SUPREME COURT OF FLORIDA
CASE NO. 67,160

NOVA UNIVERSITY, INC., et al.,

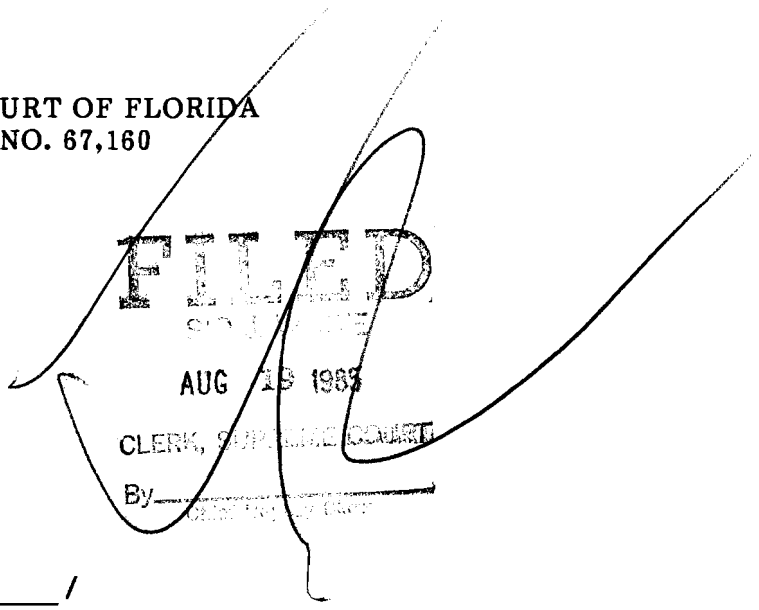
Petitioners,

vs.

JOSEPHINE C. WAGNER, etc., et al.,

Respondents.

_____/



ON DISCRETIONARY REVIEW OF A CERTIFIED QUESTION FROM
THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

BRIEF OF RESPONDENTS

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I
STATEMENT OF THE CASE AND FACTS

The single statement of the case provided by Nova and its insurer contains a number of things which are irrelevant to the narrow issue presented here. We therefore feel constrained to briefly restate the case for the reorientation of the Court. We are also unable to accept the "facts" as separately stated by the three sets of defendants, for several reasons: they are contrary to two stipulations made on the record below; they are directed to several issues not properly before the Court; and they are shaded considerably in the defendants' favor, notwithstanding that the facts must be viewed in a light most favorable to the plaintiffs here in view of the procedural posture of the case. We therefore feel constrained to restate the facts as well for the reorientation of the Court.

On February 17, 1975, four year-old Peter Wagner was brutally stomped to death by two young boys, aged 12 and 14. His sister, six year-old Christy Wagner, was also brutally assaulted and strangled, but survived with serious and permanent brain damage. The senseless attacks took place less than ¼ mile from Nova University's "Living and Learning Center", a residential treatment center for delinquent, emotionally disturbed, and ungovernable children. The assailants were residents of this institution--one of them having been entrusted there contractually by his parents; the other, after a stay at the South Florida Mental Hospital, had been entrusted there contractually by the Department of Health and Rehabilitative Services.[1/] The contracts by which Nova received the boys into its custody required it to provide psychiatric services for them, and to supervise them--and required the payment of a considerable fee for their care, $8,000.00 per year. The two boys had run away from the facility the day before (as they had many

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1/ Although there are minor differences in history and predilection between the two boys, we will treat them as one and the same here for convenience sake, since (for purposes of background to the issue on appeal at least) there is no reason for distinguishing between the two.

times in the past), in violation of the facility's rule restricting them to the premises. Although the defendants knew of the dangerous propensity of these two boys for violent assaults upon children, and although they were notified on three separate occasions of the whereabouts of the two boys on the day of the brutal assaults upon the Wagner children, they made no effort to pick them up or otherwise prevent the perfectly foreseeable and altogether unforgivable tragedy which occurred. (See generally, R. 134-71).[2/]

In her capacity as personal representative of the estate of her son, Mrs. Josephine Wagner brought a wrongful death action sounding in negligence against Nova University; its agents, Charles and Janet Stevens; and their insurers (R. 2784, 4043).[3/] A subsequent negligence action was brought by Christy, by and through her mother, Mrs. Wagner; the action sought damages for Christy's personal injuries from the same defendants, and an additional defendant--the Center's director, John Flynn (R. 4789). The two cases were ultimately consolidated for all purposes (R. 4065). The cases have a long and tortured history, and have produced a forbiddingly voluminous record. Because the cases were ultimately disposed of adversely to the plaintiffs (after a mistrial) on the single, simple legal ground that the defendants owed the plaintiffs no duty of care, most of that record is irrelevant here. We will therefore spare the Court the unhappy details of the plaintiffs' seven-year ordeal in trying to get the cases to a jury, and begin on the eve of the trial finally scheduled before The Honorable Robert L. Andrews in February, 1983.

Shortly before the trial was to begin, the defendants moved for summary judgment, contending among other things that they owed the plaintiffs no duty of care (R. 885, 888,

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[2/] The references are to plaintiffs' counsel's opening statement at trial--which, for reasons which will become clear *infra*, contains the "facts" upon which the legal issue presented here is to be determined.

[3/] Although a number of additional defendants were joined in the action, the cause did not proceed to trial against them so their presence in the litigation below can be disregarded here.

891). Extensive memoranda were filed by all parties; the motions were thoughtfully considered; and the motions were denied approximately one month before the scheduled trial (R. 936, 936). Trial began in February, 1983, and the case was mistried several days later during presentation of the plaintiffs' first witness. Nova and its insurer have asserted here that the case was mistried because of improper conduct of plaintiffs' counsel. That assertion is incorrect. The trial court initially thought that plaintiffs' counsel's manner of questioning the witness was improper, but it later stated that its initial impression was incorrect and that plaintiffs' counsel's conduct was perfectly proper--but it declared a mistrial nevertheless (R. 565-66, 586-87). It was this peculiar ruling which formed the basis for our second issue on appeal in the District Court--but that issue is not presently before this Court, so there is no need for us to elaborate upon this aspect of the case here.[4/] Suffice it to say simply that, in conjunction with granting a mistrial, the trial court also invited the defendants to file motions for summary judgment (R. 587-91).

Thus invited, the defendants moved for summary judgment on the single ground that they owed no duty of care to the plaintiffs (R. 1483, 1502). (The motions for summary judgment did *not* place the sub-issues of negligence and proximate causation in issue in any way.) In the memorandum accompanying the motion of Nova and its insurer, those defendants agreed that the "facts" to be utilized for determination of the motion were the facts alleged in the plaintiffs' complaints: "For the purpose of this motion only, all the allegations of the complaints are admitted, save the use of the word 'escape' since the uncontroverted truth is that the Nova Living and Learning Center was not a security institution" (R. 1485). In the memorandum accompanying the motion of Dr. Flynn, Mr.

[4/] If the Court desires elaboration, it may find a complete discussion of the procedural background of the mistrial in the initial brief of appellants which we filed in the District Court.

and Mrs. Stevens, and their insurer, those defendants agreed that the "facts" to be utilized for determination of their motion were the facts as stated in plaintiffs' counsel's opening statement: "For the purposes of this memorandum, it will be assumed that Plaintiffs would be able to prove all of the facts asserted in their opening statement" (R. 1503).

Because of these stipulations, the plaintiffs did not file all the evidence they had planned to introduce at trial, before the case was mistried during presentation of their first witness. They took the defendants at their word, and argued the motions for summary judgment on the allegations of the plaintiffs' complaints and the opening statement of counsel. The plaintiffs also took the defendants at their word in the District Court, and utilized the facts stated in the complaints and opening statement of counsel as the facts underlying the issue on appeal. The District Court also took the defendants at their word and decided the case below in accordance with the defendants' stipulations. In view of those stipulations, the defendants have no right to assert here, as they have, that the facts are different than the facts related in the complaints and opening statement of counsel.

Moreover, even if it would have been proper to snooker us in that fashion here, the defendants have forgotten the procedural posture in which the case appears here. They have argued that the record does not contain evidence *supporting* various allegations of the complaint, but they have ignored the fact that it was not our burden below to adduce such evidence. Because the defendants moved for summary judgment, it was *their* burden to adduce evidence *conclusively disproving* the allegations of our complaints--and until that evidence was forthcoming, we could legitimately rely upon the allegations of our complaints to resist the motions.[5/] The defendants clearly did not shoulder that

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[5/] *See Wills v. Sears, Roebuck & Co.*, 351 So.2d 29 (Fla. 1977); *Holl v. Talcott*, 191 So.2d 40 (Fla. 1966); *Visingardi v. Tirone*, 193 So.2d 601 (Fla. 1966).

burden below. In fact, they eschewed that burden altogether by stipulating that the facts were those alleged in our complaints and stated in opening statement of counsel. Clearly, therefore, it is those facts which control the issue presented here, as the District Court recognized, not the version of the facts culled by the defendants here from an incomplete record--a record which is incomplete precisely because the defendants stipulated that it was unnecessary for a record to be made.

We assure the Court that we intend to prove, in due course, all the facts alleged in our complaints and stated in opening statement of counsel. For the time being, however, it is the facts stated in our complaint and in opening statement of counsel which control the issue here. For the convenience of the Court, we reproduce the relevant allegations of the amended complaint in the wrongful death action (R. 4043):

COUNT I

> 10. That on February 17, 1975, and for many months prior thereto, the Defendant, NOVA UNIVERSITY, INC., owned, operated and maintained several single family houses in the City of Davie, Broward County, Florida, which said houses were utilized in connection with and were collectively referred to as, the Nova Living and Learning Center, which Center was conducted and operated by the Defendant, NOVA UNIVERSITY, INC., its agents, employees and servants.
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> 11. That the Nova Living and Learning Center is a duly licensed child caring institution which accepts as residents delinquent, dependent, emotionally disturbed, and/or ungovernable children, many of whom have committed offenses, which offenses if committed by adults, would be considered crimes; and all of which children have such behavior problems that their continued residence with parents, foster parents or legal guardians has been determined to be against the best interests of the general public.
>
> 12. That while the Nova Living and Learning Center has been duly licensed as a child caring institution by the DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES OF THE STATE OF FLORIDA, Nova Living and Learning Center may reject or accept applicants for residence as it deems appropriate, or, having accepted an applicant subsequently determined to be unsuitable, may request the transfer of such resident to another child caring institution.

13. That children accepted by the Nova Living and Learning Center are required to remain as permanent residents during the remainder of their minority and are provided with living quarters in those houses hereinabove mentioned, where such children live together with approximately ten (10) other children who have each been found to be delinquent, dependent, emotionally disturbed and/or ungovernable under the direct supervision of "house parents" who are the duly authorized agents, servants or employees of the Defendant, NOVA UNIVERSITY INC., and who are directly and primarily responsible for the welfare, discipline and rehabilitation of each child residing within their respective houses.

14. That with the exception of attendance at local public schools, and unless accompanied by a "house parent" or his or her duly authorized agent, each resident of the Nova Living and Learning Center is not permitted away from his or her respective house or the immediate grounds appurtenant thereto without permission of his or her house parent, although the Nova Living and Learning Center maintains no security measures with which to enforce this rule, regulation or policy.

15. That the Defendant, ROLAND MENZIES, a minor, then 12 years of age, was accepted as a resident by the Nova Living and Learning Center during the calendar year 1974, as an ungovernable child upon a voluntary application for residence submitted by the Defendants, ROBERT A. MENZIES and ESTHER O. MENZIES, the parents and natural guardians of the Defendant, ROLAND MENZIES, a minor, who were unable or unwilling to supervise, discipline and control said minor Defendant.

16. That the Defendant, DANA WILLIAMSON, a minor, then 14 years of age, was accepted as a resident by the Nova Living and Learning Center, during the calendar year 1974, as an emotionally disturbed and delinquent child, then under the custody of the Division of Family Services of the DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES OF THE STATE OF FLORIDA, which said Defendant was then the legal guardian of the Defendant, DANA WILLIAMSON, a minor, having theretofore acquired such guardianship from the Defendant, CHARLES L. WILLIAMSON, the father and natural guardian of said minor Defendant, by virtue of a commitment order rendered by the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida, in connection with such Court's finding the Defendant, DANA WILLIAMSON, a minor, to be a delinquent child; and that immediately prior to acceptance as a resident of the Nova Living and Learning Center, the Defendant, DANA WILLIAMSON, a minor, was an inmate or resident or patient of the South Florida Mental Hospital, located in Pembroke Pines, Florida.

17. That at all times material hereto, the Defendants, DANA WILLIAMSON and ROLAND MENZIES, both minors, were residents of the Nova Living and Learning Center and resided in that certain house located at 7500 S.W. 34th Court, Davie, Broward County, Florida, under the supervision, direction and control of the Defendants, CHARLES W. STEVENS and JANET C. STEVENS, his wife; and that said Defendants were the duly authorized agents, servants and employees of the Defendant, NOVA UNIVERSITY, INC.

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

19. That at all times material hereto, the Defendants, CHARLES W. STEVENS and JANET C. STEVENS, his wife, and the Defendant, NOVA UNIVERSITY, INC., had sufficient opportunity to observe the aforesaid violent and ungovernable propensities, tendencies or proclivities of the Defendants, DANA WILLIAMSON and ROLAND MENZIES, both minors, and actually observed same on numerous occasions and knew or, in the exercise of reasonable care, should have known that said minor Defendants had a propensity to commit acts which could normally be expected to cause harm to others; but that despite such knowledge, the Defendants, CHARLES W. STEVENS and JANET C. STEVENS, his wife, and the Defendant, NOVA UNIVERSITY, INC., while having the opportunity and ability to control the minor Defendants, failed and refused to exercise reasonable means of controlling said minor Defendants, or appreciably reducing the likelihood of injury to others.

20. That at all times material hereto, the Defendant, NOVA UNIVERSITY, INC., was obligated to use reasonable care in the operation, management and control of the Nova Living and Learning Center as a child-caring institution for delinquent, dependent, emotionally disturbed and/or ungovernable children, so that the use of said Defendant's property for such purpose would not be harmful to residents, invitees and guests in the vicinity thereof.

21. That the Defendants, NOVA UNIVERSITY, INC., CHARLES W. STEVENS and JANET C. STEVENS, his wife, were careless and negligent in the operation, management and control of the Nova Living and Learning Center in the following respects:

A. Said Defendants failed to employ, retain or utilize an adequate staff with which to supervise and control the residents of the Nova Living and Learning Center.

B. Said Defendants failed to employ, retain or utilize personnel sufficiently trained, educated and experienced in the field of child psychology and behavioral psychology.

C. Said Defendants failed to adopt, promote and enforce sufficient rules, regulations and policies in order to discourage and prevent repeated escapes or running away from the Nova Living and Learning Center.

D. Said Defendants failed to supervise and control those residents of the Nova Living and Learning Center who were able to escape or run away therefrom on numerous occasions.

E. Said Defendants failed to effectively discipline those residents of the Nova Living and Learning Center who repeatedly escaped or ran away therefrom so as to discourage or prevent future occurrences.

F. Said Defendants failed to establish, provide and maintain adequate security measures in order to prevent or discourage residents of the Nova Living and Learning Center from escaping or running away therefrom.

G. Said Defendants failed to conduct adequate investigations of those applicants accepted as residents of the Nova Living and Learning Center in order to determine whether acceptance thereof would constitute a threat of harm or injury to members of the community in the vicinity of the Nova Living and Learning Center.

H. Said Defendants failed and neglected to establish a program of regular psychological consultation between qualified personnel and those residents of the Nova Living and Learning Center in order to determine whether said residents dis-

played such violent tendencies or propensities that their continued residence at the Nova Living and Learning Center would constitute a threat of harm or injury to members of the community in the vicinity of the Nova Living and Learning Center.

I. Said Defendants, after having learned, or after having sufficient opportunity to learn, that the Defendants, DANA WILLIAMSON and ROLAND MENZIES, both minors, were prone to displays of violence, ungovernable temper, and repeated escapes from the Nova Living and Learning Center, failed and neglected to provide closer or additional supervision and control of said minor Defendants, failed and neglected to obtain for said minor Defendants psychological consultation in order to aid in the repression of said tendencies, and failed and neglected to request that said minor Defendants be transferred to another child-caring institution having the ability to provide the foregoing.

22. That on the 16th day of February, 1975, at approximately 5:30 o'clock P.M., the Defendants, DANA WILLIAMSON, and ROLAND MENZIES, both minors, escaped or ran away from the Nova Living and Learning Center, there being a total lack of supervision and control exercised by the Defendants, CHARLES W. STEVENS and JANET C. STEVENS, his wife, and the Defendant, NOVA UNIVERSITY, INC., to prevent or discourage said escape or run away, and a total lack of security measures with which to prevent or discourage same; and that said Defendants remained at large for several days, free from the authority, supervision and control of the Defendant, NOVA UNIVERSITY, INC., and contrary to the rules, regulations and policies established for residents of the Nova Living and Learning Center, but insufficiently enforced.

23. That on February 17, 1975, at approximately 6:00 o'clock P.M., the Plaintiff's four (4) year old decedent, PETER ALAN WAGNER, was lawfully upon the property and premises of Nova Hills Farms, located in the City of Davie, Broward County, Florida, approximately one quarter mile ($\frac{1}{4}$) south of the Nova Living and Learning Center; and that the Plaintiff's decedent, PETER ALAN WAGNER, was lawfully upon such premises with his parents as business invitees.

24. That at the location, date and time aforesaid, the Defendants, DANA WILLIAMSON and ROLAND MENZIES, both minors, encountered the Plaintiff's decedent, PETER ALAN WAGNER, on the bank of a small canal situate upon Nova Hills Farms, and proceeded to chase said Plaintiff's decedent until said minor Defendants overcame the Plaintiff's decedent; and that upon overcoming same, the minor Defendants proceeded to

push, shove, kick, beat, batter, punch, choke, strangle and kill the Plaintiff's decedent, PETER ALAN WAGNER.

25. That as a direct and proximate result of the above and foregoing carelessness and negligence on the part of the Defendants, NOVA UNIVERSITY, INC., CHARLES W. STEVENS and JANET C. STEVENS, his wife, the minor Defendants did run away or escape from the Nova Living and Learning Center and while away therefrom, and as a further direct and proximate result of said Defendants' carelessness and negligence, did, in the pursuance of those tendencies and propensities hereinabove referred to, beat, batter, punch, kick, choke and strangle the Plaintiff's minor decedent, PETER ALAN WAGNER, as aforesaid; and that the said PETER ALAN WAGNER, died almost immediately as a result thereof.

. . . .

COUNT III

28. That at all times material hereto, the Defendants, NOVA UNIVERSITY, INC., CHARLES W. STEVENS and JANET C. STEVENS, his wife, and the DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES OF THE STATE OF FLORIDA, were in the position of, and functioned as, the natural parents of the Defendants, DANA WILLIAMSON and ROLAND MENZIES, both minors, and were therefore obligated to exercise that degree of parental supervision, control and discipline as said minor Defendants' known propensities, tendencies and proclivities required and were further obligated to exercise that degree of parental supervision, control and discipline which natural parents are duly bound to exercise with respect to children having known tendencies, propensities or proclivities toward violent and ungovernable behavior likely to cause harm or damage to others.

29. That due to a complete lack of parental discipline and neglect in the exercise of needful parental influence and authority, the Defendants, NOVA UNIVERSITY, INC., CHARLES W. STEVENS and JANET C. STEVENS, his wife, and the Defendant, DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES OF THE STATE OF FLORIDA, carelessly and negligently failed to restrain the minor Defendants whom they knew to have those tendencies described in paragraph 18 above, being tendencies and propensities of a violent and ungovernable disposition; that said Defendants had full knowledge of previous acts committed by the minor Defendants, which acts were either designed to, or resulted in, injury to others; and that said Defendants well knew of the repeated escapes from the Nova Living and Learning Center by said minor Defendants, so that the minor Defendants' persistent course of conduct would, as a probable consequence, result in injury to another; but that said Defendants,

> nevertheless, continually failed to exercise any restraint whatsoever over the minor Defendants' violent and ungovernable conduct, thereby sanctioning, ratifying and consenting to the wrongful act committed against the Plaintiff's decedent herein.
>
> 30. That the minor Defendants had a propensity or tendency to escape or run away from the Nova Living and Learning Center and to become violent and ungovernable without warning; and that the Defendants, NOVA UNIVERSITY, INC., CHARLES W. STEVENS and JANET C. STEVENS, his wife, and the DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES OF THE STATE OF FLORIDA, knew or should have known of such propensities and should have also known of the necessity for controlling said minor Defendants and preventing such conduct, said Defendants having the ability at all times to control same.
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> . . . .

We will not reproduce the allegations of the complaint in the personal injury action, since they are essentially the same (except that Dr. Flynn is added as a defendant there) (R. 4789). Because space is at a premium, and because the defendants' motions for summary judgment challenge only the "duty" element of the plaintiffs' cause of action (and thereby concede the existence of material issues of fact on the elements of negligence, causation [including its sub-element of foreseeability], and damages), we will also not summarize plaintiffs' counsel's opening statement here. The facts contained in that statement (together with the allegations of the complaints) are nevertheless the facts upon which our first issue on appeal must be resolved, so the statement cannot be ignored. For the convenience of the Court, we have therefore provided the Court with a copy of plaintiffs' counsel's 38-page opening statement in a separate appendix to this brief. It bears careful reading at this point--and we think that, notwithstanding that the facts are obviously stated there in a light most favorable to the plaintiffs, the Court will be appalled at the total indifference shown by the defendants to the danger which their unsupervised, anti-social, and highly dangerous wards presented to the neighborhood in which they were freely allowed to roam.

Although we have left a reading of plaintiffs' counsel's opening statement to the Court, certain facts recited there bear emphasizing here, because the District Court found them important to its decision:

> On the day in question, the second day that these boys had run away, at 9:00 o'clock in the morning a social worker by the name of Iris Jones (phonetic) working for Nova, was lucky enough and had good fortune to spot Dana Williamson at 9:00 o'clock in the morning, the second morning, under a bridge on Davie Road and Orange Drive. When she got to the center she immediately notified Mr. and Mrs. Stevens, and Dr. Flynn. Despite this extraordinary good luck and prompt action by the social worker in reporting his whereabouts to the center, all they did was take out a little logbook and neatly note in there, Dana Williamson, 9:00 o'clock, Davie Road and Orange Drive, put the book back down and went about their business. At 12:00 o'clock noon, that same day the boys were again spotted at a specific time and location, Grant City, University Drive and Hollywood Boulevard, again literally minutes away from this center. Again reported to Mr. and Mrs. Stevens and Dr. Flynn, again, some three hours later. They took out their little logbooks and the boys are at Grant City, University and Hollywood Boulevard, 12:00 noon, and put the book back down, went about their business. At 3:00 P.M. on the day in question some six hours after the Defendants had been notified concerning the whereabouts of these two runaways, who had been gone away for two days, the father of the Williamson boy, who he hated, who had beaten him literally out of the house together with his four brothers and a sister, and took in another woman and her children after his mother died, he called up and said are these boys supposed to be out here at my place. You may remember the warning of Marjorie Miller, don't let this boy get near his father. So, what did they do? Mr. Stevens tells Mr. Williamson, no, they are supposed to be here, they ran away from here two days ago, now let me talk to one of the boys. He gets one of the boys on the phone and says, hey, will you boys come back with Mr. Williamson, will you get in the car and come back so we don't have to send the police out there for you. Sure, the boys say we will do that, no problem. So, Mr. Stevens lets the two boys assure him, he is the fellow who is running this place and knows about these boys' backgrounds, knows about all they do, has come back, touched base, take off again kind of like an airport, land and take off. Mr. Stevens lets those boys assure him they would come back. The evidence will show that the boys had already decided between themselves that if the cops came and got them they would have to go back, but if Mr. Williamson took them they could get off, outside the center and take off again and again. We have the center leaving to someone else, despite the $16,000.00 a year, the worry of two boys in whose charge and care the State of Florida and these parents,

> Mr. and Mrs. Menzies have placed these boys to be clothed, fed, housed, supervised, treated, cared for, not permitted to run, and if they could not handle them at least fess up and turn them back to their parents or the State of Florida.
>
> Now, it is approximately 5:20 P.M. on the day in question. Dana's father called the residential treatment center to see if the boys had gotten there yet, despite the fact the residential treatment center had not seen fit to call Mr. Williamson and say I thought you were bringing the boys right over here and where are you. Williamson's father has to call. He says, did they get there. No. He says, well, I dropped them off about 5:00 P.M. right at the entrance there. Again, it became very obvious these boys were off again at the very doorstep of the treatment center, and that the Stevenses and Dr. Flynn did nothing except to write down in their little book, at 5:00 o'clock Mr. Williamson calls up and wants to know if the boys had gotten back there, he had dropped them off at the entrance.

(R. 157-60). Shortly thereafter, of course, the Wagner children were attacked less than ¼ mile away.

Notwithstanding that they stipulated to all of these facts below, the defendants have ignored them here and restated the facts in a light far more favorable to their position. For the most part, the defendants' restatement of the facts is designed simply to flavor their actions and omissions with a more palatable taste, since the evidence stated in a light most favorable to the plaintiffs is indeed difficult to swallow. We are entitled to the latter view of the evidence on the defendants' motions for summary judgment, however, so the defendants' efforts to minimize the facts are ultimately irrelevant here--and the facts alleged in the plaintiffs' complaint and stated in plaintiffs' counsel's opening statement must control.[6/] We also think that most of the facts added

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6/ For example, the defendants insist that the history of prior assaults committed by their wards can be dismissed as normal horseplay among teenage boys. This view of the evidence is offered in the face of the following allegations of the plaintiffs' complaint, which the defendants have conceded are true for purposes of the motions for summary judgment:

> 18. That on numerous occasions while the Defendants, DANA WILLIAMSON and ROLAND MENZIES, both minors, were residents of the Nova Living and Learning Center, said

by the defendants are relevant only to an issue never reached below, the reasonableness of their conduct--and therefore irrelevant to the narrow issue presented here, the threshold question of whether they had any legal obligation to act reasonably in the first place.

Finally, much of the defendants' restatement of the facts is designed to persuade this Court that they were involved in a socially desirable undertaking. This point is irrelevant as well, because we do not deny that the defendants' program may have had a laudable purpose (in theory, at least). Our point is simply that the defendants should exercise reasonable care in pursuing that laudable purpose, in view of the undeniably serious risks involved to others--and we remain convinced that that is very little to ask. For all of these reasons, we think the defendants' restatement of the facts underlying the issue decided on summary judgment is largely an irrelevant exercise, and we will continue to rely upon the facts stated in our complaints and in the opening statement of counsel as an accurate and adequate foundation for the issue before the Court.

> Defendants exhibited a propensity, tendency or proclivity (a) to behave in a physically violent manner, often abusing and injuring other residents of the Nova Living and Learning Center, (b) to behave in an uncontrollable manner, often carrying to extremes of physical violence activities which began or were initiated in the spirit of frivolity, (c) to oppress both physically and verbally, children smaller and younger than themselves, and (d) to escape or run away frequently from the Nova Living and Learning Center, often overnight, and while so at large, often committing offenses which would be considered crimes, if committed by adults.

In addition, plaintiffs' counsel stated in his opening statement that one of the boys had a history of forcibly raping young boys, and that he had been previously accused of molesting a five year-old girl (R. 144, 146). Plaintiffs' counsel also stated that the other boy had a history of violent behavior towards children, which included sexual molestation of an eight year-old daughter of a teaching parent at Nova, and that he often became so violent during fights at Nova that Nova's personnel were unable to stop him (R. 151-52). This is but one example of numerous similar efforts by the defendants to minimize the facts by viewing them most favorably to themselves. We will not belabor the point with further examples, however, because the defendants have stipulated that the controlling facts are those stated in the plaintiffs' complaint and plaintiffs' counsel's opening statement--both of which the Court is capable of reading itself.

The trial court heard brief argument on the motions for summary judgment--and, as everyone in the room fully expected (since the motions had been solicited, and notwithstanding a contrary ruling less than three months before), it granted the motions with the statement, "I find as a matter of law there is no duty" (R. 608-26). A summary final judgment was thereafter entered in the defendants' favor on the single stated ground that the defendants "owed no duty to the plaintiffs as a matter of law" (R. 1572). The plaintiffs thereafter served a timely motion for rehearing--which was briefly heard and denied (R. 1574, 628-33, 1578). A timely appeal followed (R. 1579). No cross-appeals were taken from the denial of the earlier motions for summary judgment, and the *only* issue argued in the District Court concerning the propriety of summary judgment was whether the defendants owed the plaintiffs any duty of care. The Fourth District reversed, and certified the "duty" issue to this Court. In view of the procedural background related above, the only issue properly before the Court is whether the defendants owed the plaintiffs a duty of reasonable care on the facts alleged in the complaints and stated in the opening statement of counsel.

II
ISSUE PRESENTED ON REVIEW

WHETHER THE DISTRICT COURT CORRECTLY CONCLUDED THAT, ON THE FACTS ALLEGED IN THE PLAINTIFFS' COMPLAINTS AND STATED IN OPENING STATEMENT OF COUNSEL, THE DEFENDANTS OWED THE PLAINTIFFS A DUTY OF REASONABLE CARE.

III
SUMMARY OF ARGUMENT

Relying upon a handful of recent decisions in only analogous cases from California and Minnesota, the defendants contended below that, while they may have had a duty to exercise reasonable care for the safety of *specifically identifiable* potential victims of their dangerous wards, they owed no duty of care to other *foreseeable* potential victims within the zone of risk created by their activities. Florida law is clearly to the con-

trary. As we hope to demonstrate, Florida law imposes upon the defendants a duty of reasonable care to prevent foreseeable injuries in the circumstances presented here in at least three different ways: (1) a general duty to exercise care for the safety of persons within the foreseeable zone of risk created by their activities; (2) a more specific duty to supervise their dangerous wards to prevent injury to foreseeable potential victims, which arises from their practical status as substitute "parents" of their wards; and (3) a duty assumed by the defendants by assumption of the undertaking itself. We will argue each of these three bases for the defendants' duty in turn.

We will also address several of the miscellaneous contentions raised by the defendants here. In response to some of the defendants' contentions that they do not stand *in loco parentis* to their wards, we will point out that all of the defendants conceded in the District Court that they occupied that status, and that they therefore have no business arguing to the contrary here. In any event, we will also demonstrate that that status fits all of them like a glove. In response to the defendants' contentions that they were entitled to summary judgment on the grounds that there were no material issues of fact requiring resolution by a jury on the sub-issues of negligence and proximate causation, we will point out that their motions for summary judgment did not raise those grounds; that they did not assert those grounds for affirmance in the District Court; and that those alternative grounds are therefore not properly before this Court. Because those alternative grounds are not properly before the Court, we will not involve the Court in a lengthy discussion of those two sub-issues.

IV
ARGUMENT

THE DISTRICT COURT CORRECTLY CONCLUDED THAT, ON THE FACTS ALLEGED IN THE PLAINTIFFS' COMPLAINTS AND STATED IN OPENING STATEMENT OF COUNSEL, THE DEFENDANTS OWED THE PLAINTIFFS A DUTY OF REASONABLE CARE.

1. The general duty of care to persons within the foreseeable zone of risk.

Mr. Justice Stewart once wrote that hard-core pornography could never be intelligibly defined, "[b]ut I know it when I see it." *Jacobellis v. Ohio*, 378 U.S. 184, 197, 84 S. Ct. 1676, 12 L. Ed.2d 793 (1964) (concurring opinion). We think the concept of "duty" in the law of negligence is alot like hard-core pornography--elusive of definition, but recognizable when it exists:

> Whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.

Smith v. Hinkley, 98 Fla. 132, 123 So. 564, 566 (1929); *Carter v. Livesay Window Co.*, 73 So.2d 411, 413 (Fla. 1954); *Green Springs, Inc. v. Calvera*, 239 So.2d 264, 265-66 (Fla. 1970). *See Rupp v. Bryant*, 417 So.2d 658 (Fla. 1982). In short, "[a] common law duty exists when a court says it does because it thinks it should". *Robertson v. Deak Perera (Miami), Inc.*, 396 So.2d 749, 752 (Fla. 3rd DCA), *review denied*, 407 So.2d 1105 (Fla. 1981) (J. Schwartz, dissenting). Or, as Dean Prosser has put it: ". . . the courts will find a duty where, in general, reasonable men would recognize it and agree that it exists." Prosser, *The Law of Torts*, p. 327 (4th ed. 1971). The law is perhaps no more complicated than that.[7/]

We therefore perceive it to be our function here to convince this Court simply that, as a matter of fundamental fairness in the social order, a residential treatment center

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7/ In the argument which follows, we will provide the Court with three legal bases for recognizing such a duty. The District Court accepted one of them, and reversed. Because it found one of the bases sufficient to support imposition of the duty, it did not reach our alternative bases. Because all three were advanced below, however, we take it that all three can be properly advanced here, as the defendants have conceded. *See Tillman v. State*, 10 FLW 305 (Fla. June 6, 1985).

housing incorrigibly delinquent, mentally disturbed, anti-social, violence-prone boys should exercise reasonable care to control their behavior and prevent them from roaming freely about the nearby neighborhood in search of small children upon which to act out their oft-repeated aggressive fantasies. We perceive no difficulty in fulfilling that function. We simply ask the justices of this Court to assume hypothetically that their own children were being raised within ¼ mile of the Nova Living and Learning Center. On those hypothetical facts, we are certain that this Court would declare in an instant that the defendants owed their hypothetical neighbors a duty of reasonable care to prevent precisely the type of unforgivable tragedy which occurred in the instant case. The *real* neighbors of the defendants' treatment center, of course, deserve no less.[8/]

Because of the obviousness of such a conclusion, it should come as no surprise to this Court that the duty which every reasonable person would recognize on the facts in this case is almost universally accepted in the jurisprudence of this nation:

> Duty of Those in Charge of Person Having Dangerous Propensities
>
> One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.

Restatement (Second) of Torts, §319. *See Prosser, supra*, pp. 348-50.[9/]

[8/] The defendants complained of a similar argument made below, characterizing it as an impermissible "golden rule" argument, and they are likely to complain once again here. We are aware that "golden rule" arguments cannot properly be made to a finder of *fact*, but we think it is entirely appropriate to make such an argument to a court charged with determining what the public policy will be with respect to a particular question of *law*--especially since this Court sits, in effect, as the legal conscience of all the citizens of the State.

[9/] The defendants will respond, as they contended below, that this provision of the Restatement is inapplicable to them because their institution was not a *security* institution. In our judgment, the defendants' institution should have provided security, and its failure to do so is simply a breach of the general duty of care which it owed to its neighbors. We need not debate the defendants on that point, however, because it is irrelevant that the defendants' institution was not a security institution. It is irrelevant because

While the existence of a general duty of reasonable care is undeniable on the facts in this case, the more appropriate question is the one put in issue by the defendants' contention that the scope of their duty of care does not extend to reasonably foreseeable potential victims of their wards, but is limited to specifically identifiable potential victims only. The defendants' contention is, in effect, merely a restatement of the "special duty" doctrine. Florida tort law recognized this doctrine once, but only in the context of tort liability for the negligent acts of municipal officers. *See Modlin v. City of Miami Beach*, 201 So.2d 70 (Fla. 1967). Recently, however, the "special duty" doctrine was roundly and soundly rejected by this Court:

> . . . by less kind commentators, [the "special duty" doctrine] has been characterized as a theory which results in a duty to none where there is a duty to all. Regardless, it is clear that the Modlin doctrine is a function of municipal sovereign immunity and not a traditional negligence concept which has meaning apart from the governmental setting. Accordingly, its efficacy is dependent on the continuing vitality of the doctrine of sovereign immunity. If this be so, does the Modlin doctrine survive notwithstanding the enactment of section 768.28? We think not.

Commercial Carrier Corp. v. Indian River County, 371 So.2d 1010, 1015 (Fla. 1979).[10/] This sentiment was carried a step further in *Rupp v. Bryant*, 417 So.2d 658 (Fla. 1982), in which this Court noted that *Modlin* had clearly overstated the law, and that all that was

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§319 is not limited to security institutions, but is addressed to all persons who "take charge of a third person" with dangerous propensities. *See* reporter's Comment to §319.

In the instant case, whether under armed guard or not, the dangerous residents of the defendants' treatment center were prohibited from leaving the grounds without permission and supervision, and they were clearly in the *custody* of the defendants. There can be no debate about that, because Dr. Flynn admitted precisely that at trial: "House parent refers to a relatively untrained couple who provide *custodial* . . . care . . ." (R. 311). Section 319 therefore clearly applies to the defendants' treatment center. *See DeLucia v. Metropolitan Dade County*, 451 So.2d 1008 (Fla. 3rd DCA 1984) (Bus driver has duty to control known dangerous passenger).

10/ *See Manors of Inverrary XII v. Atreco-Florida, Inc.*, 438 So.2d 490, 495 (Fla. 4th DCA 1983), *review dismissed*, 450 So.2d 485 (Fla. 1984) (J. Glickstein, concurring: "[absent rejection of the 'special duty' doctrine,] a duty to all may in effect become a duty to none.").

really required was a showing of "direct, personal injury" by the negligence of the municipal officer.[11/]

The "traditional negligence concepts" referred to in *Commercial Carrier* clearly do not incorporate the "special duty" doctrine; the scope of any given duty is determined by the scope of the reasonably foreseeable risk--and a defendant's duty therefore extends to reasonably foreseeable victims of the defendant's negligence. This Court has stated the traditional scope of a defendant's duty in a negligence action as follows:

> An action for negligence is predicated upon the existence of a legal duty owed by the defendant to protect the plaintiff from an unreasonable risk of harm. The extent of the defendant's duty is circumscribed by the scope of the anticipated risks to which the defendant exposes others. In order to prevail in a lawsuit, the plaintiff must demonstrate that he is within the zone of risks that are reasonably foreseeable by the defendant.

Stevens v. Jefferson, 436 So.2d 33, 35 (Fla. 1983), quoting *Crislip v. Holland*, 401 So.2d 1115, 1117 (Fla. 4th DCA), *review denied*, 411 So.2d 380 (Fla. 1981).

There are *numerous* additional Florida decisions defining the scope of particular duties solely in terms of the foreseeability of injuries to others within the zone of risk created by the defendant's conduct. *See, e. g., A. R. Moyer, Inc. v. Graham*, 285 So.2d 397 (Fla. 1973); *Green Springs, Inc. v. Calvera*, 239 So.2d 264 (Fla. 1970); *Carter v. Livesay Window Co.*, 73 So.2d 411 (Fla. 1954); *Smith v. Hinkley*, 98 Fla. 132, 123 So. 564 (1929); *Duff v. Florida Power & Light Co.*, 449 So.2d 843 (Fla. 4th DCA), *review denied*, 449 So.2d 843 (Fla. 1984); *Parliament Towers Condominium v. Parliament House Realty, Inc.*, 377 So.2d 976 (Fla. 4th DCA 1979); *Navajo Circle, Inc. v. Development Concepts Corp.*, 373 So.2d 689 (Fla. 2nd DCA 1979); *Homan v. County of Dade*, 248 So.2d 235 (Fla. 3rd DCA 1971); *Florida East Coast Railway Co. v. Booth*, 148 So.2d 536 (Fla. 3rd DCA),

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[11/] The "special duty" doctrine is also dying in other jurisdictions as well. For recent decisions rejecting this now thoroughly discredited doctrine, *see Irwin v. Town of Ware*, 392 Mass. 745, 467 N.E.2d 1292 (1984), and *Schear v. Board of County Commissioners of the County of Bernallilo*, 687 P.2d 728 (N.M. 1984).

cert. denied, 155 So.2d 551 (Fla. 1963). *Compare Kenan v. Houstoun*, 150 Fla. 357, 7 So.2d 837 (1942) (where danger unforeseeable, no duty of care exists). No Florida decision limits the scope of a defendant's duty to readily identifiable potential victims (except the now-repudiated "special duty" doctrine cases), which should be perfectly evident from the fact that the defendants rely upon no Florida decisions here.12/

In view of this well-settled rule, it should come as no surprise to this Court that the specific duty expressed in §319 of the Restatement (Second) of Torts has been implicitly recognized in many Florida decisions, and that all of them implicitly recognize that the scope of the duty extends to foreseeable potential victims of a dangerous "charge"--not merely specifically identifiable victims. *See, e. g., Newsome v. Department of Transportation*, 435 So.2d 887 (Fla. 1st DCA 1983), *review denied*, 459 So.2d 314 (Fla. 1984) (party charged with supervisory responsibility over incarcerated, dangerous individual may be found liable for individual's escape and rape of member of the public); *Department of Health and Rehabilitative Services v. McDougall*, 359 So.2d 528 (Fla. 1st DCA), *cert. denied*, 365 So.2d 711 (Fla. 1978) (party charged with supervisory responsibility over mentally ill, dangerous individual may be found liable for individual's escape and murder

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12/ This Court's recent decision in *First American Title Insurance Co., Inc. v. First Title Service Co. of The Florida Keys, Inc.*, 457 So.2d 467 (Fla. 1984), is inapposite on this point. In that case, this Court acknowledged the traditional tort concept that the scope of a defendant's duty is determined by the foreseeability of injury--but refused to recognize the existence of a tort action (for purely economic damage) for the negligent preparation of an abstract, and limited the universe of plaintiffs in such an action to those contracting with the abstractor and third-party beneficiaries of the contract. Unlike the action in *First American Title*, the instant action cannot be limited to a contract action; it is clearly an action sounding in tort, and governed by fundamental concepts of the law of negligence.

Neither is *Forlaw v. Fitzer*, 456 So.2d 432 (Fla. 1984), apposite here. Although the defendants relied on *Forlaw* in the District Court, they have abandoned their reliance upon it here--for good reason. *Forlaw* holds only that merely prescribing drugs to a known addict--in good faith and within the scope of accepted medical treatment and without more--"is not negligent". *Id.* at 434. That is not a holding that no duty of care exists in such a situation; it is a holding that the duty of care owed by the physician *was not breached* on the facts in that case. *Forlaw* is therefore beside the point here.

of member of public); *Bellavance v. State*, 390 So.2d 422 (Fla. 1st DCA 1980), *review denied*, 399 So.2d 1145 (Fla. 1981) (party charged with supervisory responsibility over mental patient may be found liable for negligent release of individual and subsequent injury of member of public); *Sosa v. Coleman*, 646 F.2d 991 (5th Cir. 1981) (construing Florida law; party charged with supervisory responsibility over incarcerated, dangerous individual may be found liable for individual's escape and murder of member of public). *Cf. Lambert v. Doe*, 453 So.2d 844, 848 (Fla. 1st DCA 1984) (landlord with knowledge of dangerous propensity of tenant--who was, like the assailants in this case, "a veritable time bomb ready to go off at any time"--may be found liable for tenant's sexual abuse of co-tenant); *DeLucia v. Metropolitan Dade County*, 451 So.2d 1008 (Fla. 3rd DCA 1984) (bus driver has duty to control known dangerous passenger).

Other recent decisions also fully embrace the logic of §319. In *Stack v. Saxton*, 455 So.2d 1322 (Fla. 4th DCA 1984), for example, a prisoner was brought by a sheriff's deputy to the Broward General Medical Center for psychiatric evaluation. With knowledge of his dangerous condition, the hospital had him committed involuntarily to another hospital from which he escaped. Weeks later, the escaped convict assaulted a turnpike employee at a toll booth. The employee sued the sheriff--who, in turn, filed a third-party complaint against the hospital, contending that the hospital was negligent in sending the prisoner to the other hospital. The trial court entered a summary judgment in favor of the hospital. The District Court reversed, holding that the hospital's knowledge of the dangerous propensities of the prisoner and the foreseeability of the harm which might follow from sending him to the other hospital imposed a duty of reasonable care upon it which may have been breached, and that the plaintiff was entitled to a trial of the facts. Although factually distinguishable, *Stack* is legally indistinguishable from the instant case--and it clearly puts to rest the defendants' contention below that the duty of care stated in §319 applies only to "security institutions". *See*, in addition, *Burroughs v.*

Board of Trustees of Alachua General Hospital, 328 So.2d 538 (Fla. 1st DCA 1976) (hospital owes duty of reasonable care to others when in charge of psychiatric patient).

Another recent Florida decision is instructive on the point in issue here. In *Emig v. State of Florida, Department of Health and Rehabilitative Services*, 456 So.2d 1204 (Fla. 1st DCA 1984), three juvenile delinquents escaped from a "Youth Detention Center" and assaulted, battered, and robbed the plaintiff. The plaintiff filed a tort action, charging the Department of Health and Rehabilitative Services with negligence in several particulars. The District Court held that the defendant owed the plaintiff a duty of reasonable care, although it held that only some of her claims were actionable as "operational level" breaches of that duty (the remainder being immune from suit under the doctrine of sovereign immunity, because they were deemed to be "planning level" breaches of the duty). *Emig* clearly (although implicitly) recognizes that §319 of the Restatement (Second) of Torts states the law of Florida--and because the defendants are not entitled to the defense of sovereign immunity in this case, *Emig* just as clearly requires approval of the District Court's decision in this case.

Notwithstanding that the "Youth Detention Center" in *Emig* and the so-called "Living and Learning Center" in this case are twins (although, perhaps, not "identical" twins), the defendants attempted to distinguish *Emig* below on the ground that the "Youth Detention Center" in issue there was a "security institution", and their "Living and Learning Center" was not. This distinction is really the crux of the defendants' entire argument, but it will not withstand scrutiny--because it is the purest form of "bootstrapping" which we have seen in a long time. In effect, the defendants are arguing that they would have had a duty of reasonable care if they had provided some security for their dangerous charges, but because they provided no security, they had no duty. Reduced to its essentials, the defendants' argument is that no duty to exercise reasonable care exists when no reasonable care has been taken. There is no support for that proposi-

tion in Florida law. The defendants cannot decide by their conduct alone whether they have a duty; that is a question for the courts of this State.

And the issue before this Court in this case is, of course, whether such a legal duty exists. That issue cannot be finessed by the mere fact that the defendants chose to provide no security, because on the facts in this case they clearly *should have provided* security to protect their neighbors from their dangerous charges. We remind the Court that one of the defendants' admission criteria was that juveniles accepted as residents could *not* have a history of violent behavior, and that it was the defendants' policy to expel all residents who ran away from the Center (R. 138-39, 148). Perhaps if these policies had been enforced, the defendants might have been justified in having little or no security. But these policies were not enforced in this case. Both juvenile assailants had histories of violent behavior, but were accepted as residents nevertheless--and both had run away on repeated occasions prior to their tragic encounter with Mrs. Wagner's children, but had not been expelled (R. 138, 141-52).

Having made the choice to keep these two boys at the Center in violation of their own policies, we think most reasonable persons would agree that the defendants should have provided some security (or, as the District Court held, at least have picked up the boys when advised of their precise whereabouts on three separate occasions before the assaults took place)--and, in our judgment, their failure to do so provides abundant support for a jury finding that they *breached* a duty owed the plaintiffs. Their failure to do so most certainly provides no support for a legal determination that they owed Mrs. Wagner and her children no duty of care in the first place. The defendants' bootstrapped argument simply turns the law on its head. It would be rejected, we think, by most reasonable persons, and we respectfully submit that it should be rejected by this Court as well--and a jury should be empowered to determine whether the defendants' failure to provide adequate security under the circumstances (among the other negligent acts and

omissions of which the defendants stand charged) breached the duty of reasonable care which the defendants owed the plaintiffs under §319, and under Florida law.

The defendants will no doubt point out that the duty expressed in §319 of the Restatement is only implicitly recognized in the decisions cited above, and that the question presented here has not been *squarely* decided by any Florida decision. We will not completely disagree with such a rejoinder, but we must nevertheless insist that the question has been very nearly "squarely" decided by the courts of this State. It is now well-settled that everyone in this State has a duty to exercise reasonable care to guard against foreseeable criminal attacks by persons *not* in their custody and control, and that that duty extends to all reasonably foreseeable potential victims of those third parties. *See, e. g., Stevens v. Jefferson*, 436 So.2d 33 (Fla. 1983); *Allen v. Babrab, Inc.*, 438 So.2d 356 (Fla. 1983); *Orlando Executive Park, Inc. v. Robbins*, 433 So.2d 491 (Fla. 1983); *Werndli v. Greyhound Corp.*, 365 So.2d 177 (Fla. 2nd DCA 1978); *Werndli v. Greyhound Lines, Inc.*, 412 So.2d 384 (Fla. 2nd DCA 1982); *Holley v. Mt. Zion Terrace Apts., Inc.*, 382 So.2d 98 (Fla. 3rd DCA 1980); *Green Companies v. Divincenzo*, 432 So.2d 86 (Fla. 3rd DCA 1983); *Ten Associates v. McCutchen*, 398 So.2d 860 (Fla. 3rd DCA), *review denied*, 411 So.2d 384 (Fla. 1981); *Winn-Dixie Stores, Inc. v. Johstoneaux*, 395 So.2d 599 (Fla. 3rd DCA), *review denied*, 402 So.2d 614 (Fla. 1981); *Medina v. 187th Street Apartments, Ltd.*, 405 So.2d 485 (Fla. 3rd DCA 1981); *Fernandez v. Miami Jai-Alai, Inc.*, 386 So.2d 4 (Fla. 3rd DCA 1980); *Lambert v. Doe*, 453 So.2d 844 (Fla. 1st DCA 1984).

If the Court will forgive us a rhetorical question--given the well-settled duty to exercise reasonable care to protect foreseeable victims from foreseeable criminal attacks by persons *not* in the custody or control of the defendant, why should there be no such duty where the foreseeable criminal attack will come from an individual who *is* in the custody and *subject to* the control of the defendant? In our judgment, the need for a duty in the context presented here is far more important than the duty already clearly

recognized by the law of this State to guard against foreseeable criminal attacks by unknown third parties. Certainly, the conjunction of this long line of authority and the decisions cited above, in which the principle of §319 of the Restatement is implicitly recognized, compel a conclusion in this case that the defendants owed the plaintiffs a simple duty of reasonable care to guard against the perfectly foreseeable criminal attacks perpetrated by their own wards.

Forsaking the settled principles of Florida tort law, the defendants relied below upon three California decisions and a Minnesota decision: *Thompson v. County of Alameda*, 27 Cal.3d 741, 167 Cal. Rptr. 70, 614 P.2d 728 (1980); *Beauchene v. Synanon Foundation, Inc.*, 88 Cal. App.3d 342, 151 Cal. Rptr. 796 (1979); *Vu v. Singer Co.*, 706 F.2d 1027 (9th Cir.), *cert. denied*, ___ U.S. ___, 104 S. Ct. 350, 78 L. Ed.2d 315 (1983);[13/] *Cairl v. State of Minnesota*, 323 N.W.2d 20 (1982). A fourth decision (which relies in turn on these decisions) has been added here: *Furr v. Spring Grove State Hospital*, 53 Md. App. 474, 454 A.2d 414 (1983).

Both *Thompson* and *Cairl* involve the duty to "warn". Those cases are simply inapposite here, because it cannot reasonably be contended that one has a duty to "warn" the public of a dangerous person within his custody. Cases in that genre obviously require specifically indentifiable victims. *Thompson* and *Cairl* also involve governmental defendants, and the "special duty" doctrine is still alive in that context in some states (unlike Florida, in which the doctrine has been soundly repudiated). Both cases also involve allegations of negligent "release", not negligent failure to supervise a dangerous person

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13/ In actuality, the defendants relied upon the district court decision in *Vu* below. The Ninth Circuit has subsequently affirmed that decision, however. We have treated *Vu* as a California decision, because it is a diversity case in which the federal court was required to apply California law. The concurring opinion in *Vu* quarrels with the result, but agrees with it because the Court was bound to apply California law. In our judgment, it is inferable from the majority opinion that the majority also was not pleased with the result compelled by California law.

within the "custody and control" of a defendant (as in this case). In *Furr*, no duty was found because the defendants had no right to control the plaintiff's assailant--unlike the defendants in this case, who had a contractual responsibility to supervise the two assailants, and who clearly had a right to control them. It is also worth noting that *Cairl* and *Furr* are bottomed almost exclusively upon *Thompson*.

Beauchene and *Vu* do stand more closely for the proposition relied upon by the defendants, but neither of them is particularly helpful because *Beauchene* simply purports to follow *Thompson*, and *Vu* simply purports to follow *Beauchene* (as the Ninth Circuit was required to do). In addition, neither the *Beauchene* nor *Vu* courts (nor the trial court below) had the benefit of the California Supreme Court's latest decision on the subject--in which it clarified *Thompson* to some extent, and expanded the universe of plaintiffs owed a duty in cases like this one to readily *foreseeable* victims, not merely specifically identifiable ones. *Hedlund v. Superior Court of Orange County*, 34 Cal.3d 695, 194 Cal. Rptr. 805, 669 P.2d 41 (1983).

Further, the Minnesota decision (which involves failure to warn and negligent release) is clearly inapplicable here, in view of the Minnesota Supreme Court's earlier decision in *Rum River Lumber Co. v. State*, 282 N.W.2d 882 (Minn. 1979)--which holds that §319 of the Restatement states the duty owed by one who has *custody* of a dangerous person, and which reaches a conclusion perfectly consistent with our position here. In addition, whatever vitality *Cairl* may once have had, it clearly has no vitality in the context presented here in view of the Minnesota Supreme Court's more recent decision in *Lundgren v. Fultz*, 354 N.W.2d 25 (Minn. 1984)--in which the Court held that, where a psychiatrist has the ability to control a dangerous mental patient and injury to a member of the public is foreseeable, he has a duty to exercise reasonable care which is owed to others under §319. *See*, in addition, *Irwin v. Town of Ware*, 392 Mass. 745, 467 N.E.2d 1292 (1984). All things considered, the handful of decisions relied upon by the defendants

do not convince us that the defendants have no duty of care to prevent perfectly foreseeable assaults against perfectly foreseeable potential victims--children residing in the neighborhood surrounding the institution in which their dangerous charges are kept in their custody and subject to their control.

We could dissect each of the decisions relied upon by the defendants and distinguish them in several ways from the instant case, but we will not do so. We think it is more appropriate simply to point out that the overwhelming majority of courts which have considered the question presented here in the various factual situations in which it has arisen have agreed with our position--not the clearly minority "special duty" position represented by the "no control" decisions relied upon by the defendants. *See, e. g., Semler v. Psychiatric Institute of Washington, D.C.*, 538 F.2d 121 (4th Cir.), *cert. denied*, 429 U.S. 827, 97 S. Ct. 83, 50 L. Ed.2d 90 (1976); *Lipari v. Sears, Roebuck & Co.*, 497 F. Supp. 185 (D. Neb. 1980); *Liuzzo v. United States*, 508 F. Supp. 923 (E.D. Mich. 1981); *Cansler v. State of Kansas*, 234 Kan. 545, 675 P.2d 57 (1984); *Peterson v. State*, 100 Wash.2d 421, 671 P.2d 230 (1983); *Bradley Center, Inc. v. Wessner*, 250 Ga. 199, 296 S.E.2d 693 (1982); *Ryan v. State of Arizona*, 134 Ariz. 308, 656 P.2d 597 (1982); *Grimm v. Arizona Board of Pardons and Paroles*, 115 Ariz. 260, 564 P.2d 1227 (1977); *Estate of Mathes v. Ireland*, 419 N.E.2d 782 (Ind. App. 1981); *Maroon v. State of Indiana*, 411 N.E.2d 404 (Ind. App. 1980); *Cristensen v. Epley*, 360 Ore. App. 535, 585 P.2d 416 (1978), *aff'd by equally divided court*, 287 Ore. 539, 601 P.2d 1216 (1979); *McIntosh v. Milano*, 168 N.J. Super. 466, 403 P.2d 500 (1979); *Leverett v. State of Ohio*, 61 Ohio App.2d 35, 399 N.E.2d 106 (1978); *Webb v. State of Louisiana*, 91 So.2d 156 (La. App. 1956). *Cf. Payton v. United States*, 679 F.2d 475 (5th Cir. 1982) (en banc); *Korenak v. Curative Workshop Adult Rehabilitation Center*, 71 Wis.2d 77, 237 N.W.2d 43 (1976). *See generally* Prosser, *supra*, pp. 348-50 (and decisions cited therein).

Finally, the defendants complain that the duty which we seek to impose upon them will make them insurers of the public's safety, and will discourage them and others from engaging in the socially desirable enterprise which they have undertaken. To that final desperate contention, we say nonsense. The imposition of strict liability (which we have not sought) might make the defendants insurers of a sort, but imposition of the ordinary, unexceptional duty of reasonable care (which is the only duty we seek) clearly will not. All that the duty will require (as it requires of millions of persons and enterprises in this State every day) is that the defendants use reasonable care in the operation of their inherently dangerous activity, to the end that foreseeable assaults upon children in the neighborhood be prevented if possible. If reasonable care is exercised, the defendants will not be liable--and the defendants are not deprived of their right to a jury trial on that issue by anything which we have argued here. Only if the defendants are found *negligent* will they be found liable, and it is therefore simply impossible that the duty which we seek to impose upon the defendants in this case will make them "insurers" of the public's safety.

Neither will the imposition of a duty of reasonable care necessarily put the defendants out of business. The law imposes a duty of reasonable care upon numerous socially desirable enterprises--like hospitals, physicians, blood banks, drug manufacturers, charities, schools and churches, not to mention the government itself. The duty does not put them out of business; it merely asks that they exercise reasonable care in carrying out their undertakings to avoid foreseeable harm to others within the zone of risk created by their activities. Nova University itself owes a duty of reasonable care to keep its premises safe for its invitees, to drive its motor vehicles with reasonable care, to perform its construction activities carefully, and the like--all to the end that foreseeable harm to others within the zone of risk created by those activities be avoided.

It is but a logical next step--and a very small step at that, if it is a step at all--for this Court to hold that the defendants also have an unexceptional duty to exercise reasonable care in the operation of their "Living and Learning Center", to the end that foreseeable harm to others within the zone of risk created by that activity be avoided. The alternative proposed by the defendants--that they be allowed to engage in their dangerous activity without exercising any care, with impunity, and without any accountability for perfectly foreseeable human tragedy caused to others--is repugnant to every civilized notion incorporated into our jurisprudence. There is nothing unreasonable about a simple duty of reasonable care--and no good reason exists why these defendants should be exempted from that duty, which is fairly imposed on everyone else.

We return to what we said in the beginning: a duty exists when a court says it does because it thinks it should. Everything in the Florida decisional law points toward recognition of the garden-variety duty alleged by the plaintiffs in this case. The handful of decisions relied upon by the defendants are bottomed upon a doctrine which has already been repudiated by this Court; they are therefore beside the point; and they are clearly overwhelmed by numerous contrary decisions of other jurisdictions--not to mention the thinking of some of the best legal minds of the nation, assembled together as the American Law Institute, and expressed in the Restatement (Second) of Torts. We respectfully submit that this Court cannot hold in good conscience that the defendants' duty to exercise reasonable control over their dangerous charges for the safety of others is limited merely to specifically identifiable victims. A duty to all simply cannot be a duty to none. The only conclusion which accords with common sense is that the defendants' duty of care extends to all reasonably foreseeable potential victims--especially children in the neighborhood in which the defendants located their residential treatment center.

We therefore respectfully submit that the defendants' request for privileged treatment by this Court should be rejected; that §319 of the Restatement (Second) of Torts

should be applied to the instant case; and that the District Court's recognition that the defendants owed a duty of reasonable care to persons within the foreseeable zone of risk created by their activity should be approved.

2. The specific duty arising from the defendants' status as substitute parents.

Our preceding argument assumes, in the words of §319 of the Restatement (Second) of Torts, that the defendants had "taken charge" of persons having dangerous propensities. On the facts in this case, we think it is undeniable that the two assailants were "charges" of the defendants. If we are in error on that score, however, there is a second duty alleged in the plaintiffs' complaints which was owed by the defendants on the facts in this case--the duty which a parent owes to foreseeable plaintiffs to supervise a dangerous child. It is, of course, this rationale for the duty of reasonable care which the District Court endorsed below. Although we think §319 of the Restatement is the more appropriate vehicle for recognition of a duty in this case--since the defendants appear to be engaged in a commercial, profit-making enterprise--we are content to accept the District Court's alternative approach to the problem, if necessary, so we will support it briefly with argument.

Because the two assailants were residents in the defendants' institution and living under the supervision and guidance of "house parents", and because the contracts by which the defendants received the two assailants into their charge required them to supervise their charges, it is simply undeniable on this record that the defendants stood partially in place of the assailants' parents and had a corresponding parental duty to supervise their charges. *See Rupp v. Bryant*, 417 So.2d 658 (Fla. 1982); *Leahy v. School Board of Hernando County*, 450 So.2d 883 (Fla. 5th DCA 1984); *King v. Dade County Board of Public Instruction*, 286 So.2d 256 (Fla. 3rd DCA 1973), *cert. denied*, 294 So.2d 89 (Fla. 1974); *Wyatt v. McMullen*, 350 So.2d 1115 (Fla. 1st DCA 1977); *DeBolt v. Department of Health & Rehabilitative Services*, 427 So.2d 221 (Fla. 1st DCA 1983).

Mr. and Mrs. Stevens have conceded the propriety of the District Court's conclusion that they stood *in loco parentis* to the two assailants. The remaining defendants have attempted to avoid that status here in various ways, however. We will address the merits of their various contentions in a moment. For the moment, we are constrained to point out that the contentions have been raised improperly for the first time here. They were not raised in the trial court in any specific way. Neither were they raised in the District Court. All of the defendants filed a single brief in the District Court, in which they did not contest our assertion that stood *in loco parentis* to their charges.

In fact, the defendants conceded in their brief in the District Court that our description of them as substitute parents was "certainly more accurate than attempting to analogize that relationship to the relationship which traditionally exists between correctional facilities and their inmates or between security mental institutions and their dangerous psychiatric patients" (appellees' brief, p. 34). Following that concession, which was the only mention of our contention that the defendants stood *in loco parentis* to their charges, the only thing the defendants argued was that *Gissen v. Goodwill*, 80 So.2d 701 (Fla. 1955), exonerated them from liability because their charges had never murdered anyone before. By now contending that the District Court should be reversed for finding them to stand *in loco parentis* to their charges, the defendants are asking this Court, in effect, to reverse the District Court on a point never argued to it, and upon a point which was conceded to it to boot. Because this point was not presented below, it clearly is not properly before the Court. *See Tillman v. State*, 10 FLW 305 (Fla. June 6, 1985).

In any event, the defendants' various efforts to avoid their status as substitute "parents" are without merit. Nova (and its insurer) argue that only Mr. and Mrs. Stevens qualify as substitute "parents"; that Nova cannot be a "parent" because an "institution" cannot be a parent; and that the District Court's holding that it stands *in loco parentis* to the juveniles in its custody and control imposes a form of "vicarious liability" upon it not

envisioned by the concept of *in loco parentis*. We disagree. If, as all the decisions cited above hold, a district school board stands *in loco parentis* to its students when they are under its custody and control through the direct supervision of its teachers, then certainly Nova University can stand *in loco parentis* to its resident juvenile delinquents when they are under its custody and control through the direct supervision of its employees, Mr. and Mrs. Stevens.

In addition, of course, if Nova University stands *in loco parentis* over its own minor (normal) students, as it concedes, then certainly it can stand *in loco parentis* to the two badly disturbed assailants entrusted to its care under another educational program operated under its auspices. Moreover, Nova agreed in the contracts by which it gained custody of the two assailants entrusted to its care that it would provide appropriate supervision for them--and thereby expressly agreed to stand *in loco parentis* to both of them. None of this is of any importance in the final analysis, however, because once it is understood that Mr. and Mrs. Stevens stood *in loco parentis* to the two assailants (as everyone here has conceded), Nova automatically becomes vicariously liable for their negligence under the doctrine of *respondeat superior*, because of the employer-employee relationship between them. Put another way, Nova is liable to the plaintiffs for any breach of the duty owed by its employees to the plaintiffs, whether it is a "parent" or not, so Nova's effort here to avoid what it conceded below is not only untimely, but ultimately irrelevant.[14/]

[14/] Nova also suggests what it calls a "subtle solution", which would narrow the circumstances under which it stood *in loco parentis* to the two assailants to those times when they were "on the school's premises", and relieve them of any supervisory responsibility when they were gone from the premises. This contention deserves no more than a footnote in response, because the two assailants entrusted to Nova's supervision in this case were expressly forbidden to be off the premises at the time in question, and Nova passed up three opportunitites to return them to the premises on the day in question. In effect, Nova is making another "bootstrap" argument. It is arguing that, because it failed to enforce its own rules and supervise its charges in any way, it should have no duty to supervise. Perhaps Nova's argument might make some sense where its charges are off

Dr. Flynn attempts to avoid the District Court's conclusion that he also stood *in loco parentis* to the two assailants on two grounds. First, he argues (like Nova) that only Mr. and Mrs. Stevens can occupy that status in view of their "direct" responsibility for the assailants, and that his only indirect responsibility over the assailants as supervisor of Mr. and Mrs. Stevens disqualifies him from that status. We disagree. Once again, if--as all the decisions cited above hold--a distant, supervisory institution like a school board stands *in loco parentis* to its students notwithstanding that only its teachers have "direct" responsibility for their supervision, then certainly Dr. Flynn, as supervisor of Mr. and Mrs. Stevens, can stand *in loco parentis* to their charges as well. Clearly, Dr. Flynn had every bit as much responsibility for ensuring the safe operation of the activity under his charge as did his subordinates, Mr. and Mrs. Stevens. The buck, after all, ordinarily stops at the top--not at the bottom.

Dr. Flynn next seeks to avoid the status conferred upon him by the District Court by arguing that the plaintiffs did not expressly plead that his duty of reasonable care was bottomed on the concept of *in loco parentis*. It is true that the plaintiffs' amended complaint does not make specific reference to the doctrine of *in loco parentis* with respect to Dr. Flynn, but that is because there is no requirement in the Rules of Civil Procedure that the existence of a legal "duty" be alleged at all. All that is required by Rule 1.110(b), Fla. R. Civ. P., is "a short and plain statement of the ultimate facts showing that the pleader is entitled to relief . . .". As a result, it is routinely held that allegations of the existence of a legal duty are not required in a complaint; instead, what is required are allegations of "ultimate facts which establish a relationship between the parties giving rise to a legal duty on the part of the defendant to protect the plaintiff

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the premises and being supervised elsewhere, such as at school, but it clearly makes no sense when its charges have "eloped" from the Center in violation of its rules and it does nothing to ensure their return--notwithstanding that it had three opportunities to do so on the day of the terrible tragedy, a tragedy which it could easily have prevented simply by enforcing the rules it had itself adopted for precisely that purpose.

from the injury of which he complains". *Ankers v. District School Board of Pasco County*, 406 So.2d 72, 73 (Fla. 2nd DCA 1981).[15/] The allegations of ultimate fact contained in the plaintiffs' complaint are more than sufficient to establish the existence of a duty of reasonable care on the part of Dr. Flynn (bottomed upon the legal doctrine of *in loco parentis*), and his complaint that the existence of this legal concept was never specifically pled below is therefore clearly without merit.[16/] *See Nazareth v. Herndon Ambulance Service, Inc.*, 467 So.2d 1076 (Fla. 5th DCA 1985). We therefore take it that our allegation that Dr. Flynn owed the plaintiffs a duty of reasonable care is sufficient to support a holding from this Court that Dr. Flynn owed the plaintiffs a duty of reasonable care.

Having established that the various challenges to the defendants' status as substitute "parents" are both untimely and without merit, we turn briefly to the merits. It is settled in this State that parents are not liable for the torts of their minor children merely because of their paternity, but that they may be found liable for a child's tort where they know that injury to another is a probable consequence of a failure of supervision. *See Gissen v. Goodwill*, 80 So.2d 701 (Fla. 1955); *American Fire Ins. Co. v. Maxwell*, 274 So.2d 579, 70 A.L.R.3d 607 (Fla. 3rd DCA), *cert. dismissed*, 279 So.2d 32 (Fla.

15/ *Accord, Rio v. Minton*, 291 So.2d 214 (Fla. 2nd DCA), *cert. denied*, 297 So.2d 837 (Fla. 1974). *See Florida Power & Light Co. v. Bridgeman*, 133 Fla. 195, 182 So. 911 (1938); *Carter v. J. Ray Arnold Lumber Co.*, 83 Fla. 470, 91 So. 893 (1922); *Bolton v. Smythe*, 432 So.2d 129 (Fla. 5th DCA 1983). *Cf.* Forms 1.945, 1.946, 1.951, Fla. R. Civ. P. In fact, the mere allegation of the existence of a legal duty (which is no more than a legal conclusion), without allegations of ultimate fact establishing the existence of the duty, are insufficient. *Smith v. Holley*, 363 So.2d 594 (Fla. 4th DCA 1978). We also remind the Court that Rule 1.110(g) requires that "[a]ll pleadings shall be construed so as to do substantial justice".

16/ Dr. Flynn actually received more than he was entitled to, because paragraph 20 of the plaintiffs' complaint (quoted at page 9 of Dr. Flynn's brief) expressly alleges the existence of a legal duty of reasonable care owed to the plaintiffs. Although this allegation was not requried, it was clearly sufficient to allege the duty we seek here under any theory which would support it.

1973); *Bullock v. Armstrong*, 180 So.2d 479 (Fla. 2nd DCA 1965). In *Seabrook v. Taylor*, 199 So.2d 315 (Fla. 4th DCA), *cert. denied*, 204 So.2d 331 (Fla. 1967), the District Court recognized this duty of supervision, and held that the liability of parents for the tort of a child depended upon the "whole of the circumstances". 199 So.2d at 318.

Recently, the Third District disagreed in a sense with *Seabrook* (and its own prior decision in *Maxwell*), and held that the *Gissen* decision created a duty to prevent the tortious act of a child only where the child was in the habit of committing the specific tortious act in suit. *Snow v. Nelson*, 450 So.2d 269 (Fla. 3rd DCA 1984). The District Court disagreed in principle with *Gissen*; stated that it was unable to reconcile *Gissen* "with what we feel to be the dictates of justice and fairness"; and certified the question to this Court. The District Court in the instant case expressed the same sentiment, and certified a similar question.

We hesitate to predict how this Court will decide *Snow*. We note instead merely this: if the narrow restraints upon the parental duty of supervision which the Third District purported to find in *Gissen* are relaxed, then approval of the District Court's decision in the instant case automatically follows. Even if the narrow restraints in *Gissen* are reaffirmed, however, approval is also mandated, because the facts in this case fall squarely within the narrow confines of *Gissen*, however narrow those confines may be. In this case, the two assailants who beat Peter to death and strangled Christy into unconsciousness had a long history of assaulting small children. The defendants contend that *Gissen* relieves them of any duty of care because their two charges had never murdered anyone before. That contention clearly has no application to Christy's personal injury action, because she was not murdered. It also has no application to the wrongful death action, because the difference between injury and death after being brutally assaulted is simply a matter of degree. If that were not so, then an action would lie if Peter had survived, but would not lie because he died of his injuries--and that simply makes no sense.

Moreover, it is a fundamental precept of the law of negligence that the existence of a duty and liability for its breach does not depend upon foresight of the exact consequence of the act or omission:

> In order for injuries to be a foreseeable consequence of a negligent act, it is not necessary that the initial tortfeasor be able to foresee the exact nature and extent of the injuries or the precise manner in which the injuries occur. Rather, all that is necessary in order for liability to arise is that the tortfeasor be able to foresee that *some* injury will likely result in *some* manner as a consequence of his negligent acts.

Crislip v. Holland, 401 So.2d 1115, 1117 (Fla. 4th DCA), *review denied*, 411 So.2d 380 (Fla. 1981) (emphasis in original). *Accord*, *Spivey v. Battaglia*, 258 So.2d 815 (Fla. 1972); *Pinkerton-Hays Lumber Co. v. Pope*, 127 So.2d 441 (Fla. 1961); *Railway Express Agency v. Brabham*, 62 So.2d 713 (Fla. 1952); *Goode v. Walt Disney World Co.*, 425 So.2d 1151 (Fla. 5th DCA 1982), *review denied*, 436 So.2d 101 (Fla. 1983). *See Stevens v. Jefferson*, 436 So.2d 33 (Fla. 1983); 38 Fla. Jur.2d, *Negligence*, §37 (and numerous decisions cited therein). To accept the defendants' contention--that only prior assaults of the same intensity resulting in death and brain damage would be sufficient to demonstrate foreseeability in this case--would require this Court to repudiate that well-settled proposition of law, and reduce the law of negligence to an absurdly miniscule shell of itself. We do not believe this Court is prepared to do that, *Gissen* notwithstanding.

The substitute parents in this case had prior knowledge of a habitual pattern (established both before and during their tenure as parents) of almost precisely what occurred to Mrs. Wagner's children; they clearly had a duty under Florida law to exercise reasonable supervision over their two charges; and that duty was clearly owed to all foreseeable potential victims of their charges' tortious conduct.[17/] The trial court's determination

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17/ We are not impressed by Mr. and Mrs. Stevens' argument that the prior history of assaults occurred only prior to and while *in* the institution, and that no children had been beaten up on the prior occasions when the two assailants had run away. Surely, violent assaults outside the institution are foreseeable where they have occurred with regularity in the more supervised confines of the institution.

that the defendants owed the plaintiffs no duty of care was therefore erroneous for this additional reason, and the District Court's thoughtful analysis of this alternative ground for imposing a duty of care upon the defendants should (unless the Court opts for adoption of §319 of the Restatement instead) be approved.

3. The duty assumed by assumption of the undertaking itself.

Finally, there is a third, universally recognized, general proposition in the common law of negligence which is also relevant here. Simply put, even in cases where the common law of negligence does not impose a duty of care, if one undertakes to act for the benefit of another, the law charges him with a duty to carry out his undertaking with reasonable care:

> One who enters on the doing of anything intended with risk to the persons or property of others is held answerable for the use of a certain measure of caution to guard against the risk * * * it is the duty of every artificer to exercise his art rightly and truly as he ought.

Banfield v. Addington, 104 Fla. 661, 140 So. 893, 896 (1932).

Since that pronouncement, the courts of this State have routinely recognized the proposition that one who assumes a duty is charged with an obligation to carry out that duty with reasonable care. *See, e. g., Rupp v. Bryant*, 417 So.2d 658 (Fla. 1982) (where school assumes supervision of social club, it has a duty to supervise with reasonable care); *Vendola v. Southern Bell Telephone & Telegraph Co.*, 10 FLW 1589 (Fla. 4th DCA 1985); *City of Tamarac v. Garchar*, 398 So.2d 889 (Fla. 4th DCA 1981) (en banc); *Kaufman v. A-1 Bus Lines, Inc.*, 416 So.2d 863 (Fla. 3rd DCA 1982); *Cox v. Wagner*, 162 So.2d 527 (Fla. 3rd DCA), *cert. denied*, 166 So.2d 755 (Fla. 1964); *Barfield v. Langley*, 432 So.2d 748 (Fla. 2nd DCA 1983); *Fidelity & Casualty Co. of New York v. L. F. E. Corp.*, 382 So.2d 363 (Fla. 2nd DCA 1980); *Padgett v. School Board of Escambia County*, 395 So.2d 584 (Fla. 1st DCA 1981); *Shealor v. Ruud*, 221 So.2d 767 (Fla. 4th DCA 1969). *See generally*, Prosser, *supra*, pp. 343-48.

These decisions also make it clear that an "assumed duty" is owed both to specifically identifiable persons, and to foreseeable third persons who might be harmed by the duty assumed to another. *See* §§323 and 324A of the Restatement (Second) of Torts. The latter duty is described in §324A as follows:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if (a) his failure to exercise reasonable care increases the risk of such harm . . . .

The reporter's Comment to this provision makes it perfectly clear that the "assumed duty" at issue here was owed not only to the two assailants, but to Mrs. Wagner and her children as well:

> *a* The rule stated in this Section parallels the one stated in §323, as to the liability of the actor to the one to whom he has undertaken to render services. This Section deals with the liability to third persons.
>
> *b* This Section applies to any undertaking to render services to another, where the actor's negligent conduct in the manner of performance of his undertaking, or his failure to exercise reasonable care to complete it, or to protect the third person when he discontinues it, results in physical harm to the third person or his things. It applies both to undertakings for consideration, and to those which are gratuitous.

In the instant case, the defendants contracted to supervise their wards and thereby clearly assumed the duty to supervise them. The defendants also prescribed rules for the conduct of their wards, one of which prohibited their wards from leaving the premises without the permission of the defendants and unless accompanied by a responsible adult. The defendants clearly recognized in this rule alone that allowing their dangerous wards to roam freely about the community posed a grave foreseeable risk to the residents therein, and thereby assumed the duty of protecting their neighbors from the dangerous propensities of their wards. Because the law is well-settled that a duty assumed is a duty enforceable by others in a negligence action, the trial court erred in concluding other-

wise for this additional reason--and the District Court's decision should be approved for this alternative reason.

4. The sub-issues of negligence and proximate causation.

Although Nova (and its insurer) have stuck to the single issue presented here, the remaining defendants have not. They argue that the District Court's decision must be quashed because, as a matter of law, they were neither negligent nor, if negligent, was their negligence a legal cause of the plaintiffs' damages. Surely, both of these factual sub-issues of the plaintiffs' causes of action belong to a jury (if the threshold duty found by the District Court exists), not to this Court. The Court need not reach the issues, however, because they have been improperly raised here.

As we noted in our statement of the case and facts, the only issue put in issue in the trial court by the defendants' motions for summary judgment was the threshold issue of whether the defendants owed the plaintiffs a duty of reasonable care, and the summary judgment which the defendants obtained was based solely upon that ground. Because the sub-issues of negligence and proximate causation were not placed in issue in the trial court, they could not have been asserted properly in the District Court. *Loranger v. State of Florida, Department of Transportation*, 448 So.2d 1036 (Fla. 4th DCA 1983); *Gisela Investments, N.V. v. Liberty Mutual Insurance Co.*, 452 So.2d 1056 (Fla. 3rd DCA 1984).[18/] Moreover, the arguments raised here concerning those sub-issues also were not raised in the District Court in any manner, shape, or form. They have been raised for the first time here, and they therefore seek a reversal of the District Court for a ruling which it never made, upon a point which was not before the trial

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18/ Perhaps the defendants could have cross-appealed the earlier denial of their prior motions for summary judgment, or at least argued those motions in the District Court, but they did not.

court. For both of these reasons, this Court simply cannot entertain the arguments. *See Tillman v. State*, 10 FLW 305 (Fla. June 6, 1985).

If the arguments are entertained, however, we respectfully submit that they should be given short shrift. This Court has held on numerous prior occasions that summary judgments (and directed verdicts) on the issues of negligence and proximate causation are rarely proper--and especially improper where liability turns upon foreseeability, as it does in this case. *See, e. g., Stevens v. Jefferson*, 436 So.2d 33 (Fla. 1983); *Allen v. Babrab, Inc.*, 438 So.2d 356 (Fla. 1953); *Rupp v. Bryant*, 417 So.2d 658 (Fla. 1982); *Gibson v. Avis Rent-A-Car System, Inc.*, 386 So.2d 520 (Fla. 1980); *Welfare v. Seaboard Coast Line Railroad Co.*, 373 So.2d 886 (Fla. 1979); *Schwartz v. American Home Assurance Co.*, 360 So.2d 383 (Fla. 1978); *Vining v. Avis Rent-A-Car Systems, Inc.*, 354 So.2d 54 (Fla. 1977); *Helman v. Seaboard Coast Line Railroad Co.*, 349 So.2d 1187 (Fla. 1977); *Wills v. Sears, Roebuck & Co.*, 351 So.2d 29 (Fla. 1977).[19/]

Without belaboring the point--and reminding the Court only of the two assailants' past histories of violent assaults upon children, their frequent elopements, and their frequent criminal acts while off the premises; the defendants' own rules prohibiting their elopement from the Center and requiring their expulsion if they did elope; and the three callously disregarded opportunities to pick them up during the day of Mrs. Wagner's ultimate nightmare--we respectfully submit that, at the very least, reasonable persons could differ on the questions of negligence and proximate causation in this case, and that this case is a classic case for resolution by a finder of fact (if, of course, the defendants owed the plaintiffs a duty at the outset to exercise even a modicum of care for their

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19/ *See*, in addition, *Crislip v. Holland*, 401 So.2d 1115 (Fla. 4th DCA), *review denied*, 411 So.2d 380 (Fla. 1981); *Goode v. Walt Disney World Co.*, 425 So.2d 1151 (Fla. 5th DCA 1982), *review denied*, 436 So.2d 101 (Fla. 1983); *Cole v. Leach*, 405 So.2d 449 (Fla. 4th DCA 1981).

well-being).[20/] This Court would be required to ignore decades of its own decisional law, not to mention the constitutional right to a jury trial, in order to accept the defendants' untimely contention that they are entitled to judgment as a matter of law--and because we are confident that it is not willing to do that (especially when the contention has clearly been waived in the first place), we will spare it further argument on the point.

V
CONCLUSION

It is respectfully submitted that the question certified to this Court by the Fourth District should be answered in the affirmative--and that the District Court's ultimate conclusion that the defendants owed the plaintiffs a duty of reasonable care be approved, for any of the several reasons advanced above.

VI
CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 16th day of August, 1985, to: JOHN KELLY, ESQ., 1415 East Sunrise Boulevard, Ft. Lauderdale, Florida 33338; G. WILLIAM BISSETT, ESQ., 66 W. Flagler Street, Miami, Florida 33130; and to JOSEPH LOWE, ESQ., Marlow, Shofi, Ortmayer, Smith, Connell & Valerius, 1428 Brickell Avenue, Suite 204, Miami, Florida 33131.

Respectfully submitted,

RUBIN & RUBINCHIK, P.A.
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2450 Hollywood Blvd.
Hollywood, Florida 33020

[20/] The defendants' contention that they should be relieved of their negligence by the so-called "efficient, intervening" negligence of Mr. Williamson in merely dropping the boys at the gate deserves no more than a footnote in response. Certainly, given the fact that his son was at the Center because of his incompetence as a parent, a jury could find his action foreseeable--and, therefore, that his action was not an unforeseeable intervening cause sufficient to relieve the defendants from the consequences of their own negligence. More importantly, the argument ignores the fact that the defendants twice ignored reports of the boys' precise location, and twice declined to pick them up, well before they ever showed up at Mr. Williamson's house.

HARRY A. GAINES, P.A.
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-and-

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