IN THE SUPREME COURT OF FLORIDA

CASE NO. 67,160

NOVA UNIVERSITY, INC., et al,

Petitioners,

vs.

JOSEPHINE C. WAGNER, etc., et al,

Respondents.
_____/

INITIAL BRIEF OF PETITIONER DR. JOHN FLYNN

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SUMMARY OF ARGUMENT

In the instant case, the Fourth District Court of Appeal reversed summary judgments entered by the trial court in favor of three categories of defendants who were involved in various ways in the operation of a private residential rehabilitation program for delinquent juveniles. Nova University operated the program. Our client, Dr. John Flynn, was the director of the juvenile rehabilitation program. Finally, Charles and Janet Stevens were teaching parents in that program who, along with their own three minor children, lived in a single family residential dwelling with from eight to ten other minor boys enrolled in Nova's rehabilitation program.

The litigation had its genesis on February 17, 1975, when two young males enrolled in the program, Dana and Roland, after running away from the program the day before, happened to come across and for reasons unknown, viciously and ritualistically beat, stomped, and strangled the four year old son and six year old daughter of the plaintiff. Insofar as Nova and the Stevenses are concerned, plaintiffs' complaint was framed in two counts, one of which was based upon the allegation that Nova and the Stevenses occupied the status of substitute parents to Dana and Roland and therefore were obligated to exercise reasonable parental supervision and control over them. The plaintiffs omitted Dr. Flynn from this latter count.

On appeal to the Fourth District, all three summary judgments were reversed. The Fourth District concluded that "the center stood in loco parentis" to Dana and Roland, that there was

"evidence in the record of failure to exercise parental control," and that there was "evidence in the record of 'injury to another as a probable consequence'" of that negligence. In reversing the summary judgments solely on the basis of the in loco parentis doctrine, the Fourth District was forced to confront, criticize, and attempt to distinguish this Court's prior decision in GISSEN v. GOODWILL, 80 So.2d 701 (Fla. 1955). Noting that this Court might disagree with its criticism of GISSEN or even its attempt to distinguish it, the Fourth District certified the following question to this Court, deeming it 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?

With respect to the liability of Dr. Flynn, the Fourth District committed error in applying the in loco parentis doctrine to him. Neither the plaintiffs' complaint, nor the evidence revealed in the record, supported application of the in loco parentis doctrine to Dr. Flynn. Thus, regardless of the manner in which this Court answers the certified question, the summary judgment in favor of Dr. Flynn must be reinstated since he was never sued on the basis that he was a substitute parent for Dana and Roland.

Even assuming arguendo that the in loco parentis doctrine has some applicability to Dr. Flynn, Florida law nevertheless requires that a parent must first be put on notice of a child's propensity to commit a specific type of act before

the parent may be held liable for subsequent occurrences of that particular conduct. In the case at bar, neither the Stevenses nor Dr. Flynn had any knowledge whatsoever of Dana and Roland's homicidal capacities. The evidence in the record before the trial court at the time summary judgment was entered failed to disclose any prior occasion when Dana and Roland, while absent from the program without permission, had "beat up upon other children." The most the record revealed was that they would engage in acts of theft and other such property crimes during their previous elopements; they had never physically assaulted, much less attempted to ritualistically torture anyone on previous occasions. Purely and simply, the bizarre, homicidal assaults were unforeseeable as a matter of law and constitute the sole proximate, or the active and efficient intervening, cause of the injuries to their victims.

The trial court in entering summary judgment in favor of all defendants, relied upon decisions from courts in California and Minnesota which exonorated similar juvenile rehabilitation programs from liability under nearly identical circumstances to those presented in the case at bar. The decisions relied upon by the trial court found, both from an analysis of the common law and from a public policy viewpoint, that no duty to control a juvenile resident's behavior while off the center's premises is owed to unidentified potential victims of the resident's criminal behavior. In other words, those decisions have limited the scope of the duty owed under such situations to "readily identifiable" third parties. Those courts all refused to extend the scope of

the duty owed by individuals involved in such commendable endeavors to the public in general. The Fourth District did not in its opinion discuss the true basis for the trial court's ruling. It is this latter "scope of duty" issue which we believe truly presents the question of great public importance in this case. We submit that it should be resolved, as it has been in other jurisdictions, in favor of a limited scope of duty, not a duty owed to the general public.

STATEMENT OF THE CASE AND OF THE FACTS

In order to put the case at bar in its proper perspective, we feel that it is necessary to briefly discuss the specific nature of the two lower court decisions which transported the cause to this Court. The trial court's decision to enter summary judgments for the defendants was based upon the narrow ground that, under traditional common law principles and based upon important public policy considerations, the defendants owed no actionable legal duty for the protection of the plaintiffs in this case, who were simply members of the general public. The trial court relied upon the reasoning of the appellate courts in California and Minnesota, as revealed in their decisions in BEAUCHENE v. SYNANON FOUNDATION, INC., 88 Cal. App. 3d 342, 151 Cal. Rptr. 796 (Ct. App. 1979), VU v. SINGER COMPANY, 538 Fed. Supp. 26 (N.D. Cal. 1981), aff'd, 706 F.2d 1027 (9th Cir. 1983), and CAIRL v. MINNESOTA, 323 N.W.2d 20 (Minn. 1982). Those three decisions, which were discussed at some length in the defendants' memoranda, held that the scope of the duty owed by individuals engaged in rehabilitation programs similar to Nova's should be extended only to "readily identifiable" third parties, not to the public in general. The rationale underlying the trial court's ruling was applied to that count in plaintiffs' complaint based upon allegations that all the defendants were negligent in their operation, management, and control of the rehabilitation program, as well as to that additional count in plaintiffs' complaint based upon allegations that certain of the defendants stood in

loco parentis to Dana and Roland, the perpetrators of the vicious attack on plaintiff's minor children.

In seeking reversal of the adverse summary judgments in the district court of appeals, plaintiffs argued that the legal principles applied by the California and Minnesota courts were at odds with the jurisprudence of our state, and that:

> ...Florida law imposes upon the defendants a duty of reasonable care to prevent foreseeable injuries in the circumstances presented here in at least three different ways: (1) a general duty to exercise care for the safety of persons within the foreseeable zone of risk created by their activities; (2) a more specific duty to supervise their dangerous wards to prevent injury to foreseeable potential victims, which arises from their practical status as substitute "parents" of a ward; and (3) a duty assumed by the defendant by assumption of the undertaking itself. (Plaintiffs' Initial Brief at pages 20-21) (emphasis supplied).

Without discussing the plaintiffs' "general duty to the public" argument[1] or their "assumed duty" argument, the district court instead chose to rely upon plaintiffs' "in loco parentis duty" argument as its basis for reversing the trial court. The district court "concluded that the center stood in loco parentis" to its enrollees and found that there was evidence in the record of "failure to exercise parental control" and of "injury to another as a probable consequence." (Slip Opinion at 2-3). In grounding its decision upon the parent/child relationship it found to exist between the center and the juveniles enrolled in its rehabilitation program, the district court was forced to

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[1]The primary basis for plaintiffs' argument in this regard was §319 of the RESTATEMENT OF TORTS (SECOND), which plaintiffs contended required the defendants to provide beefed up security so as to prevent its enrollees from departing from the residential homes without permission. Apparently, the district court did not

confront, criticize, and find a way to distinguish this Court's decision in GISSEN V. GOODWILL, 80 So.2d 701 (Fla. 1955):

> We concede that the Gissen case can be interpreted to require a particularization of the type of violence, because in that case the court opined that prior knowledge of striking third parties did not impute knowledge of a propensity to slam a door thereby amputating a finger. We would be frank to admit that we find this distinction to be one without a difference because to us, as we have said, violence is violence. However mindful of our subservient role, we distinguish Gissen by pointing out that the prior act here was beating upon other children, which is exactly what happened on this ocassion with the exacerbated result as the only difference.
>
> Nonetheless, we must bear in mind that the Supreme Court may disagree with out criticism of Gissen (a thirty year old case written by four justices long since departed) or even our attempt to distinguish it. We, therefore, certify the following question deeming it 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? (Slip Opinion at 4-5) (emphasis supplied).

Particularly in light of the specific basis upon which the district court reversed the trial court, it is extremely

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feel it wise to go so far as to rule that the defendants owed a duty to the general public to install bars on the windows of its residential homes or to set up a system of perimeter security so as to prevent unauthorized departures by enrollees:

> There is evidence in the record of "failure to exercise parental control" which precludes summary judgment. This evidence does not so much consist of the unsupervised ease with which the two murderous minors departed the center, but rather hinges on their known overnight absence, their repeated reported whereabouts the next day, before the crime took place, coupled with the absence of any attempt whatever to bring them "home." (Slip Opinion at page 3).

important that this Court realize that the appellate court's opinion never mentions Dr. Flynn, nor does it indicate whether, in the view of that court, Dr. Flynn also stood in loco parentis to the juveniles enrolled in the rehabilitation program. Since the district court failed to present any facts bearing upon the issue of Dr. Flynn's potential liability in this case, they will be presented here.

A careful review of the pleadings and proof contained in the record at the time the trial court entered summary judgment for Dr. Flynn fails to establish any basis to support the conclusions that Dr. Flynn stood in loco parentis to the enrollees in Nova's program, that he was on notice of any facts indicating that "injury to another [was] a probable consequence" of Dana and Roland's being enrolled in Nova's rehabilitation program, or that he otherwise breached any legal duty owing to the plaintiffs because of his position as the director of Nova's rehabilitation program.

Turning first to the pleadings, this Court will discover that the plaintiffs have never even attempted to hold Dr. Flynn liable upon the basis of any allegation that he stood in loco parentis to Dana and Roland. Dr. Flynn was named only in Count I of plaintiffs' complaint; he was nowhere named in Count III of the plaintiffs' complaint, the particular count upon which the district court reversed:

* * *

COUNT III

28. That at all times material hereto, the defendants, Nova University, Inc., Charles W. Stevens and Janet C. Stevens, his wife, and the Department of Health and Rehabilitative Services of the State of Florida, were in the

> position of, and functioned as, the natural parents of the defendants, Dana Williamson and Roland Menzies, both minors, and were therefore obligated to exercise that degree of parental supervision, control and discipline as said defendants known propensities, tendencies and proclivities required and were further obligated to exercise that degree of parental supervision, control and discipline which natural parents are duly bound to exercise with respect to children having known tendencies, propensities or proclivities toward violent and governable behavior likely to cause harm or damage to others. (R.4043; Plaintiffs' Initial Brief at 17) (emphasis supplied).

In the introductory paragraph of plaintiffs' complaint, it was alleged that:

> * * *
>
> 4. ...the defendant, John M. Flynn,... was the Executive Director of the Nova Living and Learning Center, having direct responsibility for all policy and the implementation and enforcement thereof in connection with the Nova Living and Learning Center program.
>
> 5. ...the defendants, Charles W. Stevens and Janet C. Stevens, his wife,... had direct responsibility for the maintenance, conduct and operation of those houses utilized by the defendant, Nova University, Inc., in connection with the Nova Living and Learning Center program and had direct responsibility for the supervision and control of those minors who were residents of the Nova Living and Learning Center.... (Emphasis supplied).

In Count I, the only count directed to Dr. Flynn, the plaintiffs attempted to state a cause of action sounding in negligence. The allegations regarding Dr. Flynn's purported breach of duty are contained in paragraphs 20 and 21:

> 20. That... the defendants, John M. Flynn, Charles W. Stevens, and Janet C. Stevens, his wife, and Nova University, Inc., were obligated to use reasonable care in the operation, management and control of the Nova Living and Learning Center as a child-caring institution for delinquent, dependent, emotionally disturbed and/or ungovernable children, so

that the use of defendant's property for such purpose would not be harmful to residents, invitees and guests in the vicinity thereof.

21. That the defendants, Nova University, John M. Flynn, Charles W. Stevens and Janet C. Stevens, his wife, were careless and negligent in the operation, management and control of the Nova Living and Learning Center in the following respects:

* * *

C. That defendants failed to adopt, promote and enforce sufficient rules, regulations and policies in order to discourage and prevent repeated escapes or running away...

* * *

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

* * *

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

H. Said defendants failed and neglected to establish a program of regular psychological consulation... in order to determine whether said residents displayed such violent tendencies or propensities that their continued residence... would constitute a threat of harm or injury to members of the community and vicinity...

I. Said defendants, after having learned, or after having sufficient opportunity to learn, that the defendants [Dana and Roland] were prone to displays of violence, ungovernable temper, and repeated escapes from the Nova Living and Learning Center, failed and neglected to provide closer or additional supervision and control of said defendants, failed and neglected to obtain said defendants psychological consultation in order to aid in the repression of said tendencies, and failed and neglected to cause said defendants to be transferred to another facility having the ability to provide the foregoing. (Emphasis supplied).

Aside from the pleadings, the facts established in the

record at the time summary judgment was entered precluded, as a matter of law, a finding that Dr. Flynn stood in loco parentis to the youths enrolled in Nova's rehabilitation program. In addition, the evidence of record at the time the trial court granted summary judgment affirmatively revealed that plaintiffs were without sufficient competent proof to sustain the charges lodged against Dr. Flynn in their complaint. The record is devoid of any facts from which it could reasonably be concluded that Dr. Flynn was guilty of any act or omission in the discharge of his duties and responsibilities as the director of Nova's rehabilitation program that could arguably have caused or contributed to causing the outrageous acts perpetrated by Dana and Roland on February 17, 1975. The minimal contacts that Dr. Flynn had with Dana and Roland while they were enrolled in Nova's rehabilitation program simply underscores the lack of any real basis upon which one could conclude that Dr. Flynn stood in loco parentis to those two minors, or that he had any reason to anticipate that Dana and Roland's continued enrollment in the program would foreseeably result in such a tragic occurrence.

While the Nova Living and Learning Center first came into being in 1971, it was not until January of 1974 that Dr. Flynn took over as the program's director (R.3021-22). At that time, Roland had already been admitted into the program (R.3073). Dana, however, was admitted while Dr. Flynn was director (R.3098). Although Dr. Flynn was the individual who made the final decision to admit Dana into the program, that decision was based not only upon his own independent review of Dana's records,

but also, and primarily, upon the recommendation of the program's "screening board" whose responsibility it was to review the applicant's personal, medical, psychological, and educational records.[2] (R.3062-67, 3095). As with admissions, all final decisions regarding the expulsion of a boy from the program were to be made by the director. As director, Dr. Flynn's decisions regarding any specific enrollee in the program were, of necessity, based primarily upon the opinions, observations, and reports made known to him by others, particularly the enrollee's houseparents, who observed the child's behavior on a day to day basis. (R.3034-38, 3041-42, 3049-61, 3089). As to Dana and Roland, no incidents or conducts were ever brought to Dr. Flynn's attention which would, in his opinion, have warranted their being expelled from the program.[3] (R.3099). In sum, the record fails to reveal any facts to support the charge that Dr. Flynn was negligent because he had not expelled Dana and Roland from Nova's rehabilitation program at some point in time prior to their vicious attack on the plaintiff's children. (R.2995).

Likewise, the record fails to reveal any evidence from which one could reasonably conclude that Dr. Flynn was negligent

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[2]Additionally, an independent psychological examination of Dana was performed prior to his being admitted into Nova's program. (R.3098).

[3]While Dr. Flynn was aware that Roland had "problems" relating with his father, running away from foster homes and his residence in Nova's program, and stealing, he had never been advised that Roland presented a danger to the public or to others enrolled in its program (R.3080-81, 3090-91, 3099). As to Dana, Dr. Flynn was not aware that he had any particular problem or that he could become dangerously violent, although Dr. Flynn did recall that Dana also ran away on a few occasions.

for failing to take additional measures (beyond notifying the Davie Police Department) in attempting to secure the return of Dana and Roland to their residence on campus. Purely and simply, Dr. Flynn had no reason whatsoever to expect that Dana and Roland posed any threat of bodily harm to members of the public during their unauthorized absence. Viewing the facts of record in light most favorable to the plaintiffs, the most that Dr. Flynn could have anticipated was that Dana and Roland would try to steal from others during their elopment.[4]

ARGUMENT

POINT I.

REGARDLESS OF HOW THIS COURT ANSWERS THE QUESTION CERTIFIED BY THE DISTRICT COURT, THE SUMMARY JUDGMENT ENTERED BY THE TRIAL COURT IN FAVOR OF DR. FLYNN MUST BE REINSTATED, SINCE PLAINTIFFS NEVER ASSERTED IN THEIR PLEADINGS THAT DR. FLYNN STOOD IN LOCO PARENTIS TO DANA AND ROLAND OR THAT HE FAILED TO EXERCISE "PARENTAL CONTROL" OVER THEM.

As the facts set forth above clearly reveal, the relationship which existed between Dana and Roland and Dr. Flynn cannot reasonably be analogized to that which exists between a parent and child. Nevertheless, the trial court's entry of summary judgment in favor of Dr. Flynn was reversed by the district court on the basis of its apparently all inclusive conclusion that the defendants stood in loco parentis to Dana and Roland and

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[4]For purposes of this brief, Dr. Flynn will also join and adopt those facts stated in the briefs previously filed by Nova and the Stevenses so as to avoid unnecessary duplication.

therefore owed for the protection of plaintiffs a "parental duty" of reasonable care. The parental duty which the Fourth District found to exist for the benefit of the plaintiffs was not, under the pleadings and proof, applicable to Dr. Flynn. Thus, this Court should reinstate the trial court's summary judgment in favor of Dr. Flynn, regardless of the response given to the certified question.

Dr. Flynn cannot be held liable to the plaintiffs under the in loco parentis doctrine for several reasons. First, and most importantly, the plaintiffs' pleadings themselves did not even attempt to affix liability on Dr. Flynn on the basis that he occupied the status of a substitute parent to Dana and Roland. That count in the plaintiffs' complaint (Count III) directed itself only to the Stevenses, as Dana and Roland's teaching parents, and to Nova, as the operator of the rehabilitation program and the employer of the Stevenses. Secondly, assuming arguendo that plaintiffs had alleged that Dr. Flynn stood in loco parentis to Dana and Roland so as to give rise to the existence of a parental duty to supervise, the evidence of record affirmatively disproved that such a relationship existed. The proof of record is consistent with the allegations in plaintiffs' complaint that the Stevenses, as teaching parents, "had direct responsibility for the maintenance, conduct and operation of those houses utilized by the defendant, Nova, in connection with the Nova Living and Learning Center program and had direct responsibility for the supervision and control of those minors who are residents of the Nova Living and Learning Center." In

contrast, plaintiffs attempted to affix responsibility upon Dr. Flynn based upon his "having direct responsibility for all policy and the implementation and enforcement thereof in connection with the Nova Living and Learning Center program." The extensive discovery taken in this cause revealed that the day-to-day supervision and control of the youths enrolled in Nova's rehabilitation program were responsibilities delegated to and carried out by the teaching parents. It was the responsibility of those parents to supervise the individual youths and monitor their progress in the program. As the briefs filed by Nova and the Stevenses explain, the primary rehabilitational tool utilized in the program was a motivational point system under which enrollees earned points for good behavior and lost points for bad behavior. As a youth accumulated points, he could utilize those points to purchase privileges. In addition to purchasing privileges, an enrollee's accumulated points could be utilized to purchase "bonds," which ultimately could be used by the enrollee to earn his way out of the program. A youth's unauthorized departure would result in forfeiture of these bonds and other privileges.

It was the teaching parents who monitored the youths' activities in the program and awarded and took away the motivational points. Dr. Flynn's only direct source of information as to the progress, or the problems, with the youths enrolled in the program was the teaching parent and other counselors who made personal contact with the youths. This information was ordinarily communicated at weekly staff meetings. Thus, the only contact between Dr. Flynn and the various youths enrolled in the

program was indirect, that is, through information given by and reports received from the individual teaching parents.

We submit that it would be manifestly unreasonable to hold the director of a juvenile rehabilitation program such as Nova's liable on the basis of the in loco parentis doctrine for harm caused to members of the general public by the intentional tort of juveniles enrolled in the program, when such a director occupies only a policy making position and has only indirect contact with the youths involved in the program. Such a holding is particularly appropriate here, where the record is devoid of any evidence tending to establish that Dr. Flynn, as director of the program, had been asked, or was on notice of a need, to increase the amount of supervision provided to the juveniles beyond that already provided to them by the teaching parents.

POINT II.

REGARDLESS OF HOW THIS COURT ANSWERS THE QUESTION CERTIFIED BY THE DISTRICT COURT, THE SUMMARY JUDGMENT ENTERED BY THE TRIAL COURT IN FAVOR OF DR. FLYNN MUST BE REINSTATED, SINCE IMPORTANT POLICY CONSIDERATIONS REQUIRE THAT THE SCOPE OF THE DUTY OWED TO OTHERS BY INDIVIDUALS ENGAGED IN REHABILITATION PROGRAMS AND EFFORTS SUCH AS THE INSTANT ONE MUST BE LIMITED TO "READILY IDENTIFIABLE" THIRD PARTIES AND NOT EXTENDED TO THE PUBLIC IN GENERAL.

As noted earlier, plaintiffs attempted to affix upon Dr. Flynn a legal duty owing from him to the public at large based upon his alleged status as the director involved in the operation of a residential center for emotionally disturbed children. As

noted by both plaintiffs' counsel and the trial court, this case presented an issue of first impression in Florida tort law. As would be expected, California jurisprudence has been at the forefront in outlining the parameters of liability under similar factual scenarios.

A survey of California decisions in this area of law leads to the inescapable conclusion that those who have some ability to control mentally disturbed individuals, short of the ability to incarcerate or commit them, only owe a duty to prevent harm to those "readily identifiable" victims of the disturbed individual. See, e.g., TARASOFF v. REGENTS OF UNIVERSITY OF CALIFORNIA, 131 Cal. Rptr. 14, 551 P.2d 334 (S. Ct. 1976) (once a therapist does in fact determine, or under applicable professional standards reasonably should have determined, that a patient poses a serious danger of violence to others, he bears a duty to exercise reasonable care to protect the "foreseeable victim of that danger."); THOMPSON v. COUNTY OF ALAMEDA, 167 Cal. Rptr. 70, 614 P.2d 728 (S. Ct. 1980) (one who releases a dangerous juvenile from custody only owes a duty of protection to a member of the general public who is shown to be a known and "specifically foreseeable and identifiable victim" of the juvenile's threats of future harm; there is no general legal duty owed to the public at large to protect it from harm which may result from the release into society of an individual with a violent history who has made "nonspecific threats of harm directed at nonspecific victims").

Thus, the California courts have restricted the concept of "public duty" as one owed only to those "readily identifiable

victims" of the allegedly dangerous individual's threats. The California courts have expressly refused to impose a general duty owed to the public at large (and therefore blanket liability). This conclusion "is based in part on policy considerations and in part upon an analysis of 'foreseeability'." THOMPSON v. COUNTY OF ALAMEDA, 614 P.2d at 734.

The rationale of the California decisions was adopted and recently applied by the Minnesota Supreme Court in CAIRL v. STATE, 323 N.W.2d 20 (Minn. 1982).[5] There, an action was instituted against the state, a county welfare department, and certain state and county employees for an alleged breach of duty to warn plaintiffs of the dangerous propensities (starting fires) of a mentally retarded youth released from a state institution[6] on a holiday home leave. During the mentally retarded youth's home leave, he predictably started a fire, killing one of the sisters, severely burning another, and destroying the building.

On appeal from summary judgment in favor of all defendants, the supreme court affirmed, holding that the defendants had breached no legally imposed duty owing to the plaintiffs. The CAIRL court surveyed the various decisions in this area of law and adopted the view that, since a person ordinarily owes no duty to control the conduct of another, a legal duty will only be imposed to take some affirmative action to protect innocent third parties where the potentially dangerous person has made "specific

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[5]Recently cited by this Court with approval in EVERTON v. WILLARD, 468 So.2d 936, 939 (Fla. 1985).

[6]At the time of the tragic accident the minor was living in the Minnesota Learning Center, which, as here, was not a custodial facility designed to segregate dangerous persons, but was instead an open door facility operated by the state to provide treatment

threats" against "specific victims." Applying that rule to the facts presented, the court refused to find the breach of any legally imposed duty, stating:

> ...[the retarded youth] did not pose a danger to plaintiffs different from the danger he posed to any member of the public with whom he might be in contact when seized with the urge to start a fire.

323 N.W.2d at 26 (footnote omitted).

In essence, the courts are concluding that as to those plaintiffs, such as here, who can show nothing more than that they were a member of the general public, subject to a potential risk of harm from allegedly dangerous individuals not presently incarcerated in jails or committed to mental hospitals, no legal duty to protect is owed. "Each member of the general public who chances to come into contact with" such potentially dangerous individuals "bears a risk that the rehabilitative effort will fail." THOMPSON v. COUNTY OF ALAMEDA, 614 P.2d at 735; JOHNSON v. STATE OF CALIFORNIA, 73 Cal. Rptr. 240, 447 P.2d 352, 364 (S. Ct. 1968); LEEDY v. HARTNETT, 510 F.Supp. 1125, 1129-30 (M.D.Penn. 1981), aff'd, 676 F.2d 686 (3d Cir. 1982).

In concluding this part of our argument, attention will be directed to the two appellate decisions on record which most

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and education to mentally retarded youths with behavioral problems. In order to avoid institutional dependence and to promote speedy re-entry into the community, the center was committed to treating its students by the least restrictive means. Finally, there, as here, the youth had been placed in the center by court order based upon a finding that the environment offered by the center would be the most effective in treating the child's problems.

nearly approach the factual posture of the case at bar. First, we will discuss BEAUCHENE v. SYNANON FOUNDATION, INC., 88 Cal.App.3d 342, 151 Cal. Rptr. 796 (1st DCA 1979). In BEAUCHENE the plaintiff, who had been injured by a Lynn Bentley, sued the Synanon Foundation, Inc., which ran a home as a voluntary private rehabilitation institution that provided a structured or controlled environment for its residents. The primary purpose of the program was the rehabilitation of drug addicts, alcoholics, and other people with character disorders. Synanon 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 on May 2, 1975, and a court placed him on probation on the condition that he enters the Synanon program "and not leave without prior approval of the probation officer and the staff at 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. 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 claimed 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 Synanon created by accepting Bentley into the program, it had a duty to control his behavior so as to prevent Bentley from "escaping."

On appeal from judgment dismissing the complaint, the appellate court affirmed, based upon the following reasoning:

> Both theories of liability fail because of the faulty premise that [defendant] owed a duty of care to [plaintiff]. Generally, a person owes no duty to control the conduct of another. Exceptions are recognized in limited situations where a special relationship exists between the defendant and the injured party, or between the defendant and the active wrongdoer... [Plaintiff] does not contend the first exception is applicable... The issue is whether [defendant] owed [plaintiff] a duty under the second exception.
>
> "Duty is an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection" against the defendant's conduct....
>
> Here, the court must balance "the public interest in safety from violent assault"... against the public policy favoring innovative criminal offender release and rehabilitation programs... Although [plaintiff's] injuries may be grievous, "[o]f paramount concern is the detrimental effect a finding of liability would have on prisoner release and rehabilitation programs. Were we to find a cause of action stated we would in effect be encouraging the detention of prisoners in disregard of their rights and society's needs.... Each member of the general public who chances to come into contact with a paro-

> lee or probationer must risk that the rehabilitative effort will fail...
>
> The above cited cases applied Government Code Section 845.8 to establish that a public entity or employee enjoys absolute immunity from liability for [the negligent acts or omissions alleged]... [Defendant] concededly is not a "public entity or public employee" within the meaning of section 845.8. But the 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 [defendant's] private release and rehabilitation program owed no duty to this [plaintiff]. 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 [the injury-causing individual] to, and his unauthorized departure from, the [defendant's] program, the program itself owed [the plaintiff] a duty not to accept Bentley or to prevent his unauthorized departure. To hold [the defendant] civilly liable would deter the development of innovative criminal offender release and rehabilitation programs, in contravention of public policy.
>
> Because [the defendant] owed no duty of due care to [the plaintiff], the complaint failed to state a cause of action.

151 Cal. Rptr. 798-99 (emphasis supplied).

The final decision which is particularly appropriate to consideration of the question whether the defendants here owed Christy and Peter Wagner a legal duty of protection is VU v. SINGER COMPANY, 538 F.Supp. 26 (N.D. Cal. 1981), aff'd 706 F.2d 1027 (9th Cir. 1983). In the VU case the federal district court was confronted with 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 court granted the defendant's motion for summary judgment on the following facts.

The enrollees in the center were youths with disadvantaged backgrounds who were 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 had formerly 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 at 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, was found intoxicated six times in a two-month period before the attack on Mrs. Vu and had threatened staff members with bodily harm. Other youths had been documented as having

used alcohol, PCP and marijuana, and engaged in fist fights with "outsiders."

Based upon these facts the plaintiffs claimed that the defendants owed a duty to the residents in the surrounding community to exercise reasonable care in supervising and controlling its enrollees because the defendant had placed a group of high risk youths with histories of instability, criminal activity, and substance abuse in the midst of a residential community. The plaintiffs argued that this duty was breached by the defendant center by accepting such high risk enrollees, by failing to implement proper disciplinary procedures, by failing to confine or expell those enrollees who repeatedly violated the center's regulations, by failing to properly patrol nearby areas where enrollees would congregate and engage in illegal or otherwise wrong conduct, and by failing to warn either the nearby community or the local police officials of the potential dangers of contact with enrollees.

In rejecting the plaintiff's claims and rendering summary judgment for the defendant center, the district court initially noted that it "is well-settled that the existence of 'duty' is a question of law." After carefully analyzing the various precedents in this area of tort law on the issue of duty, the district court concluded that, when dealing with such rehabilitation programs, a legal duty to protect third persons should only be imposed when the facts show not only a foreseeable risk of harm, but also a foreseeable victim of that harm. The court stated:

> ...[I]t is the obligation to protect a foreseeable victim from a foreseeable risk that triggers the burden of using reasonable means to discharge the obligation, be it warning or controlling.

538 F.Supp. at 31 (emphasis supplied).

Finally, while the court recognized the distinction between an alleged duty to warn and an alleged duty to control, the court nonetheless concluded that "no duty arises to protect unforeseeable victims from third persons, by warning or supervision, because the burden of imposing liability upon a defendant for a third person's actions is too onerous without the foreseeabilty limitation." [538 F.Supp. at 31, fn.7].

As all the decisions in this area of tort law reflect, the question of duty is basically resolved by balancing the various factors of public policy. Therefore, we feel it important to bring to the attention of the Court the consequences of a finding of a duty in the instant case. First, it would be contrary to the principles of tort law forming the common law followed in Florida. Second, it would be contrary to the pronouncements of a well-respected court that has rejected the finding of a duty in similar circumstances, albeit paving new roads in other areas of law. Third, it would have a chilling effect on rehabilitative institutions in this state in their ability to interact with the community and deal with the community's problem individuals. Most importantly, it would be contrary to the public policy of this state in encouraging juvenile rehabilitation programs as an alternative to traditional penal institutions.

The dilemma created by attempting to balance these weighty public policies against the desire to provide a source of compensation for those like the plaintiffs here who suffer injuries at the hands of another is unavoidable. Previous precedent has struck a workable compromise by limiting the legal responsibility of those engaged in efforts to rehabilitate individuals without physically restraining them strictly to those foreseeable ("readily identifiable") victims of a foreseeable risk posed by individuals enrolled in the rehabiliation program.

The record in the case at bar is devoid of any allegation or proof that Christy and Peter Wagner were foreseeable or readily identifiable victims of the risk posed by enrollees at Nova Living and Learning Center. As such, the only question involved is one of law for decision by this Court, as it was for the trial court. Under prevailing law, that question must be answered adversely to the plaintiffs and the decision of the trial court reinstated.

The reasoning and citations of authority set forth above form the foundation upon which the trial court entered summary judgment for Dr. Flynn, as well as the other defendants. The district court, in reversing, chose not to even discuss this aspect of the duty question which is unavoidably raised by the facts of this case. Instead, the district court proceeded to consider this case on the basis of an in loco parentis analysis and concluded that, since the center was acting as substitute parents for Dana and Roland, it was obligated to exercise reasonable parental control over those individuals to protect the

public at large. However, since the in loco parentis analysis is inapplicable to Dr. Flynn, his potential liability to plaintiffs must be assessed solely in light of the authorities cited above and the rationales expressed therein. The unavoidable question regarding the liability of Dr. Flynn revolves around the concept of scope of duty. This Court, as the courts noted above, should restrict the scope of the duty owed by individuals involved in the operation of private juvenile rehabilitation programs to "readily identifiable" victims. In the instant case there is no allegation, much less proof, that any of the defendants owed a duty to the plaintiffs because their minor children were readily identifiable victims of Dana and Roland. This Court should affirm the summary judgment in favor of Dr. Flynn based upon a holding that the scope of the duty of protection owed by Dr. Flynn did not extend so as to encompass the plaintiffs, who were merely members of the general public who unfortunately came into contact with ones as to whom the rehabilitative effort had failed.

POINT III.

ANY ALLEGED NEGLIGENCE OF DR. FLYNN WAS NOT A PROXIMATE LEGAL CAUSE OF PLAINTIFFS' INJURIES WHERE DANA AND ROLAND HAD NEVER EXHIBITED A PROPENSITY FOR VIOLENCE DURING THE PREVIOUS ELOPEMENTS AND HAD NEVER COMMITTED ANY ACT WHILE AT THE CENTER REMOTELY COMPARABLE IN VIOLENCE, METHOD, AND CONSEQUENCES TO THE ACTS COMMITTED AGAINST THE PLAINTIFF'S MINOR CHILDREN.

To avoid duplication, Dr. Flynn will adopt and incorporate herein by reference the argument previously presented on

this point at pages 10 through 20 in the initial brief filed by the Stevenses.

POINT IV.

ANY ALLEGED NEGLIGENCE OF DR. FLYNN WAS NOT A PROXIMATE LEGAL CAUSE OF THE PLAINTIFFS' 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.

To avoid duplication, Dr. Flynn will adopt and incorporate herein by reference the argument previously presented on this point at pages 20 through 24 in the initial brief filed by the Stevenses.

CONCLUSION

Based upon the reasoning and citations of authority set forth above, it is respectfully sumbmitted that the trial court correctly entered summary judgment in favor of Dr. Flynn. Reversal by the Fourth District Court of Appeal, to the extent based upon the in loco parentis doctrine, was erroneous under the pleadings and proof in the case respecting the liability of Dr. Flynn. In addition, the decision of the Fourth District fails to address the true issues of duty and proximate cause raised by the facts in the case. Accordingly, this Court should quash the decision of the district court and remand with instructions to reinstate the summary judgment entered in favor of Dr. Flynn, as well as those in favor of the other defendants.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the above and foregoing was mailed this 15th 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, 700 Brickell Avenue, Miami, Florida 33131; JOEL D. EATON, ESQ., Podhurst, Orseck, et al, 25 West Flagler Street, 1201 City National Bank Building, Miami, Florida 33130; JOHN P. KELLY, ESQ., 1415 East Sunrise Boulevard, Ft. Lauderdale, Florida 33338; and JOSEPH H. LOWE, ESQ., of Marlow, Shofi, et al, 1428 Brickell Avenue, Suite 204, Miami, Florida 33131.

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