IN THE SUPREME COURT OF FLORIDA
CASE NO. 67,160

NOVA UNIVERSITY, INC., JANET STEVENS, CHARLES STEVENS, et al,

Petitioners,

vs.

JOSEPHINE C. WAGNER, et al,

Respondents.

ON PETITION TO REVIEW A CERTIFIED QUESTION OF THE FOURTH DISTRICT COURT OF APPEAL

BRIEF OF PETITIONERS JANET STEVENS, CHARLES STEVENS AND CHICAGO INSURANCE COMPANY

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SUMMARY OF ARGUMENT

The Fourth District Court of Appeal certified the following question to this Court:

> Does knowledge of a child's violence require a parent to exercise control to avoid injury to another caused by subsequent violence which is more severe?

The question posed is too general to be answered as a matter of law since the answer will depend on the relative severity of the prior and subsequent violence.

In the present case, Dana and Roland, two young male housemates of a private residential, juvenile treatment center, left without permission and brutally beat, stomped and strangled a four year old and a six year old they happened to come upon. The four year old sustained a crushed skull and died of asphyxia. The six year old was strangled into unconsciousness but survived. Charles and Janet Stevens, whom we represent, were employed as houseparents at the Center.

Florida law requires that a parent must first be put on notice of a child's propensities to commit a specific type of act before the parent may be held liable for subsequent occurrences of that particular conduct. Here, the Center had no knowledge of the boys' homicidal capacities. During previous elopements they had not hurt anyone. Though they had been

involved in the usual fights among themselves at the Center, there is no evidence in the record that anyone was ever seriously hurt as a result of those scuffles. The boys' homicidal assaults, being unforeseeable, constituted the sole proximate cause, or the active and efficient intervening cause, of the injuries to their victims.

Assuming the Stevens were somehow negligent in failing to stop the boys from running away from the non-custodial center or in pursuing them more strenuously once they escaped, the Stevens' negligence was not a proximate cause of the injuries the boys inflicted. On the day after they ran away, the boys showed up at the home of Dana's father. Dana's father learned, from calling Mr. Stevens, that the boys had run away and that they were expected back immediately.

Although he promised Mr. Stevens that he would return the boys to the Center, and Mr. Stevens desisted from sending the police to Dana's home on the strength of this promise, Dana's father dropped the boys off some distance from the Center. The boys did not return to the Center, but ran off and, within a very short time, found and assaulted the children. Dana's father behaved in such an unforeseeable and negligent manner when he failed to return the boys to the Center, after undertaking to do so, that his negligence constituted the sole proximate cause, or the active and efficient intervening cause,

of the victims' injuries.

Because of the several levels of unforeseeability that intervened between the Stevens' alleged negligence and the victims' injuries, one of the key ingredients of "duty," namely, foreseeability of harm, is missing in this case. Public policy considerations also militate against imposing a duty of care on the Stevens.

Residential treatment centers for troubled juveniles are highly favored, non-restrictive alternatives to juvenile detention facilities. These centers work closely with courts and public agencies in an effort to provide non-custodial alternatives for dependent or troubled minors. Dana was originally sent to the Center by the juvenile court. Both Dana and Roland were repeatedly returned to the Center by the juvenile court after each of their previous elopements.

The complex decision of a court or public agency to refer or divert a child to a non-custodial setting is the very essence of an immune discretionary planning function. The decision by a private residential program to accept a referral, or retain a child in its program, is equally complex and must be equally free from the threat of liability if hindsight shows that the child should have been placed in a more physically restrictive setting.

Even if the Stevens did have a duty to their wards' victims, they did not act negligently. They were merely employees of

of Nova University under whose auspices the Center was created. The Stevens were at the very bottom of the decisional hierarchy at the Center. They could do nothing more than implement the Center's policies, make recommendations to their superiors, and act as a component part of a much larger Center staff. The Stevens had no unilateral authority to refuse to admit Roland and Dana to the program or exclude them from it once they were in.

When Roland and Dana eloped, the Stevens acted as they were supposed to do by calling the police and alerting the Director of the Center. Since Roland and Dana had never posed a threat to anyone's safety during prior elopements, the Stevens had no reason to expend extraordinary effort or time to secure their return but could reasonably wait until they were caught by the police, returned voluntarily, or were brought back by Dana's father.

Because of the absence of proximate causation, or duty, of the Stevens, the summary judgment in their favor, entered by the trial court, should be reinstated.

INTRODUCTORY SUMMARY

On the evening of February 16, 1975, fifteen year old Dana Williamson and thirteen year old Roland Menzies ran away from their residential group foster home. Their home was one of two private houses owned by defendant, Nova University, which made up the Nova Living and Learning Center ("the Center").

The Center was a state-licensed, private agency which accepted private and public placements of dependent and delinquent male adolescents. Dana had been accepted by the Center following a juvenile court finding of dependency; Roland had been placed directly by his parents. At the time of their elopement, Dana had lived at the house for about three months and Roland for slightly over one year.

The house in which Dana and Roland lived was under the supervision of Charles Stevens and his wife, Janet Stevens, whom Nova employed and trained as houseparents. The Stevens lived at the house with their three minor children. Their function was to manage the day-to-day affairs of the house and to provide an open, warm and positive home environment for up to nine or ten boys in which good behavior would be reinforced with prescribed points and privileges, and bad behavior punished by a loss of benefits. Although the home was not locked, barred or fenced, the boys were not supposed to leave the premises without permission.

By the afternoon of February 17, 1975, following their flight the day before, Dana and Roland had found their way to the home of Dana's father, Charles Williamson. Mr. Williamson, after calling and learning from Charles Stevens that Dana and Roland had run away, agreed to drive Dana and Roland back to the Center. He did not drive them to the Center door but dropped both boys off some distance away. Instead of returning to the Center, Dana and Roland continued their flight.

Within a short period of time, and close to where they had been dropped off by Dana's father, Dana and Roland came upon four year old Peter Wagner and his six year old sister, Christy. Using their feet, their hands and some wire, and without any apparent motive, Dana and Roland brutally beat, stomped and strangled Peter and Christy. Christy survived but Peter did not.

Dana and Roland were caught several days later. They confessed to the crimes, pleaded guilty to manslaughter, and were imprisoned. The civil actions which are the subject of this appeal are a wrongful death action arising out of Peter's death and an action for damages for Christy's injuries.

STATEMENT OF THE CASE AND FACTS

Although the first complaint in this case was filed in 1976 (R. 2784), the relevant procedural events begin in late 1982, on the eve of trial of the plaintiffs' 1979 amended

complaint (R. 4043). At that time, the Stevens, along with Nova and other defendants, moved for summary judgment. (R. 885-892). The Stevens sought summary judgment on the grounds that there was no legal or causal relationship between anything they did or did not do and the acts of Dana and Roland. (R. 885-7). Their motion was denied (R. 936), and the trial began.

Following a mistrial, the Stevens, along with the other defendants, again moved for summary judgment. (R. 1502; 1483-4). Five memoranda of law were filed by the parties. (R. 1503-16; 1485-1501; 1539-1559; 1560-1566). Based upon these new memoranda, and additional argument, the trial judge reconsidered his earlier position and granted all the defendants' motions for summary judgment on the grounds that the defendants "owed no duty to the plaintiffs as a matter of law." (R. 1572). This appeal followed. (R. 1579).

In formulating a statement of facts, we are faced with an unusual problem. Nova stipulated, in its memorandum of law in support of its motion for summary judgment, that

> For the purposes of this motion only, all the allegations of the complaints are admitted.... (R. 1485,n.1).

The Stevens, who were independently represented, did not join in Nova's stipulation. They stipulated, instead, that

> For the purposes of this memorandum, it will be assumed that Plaintiffs would be able to prove all the facts asserted in their opening statement. (R. 1503,n.1).

The opinion of the Fourth District Court of Appeal acknowledged and accepted Nova's stipulation, but said nothing about that of the Stevens'. Wagner v. Nova University, et al., 10 FLW 1383 (Fla.4th DCA June 5, 1985).

Rather than attempt to intuit just what part, if any, of the record the District Court relied upon, or argue that Nova's stipulation was never binding upon the Stevens or that their stipulation is no longer operative, we have chosen to do the following. We will generally honor both stipulations except for those demonstratively untrue or grossly overstated assertions contained in the amended complaint and the plaintiffs' opening statement. We will also allow ourselves a citation to the record where the amended complaint and the opening statement fail to address some essential aspect of this case.

We take this position because we are confident that an answer to the question certified by the District Court will not hinge on what the complaint or the plaintiffs' opening allege, but on the indisputable fact that Dana and Roland never exhibited any behavior remotely comparable to their homicidal conduct on February 17, 1975.

The essential, factual allegations against the Stevens--considering that the extent of their appreciation of Dana's and

Roland's alleged capacity for violence will be largely determinative of their liability herein--are contained in paragraphs 18, 19 and 29 of the amended complaint. (R. 4043). Paragraph 18 alleges that Dana and Roland, while at the Center

> 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.

Paragraph 19 alleges that the Stevens actually observed the "violent and ungovernable propensities, tendencies or proclivities" of Dana and Roland and knew or should have known that they "had a propensity to commit acts which could normally be expected to cause harm to others." The Stevens, it is alleged, nevertheless failed to properly control and supervise Dana and Roland. Paragraph 29 essentially reincorporates the allegations of Paragraph 18 and 19 in an in loco parentis count.

When we search the factual record for instances of assaultive conduct that either boy had previously exhibited to the Stevens during the only time periods that are relevant here--

while they were on runaway status--we find the following. From his admission to the Center in November, 1974, to his final departure on February 16, 1975, Dana was never reported as committing any assaultive act against any person during any of his elopements from the Center.

Roland, like Dana, would run away from the Center. During his elopements, Roland had a propensity toward larceny. He was repeatedly accused of, or implicated in, thefts of bicycles, shoplifting and assorted break-ins to cars and buildings during his sojourns from the Center. On each occasion, Roland was apprehended, diverted from the juvenile justice system and returned to the Center. (R. 2660-2680; 4123-4154).

Just as Dana's case, however, the records of Roland's elopements are totally devoid of any mention of offenses against persons. However incorrigible and rebellious Roland may have been in an institutional or supervised atmosphere, the record reveals, without exception, that he committed only larcenous offenses during his elopements from the Center.

The factual allegations made against Dana and Roland in the plaintiffs' opening statement (R. 134-171) are not at variance with the foregoing. All the allegations regarding Dana's conduct contained in the plaintiffs' opening statement refer to Dana's behavior before he arrived at the Center. Aside from boyish fighting, no incidents of gratuitous violence or assaultiveness of any kind are attributed to Dana, during the

period of time that he resided at the Center. This includes the periods Dana was physically present at the Center as well as during his periods of elopement. (R. 141-150).

The plaintiffs also allege in their opening statement that Roland sexually molested the Stevens' young daughter. (R. 151). Roland's act, which consisted of no more than a touching (R. 3932-3), was viewed by the Stevens, at the time, simply as an attempt to provoke them. As the Stevens contemporaneously reported the incident in their daily log:

> Roland is trying to get us mad so we will hit him (Beat him). He wants to have us fired and be able to sue us.

(Center log of 4/16/74, R. 1719-1875: R. 2745). The Stevens, it may be inferred, since the record is silent on this point, did not feel the incident so ominous or threatening to their three young children's safety that Roland had to be punished further than by a loss of privilege points.

The plaintiffs' also allege that Roland engaged in "violent behavior" toward others. (R. 151). With few exceptions, Roland's physical aggression was confined to the institutional setting of the Center and directed at the adults and children with whom he lived and closely interacted. Roland's anger was manifested primarily in terms of fighting and malicious, non-injurious assaultive acts.

Fighting and assaultive behavior was not at all uncommon among the population of the Stevens' home. According to

Mr. Stevens:

> I would say that [Roland] didn't fight any more than any of the other boys did in the program, which would be--there was perhaps one or two fights a week between any two boys. It was--you get nine boys in one house together, a total of fourteen people living in there, tempers are bound to flare, especially with boys with a background such as these, being problem children anyway. (R. 3931-3)

Fights in the house were generally quick and uneventful. For the most part one boy would take a swing at another. In Mr. Stevens' words, "That would be it. Sometimes they connected, sometimes they didn't." (R. 3931-3).

The record, in short, is totally devoid of any evidence that Dana or Roland ever killed a person, attempted to kill a person, choked a person, stomped on a person, rendered a person unconscious, caused a person to seek medical treatment, or, during any period of elopement, as much as touched another person in any aggressive way.

Against this background, Roland and Dana, who had never run away together before, departed from the Center without permission on the evening of February 16, 1975. (R. 2981). As was their usual practice, the Stevens reported the boys' elopement to the police, and to Dr. John Flynn, the Director of the Center. (R. 3082-83; 3933-35).

The next day, February 17, 1975, after learning that the

boys had been seen in the area, Charles Stevens received a telephone call from Charles Williamson, Dana's father. Mr. Williamson told Mr. Stevens that both boys were at his home and was informed that the boys had run away from the Center. Mr. Stevens advised either Dana's father or Dana, or both, that if the boys did not return voluntarily, the police would be sent for them. Dana's father told Mr. Stevens that he would bring the boys back to the Center. To create the illusion that the boys were returning voluntarily, Dana's father dropped them off some distance from the Center. The boys waited until Dana's father had left and then went off in another direction. About an hour later, Dana and Roland came upon Peter and Christy Wagner and in the manner already described, killed Peter and almost killed Christy. (R. 158-160; 4087-4154 - containing, at page 1 of the "Confidential Evaluation" sections in the Pre-Sentenced Investigations of Dana and Roland, the confessions of each boy).

The Fourth District Court of Appeal reversed the defendants' summary judgments for two reasons. First, the Court found evidence of "failure to exercise parental control" in the ease with which Dana and Roland left the Center and in the Center's failure to bring them back the next day although advised of their whereabouts. Secondly, observing that "violence is violence," the Court found that Dana's and Roland's alleged propensity for fighting sufficiently revealed their latent

capacity for homicidal violence. Wagner v. Nova University, supra, 10 FLW 1383-4.

For the latter reason, the Court distinguished the case of Gissen v. Goodwill, 80 So.2d 701 (Fla.1955) which clearly requires a child to have committed the same type of injurious act before the child's parents can be held liable for its repetition.

For the reasons that follow, the conclusions of the District Court as to the liability of Charles and Janet Stevens lack factual support in the record and are, as a matter of law, unsound.

POINT I

THE ALLEGED NEGLIGENCE OF THE STEVENS IN ALLOWING DANA AND ROLAND TO LEAVE THE CENTER AND IN FAILING TO SECURE THEIR EARLIER RETURN WAS NOT A PROXIMATE CAUSE OF THE WAGNERS' INJURIES WHERE DANA AND ROLAND HAD NEVER EXHIBITED A PROPENSITY FOR VIOLENCE DURING THEIR ELOPEMENTS AND HAD NEVER COMMITTED ANY ACT WHILE AT THE CENTER REMOTELY COMPARABLE IN VIOLENCE, METHODS AND CONSEQUENCES TO THE ACTS COMMITTED AGAINST THE WAGNERS.

Gissen v. Goodwill, 80 So.2d 701 (Fla.1955) is completely dispositive on this point. Gissen, a hotel employee, lost his finger when little Geraldine Goodwill slammed a hotel door upon it. Geraldine had previously destroyed furniture and furnishings in the hotel and had harrassed, struck and injured hotel guests

and employees. Gissen sued Geraldine's parents, but failed to allege that Geraldine "had a propensity to swing or slam doors at the hazard of persons using such doors." Id. at 705.

This court first stated the general rule that paternity, per se, will not render a parent liable for a child's torts unless the parent

> fails to exercise parental control over his minor child although he knows or in the exercise of due care should have known that injury to another is a probable consequence. Id. at 704.

This rule was then interpreted to require allegations and, by inference, proof "that the child had the habit of doing the particular type of wrongful act which resulted in the injury complained of." Id. at 705. Mr. Gissen's complaint, which had failed to contain such an allegation, was, therefore, held to have been properly dismissed.

The Fourth District Court of Appeal acknowledged that Gissen v. Goodwill seems to require that the minor must have engaged in the particular conduct in question before parental liability can attach. The District Court attempted to distinguish Gissen v. Goodwill by asserting that "violence is violence" and that Dana's and Roland's prior acts of "beating upon other children" was what happened to the Wagner children "with the exacerbated result as the only difference." The District Court then certified this question:

> Does knowledge of a child's volence require a parent to exercise conrrol to avoid injury to another caused by subsequent violence which is more severe?

The question, with all deference to the lower court, is so unfairly loaded and unresponsive to the facts of our case that it is more a rhetorical flourish than an analytical inquiry. Obviously, if a child is known to slap, and thereafter whacks, his subsequent violence, if we can call it that, "is more severe." But that is hardly our case. We are dealing here with a particularly brutal murder preceded by nothing more serious than petty larcenies and non-injurious demonstrations of boyish physicality.

The difference between a few blows exchanged with a fellow housemate that result at most in a bloody nose or a split lip, and murder and attempted murder, attended by stomping, strangulation and a crushed skull, are as far apart on any meaningful scale of assaultive conduct as any two forms of physical violence can be. We would not be here if all Dana and Roland had done was punch Peter and Christy a couple of times and continue on their way.

The plaintiffs' own description of the physical assault underscores this crucial difference between the boys physical behavior at the Center and the homicidal rage they directed at the Wagner children. After having caught the Wagner children, Dana and Roland

> then proceeded with the ritualistic execution, to stomp on these two children with their feet, brutalize them with their feet, hold their feet on the neck of Christy and snap it back and forth, strangle Christy to unconsciousness, and stomp on the head of the little four year old Peter until they crushed and demolished his skull and killed him. (R. 166).
>
> * * *
>
> The evidence will show that one of the doctors who saw Peter at the emergency room will state that he had never seen a boy as badly battered as Peter in his career. (R. 168).

Peter was not merely beaten, but, like his sister, he was also strangled. In fact, the cause of Peter's death was attributed to strangulation and not to his crushed skull. (R. 3952-54).

The record is devoid of any evidence that Dana and Roland killed, attempted to kill, strangled, or stomped anyone, at any time, anywhere, but we need not look so far afield for evidence of Dana's and Roland's allegedly violent propensities. The only relevant times to consider in determining whether Dana and Roland previously exhibited the violent propensities they displayed to the Wagner children are those previous times when Roland and Dana were outside institutional and adult custody or control. When we look at each of those times--after Roland and Dana had run away from the Center, but before they were apprehended--we find no evidence of <u>any</u> assaultive behavior

against anyone. Dana and Roland might take a bicycle, shoplift, or steal from a house or car, but there was not the faintest suggestion of assaultive behavior in their personalties when they were free of a therapeutic or institutional environment.

The distinction between institutional or supervised conduct, and unsupervised conduct, is an important one. Spann v. State of Florida, Department of Corrections, 421 So.2d 1090 (Fla.4th DCA 1982), for example, notes the obviously unique capacity of an institutional environment to breed assaultive behavior. And Charles Stevens candidly observed that in a house with fourteen persons, nine or whom are delinquent or disturbed, some assaultive and combative behavior is the norm not the exception. (R. 3931-3). See, also, Diffenderfer v. State, infra.

Post-Gissen Florida case law is unhelpful in directly answering the real question behind the one certified herein, namely, how similar in method and consequences must prior and subsequent violence be before the latter becomes foreseeable. Apparent in many out-of-state cases, however, is an assumption that a child's prior and subsequent behavior must be comparable and proportionate if the child's parents are to be held accountable for it. As a general rule, the more heinous, injurious and outrageous the subsequent conduct, the more reluctant courts will be to hold parents liable unless that conduct was clearly foreshadowed by equally violent acts.

Illustrative of the sensible and necessary principle that parents should not be held infinitely liable for every injurious consequence of their child's general incorrigibility and nasty disposition, see, Prosser and Keeton Torts, 5th ed., §124, are the cases of Parsons v. Smithey, 504 P.2d 1272 (Ariz.1973) and Moore v. Crumpton, 295 SE.2d 436 (N.C.1982).

In Parsons v. Smithey, the minor, Michael Smithey, entered the plaintiff's home and began beating her head with a hammer and demanding she take off her clothes. When the plaintiff's daughter intervened, the minor began beating her too. He then assaulted the plaintiff with a knife and belt buckle, almost severing her ear and leaving her with contusions, lacerations and compound fractures.

Michael's prior behavior had clearly been assaultive. He once told a stranger on the street to take her clothes off and when she refused, threw rocks at her. He once followed a classmate home, forced his way into her house, and pushed her around. At school, he was observed to poke and pummel other children. He committed arson at ages eight and eleven, ran away at nine, stole his father's watch at ten, and went joy-riding three times at fourteen. He was recommended for psychiatric treatment on at least three occasions.

The Arizona Supreme Court nevertheless approved a directed verdict in the parents' favor following the plaintiff's presentation of the foregoing evidence. Because of the extra-

ordinarily uncontrolled and mindlessly brutal nature of Michael's acts, the court sought, but was unable to find in the above acts, some equally violent, antecedent behavior sufficient to put the parents on notice:

> Under no view of the evidence is it proper to conclude that Mr. and Mrs. Smithey should have reasonably foreseen that Michael had a disposition to perform such a violent act.
>
> * * *
>
> To hold that the parents should have foreseen from his past conduct and from the fact that they were advised to seek psychiatric help for Michael, that Michael would commit such violent and vicious acts would stretch the concept of foreseeability beyond permissible limits. [Emphasis supplied]

Id. at 1277.

In Moore v. Crumpton, supra, John, Jr., broke into the plaintiff's home while under the influence of narcotics and repeatedly raped her using a knife to overcome her resistance. The North Carolina Supreme Court approved the summary judgment in favor of John's parents.

John was also less than a model child. He had been using marijuana and other controlled substances from an early age resulting in his hospitalization on one occasion for a drug overdose. He skipped school and had frequent conflicts with his parents. He was once arrested for carrying a concealed knife, had once assaulted someone with a knife, and owned an

assortment of guns and knives. He had once impregnated a young girl. His parents had been consulting mental health professionals about him for eight years.

Nevertheless, because of the enormity of the subsequent crime, the court was unable to find that John's prior offenses and disorders had sufficiently predicted its occurrence:

> We find no indication in the forecasts of evidence that the defendant parents had any indication that John, Jr. was disposed to commit the crime committed against the plaintiff. At worst the parents were aware that John, Jr. had been involved in an assault on another person with a deadly weapon a year or more before the attack on the plaintiff. They knew he had used controlled substances and were aware that he had engaged in sexual intercourse. However, they had no recent information to indicate that another assault might occur or that John, Jr. might become involved in a forceable rape accomplished through the threatened use of a deadly weapon.

Id. at 442.

The principle that the more heinous the subsequent offense the more closely the prior conduct must approximate it is equally applicable to institutional residents and those who stand in loco parentis to them. In fact, as applied to children who are presumptively incorrigible, the need for their prior behavior to be scrutinized for clear signs of the specific subsequent viciousness, is particularly important if their custodians are not to become, in the manner of Rylands v.

Fletcher, 1868, L.R., 3 H.L. 330, absolutely liable for all damages the children cause during their elopements.

In Diffenderfer v. State, 278 NYS.2d 710, 714 (Ct.Cl. 1967), where youths from a residential rehabilitation center attacked and rendered a townsperson unconscious, the court stated:

> Admittedly, there had been the usual disciplinary problems with some boys in the center much the same as with any group of boys. There was a suggestion that on prior occasions when boys had left the center for an evening that there had been some problems but none of which could be said to be of a serious nature such as an assault.

And in Staruck v. County of Otsego, 138 NYS.2d 385, 387 (App. Div. 1955), where a boy from a boarding home shot the plaintiff, the court observed:

> While the delinquent had been guilty of conduct sufficient to stamp him as a delinquent child nevertheless the proof was hardly such as to indicate to a reasonable mind that he would shoot someone.

Roland, and to a much lessor extent Dana, could have been any of the boys in the preceding cases. The methodology and consequences of their ultimate homicidal rage so far differed from and surpassed anything they had been guilty of in the past, that their acts against the Wagner children could not fairly be said to be foreseeable.

In terms of proximate causation, Roland's and Dana's criminal acts were the sole proximate causes or the active and efficient intervening causes of the Wagners' injuries. An active and efficient intervening cause will relieve a prior negligent actor of liability if its occurrence is unforeseeable. An intervening cause is foreseeable if it falls into one of three categories:

> First, the legislature may specify the type of harm for which a tort-feasor is liable. ...Second, it may be shown that the particular defendant had actual knowledge that the same type of harm has resulted in the past from the same type of negligent conduct. ... Finally, there is the type of harm that has so frequently resulted from the same type of negligence that "'in the field of human experience' the same type of result may be expected again."

Gibson v. Avis Rent-A-Car System, Inc., 386 So.2d 520, 522-3 (Fla. 1980).

The first category is obviously inapplicable to the Stevens since the legislature has not imposed liability on foster parents for their wards' acts. The second and third categories are also inapplicable. What happened to the Wagner children had never before resulted from admitting a delinquent boy to the Center, from failing to remove a delinquent boy from the Center, or during any delinquent boy's elopement from the Center. And it obviously cannot be said that admitting boys like Dana and Roland to residential centers has so frequently resulted in acts of

homicidal aggression against passing strangers that those consequences may be expected again.

In short, traditional principles of causation and foreseeability are all that are needed to resolve this appeal in favor of the Stevens. Whatever the future of Gissen v. Goodwill may be, its holding is not necessarily called into question by the facts of this case which so clearly bespeak a total absence of foreseeability.

Where an active and efficient intervening cause is present, as it was in this case, the issue of proximate causation may be decided by the court as a matter of law. National Airlines, Inc. v. Edwards, 336 So.2d 545, 547 (Fla. 1970); Kwoka v. Campbell, 296 So.2d 629 (Fla.3rd DCA 1974). The summary judgment in favor of the Stevens was clearly proper and should be reinstated.

POINT II

THE ALLEGED NEGLIGENCE OF THE STEVENS IN ALLOWING DANA AND ROLAND TO LEAVE THE CENTER AND IN FAILING TO SECURE THEIR EARLIER RETURN WAS NOT A PROXIMATE CAUSE OF THE WAGNERS' INJURIES WHERE BETWEEN THE TIME OF DANA'S AND ROLAND'S ELOPEMENT AND THEIR CRIMINAL ACTS, DANA'S FATHER BREACHED A DUTY HE UNDERTOOK TO RETURN BOTH BOYS TO THE CENTER.

We have previously described how both boys showed up at the home of Dana's father, Charles Williamson, on February 17, 1975, and the father, after learning from Mr. Stevens that the

boys had run away, and that Mr. Stevens was about to send the police, told Mr. Stevens that he would bring the boys back to the Center. Instead of doing what he said he would do, Dana's father, in a by then hopelessly transparent and futile effort to make the boys' return appear voluntary, dropped both boys off some distance away from the Center and drove away without making sure that the boys ever reached the Center door.

The negligence of Charles Williamson constituted the sole proximate cause or the active and efficient intervening cause of the Wagners' injuries because it simply was not foreseeable to Mr. Stevens, as a matter of law, that after agreeing he would do so, Charles Williamson would intentionally fail to transport Dana and Roland back to the Center. Gibson v. Avis Rent-A-Car System, Inc., supra.

Mr. Williamson's duties and liabilities when he accepted temporary custody of Dana and Roland, were analogous to those of the father of the juvenile in Repko v. Seriani, 214 A.2d 843, 845 (Conn.Cir.Ct.1965). There, a resident of the state school for boys was permitted to live with his father on an experimental basis. He soon ran away from his father's home and, while at large, caused some damage with an automobile.

The father was sued for the damage his son had caused and sought to defend on the ground that once his son ran away from him, whatever control he may have had terminated and reverted to the state. The court disagreed stating that while

the boy "was technically in the custody of the state, he was under the control of his father. ...The duties of a parent belong to the parent while the child is in his control." To a like effect, see Potomac Insurance Co. v. Torres, 401 P.2d 308, 309 (N.M. 1965).

Here, Dana and Roland were effectively, although temporarily and conditionally, placed in Charles Williamson's custody, by Mr. Stevens, for the purpose of transporting them back to the Center. Charles Williamson breached the duties attendant upon his acceptance of this responsibility by failing to return the boys to the Center. Dana and Roland committed the crimes against the Wagner children within an hour after Mr. Williamson's default.

When Charles Williamson undertook to transport Dana and Roland back to the Center, he was required to perform his undertaking with reasonable care. Banfield v. Addington, 104 Fla. 661, 140 So. 893 (1932); Barfield v. Langley, 432 So.2d 748 (Fla.2nd DCA 1983). Mr. Williamson did not merely perform his duty negligently. By not returning the boys to the Center, he failed to perform his duty at all.

Parents' active intervening negligence in the supervision of their children has routinely been held to relieve a prior negligent actor of responsibility for the subsequent harm. For example, in Perotta v. Tri-State Insurance Co., 317 So.2d 104 (Fla.3rd DCA 1975), the plaintiff was a guest in the defendant's

house. The defendant had negligently left his pool unguarded and when an infant invitee fell in, the plaintiff injured himself attempting a rescue. The proximate cause of the plaintiff's injuries was held not to be the defendant's failure to guard his pool, but the intervening failure of the parents of the infant to supervise their child knowing of the existence of the pool hazard.

Similarly, in Alves v. Adler Built Industries, Inc., 366 So.2d 802 (Fla.3rd DCA 1979) where an infant drowned while playing on the defendant's unprotected sand lot, the intervening negligence of the parents in failing to properly supervise their child knowing the child's propensity to play in the lot, and not the allegedly dangerous condition of the defendant's land, was held to be the proximate cause of the child's death.

Since Mr. Williamson's complete abdication of the responsibility he had assumed for the boys' return was totally unforeseeable, it served as the sole proximate cause or the active and efficient intervening cause of the final leg of Dana's and Roland's ill-fated elopement and the accompanying harm to the Wagner children. Under the rules in National Airlines, Inc. v. Edwards, supra, and Kwoka v. Campbell, supra, the trial judge was entitled to resolve the proximate causation issue as a matter of law. The summary judgment in favor of the Stevens was fully justified under the above facts and should be reinstated.

POINT III

THE STEVENS OWED NO DUTY TO THE WAGNER CHILDREN UNDER THE CIRCUMSTANCES OF THIS CASE, BUT IF THEY DID, THEY DISCHARGED THEIR DUTY IN A REASONABLE MANNER.

In treating proximate causation in Points I and II, we have impliedly, but necessarily, treated an aspect of duty as well. Foreseeability of harm is as much an ingredient of proximate cause as it is a prerequisite to a finding of duty. Thus, by asserting in Points I and II that the Stevens, because of the active and efficient intervention of Dana's and Roland's unforeseeable criminality, and Charles Williamsons' breach of duty, did not proximately cause the Wagners' injuries, we also were indirectly arguing that the Stevens owed no enforceable duty, under the circumstances, to the Wagners.

Point III, however, will treat the existence vel non of the Stevens' duty in its larger sense--as "an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection." Prosser and Keaton, Torts 5 ed., §53. Even from this broader perspective, it is clear that the Stevens had no duty to the Wagners.

At the very heart of the plaintiffs' position are the twin assumptions that Dana and Roland should never have been admitted to the Center in the first place, but once there,

should not have been permitted to stay because of their incorrigibility. However, the decision whether to provide non-custodial alternatives like the Center for minors like Dana and Roland was not one that had been delegated to the Stevens. In §39.001 (3) Fla. Stat.(1973), of the Florida Juvenile Justice Act, the Legislature decreed that a child is to be afforded the least restrictive treatment alternative:

> [A] child removed from the control of the child's parents shall receive care, custody, and discipline as nearly as possible equivalent to that which should have been given to the child by the parent....

The decision by a judicial or public agency to place a child in a legislatively-approved, non-custodial setting like that of the Center, is a prime example of a discretionary planning function. In Thompson v. County of Alameda, 167 Cal. Rptr. 70,74 (1980), the County decided to remove a child from confinement and return custodial supervision to his mother. Within a day after his release to his mother, the child killed a five year old neighbor. The court observed, in finding the County immune from liability, that

> Choosing a proper custodian to direct the attempted rehabilitation of a minor with a prior history of antisocial behavior is a complex task. ... The determination involves a careful consideration and balancing of such factors as the protection of the public, the physical and psychological needs of the minor, the

> relative suitability of the home environment, the availability of other resources such as halfway houses and community centers, and the need to reintegrate the minor into the community.

The identical analysis, and balancing of costs and benefits, is engaged in routinely by private juvenile rehabilitation centers such as the Center. By choosing to accept select referrals from public agencies and by choosing to admit select private patients who might otherwise have required more direct supervision by a court or public agency, these private centers exercise the most complex types of discretion and have become an integral part of the juvenile justice system. The illogic in holding a private rehabilitation center liable for discretionary activities that would be immune if performed by a public agency, has been cogently expressed in Beauchene v. Synanon Foundation, Inc., 151 Cal. Rptr. 796 (Ct. App. 1979).

There, Bentley, an adult convicted of burglary, was admitted to probation on condition that he enter the Synanon drug program and not leave it without permission. Synanon, a voluntary, private residential rehabilitation center chose to accept the probationer as a patient. Synanon's screening policy was not to accept an applicant who would be dangerous to himself or society.

When Synanon accepted Bentley, it knew or should have known that Bentley had a long history of behavorial difficulties, arrests, convictions, criminal confinement, and escape attempts.

Id. at 797. Bentley had even run away from a treatment program similar to Synanon's without permission. Five days after his admission to Synanon, Bentley eloped from the center and injured or killed several persons.

California had a statute immunizing a public entity from the consequences of its decision to parole or release. Florida, we would note, has reached a similar position judicially, in Reddish v. Smith, 468 So.2d 929 (Fla. 1985).

Behind California's statute was an attempt to balance the public interest in safety from physical assault against "the public policy favoring innovative criminal offender release and rehabilitation programs," and the concern that imposing upon a custodian liability for his wards' behavior would "encourag[e] the detention of prisoners in disregard of their rights and society's needs." The court believed that some risk from non-custodial rehabilitation methods was unavoidable and that everyone "who chances to come into contact with a parolee or probationer must risk that the rehabilitation effort will fail." Beauchene v. Synanon Foundation, Inc., supra, 151 Cal.Rptr. at 798-9.

The court concluded by holding that Synanon, like its judicial or public agency counterpart, had no duty to those whom its elopees injured:

> [T]he same public policy that moved the Legislature to immunize public release and rehabilitation programs from liability--to encourage such

> innovations in the interests of criminal justice--compels the conclusion that respondent's private release and rehabilitation program owed no legal duty to this appellant. In light of the purpose behind the governmental immunity, it would be incongruous to hold that, while the state is immune from liability for its decision to assign Bentley to, and his unauthorized departure from, the Synanon program, the program itself owed appellant a duty not to accept Bentley or to prevent his unauthorized departure. To hold respondent civilly liable would deter the development of innovative criminal offender release and rehabilitation programs, in contravention of public policy.

Id. at 799.

The reasoning of Beauchene v. Synanon Foundation, Inc. is directly applicable here. That case is certainly not distinguishable on the grounds that Bentley was an adult and Dana and Roland were juveniles. If age is relevant at all, it would work in favor of permitting more rather than less innovation in implementing non-custodial alternatives for juveniles.

Also without distinguishing importance is the fact that Bentley was a probationer and Dana and Roland were not. The Center, like Synanon, voluntarily chose whom to accept in its program. As it happens, however, Florida's juvenile system was integrally involved in the placement or continued residence of Dana and Roland at the Center.

On September 4, 1974, two months before he took up residence in the Center, Dana was adjudicated a "dependent child in need of supervision" by the Broward County Juvenile Court. The pertinent part of the dependency Order read:

> [I]t is the finding of the Court that this child is in need of a special residential program, most appropriately offered by the Nova Living and Learning Center; further, the Court has been informed that the child has been accepted by this program but that his admission therein cannot be effected for at least thirty (30) days; it is the further finding of the Court that additional detention of DANA is not necessary and that he should be released into the custody of his natural father. (R. 1644-1718; 2603-2659; 4087-4122).

The quasi-custodial regime imposed upon Dana was legally indistinguishable from Bentley's probation. In his Order, the Juvenile Court judge first conditionally released Dana to his father, and then, placing Dana's legal custody in the Division of Family Services, directed Dana's placement in the Center.

When Dana ran away from the Center on January 25, 1975, he was caught and accused of breaking and entering and larceny. On February 3, 1975, the Division of Youth Services Intake Counsellor decided that it would be in Dana's best interests to return him to the Center rather than seek a more restrictive custodial alternative. The State Attorney's Office agreed. (R. 2603-2659; 4087-4122).

The February 3rd decision to return Dana to the Center was, as a matter of law, a decision of the juvenile court.

First, in his September 4, 1974 Order, the court had retained jurisdiction over Dana's case. Secondly, pursuant to §39.06(7) Fla. Stat.(1973), juvenile court jurisdiction would have again automatically attached at the time Dana was taken into custody for his elopement and larceny. The Division of Youth Services is statutorily empowered to act as the intake arm of the juvenile court for the purpose of making the initial decisions on whether a child should be enmeshed in or diverted from the more formal juvenile justice process. §39.04 Fla. Stat.(1973.

Roland's case is only slightly different. Although Roland was placed at the Center by his parents and not by a court order, the intake arm of the juvenile court repeatedly chose to return Roland to the Center rather than formally charge him with delinquency as a result of his numerous larcenous activities and elopements. On at least three occasions, in February, May and July, 1974, Roland was diverted by the intake arm of the juvenile court and sent back to the Center. (R. 2660-2680; 4123-4154).

Four months before his admission to the Center, Roland had been adjudged a child in need of supervision. On that occasion, October 11, 1973, it was the intake arm of the juvenile court that directed Roland's parents to the Center. (R. 2260-2680; 4123-4154).

Against this background of repeated juvenile court and agency endorsements of the Center as a suitable residence for

Dana and Roland, the analogy of Beauchene v. Synanon Foundation, Inc. to our case becomes complete. The reasoning of Beauchene v. Synanon Foundation, Inc., coupled with the unforeseeability of Roland's and Dana's homicidal conduct, require that no duty of care by the Stevens to the Wagners be recognized as a matter of public policy.

Even if we were to hypothesize a duty of care, the Stevens would not have violated it. No one suggests that the Stevens, who were at the very lowest level of the Center hierarchy, had the discretion unilaterally to deny Dana and Roland admission to the Center, or to terminate either boy's residence at the Center. The Stevens functioned simply as members of a much larger staff consisting, in part, of mental health professionals who, in conjunction with the Center Director, had the ultimate power to deny admission or terminate the tenure of any Center resident. (R. 1437, 1461-2; 1876-2177).

The screening board on which the Stevens sat could only recommend admission or rejection to the Director. (R. 1437; 3063-65; 3069; 3098). The decision on how and whether to provide a boy with professional therapy or whether to remove a boy from the program were, like all major operational decisions, entrusted to the collective staff in what were called "staffing" sessions, or to the Directors. (R. 1461-2; 1480; 3041-42; 3049-50; 3068; 3099-3100; 3939-40).

Ultimately, the Director and the Associate Director had "bottom line responsibility" for the operation of the Center and the "policies and procedures instituted within the program." (R. 1456, 1461; 1462-3; 3037-38). The Stevens, who were rated highly effective house parents by those who trained them, were merely responsible for implementing these decisions and policies by operating the program on a day-to-day basis. (R. 1457-8).

Among the procedures that the Center had formulated was one defining the Stevens' duties when a boy ran away. Running away was not regarded by the Center as either extraordinary or unpardonable. Running away was, in fact, an expected occurrence both at the Center, and in juvenile residential treatment programs generally. As the Center's Associate Director stated:

> In any kind of program that deals with adolescents that is probably one of the most frequent happenings that exist regardless of the orientation of the program.

(R. 1442-3; 1456-7). Obviously, all elopements could be stopped if all residential centers were converted into jails; but that would be an anti-therapeutic step clearly at variance with public policy.

At the Center, if a boy had not returned from public school within an hour, or otherwise left the Center without permission, the police were called, the Director was notified, a boy's

family was notified where appropriate, and a search made. The Stevens followed these procedures when Dana and Roland ran away. (R. 1457-58; 3082-4; 3933-5). Similar police notification procedures have been implicitly approved in other elopement cases. See, Evangelical United Brethren Church of Adna v. State, 407 P.2d 440 (Wash. 1965); Crowe v. State, 264 NYS.2d 459 (Ct.Cl. 1965).

It would, in any event, be unreasonable as a matter of law to suggest, as the District Court did, that Mr. Stevens should have abandoned his children, his six or seven remaining wards, and his home, and pursued the elusive Roland and Dana through the neighborhood. See, Benton v. School Board of Broward County, 386 So.2d 831, 384-5 (Fla.4th DCA 1980). Such an active and avid pursuit would have been particularly unnecessary in the case of Roland and Dana who had never previously posed a physical threat to anyone's safety while at large.

Circumstances as they were by the dictates of legislative and social policy, the rules and procedures of the Center, and the unforeseeability of Dana's and Roland's homicidal behavior, the Stevens acted reasonably, as a matter of law, in the ways they responded to Dana's and Roland's behaviors and elopements. To find that the Stevens violated any duty in this case would be to hold them responsible for faithfully implementing social, legislative, judicial and rehabilitative policies and procedures which they did not create and over which they had no control.

CONCLUSION

For the foregoing reasons, the summary judgment entered in the Stevens' favor by the trial judge was proper. Its reversal by the Fourth District Court of Appeal is at variance with settled principles of proximate causation, intervening causation and duty.

The certified question posed by the District Court is so general that it lacks any relevance to this case. As presently phrased, one would have to answer the question "yes and no--depending on the types of violence the child has manifested before and at the time of the incident in question."

The real questions are: "Does knowledge that a ward has only committed larceny offenses during his elopements from his residence require his caretakers to exercise control to avoid a subsequent homicidal assault committed by the ward during an elopement?" or "Does knowledge that a ward has fought with other boys in his residence, inflicting minor injuries, if any, require his caretaker to exercise control to prevent the ward from eloping and committing a homicidal assault against two unknown infants?" Under the facts of our case, the answer to these far more pertinent questions is obviously "no."

So viewed, the certified question posed by the District Court must similarly be answered in the negative and the judgment of the District Court of the Appeal, against the Stevens, must be reversed.

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CERTIFICATE OF SERVICE

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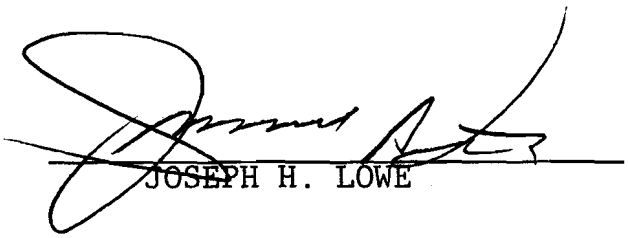

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