IN THE SUPREME COURT
OF FLORIDA

CASE NO. 67,160

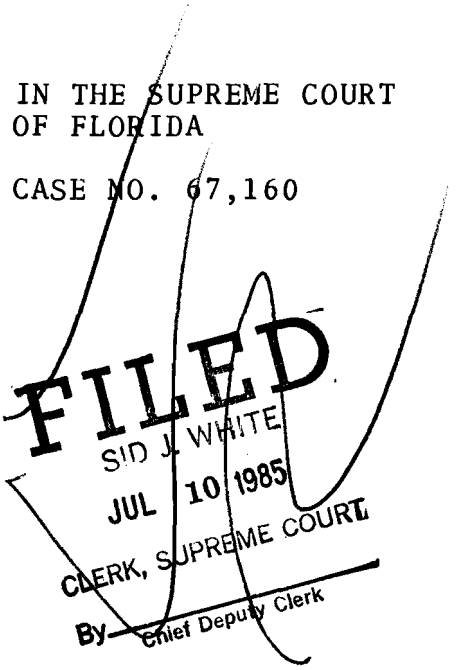
NOVA UNIVERSITY, INC., et al.,

Petitioners,

vs.

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

Respondents.



ON APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL PURSUANT TO FLA. R. APP. P. 9.030(2)(A)(V)

BRIEF OF PETITIONERS NOVA UNIVERSITY, INC. AND INSURANCE COMPANY OF NORTH AMERICA

John P. Kelly, Esq.
Fleming, O'Bryan & Fleming
1415 East Sunrise Boulevard
Post Office Drawer 7028
Fort Lauderdale, Florida 33338
Attorneys for NOVA UNIVERSITY, INC. and INSURANCE COMPANY OF NORTH AMERICA

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SUMMARY OF ARGUMENT

The Court of Appeal misperceived the determinative and exclusive issue in the cause, which was whether the common law imposes upon a non-custodial juvenile residential rehabilitation center the duty to control the behavior of residents of the center for the protection of the plaintiffs, who encountered the residents and were viciously beaten by them off the center's premises. Nova University, Inc. is a private university that sponsored the rehabilitation center, which accepted delinquent juveniles for non-custodial living at the center with model families.

The Court of Appeal chose not to discuss the law of three other jurisdictions that have exonerated similar centers from liability under identical circumstances for the intentional torts of their residents. These courts have found both from an analysis of the common law and from a public policy viewpoint that no duty to control resident's behavior off the center's premises is owed to unidentified potential victims of a resident's criminal behavior.

The question certified cleverly attempts to justify the weak underpinnings to the Court of Appeal's reversal of the trial judge's well-reasoned summary judgment. The Court of Appeals initially erred by finding as a matter of law that "the center stood in loco parentis." Having adopted this legal fiction, which is used in a manner not heretofore utilized in the courts

of this nation, the Court of Appeal proceeded to apply the law of Gissen v. Goodwill. Realizing that Gissen was not good precedent for its novel analysis, the court below had no choice but to certify the question as a matter of great public importance.

This Court is not bound by the scope of the certified question, which is based upon a faulty legal analysis of the case. This case has enormous consequences for juvenile rehabilitation programs and the psychiatric profession in Florida. In addition, under the lower court's analysis, any institution that even temporarily deals with juveniles will suffer jeopardy if the juveniles commit intentional torts on unidentified persons. The lower court has created an undesirable exception to well-recognized principles of the common law in Florida. The lower court's opinion should be quashed and the trial court's summary judgment for NOVA UNIVERSITY and INSURANCE COMPANY OF NORTH AMERICA affirmed in all respects.

STATEMENT OF THE CASE

Case No. 76-20760 commenced in December 1976 with the filing in Broward Circuit Court of a complaint by Josephine C. Wagner, as administratrix of the Estate of Peter Allen Wagner, a deceased minor, against Nova University, Inc., the Department of Health and Rehabilitative Services of the State of Florida, Dana Williamson, Roland Menzies, Robert A. Menzies, Esther O. Menzies, Charles L. Williamson, Charles W. Stevens, Janet C. Stevens, and the Insurance Company of North America. The action arose out of the death of Peter Allen Wagner and was based on a negligence theory. As the case progressed, various defendants were added and deleted. An amended complaint was filed on April 17, 1979, alleging negligence and naming Nova University, Inc., Dana Williamson, Roland Menzies, Charles L. Williamson, Charles W. Stevens, Janet C. Stevens, Insurance Company of North America, First State Insurance Company and Chicago Insurance Company as defendants.

A second action was filed on February 15, 1979, by Christy Ellen Wagner, a minor, by and through her mother and next friend, Josephine C. Wagner. Case No. 79-3084 was also filed in Broward Circuit Court and named the same defendants as the amended complaint in case no. 76-20760, with the addition of the Department of Health and Rehabilitative Services of the State of Florida and John M. Flynn. Due to the similarity of issues and parties, the two cases were consolidated.

Interlocutory appeals have resulted in two decisions by the Fourth District Court of Appeals. The Department of Health and Rehabilitative Services (DHRS) appealed an order of Judge Minnet denying its motion for change of venue to Leon County. The DHRS was successful in reversing the lower court's decision, and the case was remanded to the lower court for the issuance of an order transferring the cause to Leon County. Department of Health and Rehabilitative Services v. Wagner, 361 So.2d 739 (Fla. 4th DCA 1978). Another non-final appeal was instituted by the Plaintiffs from an order of Judge Futch transferring the two consolidated cases to Leon County for trial. The Fourth District Court of Appeal affirmed in part and reversed in part determining that the action against the DHRS in case no. 79-3084 should properly be transferred to Leon County, while the remainder of the consolidated cases remained in Broward County. Wagner v. Nova University, Inc., 397 So.2d 375 (Fla. 4th DCA 1981).

Trial has commenced three times and has been mistried on all three occasions. The first two mistrials occurred as a result of improper statements made by Plaintiffs' counsel during questioning of the prospective jurors. The first mistrial resulted when the Plaintiffs' counsel mentioned that Mrs. Wagner had been divorced since the incident. The second mistrial occurred when the Plaintiffs' counsel accused Defendants of trying to place an insurance adjuster on the jury (TR 585). The third mistrial was a result of the Plaintiffs' counsel's conduct on March 7, 1983 (TR 587).

Prior to this most recent trial all Defendants had filed motions for summary judgment, relying on Florida law for the proposition that they owed no duty to the Plaintiffs (R 885-892). These motions were denied by the trial court on January 21, 1983 (R 936).

Trial commenced on February 28, 1983 before the Hon. Robert L. Andrews. By the end of that week the Plaintiffs had not completed direct examination of their first witness. The Defendants moved for a mistrial in the action on various grounds, and on the following Monday morning, March 7, 1983, the motion was granted (TR 587).

Renewed motions for summary judgment and memoranda in support were filed by the Defendants on March 14, 1983, and March 15, 1983 (R 1483-1516). On March 16, 1983, the Plaintiffs filed a motion for disqualification of Judge Andrews with attached affidavits (R 1517-1538). Reply memoranda to the motions for summary judgment and motion for disqualification were filed by all parties (R 1539-1571). On April 8, 1983, the trial judge ruled on the pending motions, granting the final summary judgment on behalf of the Defendants, and denying the Plaintiffs' motion for disqualification of the judge (R 1572-1573). The Plaintiffs' motion for rehearing was denied on April 28, 1983, and a timely notice of appeal to the Fourth District Court of Appeal was filed on May 3, 1983 (R 1578-1580).

After briefing and oral argument, the Fourth District Court of Appeal rendered an opinion on June 5, 1985 that reversed

and remanded the cause. The lower court found that Nova University stood in loco parentis and proceeded to apply the law of Gissen v. Goodwill, 80 So.2d 701 (Fla. 1955).[1] The court found that the two juvenile residents of the center had a propensity to violence, which it deemed to be a "habit." However, the court acknowledged difficulty in finding, as required by Gissen, Nova University's knowledge of a particularization of the type of violence committed by the juveniles. The court, therefore, certified the following question to be of great public importance:

> 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?

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[1]The lower court also had been presented with an issue arising out of the trial judge's refusal to recuse himself, but the court found "no reversible error in the remaining point on appeal." Op. at 5.

STATEMENT OF THE FACTS

This litigation had its genesis on February 17, 1975, when the Plaintiff's son and daughter were attacked and severely beaten by two juveniles, Defendant Roland Menzies (age 13) and Defendant Dana Williamson (age 15). As a result of the injuries inflicted in the attack, Plaintiff's son, Peter, died and her daughter, Christy, sustained permanent injuries. At the time of the incident, the two assailants were enrolled[2] in a residential rehabilitation program operated by the Defendant Nova University. As enrollees in the program, Dana and Roland lived in one of the two private residential homes located on the western end of the Nova University campus. The home was occupied at the time by Dana, Roland, and several other youths, who were all part of a teaching family unit living with the Defendants Mr. and Mrs. Stevens. Mr. and Mrs. Stevens' daughter (age 5) and two sons (ages 3 and 1) also lived with them amongst the boys. The

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[2]Dana and Roland had run away from their home at Nova University on Sunday, February 16, 1975, which fact was reported to the local police authorities. The two boys apparently slept overnight in an apartment complex in Davie. Later they showed up at Dana's father's house in Miramar and rode horses for a while. Mr. Williamson called the Stevens and, after being advised that the boys had run away the previous day, told them he would drive the boys back home. As it turns out, Mr. Williamson dropped the boys off several blocks away from the Nova University home. The boys did not return to the home, but instead proceeded to the area where they came across and assaulted the Plaintiff's children and which was located off the Nova University premises. Both boys thereafter separated and were eventually apprehended the following Saturday.

teaching family units living in these two homes were part of a program known as the Living and Learning Center, which was begun at Nova University in 1971 by its Institute of Human Development. The remaining Defendant, Dr. John Flynn, first became director of the program in 1974 and was still the director at the time of the subject incident (R 2922-24, 3087-88).

The purpose of a teaching family program, such as the one established at Nova University, was to create an atmosphere and those relationships which are usually associated with a family unit in an effort to help those youths in our society who could generally be described as "pre-delinquent," "delinquent" or "emotionally disturbed." The behavior problems of the various youths enrolled in this type of program are basically similar: in some manner their behavior is disturbing to their family, school, or community. The youths' disturbing behavior is almost uniformly traceable to their past environments, which for one reason or another failed to provide the love, instructions, role models, and feedback necessary for the child to develop appropriate social behaviors.[3] The result which is normally to be expected is a pattern of academic failure, thievery, vandalism,

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[3]The depositions and other documentary evidence contained in the record reveal that the family and social environments which surrounded Dana and Roland fit within this general pattern. Both boys were basically rejected by their natural families from an early age and were never "rooted" in one place or with any particular peer group for a long enough period of time to develop solid, mutually beneficial personal relationships with other adults or children their age.

truancy, defiance, and other similar socially unacceptable behavior. Residential rehabilitation programs such as Nova University's are part of the contemporary trend in the treatment of juvenile behavior problems. This contemporary trend is directed towards establishing programs in community-based settings rather than in large institutions such as reformitories and mental hospitals. The teaching family units utilized in Nova University's program attempt to provide an environment for the youths which would establish and reinforce the various types of behavior necessary to eventually bring the youths back into contact with normal community resources which are available for developing academic, social, and vocational skills. (R 2923, 2932-47, 3-24-25, 3896, 3901, 3922).

The basic philosophy of the type of juvenile rehabilitation model adopted at Nova University was motivational or positive in approach (as opposed to disciplinarian and negative) and was patterned after a well-respected program established at the University of Kansas known as the "Achievement Place" (or sometimes called the "token economy" system). The Achievement Place system called for a daily evaluation of each youth by their teaching parents and peers, awarded points to those youths who had exhibited appropriate social and educational behaviors, and took points away from those youths who exhibited bad or inappropriate behaviors. Those points which were earned could then be used by a youth to purchase special privileges which included, for example, trips to the store, outside playtime and recreational activities, advancement into the merit system (under which

no points were earned or lost), and time off after supper for employment pursuits. (R 2941-47, 2954-57, 2966-67, 3034-37, 3055-56, 3900, 3922, 3936).

In keeping with the philosophy of creating an atmosphere and environment akin to that generated by ordinary families, the two Nova University teaching parent homes purposefully avoided any layout or design which was geared towards being a security installation. There were no fences or walls around the property, nor were there other measures designed to create a feeling of restraint or isolation from the rest of the community. However, not unlike the rules established in an ordinary family setting, the youths in Nova University's program were not completely free to come and go as they pleased, but had to ask permission of the teaching parents before leaving the yard and keep their teaching parents informed of their whereabouts. For example, the boys were allowed to leave the home to go to a store if they had permission and had earned sufficient points to qualify for the privilege. (R 2966-67, 3036-37, 3041, 3066, 3087-89, 3094-95).

The youths enrolled in the program attended public schools on a daily basis.[4] Attendance at public schools, it was believed, would further the efforts of the program by

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[4]While all boys enrolled in the program were classified as dependent-neglected, delinquent, or "problem children" either because of their contracts with the juvenile courts or criminal justice system, or because of behavior problems, no youth could be enrolled or remain in Nova University's program if his behavior or psychological condition was so severe that he would not be able to attend the public schools (R 3066).

allowing the youths enrolled in the program to come into contact with other children their age and to provide the opportunity for them to be able to observe appropriate behaviors exhibited by this peer group. The youths enrolled in the program would ride the bus to and from school with other public students in the community and were expected, as most children are, to return home after school recessed for the day. (R 2966-67, 3036-37, 3041, 3066, 3087-89, 3094-95).

Dana was admitted into Nova University's program upon the application of the State of Florida Department of Health and Rehabilitative Services, Division of Family Services, which agency had petitioned for and secured legal custody of Dana in 1970 as a result of family neglect and alleged parental cruelty. Between 1970 and Dana's admission into Nova's program, Family Services had placed him in various foster homes, shelter homes, as well as a place known as Boys Town. Dana had also been placed into the children's section of South Florida State Hospital for an 18-month stay some three years prior to the subject incident.[5] Roland, on the other hand, had been voluntarily

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[5]Though Dana had been admitted to the State Hospital, his discharge progress was quite favorable in 1972:

> Dana has remained at the hospital up to the present time. He has been described as greatly improved. The hospital report said there is no evidence of psychosis and they feel that he could adjust to a foster home or group care facility at this time. Dana has a real need for acceptance. He has gained in

enrolled into Nova University's program at the request of his parents, Dr. and Mrs. Robert Menzies, who felt they no longer had the patience or ability to attend to his special needs. (R 2959, 3000, 3062, 3077, 3092-93; Plaintiff's Exhibit Nos. 2, 3, 5, 8, 9, 10, 11, "A" for Identification and "B" for Identification).

Unquestionably, neither Dana nor Roland was a model child; indeed they would not have been enrolled in Nova University's program if they were. Concededly both children had personality and behavioral problems which had to be modified and corrected before the children could be productive, normal human beings. Nevertheless, the portrait of Dana and Roland which Plaintiffs have attempted to paint below is astoudingly inaccurate. More specifically, the Defendants vigorously dispute Plaintiffs' characterization of Dana and Roland as "anti-social, and highly dangerous wards," as individuals "in search of small children upon which to act out their oft-repeated aggressive fantasies, as individuals who "had a long history of beating up small children," or as individuals whose prior history reflected a "habitual pattern of precisely what occurred to [Plaintiff's children]." We respecfully submit that the actual facts

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([5] continued)

self-esteem and has developed internal control while in the hospital.

September 19, 1972, report of Mrs. Alva Smith, representative of the Division of Family Services; Plaintiff's Exhibit No. 5 (R 2178-2475).

contained in the record before this Court, when reasonably viewed in the light most favorable to Plaintiffs, fall woefully short of supporting these unqualified factual assertions which form the basic foundation upon which all the arguments presented by Plaintiffs are constructed.

The facts contained in the record reveal that while both boys had problems in the form of lying, stealing, running away from home, foster homes, and causing various disruptions and disturbances, neither boy had ever previously exhibited any behavior even remotely approaching the form of extreme, outrageous violence which they exhibited on February 17, 1975. (R 2963, 2967-69, 2976-78, 2981-92, 2998-99, 3001-3002, 3080-82, 3099, 3919-37, Plaintiffs' Exhibit Nos. 2, 3, 5, 8, 9, 10, and 11). Granted, both boys had gotten into their share of fights and "scraps." Id. However, there is absolutely no indication in the voluminous and exhaustive record before this Court that these prior episodes of physical contact with others were anything more than one would typically expect from boys who grew up in the atmospheres which these boys had. Id. Indeed, we would go so far as to note that it is a rare boy indeed who has never gotten into at least several fights during the course of his childhood. Mr. Stevens aptly described the situation:

> I could say that he [Roland] didn't fight any more than any of the 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. Frequency of fights, I can't specifically recall who fought with who and at what time. All I can say is perhaps it was one fight a week. Nothing very violent. They would swing at each other. That would be it, sometimes they connected, sometimes they didn't.

(R 3932-33) (emphasis supplied).

The lower court apparently did not fully review the record but instead chose to rely on certain factual allegations of the Plaintiffs' complaint, specifically paragraph 18, for the proposition that "there [was] evidence in the record of 'injury to another as a probable consequence.'" Such an "escape route" analysis is unfortunate. Although the center had stated in a memorandum of law that the facts of the complaint could be deemed true for the purpose of the trial court's determination of the issue of whether a legal duty was owed, at no time were any facts stipulated to below. In fact, the allegations of paragraph 18 of the complaint were mere conclusory allegations, actually unsupported in the record. Moreover, the Defendant had requested in its pleading, i.e., its motion for summary judgment, that the judgment be entered on the basis on the "pleadings and proof" on file.

I. THE LOWER COURT DELIBERATELY OVERLOOKED THE BASIS FOR THE TRIAL COURT'S SUMMARY JUDGMENT: NO DUTY WAS OWED TO THE PLAINTIFFS, WHO WERE UNIDENTIFIABLE VICTIMS OF THE INTENTIONAL TORTS OF THE JUVENILE RESIDENTS OF THE CENTER, AS A MATTER OF LAW.

The summary judgment entered by the trial court had been predicated upon the court's review of case law from other jurisdictions wherein other residential rehabilitation centers had been exonerated from liability to the public-at-large for the intentional torts of their residents. The Fourth District chose not to reach these cases, instead relying upon the legal fiction of in loco parentis. Yet, without question, these cases are legally indistinguishable from the case at bar.

In Beauchene v. Synanon Foundation, Inc., 88 Cal. App. 3d 342, 151 Cal Rptr. 796, (Cal. 1 Dist. 1979), plaintiff, who had been injured by a Lynn Bentley, sued the Synanon Foundation, Inc., the operator of a voluntary private rehabilitation institution that provided a structured environment for its residents. The primary purpose of the program was the rehabilitation of drug addicts, alcoholics, and other people with character disorders. Synanon also accepted convicted persons, who were sent to it rather than to prison. Synanon screened those referred to it to determine whether the person placed in the program would be dangerous to himself, Synanon, or to society generally, and Synanon could reject a referral.

Bentley had been convicted of first degree burglary, and a court placed him on probation on the condition that he enter

the Synanon program "and not leave without prior approval of the probation officer and the staff of Synanon." The complaint alleged, moreover, that Synanon knew or should have known that Bentley had a long history of behavioral difficulties, arrests, convictions, criminal confinement, and escape attempts. Furthermore, the complaint alleged that Synanon knew that Bentley had a prior probation revoked because of his inability to comply with the probation rules. Five days after his admission to the Synanon home, the complaint alleged, Bentley "escaped from the program" and "went on a crime spree that included the killing of several people and the shooting of the plaintiff."

The plaintiff argued that Synanon had a duty to exercise due care in accepting convicted persons into its program and an affirmative duty to prevent Bentley from leaving the program. With regard to the first theory of liability, plaintiff claimed that Synanon breached the duty by admitting Bentley with knowledge of his antisocial tendencies, which presented an unreasonably dangerous risk to society, and but for the breach, Bentley would have been sent to prison. Under the second theory of liability, the plaintiff argued that because of the special relationship that Synanon undertook by accepting Bentley into the program, it had a duty to control his behavior so as to prevent Bentley from "escaping."

The California court held that the complaint failed to state a cause of action and reasoned:

> Both theories of liability fail because of the faulty premise that [Synanon] owed a duty of care to [plaintiff]. Generally, a person owes no duty to control the conduct of another. Exceptions are recognized in limiting situations where a special relationship exists between the defendant and the injured party or between the defendant and the active wrongdoer.

Id. at 798. The court found that neither exception applied, and hence no duty existed upon which to predicate negligence. The court noted, "Each member of the general public who chances to come into contact with a parolee or probationer must risk that the rehabilitative effort will fail. ... To hold [Synanon] civilly liable would deter the development of innovative criminal offender release and rehabilitation programs, in contravention of public policy." Id. at 799. Accordingly, the appellate court concluded that Synanon owed no duty of due care to the plaintiff.

Vu v. Singer Company, 538 F.Supp. 26 (N.D. Cal. 1981) aff'd, 706 F.2d 1027 (9th Cir. 1983), involved a negligence action against the Singer Company, which operated a Job Corps Center, for damages sustained when members of the center entered the plaintiff's home and raped the plaintiff's wife. The trial court granted the defendant's motion for summary judgment on the following facts.

The enrollees in the center were youths from disadvantaged backgrounds who had been provided with room and board at the center while attending vocational training classes. The center structured the youths' lives; for example, the youths had to wake up at a certain time, had to obtain a pass to leave the center, and could not own a car or bicycle. It was undisputed

that on December 17, 1978, six male and several female members of the center consumed alcohol in a nearby park, entered the plaintiff's home about seven blocks from the center, and attacked Mrs. Vu.

The undisputed proof also established that a few months prior to the attack of Mrs. Vu, several of the attackers had returned to the center under the influence of alcohol or drugs and had been involved in fights off center grounds. Several of the attackers had been convicted of theft and one of the attackers formerly had been expelled or had resigned from the center. Singer Company previously had placed the park off limits to the youths and had undertaken irregular patrols of the park.

It was uncontradicted that Singer Company at no time had disciplined the attackers on account of their violation of the rules of the center, their drug use, or their episodes of violence. Documents submitted to the court showed that almost all of the attackers had drug abuse problems, and many had histories of theft. Several had engaged in fights and other confrontations. One of the attackers, the center's records showed, had been found intoxicated six times in a two-month period before the attack and had threatened staff members with bodily harm. Other youths had been documented as having used alcohol, PCP and marijuana, and having engaged in fist fights with "outsiders."

The federal district court found no duty was owed by the Singer Company to the plaintiff and granted summary judgment for the Singer Company. On appeal, the Ninth Circuit Court of

Appeals affirmed, citing the public policy in favor of rehabilitation programs:

> To impose on the operator of a center a duty to prevent the tortious acts of corps members and to impose liability to the victims of such acts for having failed to do so would place in some degree of jeopardy the Job Corps program and its efforts towards the rehabilitation of disadvantaged young people. Faced with such potential liability an operator with any concern for its economic survival could be expected to terminate from the corps any person whose conduct suggests that he might pose a risk, whether it otherwise justifies termination or not. This would deprive of the program's benefits those most in need of rehabilitation.
>
> Further, placing in the hands of a jury the cost of a failure on the part of an operator to perform its duties successfully (and the standards for successful performance) could well discourage as too risky the effort to perform at all.

Id. at 1030-31.

Plaintiffs cannot cite a single case wherein a residential rehabilitation center or half-way house has been found to owe a duty to the general public for the acts of one of its enrollees who "escapes," "elopes," "goes AWOL," "runs away," "departs," "takes the day off," or otherwise divorces himself from the center other than by an authorized release.

The only acceptable analysis is that the theories of liability asserted in the case sub judice directly parallel the theories of liability asserted in Beauchene and Vu. Both cases deal with the overriding issue of whether a residential rehabilitation center can be held liable for harm caused by enrollees

either because of a duty owed in accepting them into the program or thereafter in controlling their behavior. Plaintiffs will argue that the California Supreme Court's decision in Hedlund v. Superior Court, 34 Cal.3d 695, 194 Cal. Rptr. 805, 669 P.2d 41 (Cal. 1983) somehow erodes the authority of Beauchene and Vu under California law. This position completely misses the mark. Hedlund is merely a logical extension of the limited duty to warn by a psychotherapist enunciated in Tarasoff v. Regents of University of California, 17 Cal. 3d 425, 131 Cal. Rptr. 14, 551 P.2d 334 (Cal. 1976).[6] The plaintiffs in Hedlund alleged that the defendant psychotherapist was specifically told by his patient of the latter's intent to commit serious bodily injury upon a woman, LaNita Wilson. The patient carried out his threat with a shotgun, and in the course thereof injured LaNita Wilson's young child. Hedlund does not expand the Tarasoff duty to all foreseeable victims, but rather, to foreseeable and identifiable bystanders (such as a young child) when a specific threat has been made against a specific person (the mother). Hedlund, 669 P.2d at 46-47.

Therefore, had either Dana or Roland communicated a threat to Defendants against a member of the Wagner family, and the subject incident occurred, arguably, a duty would exist under

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[6]The Tarasoff case, a seminal decision in the area of tort liability of psychiatrists and psychotherapists, holds that a therapist has a duty to warn only readily identifiable targets of his patient's threats.

the California high court's pronouncements in Tarasoff and Hedlund. However, such a factual scenario is totally remote from the facts before the trial court below. This is not a Tarasoff -- Hedlund case.

Finally, in Furr v. Spring Grove State Hospital, 454 A.2d 414 (Md. 1983), the Maryland high court followed the reasoning of Beauchene and Vu. The parents of a young boy murdered by a patient who left a state mental hospital sued the state hospital, state psychiatrist, and the hospital's director of admissions. A young male sex deviate with documented pedophilic tendencies, Arthur Goode, had been a voluntary patient at the Spring Grove Hospital on numerous occasions. He was not restrained in the ordinary sense, and he could leave the hospital upon application and 72-hours notice. If he left without the requisite notice, the enrollee was considered to have "eloped." An elopee could return to the hospital at any time.

During Goode's fourth stay at the hospital, he began to occupy himself with unnatural sex acts upon other male patients, engaged in temporary "elopements" seeking out young males for sexual purposes when he was denied outside privileges, and made threatening telephone calls to his own sister. After about twenty weeks at the hospital, Goode eloped and lured an eleven year old child into a wooded area and committed brutal sex acts and murdered the child. Among other things, the hospital was sued for negligently allowing Goode to abscond and for negligently failing to expedite his readmission and/or notify authorities of his reappearance and disappearance.

The Maryland high court turned to the familiar analysis and stated:

> The 'duty' concept as used in negligence cases is really an obligation to conform to a standard of conduct toward an identified person.

Id. at 417. The Maryland high court carefully analyzed the consequences of imposing a duty on the hospital and its doctors to the "unforeseeable plaintiff." Furthermore, the court found that Tarasoff, supra and Thompson v. County of Alameda, 27 Cal. 3d 741, 167 Cal. Rptr. 70, 614 P.2d 728 (Cal. 1980) interpret the relevant sections of the RESTATEMENT (SECOND) OF TORTS to mean that "for a doctor's (Tarasoff) duty to be imposed creating a special relationship to a victim, the victim must be readily identifiable." Furr, 454 A.2d at 421. Finally, the court summed up eloquently the logic behind its rationale and that of the Beauchene and Vu courts:

> That society has not yet acquired the clairvoyance to determine and restrain those bent upon preying on such youths as Kenneth Dawson is a phenemenon we can only hope to overcome. But when such violence is perpetrated it is not always the fault of those charged with seeking out such sinners. As pointed out by Prosser, frequently under our law it is the good samaritan who tries to help somewhat and finds himself mulcted in damages, while the pervert and the deviate who pass on the side go on their cheerful way rejoicing. As we impose upon samaritans (and those who walk in their shadow) more obligations in the nature of Tarasoff's, we must avoid driving them to the other side of the road.

Id. at 421. The obligations which Plaintiffs seek to impose on the Defendants fall within the category of those that drive the

good samaritans to the other side of the road. Science and human behavior is an imperfect match, but that does not mean that its failure must negate efforts to form a more perfect coalescence. A judicially-imposed duty on the Defendants herein will in fact cause an undesirable retrenchment in the establishment and continuation of rehabilitation programs designed to improve the human condition. The Florida legislature has enacted a policy to substitute juvenile offender rehabilitation in place of retributive punishment under the Florida Juvenile Justice Act. Fla. Stat. §39.001(a). Both the common law and the public policy of Florida will thus be frustrated by a reversal of the trial court's judgment. Notwithstanding that the overwhelming precedent from other jurisdictions sustain the trial court's judgment, the Fourth District totally ignored this case law and instead merely held Nova University to be a factitious parent with respect to the juvenile residents of the center and thereby, presumably, found a duty owed to the plaintiffs.

II. THE LOWER COURT'S APPLICATION OF THE IN LOCO PARENTIS DOCTRINE DIRECTLY AND EXPRESSLY CONFLICTS WITH THE CASE LAW OF THIS COURT AND OTHER DISTRICT COURTS OF APPEAL.

As stated by the Court in Niewiadomski v. United States, 159 F.2d 683, 686 (6th Cir. 1947), cert. denied, 331 U.S. 850, 67 S.Ct. 1730, 91 L.Ed. 1859 (1947),

> [t]he term "in loco parentis," according to its generally accepted common law meaning, refers to a person who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation without going through the formalities necessary to legal adoption.

It generally has been recognized that the status assumed by one in loco parentis is temporary in character and arises "only when one is willing to assume all the obligations and to receive all the benefits associated with one standing as a natural parent to a child." Fuller v. Fuller, 247 A.2d 767 (D.C. Mun. App. 1968; accord, Pope v. State, 396 A.2d 1054 (Md. 1979).

The courts of this state have held that there is no difference between one in loco parentis and a natural parent insofar as common law liability for a child's conduct. Wyatt v. McMullen, 350 So.2d 1115 (Fla. 1st DCA 1977); Weigl v. Ombres, 106 So.2d 614 (Fla. 2d DCA 1958).

The Fourth District's opinion, however, applies the in loco parentis status to an institution, i.e., Nova University. The amended complaint had alleged that Nova University "owned, operated and conducted the Nova Living and Learning Center (R 4281). The Living and Learning Program contract (A 7-11),

described the program as a "school" and the residents of the program as "students." The issue arises, then, as to the extent to which the Florida courts have applied the in loco parentis doctrine to schools or other institutions of learning.

This Court in Rupp v. Bryant, 417 So.2d 658, 666 (Fla. 1982), held that school employees stand "partially in place of the student's parents." This interpretation of the extent of the in loco parentis status of schools and their employees is consistent with several district courts of appeal decisions also holding that schools stand in loco parentis only to a "limited degree." Nelson v. State, 319 So.2d 154 (Fla. 2d DCA 1975); State v. D.T.W., 425 So.2d 1383 (Fla. 1st DCA 1983); In re Expulsion of Jeff Perry v. School Board of Putnam County, 442 So.2d 1101 (Fla. 5th DCA 1983). Although the foregoing cases deal with issues extraneous to the tort liability of schools, the Third District in King v. Dade County Board of Public Instruction, 286 So.2d 256 (Fla. 3d DCA 1973), relied upon by this Court in Rupp v. Bryant, stated, in a case involving an assault of a student in a school restroom by a fellow student.

> We see some difficulty in strictly holding the school board, under the in loco parentis doctrine to the same standard that applies to actual parents.

Id. at 257. Other jurisdictions also have found schools to be only in loco parentis to a limited degree. See Mercer v. Board of Trustees, 538 S.W. 2d 201 (Tex. Civ. App. 1976) ("The schools stand somewhat in loco parentis to the child.") Smith v. W. Va. State Board of Education, 295 S.E. 2d 680 (W. Va. 1982) ("The

Blackstonian in loco parentis theory gives the school authorities only that portion of the power of a parent as may be necessary to answer the purposes for which he is employed."); Lunsford v. Board of Education, 374 A.2d 1162 (Md. 1977).

Recently, in Pesek v. Discepolo, 475 N.E. 213 (Ill. App. 1st Dist. 1985), the court considered a case wherein a plaintiff, who had been raped at her home by a truant high school student, sued the student's parents and high school under a theory of negligence. The plaintiff's complaint alleged that the school knew of the student's truancy, association with juvenile delinquents, prior criminal acts, and past use of alcohol and drugs and that the school authorities should have taken corrective action. The court affirmed the dismissal of the action against the school and the parents, but also expressed reservation as to whether the school would be held to the same standard of care as to the parents, even if a cause of action could be stated.

Under the Fourth District's opinion, Nova University has been deemed a "substitute parent" as a matter of law. Op. at 2. The lower court made no attempt to limit the application of the in loco parentis doctrine to Nova University as required by the case law of this Court and four other district courts of appeal. Conceptually, it is difficult to distinguish between Nova University's in loco parentis status to its minor students[7] and

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[7]It has been held that the parental liability theory does not extend to emancipated children. Thorne v. Ramirez, 346 So.2d 121 (Fla. 3d DCA 1977). However, an early decision of this Court

that found by the Fourth District with respect to the students at the Living and Learning Center. Accordingly, under the Fourth District's precedent, schools and universities in Florida now incur lawsuit exposure and potential liability to unforeseeable and unidentifiable plaintiffs injured by the intentional torts of minor students while the students are off the school premises.

A subtle solution to this undesirable expansion of tort liability would be to hold that Nova University was acting in loco parentis only while the students of the Living and Learning Center were on the school's premises or when the school had actual control and supervision of their activities. Any other duty cannot be realistically carried out. See Rupp v. Bryant, supra, at 667.[8]

([7] continued)

suggests that a university may act in loco parentis to its students. See John B. Stetson University v. Hunt, 102 So.2d 637 (Fla. 1924).

[8]Even when there is an issue of a school's supervisory negligence for the protection of its students, recovery generally has been denied when a student has been assaulted by a fellow student while off school grounds. See Lunsford v. Board of Education, 374 A.2d 1162 (Md. 1977); Mancha v. Field Museum of Natural History, 283 N.E.2d 899 (Ill. App. 1972); May v. Board of Education, 269 App. Div., 58 N.Y.S.2d 127, aff'd 295 N.Y. 948, 68 N.E.2d 44 (1945); Nichols v. Texico Conference Ass'n of Seventh Day Adventists, 438 P.2d 531 (N.M. Ct.App. 1968). Florida courts have held that a school has no duty to supervise off-premises activities of students which are not student related. Ogleshy v. Seminole County Bd. of Pub. Instruction, 328 So.2d 515 (Fla. 4th DCA 1976). It seems rather anomalous to now hold that a school has the duty of a parent to supervise students off school premises in the student's pursuit of non-school activities in order to protect the public-at-large.

III. THE CERTIFIED QUESTION MUST BE ANSWERED IN THE NEGATIVE AS TO THE FACTITIOUS PARENTAL LIABILITY OF NOVA UNIVERSITY.

Point I of this brief suggests that this Court should adopt the analysis used by every court that has considered the identical issue on similar facts. Point II of this brief suggests clear error and conflict with this Court in the Fourth District's carte blanche application of the in loco parentis doctrine to an institution of learning so that the institution becomes a parent. Assuming that this Court rejects the analysis relied upon by its sister courts and assuming that this Court upholds the application of the legal fiction of in loco parentis as a vehicle to impose liability on Nova University, then, and only then does the certified issue partake of any significance in the merits of this appeal. For the purposes of this argument, then, Nova University will step into the shoes, temporarily, of the parents of Dana and Roland.

It is anticipated that this Court has been fully briefed on Gissen v. Goodwill, 80 So.2d 701 (Fla. 1955) and its progeny in connection with its consideration of Snow v. Nelson, 450 So.2d 269 (Fla. 3d DCA 1984). See generally Annot., Parents' Liability for Injury or Damage Intentionally Inflicted By Minor Children, 54 A.L.R. 3d 974 (1974).

In determining whether Defendants could be held liable to Plaintiffs under the parental theory of liability, two questions must be answered: (a) are parents liable for damages caused to strangers by the intentional torts of their minor

children; and (b) if so, under what circumstances and to what extent?

In Gissen v. Goodwill, supra, this Court recognized that parents are generally not liable for the intentional torts committed by their minor children. However, the Court delineated four exceptions to this general rule of non-liability: (1) where the parent entrusts his child with an instrumentality which, because of the child's age, judgment, or inexperience, may become a source of danger to others; (2) where the child who commits the tort is in a master/servant or agency relationship with the parent; (3) where the parent knows of and consents to, or otherwise sanctions the child's acts; and (4) where the parent fails to exercise proper parental control over the child even though he knows, or in the exercise of due care should know, that injury to another is a probable consequence. 80 So.2d at 703.

It was the scope of the fourth exception that the Court was primarily concerned with in Gissen. Analysis of the Gissen opinion leads one to the inescapable conclusion that the Court intended this particular exception to the general rule of non-liability to be very narrow in scope. Accordingly, the Court then held, in order to state a cause of action within the parameters of that exception, the parents' negligence in failing to exercise the requisite degree of parental control must have some definite relation to the special act which resulted in the injury sued upon. To this end, the Court ruled that both the pleadings and proof submitted by plaintiff must establish that the parent

had actual or constructive knowledge that "the child had the habit of doing the particular type of wrongful act which resulted in the injury complained of" (emphasis supplied) [80 So.2d at 705].

A close examination of the facts stated in the Gissen opinion readily reveals its true precedential value with respect to the case at bar. The plaintiff in Gissen filed a civil action seeking damages from the parents of a child who had slammed a door on his fingers. Liability was pursued against the parents based upon the theory that they were negligent for failing to adequately supervise, control, or otherwise restrain their minor child. More particularly, the plaintiff in Gissen alleged that:

> ...[O]wing to a lack of parental discipline and neglect in the exercise of needful paternal influence and authority, the ... [parents] ... carelessly and negligently failed to restrain the child ... whom they knew to have dangerous tendencies and propensities of a mischievous and wanton disposition; that said parents had full knowledge of previous particular acts committed by their daughter about the hotel premises, such as ... disturbing and harassing the guests and employees of the hotel and that the [child] did commit other wanton, willful and intentional acts of a similar nature to the act committed against the plaintiff, such as striking guests and employees of the aforesaid hotel, which acts were designed or resulted in injury.... Said parents nevertheless, continually failed to exercise any restraint whatsoever over the child's reckless and mischievous conduct, thereby sanctioning, ratifying and consenting to the wrongful act committed by ... [the child] ....

80 So.2d at 702 (emphasis supplied).

The Supreme Court affirmed the trial court's dismissal of the complaint containing these allegations, based upon its

conclusion that such generalized assertions of a child's dangerous propensities and mean disposition are legally insufficient to serve as a predicate for fastening responsibility on the parents of a child who commits an intentional tort against another. The Court specifically emphasized the absence from the complaint of any allegation that the defendant's child had previously exhibited a propensity to or had a habit of "slamming doors." The allegations in the complaint that the child had previously committed similar harmful acts (such as striking people) were deemed to be insufficient to satisfy the requirement that the plaintiff plead and prove that the child had "a habit of doing the particular type of wrongful act" which caused the plaintiff's injuries. See also Spector v. Neer, 262 So.2d 689 (Fla. 3d DCA 1972) (affirming trial court's dismissal of action instituted by landlord to recover damages from the parents of a child who was allegedly responsible for setting fire to the landlord's building while playing with matches, where landlord's complaint failed to allege that the minor child had a habit of doing the particular type of wrongful act which resulted in the injuries and failed to allege that the minor child had ever previously set fire to anything).

As applied to the facts revealed in the case at bar, the decision in Gissen compels the conclusion that liability cannot be fastened upon Nova University as putative parent. The record is devoid of any allegation, much less competent proof, that Dana and Roland had a "habit" of committing the sort of severe,

unprovoked battery upon total strangers, much less any allegation or proof that they had a "habit" of committing or attempting to commit homicide. The allegations in the instant complaint are as deficient as those which were made in Gissen; nothing more is alleged than that Dana and Roland were incorrigible and exhibited a propensity to behave in a violent manner, both physically and verbally. Review of the record brought before this Court reveals a total absence of support for the factual statements made by Plaintiffs in their brief before the Fourth District to the effect that Dana and Roland "had a long history of beating up small children" and that the Stevens "had prior knowledge of a habitual pattern of precisely what occurred to Mrs. Wagner's children."

We submit that the facts contained in the record before this Court are insufficient to rise to the level of establishing that either Dana or Roland had a propensity toward, or habit of, committing the type of unprecedented, unprovoked criminal attack which resulted in Peter's death and Christy's injuries. See also Parsons v. Smithey, 109 Ariz. 49, 504 P.2d 1272, 54 ALR 3d 964 (S. Ct. 1973) (parents' knowledge that their child was a behavioral problem at school, had "poked and pummeled," threatened, and otherwise acted aggressively towards other children, and was in need of psychiatric help, did not rise to the level of particularized knowledge necessary to hold them responsible for child's violent and vicious attack on neighbor); Pesek v. Discepolo, supra (no cause of action stated against either high school or parents based upon rape by minor where neither parents

nor high school had knowledge of a prior rape, though complaint alleged knowledge of minor's past criminal behavior).

In Snow v. Nelson, supra, the Third District Court of Appeal, expressed disapproval of the rule laid down in Gissen and suggested a rule of "reasonable care in the circumstances short of some form of vicarious liability." Id. at 272-73. The Fourth District's opinion, however, goes one step further and does in fact impose pure vicarious liability on Nova University as a "substitute parent." Nova University's tort liability to the Plaintiffs under the only theory of liability sanctioned by the Fourth District arises solely out of its substitute parent status. Yet both the pleadings and record are clear that Nova University only had a vicarious relationship to the Living and Learning Center by virtue of its sponsorship of the program. The Fourth District rejected the other theories of liability that the Plaintiffs had asserted against Nova University and instead found it liable as a "vicarious parent." Even the Third District's Snow decision does not go this far so as to impose strict liability.[9]

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[9]The Fourth District's opinion, in discussing the "failure to exercise parental control," focused on the Stevens' failure "to bring [Dana and Roland] 'home.'" Op. at 3. Likewise, in discussing the alleged evidence of "injury to another as a probable consequence," the Fourth District referred to the activities of the youths while residents of the center and therefore under the direct supervision of the house parents. None of this relates to any direct negligence of Nova University.

CONCLUSION

The Fourth District Court of Appeal's opinion should be quashed, and the trial court's final summary judgment affirmed.

Respectfully submitted,

FLEMING, O'BRYAN & FLEMING
1415 East Sunrise Boulevard
Post Office Drawer 7028
Fort Lauderdale, Florida 33338
Tel: (305) 764-3000
Attorney for Petitioners

By: _____
JOHN P. KELLY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Petitioners Nova University, Inc. and Insurance Company of North America was furnished by mail this 8th day of July, 1985, to: RUBIN & RUBINCHIK, P.A., 500 Center Court Building, 2450 Hollywood Boulevard, Hollywood, Florida 33020; HARRY A. GAINES, ESQ., Penthouse 1003, Nortrust Building, Miami, Florida 33131; JOEL D. EATON, ESQ., Podhurst, Orseck, Parks, Josefsberg, Eaton, Meadow & Olin, P.A., 25 West Flagler Street, Suite 1201, Miami, Florida 33130; JOSEPH H. LOWE, ESQ., Marlow, Shoft, Ortmeyer, Smith, Connel & Valerius, 1428 Brickell Avenue, Miami, Florida 33131; and G. WILLIAM BISSET, ESQ., Preddy, Kutner & Hardy, P.A., 66 West Flagler Street, Miami, Florida 33130.

FLEMING, O'BRYAN & FLEMING
Attorneys for Petitioners
1415 East Sunrise Boulevard
Post Office Drawer 7028
Fort Lauderdale, Florida 33338
Tel: (305) 764-3000

By: _____
JOHN P. KELLY

jer/3329e