v. Keaton*.” Once again, *Farwell* is seen as the outermost limit for how far courts will stretch the duty.

As can be seen, *Farwell* has had a fairly large impact on tort law, especially within the state of Michigan and the Sixth and Seventh Circuits. From these cases, it is clear that several novel points were made in the *Farwell* opinion, which has enabled the courts to turn to *Farwell* for guidance on a variety of issues.

### **The Status of the “Good Samaritan” in Other Jurisdictions**

While at the time novel and unique, the theory behind the holding in *Farwell* has been explored in other states, through both legislation and litigation. Most notably, states have enacted statutes, commonly known as “Good Samaritan” statutes, which grant limited liability for the “Good Samaritan” who takes it upon him or herself to aid in the rescue of another.<sup>211</sup> For example, in November of 1977, the Wisconsin Legislature extended a grant of immunity from civil liability to any person rendering emergency care in good faith at the scene of an accident or

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<sup>210</sup> *Stockberger v. United States*, 332 F.3d 479, 481 (7<sup>th</sup> Cir. 2003).

<sup>211</sup> See Dawn B. Lieb, *Note: Torts- Immunity – The Good Samaritan Statute*. *Wis. Stat. § 895.48 (1977)*, 62 *Marq. L. Rev.* 469 (1979).

emergency.<sup>212</sup> By 1977, all fifty states and the District of Columbia had enacted some form of “Good Samaritan” legislation, although Michigan was not among the states that had granted immunity to all individuals rendering aid in an emergency. The state of Michigan enacted Mich. Comp. Law Ann. § 691.1501 in 1968, which protects only physicians, nurses, and other medically trained personnel.<sup>213</sup>

Generally, this type of legislation arose from the claim that individuals were deterred from rendering assistance in emergency situations for fear of potential liability. This type of legislation was enacted to “encourage lay persons and professionals to respond to another’s need for help by granting limited immunity for negligent acts which might occur while rendering emergency assistance.”<sup>214</sup> Proponents of this type of legislation hope to prevent tragedies such as Farwell’s death from happening by encouraging those that can help to do so without the threat of liability.

Although these “Good Samaritan” statutes are prevalent, they are not without criticism. These statutes have been criticized as “unnecessary, unfair, and unconstitutional.”<sup>215</sup> While some argue that the limited judicial interpretation of these statutes is evidence that these criticisms are not true, others say that this lack of judicial interpretation only illustrates more problems with the statutes, including “lack of uniformity among them, their imprecise language, and their sparse legislative histories.”<sup>216</sup> As a result of the vagueness associated with these statutes, “serious questions remain regarding the outer limits of the statutes’ protection and the circumstances under which their protection is provided.”<sup>217</sup> For instance, one commentator<sup>218</sup> points out that

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<sup>212</sup> Wis. Stat. § 895.48 (1977). This law is an extension of 1963 Wis. Laws ch. 94, which granted immunity to physicians and nurses attempting to render care at the scene of an emergency.

<sup>213</sup> D. Lieb, *Note*, 62 Marq. L. Rev. 469, 470, N. 5 (citing Mich. Comp. Laws. Ann. § 691.1501 (1968)).

<sup>214</sup> *Id.* at 470 (Footnote 8 states, “The first good Samaritan statute passed by California in 1959 was apparently catalyzed by the callous refusal of several available physicians to aid an injured skier lying on a ski slope. See 51 Calif. L. Rev. 816, 818 (1963); 64 Colum. L. Rev. 1301 (1964); 42 Or. L. Rev. 328 (1963)”).

<sup>215</sup> *Id.* at 471.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* at 470, N. 5 (citing Mich. Comp. Laws. Ann. § 691.1501 (1968)).

Wisconsin's statute is vague in many respects, most notably (for our purposes at least) its failure to address the status of liability in situations of abandonment. "The rendering of emergency care can be life threatening in some instances when treatment is begun but not completed, and legislative consideration should be given to withdrawing the immunity in situations where this type of malfeasance compounds the victim's injuries."<sup>219</sup> Hence, even where a statute is present, it is not clear whether liability will be found in cases similar to *Farwell*.

In an even further extension of the duty to rescue, the state of Vermont has imposed on all persons a general duty to rescue.<sup>220</sup> Although this duty is common in Europe, so sweeping a statute is unprecedented in the United States.<sup>221</sup> The statute states that "a person who knows that another is exposed to grave physical harm shall...give reasonable assistance to the exposed person."<sup>222</sup> A person shall give assistance if assistance or care "can be rendered without danger or peril to himself or without interference with important duties owed to others... unless that assistance or care is being provided by others." Failure to render assistance where it is necessary and does not qualify in the above exceptions results in a fine of not more than \$100.00.<sup>223</sup> Subsection (b) states that one who provides reasonable assistance in compliance with the statute will not be liable in civil damages "unless his acts constitute gross negligence or unless he will receive or expects to receive remuneration." Subsection (b) also mentions that existing tort law with respect to tort liability of a "practitioner of the healing arts for acts committed in the ordinary course of his practice" shall not be altered by this section. Hence, in Vermont, laypersons are protected from civil liability if they provide reasonable assistance and owe a small fine if they can assist and do not, and doctors are still liable during the course of their practice. Although the statute is much more far-reaching than those of other states, Lieb suggests that it might be a better option because "the imposition of a statutory obligation is more likely to be

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<sup>219</sup> *Id.* at 479.

<sup>220</sup> *Id.* at 481 (citing Vt. Stat. Ann. tit. 12, § 519 (1973)).

<sup>221</sup> *Id.*

<sup>222</sup> Vt. Stat. Ann., tit. 12 § 519 (1967).

<sup>223</sup> *Id.* at subsection (c).

known to the community than knowledge of changes in tort liability...”<sup>224</sup> Despite that, only a few states have followed Vermont’s lead.<sup>225</sup>

In addition, Franklin and Rabin note that other states have attempted to address this problem by giving awards to persons hurt while attempting rescues.<sup>226</sup> For example, California Government Code §§ 13970-74 states that “[d]irect action on the part of private citizens in ... rescuing a person in immediate danger of injury or death as a result of fire, drowning, or other catastrophe, benefits the entire public.” The statute continues, “[i]n recognition of the public purpose served, the state may indemnify such citizens...for any injury, death, or damage sustained by such citizens... as a direct consequence of such meritorious action...” By indemnifying for loss, rather than rewarding action, the hope was to encourage citizens to assist other citizens.

As can be seen, legislative action has become one way which society has regulated the duty to rescue, but these “Good Samaritan” statutes are not without criticism.

## **Conclusion**

*Farwell v. Keaton* has been heralded as “[o]ne of the most celebrated affirmative duty cases.”<sup>227</sup> The case explores and expands the concept of duty, based on the theory of a special relationship. The court created a new special relationship – that of “companions engaged in a common undertaking” or “companions on a social venture.” Although vigorously dissented and having received some criticism from courts and commentators, there can be no doubt that *Farwell* has altered tort law and the concept of the duty to rescue.

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<sup>224</sup> Dawn B. Lieb, *Note: Torts- Immunity – The Good Samaritan Statute*. *Wis. Stat.* § 895.48 (1977), 62 *Marq. L. Rev.* 469, 482 (1979).

<sup>225</sup> Marc A. Franklin & Robert L. Rabin, *Tort Law and Alternatives* at 155 (7<sup>th</sup> ed. 2001).

<sup>226</sup> *Id.* at 155-56.

<sup>227</sup> Peter F. Lake, *Recognizing the Importance of Remoteness to the Duty to Rescue*, 46 *DePaul L. Rev.* 315, 353 (1997).

Yet, it is easy to forget that this case arose from a tragedy: a boy lost his life and a family was devastated. Students and teachers of the law must not forget these facts. For every cause of action, for every case, for every new theory, there is a story behind that cause, case, or theory. The lesson that must not be forgotten is this: For every tort, there is indeed a tort story.

In reminiscing about the case, plaintiff's attorney Ken Davies said to me, "Life goes on. It is too bad for this boy it didn't but at the very least, we should be glad we have ours."<sup>228</sup> Ken Davies proceeded to tell me that he was in Florida vacationing with his best friend, Dr. Gene W. Henssler, an incredibly successful fund manager of the Henssler equity fund. He was heading out on Dr. Henssler's boat, which Ken Davies had given the name "Dr. Dollars." Dr. Henssler's parents were Inca Henssler and Ted Farwell. Ted Farwell was the brother of Richard Farwell, Jr. Ted Farwell also had a nephew named Ricky who died when he was just 18-years-old. At that very moment, I realized that Ricky's relative was relaxing in beautiful Key West, Florida with his best friend of many years, Ken Davies, the lawyer who fought Ricky's claim all the way to the Supreme Court of Michigan. At that moment, when I was able to put all the pieces together, the only words I could muster were, "Life goes on. Indeed, it does."

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<sup>228</sup> Interview with Plaintiff's attorney Kenneth M. Davies of Detroit.