

No. A05-1524

---

**STATE OF MINNESOTA  
IN COURT OF APPEALS**

---

JAMES D. STUEDEMANN AND JEANNE R.  
STUEDEMANN, as Co-Trustees for the Heirs  
and Next of Kin of Jolene Stuedemann,  
Decedent,

Appellants,

vs.

TONY ALLEN ROMAN NOSE, R-HOME OF  
WOODBURY, INC., ROBERT RITTER AND  
DONNA RITTER, INDIVIDUALLY AND AS  
PROPRIETORS OF PROLAWN LANDSCAPING,  
AND KEVIN FLYNN,

Respondents.

---

**APPELLANTS' BRIEF AND APPENDIX**

---

ARLO H. VANDE VEGTE, P.A.  
Arlo H. Vande Vegte #112045  
Attorney for Appellants  
1850 W. Wayzata Blvd.  
P.O. Box 39  
Long Lake, MN 55356-0039  
(952) 475-2219

LARSON • KING  
Mark Solheim #213226  
Marcus Sanborn #032338  
Attorneys for Respondent  
R-Home of Woodbury, Inc.  
2800 Wells Fargo Place  
30 East Seventh Street  
St. Paul, MN 55101  
(651) 312-6500

RIDER BENNETT, LLP  
Diane B. Bratvold #18696X  
Richard C. Scattergood #251069  
Attorneys for Respondents  
Robert Ritter and Donna Ritter  
33 So. Sixth Street, Suite 4900  
Minneapolis, MN 55402  
(612) 340-8900

Attorney for Appellants

Attorneys for Respondents

---

**TABLE OF CONTENTS**

STATEMENT OF THE ISSUES ..... 1

STATEMENT OF THE CASE ..... 2

RELEVANT PROCEDURAL HISTORY ..... 4

STATEMENT OF THE FACTS ..... 6

    1. Taking charge of third person ..... 6

    2. Knowing or having reason to know that the third person is likely  
    to cause bodily injury if not controlled ..... 8

    3. Failure to exercise reasonable care to control the third person to  
    present him from causing bodily harm to others ..... 14

        A. Failure to refuse to accept Roman Nose after the June 21,  
        1999, baseball bat assault and to require active treatment ..... 14

        B. Failure to discharge Roman Nose to a higher level of security ..... 16

        C. Failure to enlist the assistance of the juvenile court ..... 18

        D. Failure to report “neglect” or seek involuntary commitment ..... 19

        E. Failure to take steps to remove Roman Nose from the  
        streets on July 10, 2000 ..... 21

ARGUMENT ..... 23

I. The trial court erred in granting summary judgment on grounds of duty,  
foreseeability and causation ..... 1, 23

    A. Duty/Foreseeability ..... 24

        1. § 319 [if not § 316] Duty Applies ..... 24

        2. Foreseeability ..... 32

    B. Causation ..... 36

II. The trial court erred in dismissing the complaint against Kevin Flynn ..... 1, 39

A.	Timeliness .....	40
B.	Causation .....	41
	1. <u>Screening Failure</u> .....	41
	2. <u>Treatment Failure</u> .....	41
	3. <u>Re-Assessment Failure</u> .....	41
	4. <u>Patient Abandonment</u> .....	42
	5. <u>Statutory Mandates/Prerogatives</u> .....	42
C.	Taking Charge .....	44
	CONCLUSION .....	44

## TABLE OF AUTHORITIES

### STATUTES

Minnesota Statutes Chapter 3 .....	30
Minnesota Statutes Chapter 466 .....	30
Minnesota Statutes Chapter 253B .....	42
Minn. Stat. § 145.682 .....	1, 4, 39, 40, 43
Minn. Stat. § 626.556 .....	1, 19, 42

### CASES

<u>Carlisle v. City of Minneapolis</u> , 437 N.W.2d 712, 715 (Minn.App. 1989) .....	37
<i>Cf.</i> , <u>Koellen v. Nexus Residential Treatment Facility</u> , 494 N.W.2d 914, 917-22 (Minn.App. 1993), <i>review denied</i> (Minn. Mar. 22, 1993) .....	31
<u>E.H. Renner &amp; Sons, Inc. v. Primus</u> , 295 Minn. 240, 243, 203 N.W.2d 832, 835 (1973) .....	37
<u>Foss v. Chicago, B &amp; Q Ry Co.</u> , 151 Minn. 506, 508, 187 N.W. 609, 610 (1922) .....	34
<u>Huttner v. State</u> , 637 N.W.2d 278 (Minn.App. 2001), <i>reviewed denied</i> (Minn. Nov. 13, 2001) .....	1, 27, 28, 35, 38, 44
<u>L.G. v. Barber</u> , 1999 Minn.App. LEXIS 839 and <u>M.H. v. Barber</u> , 1999 Minn.App. LEXIS 602 .....	31
<u>Lundgren v. Fultz</u> , 354 N.W.2d 25 (Minn. 1984) .....	1, 26, 27, 28, 35, 38, 43, 44
<u>M.H. v. Barber</u> , 1999 Minn.App. LEXIS 602 .....	31

Pluwak v. Lindberg, 268 Minn. 524, 528-29, 130 N.W.2d 134,  
135-36 (1964) ..... 1, 37

Republic Vanguard Insurance Co. v. Buehl, 204 N.W.2d 426 (Minn. 1973) ..... 31

Rum River Lumber Co. v. State, 282 N.W.2d 882 (Minn. 1979) ..... 1, 26, 34, 35, 38

Sayers v. Beltrami County, 472 N.W.2d 656 (Minn.App. 1991) ..... 34, 35

Silberstein v. Cordie, 474 N.W.2d 850, 856 (Minn.App. 1991), *review*  
granted in par and denied in part (Minn. Nov. 26, 1991) ..... 32

State v. Roman Nose, 649 N.W.2d 815 (Minn. 2002), *affirmed after*  
*remand*, 667 N.W.2d 386 (Minn. 2003) ..... 23

**SECONDARY AUTHORITIES**

Restatement (Second) of Torts § 315 ..... 1, 24

Restatement (Second) of Torts § 315(a) ..... 24

Restatement (Second) of Torts § 316 ..... 1, 24, 31, 32

Restatement (Second) of Torts § 319 ..... 1, 2, 6, 14, 24, 25, 26, 28, 31, 38, 39, 44

## STATEMENT OF THE ISSUES

**I. Did the trial court err in dismissing appellants' claims against respondents on grounds that there was no duty, no foreseeability and no causation?**

A. The trial court held in the negative.

B. Most apposite law

1. Cases

- a. Rum River Lumber Co. v. State, 282 N.W.2d 882 (Minn. 1979)
- b. Lundgren v. Fultz, 354 N.W.2d 25 (Minn. 1984)
- c. Huttner v. State, 637 N.W.2d 278 (Minn.App. 2001), *review denied* (Minn. Nov. 13, 2001)

2. Statutes/rules

- a. Minn. Stat. § 626.556
- b. Restatement (Second) of Torts §§ 315, 316 and 319

**II. Did the trial court err in dismissing appellants' amended complaint against Kevin Flynn on grounds that there was no duty, no foreseeability, no causation and lack of timeliness?**

A. The trial court held in the negative.

B. Most apposite law

1. Cases

- a. Lundgren v. Fultz, 354 N.W.2d 25 (Minn. 1984)
- b. Huttner v. State, 637 N.W.2d 278 (Minn.App. 2001), *review denied* (Minn. Nov. 13, 2001)
- c. Pluwak v. Lindberg, 268 Minn. 528-29, 130 N.W.2d 134, 135-36 (1964).

2. Statutes/rules - Minn. Stat. § 145.682

## STATEMENT OF THE CASE

This wrongful death claim was brought under the auspices of *Restatement (Second) of Torts* § 319. On the eve of trial, and save Tony Allen Roman Nose ["Roman Nose"] ( the convicted murderer/rapist of eighteen year old Jolene Stuedemann), the trial court, Hon. Gary R. Schurrer, dismissed all other defendants from the suit.

The defendants dismissed from this case are R-Home of Woodbury, Inc. ["R-Home"] Robert and Donna Ritter ["Ritters"] and Kevin Flynn ["Flynn"]. R-Home is a corporation that was organized in 1989 for the purpose of providing "foster care" to disadvantaged teens. It is owned by the Ritters. [Affidavit of Arlo H. Vande Vegte, *Exhibit 1*, Donna Ritter Dep 215-16]. In actuality, from the 1980's, and well into the 1990's, R-Home and/or the Ritters provided "Rule 8" group home services through another licensed provider. In 1997 the Ritters obtained their own "Rule 8" group home license from the Department of Human Services under the R-Home name and began operating their own business. Flynn was a licensed psychologist who assisted the Ritters in this process. Once the Ritters' business was established, Flynn provided counseling and chemical dependency services to the R-Home group home residents on an exclusive basis, i.e., he had no other clients.

By the time of the operative facts in this case, Ritters/R-Home, assisted by Flynn, operated five different group homes, including the one located at 7177 Sherwood Road, Woodbury, Minnesota, where Roman Nose was housed. Roman Nose had a known history of violent behavior fueled by chronic chemical dependency and anger issues. His MMPI was emblematic of this.

Knowing that Roman Nose suffered from these untreated issues, the defendants volunteered to re-accept Roman Nose, then aged 16, as a group home resident in the summer of 1999. They knew that he had just assaulted and hospitalized a man at his home reservation in Lame Deer, Montana, while highly intoxicated. He had struck the man in the head with a baseball bat. He spent two months in jail at the reservation and was returned, without intervening treatment of any kind, to R-Home in August of 1999.

Defendants' group home setting was ill-equipped to control Roman Nose. After his re-acceptance, Roman Nose continued to abuse chemicals and engage in violent behavior. He had homicidal ideation. He broke the group home rules with impunity. He was frequently AWOL. Defendants took few steps to control him. They kept important information from the juvenile court concerning his history of violence and chemical dependency. Their disciplinary methods relied upon little more than gentle persuasive tactics. He clearly belonged at a higher level of security and his chemical dependency/anger management issues went untreated.

This is the basic factual backdrop upon which Roman Nose was permitted to roam the neighborhoods of Woodbury, Minnesota, the night of July 10<sup>th</sup> and 11<sup>th</sup>, 2000, to become, once again, highly intoxicated and, this time, murderous.

Plaintiffs here appeal the trial court's dismissals on duty, foreseeability and causation grounds. They also appeal the dismissal of Flynn. As will be shown, there is no legal or factual currency in any of these dismissals.

## RELEVANT PROCEDURAL HISTORY

Suit was commenced in June of 2003 without including Flynn as a defendant. The need for an expert under Minn. Stat. § 145.682 was in doubt. Appellants' counsel elected to first take some discovery and then, if necessary, seek the court's input on the question of the need for an expert. [Affidavit of Arlo H. Vande Vegte, p. 4]. However, R-Home unilaterally third-partied Flynn into the suit. R-Home had no affidavit of expert review and never attempted to get one. Flynn defended and, to-date, has fully participated in discovery (except for two depositions which his counsel elected not to attend). [Id.]. On May 28, 2004, Flynn brought a motion to dismiss the third-party complaint on § 145.682 grounds. Appellants also noticed a discovery motion seeking access to all of Roman Nose's juvenile records which, likewise, was heard on May 28, 2004. It was unopposed. The trial court dismissed Flynn from the case by its order of August 3, 2004. It did not rule on appellants' motion seeking juvenile records. [A-26 to 27; A-31 to 35; A-36].

On August 27, 2004, appellants brought another discovery motion seeking *in camera* review and confidential disclosure of the Department of Human Service's R-Home license revocation file. Jolene Stuedemann's rape and murder had precipitated revocation proceedings. Appellants also sought to compel R-Home to answer interrogatories and Rule 34 requests. [A-28 to 30].

In September of 2004, a collateral declaratory judgment action was started over liability insurance coverage for R-Home. This was also venued in Washington County

District Court [Case No. 82-C1-04-4471]. It was assigned to Hon. David C. Doyscher. On November 1, 2004, Judge Doyscher entered an amended order consolidating the instant case with the declaratory judgment case for discovery purposes [A-80 to 81]. He issued a Scheduling Order on December 22, 2004. [A-82 to 84].

On November 23, 2004, the trial court issued an order denying appellants' August 27<sup>th</sup> motion to compel, but did not rule on appellant's May 28, 2004, unopposed motion for juvenile records. Nor did it rule on the August 27, 2004, motion for *in camera* review and confidential disclosure of the DHS records. [A-36 to 37; A-38 to 41].

On November 29, 2004, appellants sent the trial court a letter requesting rulings on the May 28, 2004, juvenile records motion and the August 27, 2004, motion for DHS records. [A-36 to 37]. On December 14, 2004, the trial court issued an order granting appellants access to a single juvenile court file and granting them access to the DHS file. [A-38 to 41].

The first Scheduling Order in the instant case was not issued until February 2, 2005. [A-42 to 43]. A telephone conference with the court was held on February 10, 2005, as defense counsel wanted some changes to accommodate their dispositive motions. Appellants' counsel, at that time, advised the court that he had consulted with an expert regarding Flynn and had a positive indication of malpractice. There was discussion about having to cram a motion to amend into the existing scheduling order. On February 17, 2005, appellants' counsel wrote to the trial court advising of updated events and requesting the possibility of an extension of the March 1, 2005, deadline for joining additional parties. [A-

46 to 47]. However, when Flynn's counsel was contacted by appellants' counsel about what was transpiring, he waived the need for a motion to amend and said Flynn would rely upon a later dispositive motion. Flynn was then re-inserted as a defendant by stipulation. [A-10 to 12]. Flynn never served or filed an answer to the Amended Complaint. His counsel was served with Dr. Alecky's affidavit on May 3, 2005. Flynn simply brought a dispositive motion claiming, *inter alia*, laches. He never demonstrated any prejudice. He merely claimed its existence. The trial court, in part, dismissed the claim against him holding that appellants had violated the March 1, 2005, expert witness disclosure deadline and holding that there was no causation shown by Dr. Alecky's opinions in any event. [A-75 to 77].

#### **STATEMENT OF THE FACTS**

There are three elements to the legal duty imposed by *Restatement (Second) of Torts*

§ 319:

1. Taking charge of a third person;
2. Knowing or having reason to know that, unless controlled, that third person is likely to cause injury to others; and
3. Failure to exercise reasonable care to control that third person to prevent him from causing bodily harm to others.

Appellants' discussion of the facts will parallel each of these elements.

**1. Taking charge of a third person.** Donna Ritter testified that she and her husband obtained referrals for their group homes from Minnesota agencies and the Lane

Deer Indian Reservation in Montana. [Id., 30]. Roman Nose had come from Lane Deer. He initially came to R-Home in 1997. [A-66]. He was sent back to the Reservation in June of 1999. Flynn did a discharge summary dated June 14, 1999, that included a discharge diagnosis of “Drug Dependence, Oppositional Defiant Disorder, Conduct Disorder features” and concluded with a “guarded” prognosis. [Id., *Exhibit 3*].

Roman Nose did poorly at the Reservation. On June 21, 1999, he became highly intoxicated [using alcohol and marijuana]. He hit a man in the head with a baseball bat causing a subdural hematoma/concussion with “the potential to be lethal”. [Id., *Exhibit 4* - 11/23/99 letter from John I. Moseley, MD].

On June 28, 1999, Flynn wrote a “Psychological Profile” for Lane Deer social services. He predicted a “good prognosis” assuming Roman Nose could accept long term care. [Aff. Arlo H. Vande Vegte, *Exhibit 6*]. This is to be contrasted with his “guarded” prognosis only two weeks prior.<sup>1</sup> Robert Ritter testified that he, too, was involved in the decision to accept Roman Nose’s return to R-Home. [Id., *Exhibit 7*, B. Ritter Dep 57-58]. He was aware of the June baseball bat assault. [Id., *Exhibit 8*].

Roman Nose returned in August of 1999. Flynn did a psychological assessment and “Treatment Plan” on August 9, 1999. He recorded the following things:

---

<sup>1</sup>The records in this case show that Roman Nose had a prior history of violence as well. However, for purposes of the dispositive motions which led to this appeal, appellants began their factual recitations demonstrating foreseeability, breach of duty and causation in the June 1999 time-frame.

- a. "Chemical Dependency" since the age of 5 with "daily" use;
- b. history of neglect and physical abuse; and
- c. "assaultive".

The baseball bat assault was also documented. Flynn's report listed the "Identified Problems" as "alcohol/drugs"; "anti-social behavior"; "anger outbursts"; and "conflict with others". [Id., *Exhibit 9*].

After the murder, [and on July 26, 2000] James Klinger, from the licensing division of the Department of Human Services, interviewed Flynn and Robert Ritter. He was accompanied by DHS maltreatment investigator, Mary Truax [Id., *Exhibit 11* - Truax Dep 15; 23]. Mr. Klinger took notes [Affidavit of James Klinger] and Ms. Truax kept an "Investigation Data" log. [Affidavit of Arlo H. Vande Vegte, *Exhibit 12* - A61-62]. Klinger's notes reflect the prior knowledge of R-Home principals concerning the baseball bat assault. Then, the following conversation with Flynn is recorded:

Why did you take T.R. back after assault? I took him back to focus on C.D. issues. I didn't see him prone to violence.

[Affidavit of James Klinger and p. A187 thereto].

**2. Knowing or having reason to know that the third person is likely to cause bodily injury to others if not controlled.**

The Ritters and Flynn all knew of Roman Nose's chemical dependency and his assaultive, anti-social behavior even before they took him back. They also knew that he had not received treatment for his chemical dependency while incarcerated at Lame Deer Reservation. [Id., *Exhibit 3; Exhibit 8; Exhibit 9*]

Appellants retained a forensic psychologist to, *inter alia*, assess the conduct of Kevin Flynn by professional standards of care. [Id., *Exhibit 13*]. Dr. Aletky's affidavit is helpful to an understanding of the knowledge Flynn had, or should have had, regarding Roman Nose's likelihood of causing bodily harm to others if not controlled. But, Flynn's knowledge is also imputable to the Ritters. The Ritters have testified that they had regular sessions with Flynn to discuss the progress or status of Roman Nose. [Id., *Exhibits 1* - D. Ritter Dep 136-137; *Exhibit 7* - R. Ritter Dep 32; 40]

A number of documents completed by Flynn, various house parents and the Ritters from 1999 and 2000, together with DHS post-murder investigational records, document the R-Home staff members' knowledge [or reason to know] of Roman Nose's escalating chemical dependency and his actual harm to others:

1. Knowledge of his frequent use of marijuana while working at Broadway Pizza [Id., *Exhibit 12*, p. A188; *Exhibit 16*];<sup>2</sup>
2. Knowledge of his November 1999 five day suspension from school for a serious school fight [Id., *Exhibit 1* - Donna Ritter Dep 127-128; *Exhibit 7* - Robert Ritter Dep 100-101, 154-155; *Exhibit 14* - Daniel Ritter Dep 35; *Exhibit 16*; *Exhibit 17*];

---

<sup>2</sup>DHS official, Klinger, recorded Robert Ritter's responses about Roman Nose's conduct at Broadway Pizza as follows:

..we knew TR was using pot. He had several positive drug tests 1999. In 1999 we had him TR quit Broadway Pizza because he was smoking pot there.

3. Knowledge of his testing positive on November 16, 1999, for cocaine and amphetamines [Id., *Exhibit 1* - Donna Ritter Dep 134-35; *Exhibit 14* - Dan Ritter Dep 40];
4. Knowledge of his repeated “poor” scores for anger control in monthly R-Home Progress Reports and repeated documentation of his curfew violations and lies about his whereabouts after work [Id., *Exhibit 16*; *Exhibit 19*; *Exhibit 23* p. A176];<sup>3</sup>
5. Knowledge of his injurious assault upon another group home resident on February 20, 2000, when he pushed his body weight against the victim’s arm as it was between the dishwasher and its door [Id., *Exhibit 20* - Washington County Juvenile Court records; *Exhibit 1* - Donna Ritter Dep 144-45; *Exhibit 7* - Robert Ritter Dep 78-79; *Exhibit 14* - Dan Ritter Dep 50];<sup>4</sup>
6. Knowledge of his April 9, 2000, over-dose on Dramamine tablets he had stolen in order to get a “thrill” together with his resulting hospitalization for seizure activity/injury to his shoulder [Id., *Exhibit 7* - Robert Ritter Dep 109; *Exhibit 21*; *Exhibit 22* p. A69; *Exhibit 23* p. A176 and handwritten page 54];<sup>5</sup>
7. Knowledge of his assault on another group home resident of April 11, 2000, when he “punched Dominic in the face at study time, then kned Dominic when his face was down” and his other violent/tantrum-like conduct of that date [Id., *Exhibit 23* p. A176; *Exhibit 14* - Dan Ritter Dep 53; *Exhibit 7* - Robert

---

<sup>3</sup>Donna Ritter testified that the monthly Progress Reports were the result of collaborative efforts of herself, the house parents and Flynn [Id., *Exhibit 1* - Donna Ritter Dep 137-38]

<sup>4</sup>Flynn claims he never knew of this assault. [Id., *Exhibit 15* - Flynn Dep 203].

<sup>5</sup>Flynn also claims that he did not know of this over-dose incident. [Id., *Exhibit 15* - Flynn Dep 204-05]. However, Robert Ritter contends that Flynn not only knew of it, he spoke directly to Roman Nose about it. [Id., *Exhibit 7* - Robert Ritter Dep 109-110; 151-52]. The DHS investigation records appear to document at least Flynn’s knowledge of the incident. [Id., *Exhibit 22* p. A71]

Ritter Dep 110];<sup>6</sup>

8. Knowledge that he disdained important probation obligations as imposed by the juvenile court on April 21, 2000, for the February 20, 2000, dishwasher assault (remain “law abiding”/ complete 20 hours of community service within 45 days) [Id., *Exhibit 20*; *Exhibit 7* - Robert Ritter Dep 103; *Exhibit 23*, page hand numbered 54 and *Exhibit 1* - Donna Ritter Dep 158-59; 164-65];
9. Knowledge that on May 6, 2000, he threw a fork into the face of another group home resident “and misses by fractions of an inch Dominic’s eye” and memorialization that “Tony’s impulses and tempers are getting worse...” [*Exhibit 23* p. A177; *Exhibit 7* - Robert Ritter Dep 120; *Exhibit 1* - Donna Ritter Dep 157];
10. Knowledge of his unexplained absence from school on May 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup> and 15<sup>th</sup>, 2000 [*Exhibit 23* p. A177; *Exhibit 7* - Robert Ritter Dep 120-22];
11. Knowledge of their having to move another group home resident from the Sherwood Avenue residence on May 22, 2000, “...to get away from Tony as Tony was verbally assaulting Shawn for days and raising fist to Shawn whenever Shawn would walk by...” [Id., *Exhibit 23* p. A177];
12. Knowledge of many reported incidents of insubordination and refusal to follow the group home rules or directions of group home parents [Id., *Exhibit 23* pp. A177-76];
13. Knowledge of his “poor anger control” and being “physically abusive” during the months of April, May and June of 2000 [Id., *Exhibit 19* - June 2000 “Progress Report”];

---

<sup>6</sup>Besides the assault, Roman Nose refused to do study time; slammed a chair into the floor twice and raised it above his head as if to throw it at others; threw the chair into the kitchen wall; and punched a hole in the wall near the bathroom. [Id., *Exhibit 23* p. A176]

14. Knowledge of his “bad attitude” and the new group home parent’s strong suspicion of drug use in early July of 2000 [Id., *Exhibit 24* - Bruss Dep 74-76; *Exhibit 25*];
15. Knowledge of his assault/intimidation of another resident while appearing to be under the influence of drugs on July 5, 2000, thus resulting in a new juvenile court citation for assault [Id., *Exhibit 25*; *Exhibit 26*; *Exhibit 24* - Bruss Dep 74-79];<sup>12</sup>
16. Knowledge of his “I remember” poem which graphically related his childhood memories of violence, transience, chemical dependency and blood and which was found in his group home file by the police [Id., *Exhibit 28*; *Exhibit 36* - Sgt Jagodzinski Dep 87-88];<sup>13</sup>
17. Knowledge of his “The Mind of a Serial Killer” wall-hanging creation seized by law enforcement authorities from the wall of his room at the Sherwood Avenue group home after the murder [Id., *Exhibit 27*];<sup>14</sup>

---

<sup>12</sup>Mrs. Bruss’ notebook entries of July 5<sup>th</sup> discuss his “very bad attitude” and his “very glassy eyes pupils dilated”. They go on to relate the day’s assault and the intimidation, including a threat regarding the victim’s home and a finger across the throat gesture. [Id., *Exhibit 25*]

<sup>13</sup>Flynn testified to the significance of this poem. He said that had he known of Roman Nose’s escalating pattern of chemical dependency and violent behavior that information and that poem he would have considered Roman Nose to be appropriate for a higher security custodial setting and even capable of rape and murder. [Id., *Exhibit 15* - Flynn Dep 213-16; 251-52]

<sup>14</sup>Comparison of this document to the position of Jolene Stuedemann’s body at the crime scene is striking. [See, *Exhibit 27*]. When the police seized Roman Nose’s personal effects via a search warrant, they found a cannister with apparent marijuana residue in his jacket; a spiral notebook containing several pages with “writings that mention killing and other violent acts”; and the wall poster with “The Mind of a Serial Killer”. [Id.]. Bruss testified that house parents had the right to and did come into the residents’ rooms on a daily basis to inspect and to restrict what the residents were allowed to keep. [Id., *Exhibit 24* - Bruss Dep 94-95].

18. Knowledge of his 1998 MMPI containing Flynn's notations: "frustrated", "anger", "impulsive", "poorly developed conscience" and "can act out in emotional outbursts" [Id., *Exhibit 29*; *Exhibit 15* - Flynn Dep 138; 147-48];
19. Knowledge that very few group home residents from the hundreds of residents the Ritters claim to have serviced over the years had presented to them with a history similar to Roman Nose's (history of seriously violent behavior, chemical use since a very early age, neglect and physical abuse). [Id., *Exhibit 1* - Donna Ritter Dep 216-218].
20. Knowledge that Roman Nose was at greater risk of violence while under the influence of alcohol and/or drugs; that teenagers have relatively easy access to drugs and alcohol while away from home; that by July 10, 2000, Roman Nose had demonstrated that he was not succeeding in meeting the expectations of R-Home in terms of responsibility, acceptance of direction and positive interaction with peers; that Roman Nose could get into drugs or alcohol; and that Roman tended to take time away from the group home depending upon how he felt on any given day [Id., *Exhibit 1* - Donna Ritter Dep 177-78; *Exhibit 7* - Robert Ritter Dep 127-131];
21. Knowledge that Robert Ritter had spoken to Roman Nose six to eight times about his behavior in the year before the murder and that Flynn had warned Roman Nose that if he drank he would get into "big trouble" and "would end up in prison" [Affidavit of James Klinger and p. A188 thereto];
22. Knowledge that from April, 2000, to the murder of July 11, 2000, Roman Nose had no contact with Flynn or any form of mental health treatment even though he was demonstrating serious deterioration and his need for treatment was well understood [Affidavit of Arlo H. Vande Vegte, *Exhibit 31* pp A12-13 (DHS response letter to R-Home's request for reconsideration of the revocation of its group home license); *See also*, *Exhibit 15* - Flynn Dep 208-210; 240-242].

These facts create not only a strong basis for satisfaction of the second element of a § 319 duty, they bear directly upon the question of foreseeability of harm to others *[infra]*.

**3. Failure to exercise reasonable care to control the third person to prevent him from causing bodily harm to others.**

R-Home, Ritters and Flynn eschewed numerous reasonable and available “control” mechanisms in order to prevent Roman Nose from murdering Jolene Stuedemann:

A. Failure to refuse to accept Roman Nose after the June 21, 1999, baseball bat assault and to require active treatment. The initial means of control, of course, would have been to refuse to accept him after the June 21, 1999, baseball bat assault. The Ritters admit that it was within their discretion to refuse him. [Affidavit of Arlo H. Vande Vegte, *Exhibit 1* - Donna Ritter Dep 105-06; *Exhibit 7* - Robert Ritter Dep 21]. Lame Deer called and asked the Ritters to take him back on condition that Roman Nose go to school, get a job and attend AA. Without imposing any conditions of their own, the Ritters agreed. [Id., *Exhibit 1* - Donna Ritter Dep. 95-98].

Flynn also participated in the decision to have Roman Nose return to R-Home by writing a “Psychological Profile” for Lame Deer Social Services dated June 28, 1999. [Id., *Exhibit 6*.]. He knew that Roman Nose had not had chemical dependency treatment. [Affidavit of James Klinger and p. A187 thereto]. He said he took Roman Nose back to “focus on CD issues.” [Id.]. However, Flynn knew that the group home setting only offered exposure to the “12 Steps” concept and was not actual “treatment”. [Affidavit of Arlo H.

Vande Vegte, *Exhibit 15* - Flynn Dep 162]. Furthermore, Flynn admitted to James Klinger that he considered actual treatment for Roman Nose but did not pursue it because he did not think it would be funded. [Affidavit of James Klinger and p. A187 thereto].

In her opinions detailing Flynn's breaches of standards of care and causation, Patricia Aletky, Ph.D., L.P., criticized his decision to allow Roman Nose to return to R-Home in August, 1999, without first having active treatment for his severe anger management and chemical dependency problems. [Id., *Exhibit 13* pp. 6-7; 8; 9]. Then, knowing that the group home setting is, itself, not active treatment, Dr. Aletky opined that Roman Nose presented a foreseeable and unacceptable risk of returning to alcohol/chemical abuse and violence which, in fact, plainly occurred. [Id.].

Dr. Aletky also heavily criticized, as causal fault, Flynn's August 6, 1999, "Clinical Assessment and Treatment Plan" [see, Id., *Exhibit 9*]. It had little hope of success and would leave Roman Nose's recovery, essentially, to R-Home's inadequate system (or to "chance"). [Id., *Exhibit 13* pp. 8-10; 16-17]. And, she found great causal fault with Flynn's non-pursuit of active treatment for Roman Nose per his belief that it would not get funded. [Id.]. The fact is - Roman Nose never received in-patient or even out-patient treatment. Instead, he may have gone to some Thursday night "Solutions" group meetings at the Ritters' home. These meetings were not even truly AA meetings. [Id., *Exhibit 1* - Donna Ritter Dep 21-22]. The "Solutions" group meetings were not mandatory and residents who were working did not go.

[Id., Exhibit 7 - Robert Ritter Dep 65-66].<sup>15</sup> From August 6, 1999, to March 23, 1999, Roman Nose had thirteen “One to One” sessions with Flynn. [Id., *Exhibit 16*]. Flynn testified that he also had dinner one night a week at each R-Home facility and would, in group fashion, discuss issues with the residents. Thursday nights was his night to go to the Sherwood Avenue residence. This was the sum and substance of his “treatment” in 1999 and 2000. It was obviously unsuccessful in controlling anything.

B. Failure to discharge Roman Nose to a higher level of security. The knowledge, and reason to know, of the risks and actual incidents of injurious assault that Roman Nose presented following his final admission to R-Home have been detailed above. The Ritters admit that on prior occasions they had discharged a few group home residents as safety risks. [Id., *Exhibit 1* - Donna Ritter Dep 122-24]. Donna Ritter recalled three, but in each case the perceived safety risk was to **herself**. She recalled no instances of discharge where the safety risk was to other group home residents. [Id.]. Robert Ritter recalled one or two instances of discharge to a higher level facility where the resident presented a safety risk to himself. [Id., *Exhibit 7* - Robert Ritter Dep 25; 112-13].

---

<sup>15</sup>Robert Ritter claims that Roman Nose went to AA meetings in Woodbury, but he had no documents to demonstrate he did; Ritter did not know where he went or the day of the week; and he did not know how many times Roman Nose attended. Moreover, Flynn testified that the “AA Solutions Group” that he drafted into Roman Nose’s treatment plan of August, 1999, was the Thursday night meetings. [Id., *Exhibit 15* - Flynn Dep 59-60; 183-84]

Respondents' description of their ability to control the residents while in their custody was very vague. Robert Ritter testified that they, essentially, voluntarily imposed on themselves a restriction of no confinement, no physical contact and a "kid" dependent set of consequences for non-compliant behavior. [Id., 113-115]. They did not have a progressive discipline policy. [Id., 31-32]. It would appear, then, that, once accepted at R-Home, the only strong sanction available was discharge to a higher level of security. When asked if that was considered in Roman Nose's case prior to the murder, the Ritters responded negatively. [Id. *Exhibit 1* - Donna Ritter Dep 155-56; *Exhibit 7* - Robert Ritter Dep 115-22]. Indeed, it appears that the Ritters' use of this sanction focused heavily upon their own personal security - not the welfare of the child, the other residents or the house parents.

As a referral from the Lame Deer reservation, Roman Nose brought [over and above costs for health care] \$89.00 per day to the R-Home business. This was \$20.00 per day more than state referred residents. [Id., *Exhibit 1* - Donna Ritter Dep 36-43]. Despite their denial, clearly the Ritters had a financial incentive to keep Roman Nose in their own system.

Dr. Aletky criticized Flynn's conduct in failing to continually re-assess Roman Nose's status and, upon his learning of Roman Nose's continuing chemical use and violence, recommend discharge to a higher level of security.<sup>16</sup> She opined that Roman Nose's MMPI

---

<sup>16</sup>While Flynn denies personal knowledge of Roman Nose's escalation, he was aware of a "Rule 5" facility in Stillwater. He was aware that "Rule 5" facilities are "institutional" and are for "severely emotionally disturbed" children. He agreed that had he known of Roman Nose's escalating chemical abuse and violence in 2000, he would have considered Roman Nose appropriate for discharge to a "Rule 5" facility. No such

and history made it apparent that Roman Nose was a sociopath whose control depended upon a highly structured system of rewards and punishments, such as those one finds in a correctional facility. [Id., *Exhibit 13*, pp. 16-17]. She also noted that Flynn had available to him the civil commitment process in the event the Ritters resisted his recommendation. [Id., *Exhibit 13* pp 18]. None of this was done.

C. Failure to enlist the assistance of the juvenile court. Because of his February 20, 2000, assault, Roman Nose was subjected to the jurisdiction of the Washington County Juvenile Court on April 21, 2000.[Id., *Exhibit 20*]. The juvenile court records contain no reference to Roman Nose's severe chemical dependency. Robert Ritter accompanied him to court. He has no recall of informing the court of the June 21, 1999, baseball bat assault, the positive drug test of November 1999, the school suspension or the marijuana smoking. [Id., *Exhibit 7* - Robert Ritter Dep 98-101].

When the juvenile court did impose probationary conditions pending Roman Nose's scheduled adjudication in July of 2000, R-Home failed to enforce them. Yet, Robert Ritter co-signed the conditions of probation. [Id., *Exhibit 20*].

Roman Nose did not remain "law abiding" as the court's April 21, 2000, conditions of probation specified. [Id.]. For example, on April 25, 2000, he lunged at Dan Ritter in an altercation involving the throwing of water; on May 6<sup>th</sup> he threw a fork in another resident's

---

conversation, however, ever transpired between him and the Ritters. [Id., *Exhibit 15* - Flynn Dep 68; 213-216].

face; on May 22<sup>nd</sup> another resident had to be transferred because Roman Nose kept threatening and cajoling him; on July 5<sup>th</sup> he assaulted and injured another resident. [Id., *Exhibit 23*; *Exhibit 24* p. 9; *Exhibit 25* pp. 9-19].

In addition, Roman Nose made it known that he had no intention of completing the twenty hours of court ordered community service within 45 days. [Id., *Exhibit 23*, hand numbered p. 54]. In fact he did not complete it. Donna Ritter claimed to have no recall of what she meant when she handwrote entries regarding his contempt for his community service obligation and the three anger classes he did attend. [Id., *Exhibit 1* - Donna Ritter Dep 164-66].<sup>17</sup>

When questioned about availability of probation officers for assistance, the Ritters admitted to having knowledge of the same, but had no recall of considering their involvement. [Id., *Exhibit 1* - Donna Ritter Dep 164-66; *Exhibit 7* - Robert Ritter Dep 104-05].

D. Failure to report “neglect” or seek involuntary commitment. R-Home lost its “Rule 8” group home license due, in substantial part, to its violation of the Maltreatment of Minors Act. *Minn. Stat.* § 626.556 prohibits “neglect” through failure to provide indicated mental health/chemical dependency services when the provider is reasonably able to do so. [Id., *Exhibit 31*, pp. A12-13; A42-43]. The “neglect” found by the DHS occurred after Flynn

---

<sup>17</sup>She wrote “court ordered, why only 3 sessions if he was still angry...” and “Dan told prosecuting attorney lady Tony got nothing out of his classes, need to do more. Also Tony not going to do community service - no intentions”. [Id., *Exhibit 23*, page handwritten 54]. However, there was no follow up by the Ritters, who by these comments, clearly had concerns regarding Roman Nose’s anger.

became ill in April of 2000 and was unable to continue servicing his R-Home clientele until June.

Admittedly, R-Home had written policies which identified failure to protect a child's mental health as violation of the Maltreatment of Minors Act and which specified that "...all persons connected to R-Home as employees or consultants are mandated reporters." [Id., *Exhibit 30*]. Although aware of these policies and requirements, the Ritters gave no consideration to the question of whether the failure to provide Roman Nose with required mental health services in Flynn's absence constituted a violation of the Maltreatment of Minors Act. Nor did they consider their legally imposed obligation to report "neglect". [Id., *Exhibit 1* - Donna Ritter Dep 184-87].

Flynn testified that after his return to duty in June, 2000, he went to the Sherwood Avenue group home two or three times expecting to see Roman Nose but was told he was working. He claims that he was not informed of what had been occurring with Roman Nose [Id., *Exhibit 15* - Flynn Dep 241-42]. Yet, he testified, as above noted, that had he known of the recent chemical abuse and violence he would have considered Roman Nose capable of rape/murder and, he would have considered Roman Nose appropriate for a "Rule 5" placement. [Id., 213-16; 251-52].

Flynn was criticized by Dr. Aletky for two causal negligences in this regard. First, Dr. Aletky opined that it is below standard of care to fail to have a back up psychologist in place to assist the clients when the treating psychologist is ill or otherwise unavailable. [Id., *Exhibit*

13, p. 15; 18-19]. Second, Dr. Aletky testified that it was negligent to fail to follow up upon Roman Nose's purported unavailability after his return in June knowing that Roman Nose had serious, untreated issues. [Id.].<sup>18</sup>

Likewise, Flynn had the legal obligation to report Roman Nose's "neglect" under Minn. Stat. § 626.556 but failed to do so. This, too, is below standard of care. [Id.]. Finally, Flynn had the civil commitment process at his disposal but failed to use it. [Id.].

E. Failure to take steps to remove Roman Nose from the streets on July 10, 2000. On July 10, 2000, at 11:10 p.m. Cynthia Bruss called the Woodbury Police to report Roman Nose as a runaway. ICR # 100611176 recorded her complaint as follows

RUNAWAY REPORT  
JUVENILE RUNAWAY: TONY ALLEN ROMAN NOSE DOB/9-11-82  
7177 SHERWOOD RD, WOODBURY, MN  
55125  
COMP. REPORTED THE LISTED FOSTER CHILD LEAVE THE HOUSE WITHOUT PERMISSION ON 7-10-00 AT 2000 HOURS. UNKNOWN CLOTHING, DESTINATION OR PEOPLE HE MAY BE WITH. **HE WAS ANGRY WHEN HE LEFT THE HOUSE.** PERSON REPORT ATTACHED. PHOTO WAS TAKEN.

[Id., *Exhibit 26*, hand numbered page 11] (emphasis added).

The Ritters testified that they were called by Bruss at around 8:00 p.m. that evening. They were told that Roman Nose and another resident had left the Sherwood Road residence

---

<sup>18</sup>Dr. Aletky characterized this as an "abandonment of the psychologist's duties to his patient, which...left Tony unattended, untreated and subject to his escalating problems at a time when he needed the most attention." [Id., *Exhibit 13*, p. 18].

despite being ordered not to do so. Donna Ritter deferred to her husband's judgment in the matter. Robert Ritter advised Bruss to wait before calling the police. Later, Bruss called again to advise that she had found Roman Nose and the other boy but had not picked them up. The other boy had returned to the home after that but Roman Nose did not. Still Robert Ritter advised Ms. Bruss against calling the police. Finally, once it got to be too late at night, Robert Ritter told Ms. Bruss to involve the police. [Id., *Exhibit 1* - Donna Ritter Dep 171-74; *Exhibit 7* - Robert Ritter Dep 126-133].

Despite Roman Nose's history, Robert Ritter claims to have had no concern that Roman Nose could get into violence [even if he got into drugs and alcohol] while "AWOL" from R-Home that night. He claimed that Roman Nose was not a "runner", but admitted Roman Nose had been going "AWOL" against the rules. [Id., *Exhibit 7* - Robert Ritter Dep 129-130]. When challenged as to who made the rules at R-Home, Mr. Ritter stated that it was him, his wife and Flynn. [Id., 131].

The last known opportunity for R-Home to control Roman Nose on July 10, 2000, then, involved Cynthia Bruss' contact with him on the streets. She had taken the house van and brought the boy who knew where Roman Nose and the other boy had gone with her. The following is her testimony as to what happened when she found them:

Q And you saw Mr. Roman Nose and Mr. Bullcoming there?

A Yes

Q Did you speak to them?

A No

Q Why not?

A I wasn't going to confront them in front of their friends and, if he was angry, make him more angry. I made eye contact with both of them, they both understood what they were supposed to do and they both knew that there would be consequences if they didn't come home.

Q So you didn't ask, for instance, Dominic to get out of the van and go talk to them and ask them to come over and speak to you?

A I didn't feel - - I didn't feel that was appropriate.

[*Id.*, *Exhibit 24* - Bruss Dep 100-101]. Roman Nose proceeded from that location to the Reiman residence where he found Jolene Stuedemann and Andrew Reiman. They began consuming drugs and alcohol. Early in the morning of July 11, 2000, he followed Jolene Stuedemann home and proceeded to rape and murder her. [*See, State v. Roman Nose*, 649 N.W.2d 815 (Minn. 2002), *affirmed after remand*, 667 N.W.2d 386 (Minn. 2003)].

### ARGUMENT

#### **I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON GROUNDS OF DUTY, FORESEEABILITY AND CAUSATION.**

The trial court's ruling that there is no legal duty/foreseeability is as confounding as it is wrong. Likewise, its no causation as a matter of law analysis cannot be justified. As duty and foreseeability go hand in hand, they will be discussed together. Causation is a separate matter.

**A. Duty/Foreseeability**

1. § 319 [if not § 316] Duty Applies The trial court recognized that appellants' primary theory of liability rests upon *Restatement (Second) of Torts* § 319. It reads as follows:

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

This duty, as well as § 316, are recognized exceptions to the general non-liability rule found in *Restatement (Second) of Torts* § 315. That section reads as follows:

There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other which gives to the other a right to protection.

The "Comment on Clauses (a) and (b)" under § 315 state "[t]he relations between the actor and a third person which require the actor to control the third person's conduct are stated in §§ 316-319". In this case the "special relationship" is created by § 319 [and/or § 316] and applies under § 315(a).

Curiously, the trial court distinguished this case from three earlier Minnesota § 319 precedents where liability was imposed. It also distinguished the comments to § 319. It did so in an apparent effort to hold that § 319 is only intended to apply to circumstances involving a "...much higher level of security...than that provided by R-Home." [A-69 to 70]. Even cursory analysis of the wording of § 319, the comments to it and the cases discussed,

however, demonstrate that the trial court's predicate is, in actuality, a misperception.

The wording of § 319 only implies the taking "charge" of a dangerous third person. It does not demand a threshold level of "security". The comments and illustrations to § 319 plainly bear this out. The "Comment" reads as follows:

The rule stated in this Section applies to two situations. The first situation is one in which the actor has charge of one or more of a class of persons to whom the tendency to act injuriously is normal. The second situation is one in which the actor has charge of a third person who does not belong to such a class but who has a peculiar tendency to so act of which the actor from personal experience or otherwise knows or should know.

In Roman Nose's case, either of these two situations could apply, but certainly the second situation fits both Roman Nose and R-Home perfectly.

The illustrations to § 319 involve a "hospital for contagious diseases" where an infected patient is negligently discharged under the false assumption that he is no longer infectious and a "private sanitarium for the insane" that negligently permits a homicidal maniac to escape. While the latter mentions "guards" the former makes no mention of any security threshold. Indeed, there simply is no required level of security associated with the duty § 319 imposes upon "[o]ne who takes charge of a third person whom he knows or should know is likely to cause injury to others if not controlled...".

Furthermore, at least two of the three § 319 liability cases cited by the trial court for its "much higher level of security" argument do not even remotely support it. Of the three, the only case even arguably having a "...much higher level of security...than that provided by

R-Home.” [A-70] is Rum River Lumber Co. v. State, 282 N.W.2d 882 (Minn. 1979). There the arsonist was a patient in a state mental hospital. Due to the hospital staff’s negligence, he gained access to a key, escaped and burned the plaintiff’s lumber yard. A careful reading of the Rum River facts, however, shows that the arsonist’s foreseeability “rap sheet” was not even as extensive as Roman Nose’s.<sup>19</sup>

The two other § 319 cases the trial court distinguished from this case had either no level or a very remote level of “security”. In Lundgren v. Fultz, 354 N.W.2d 25 (Minn. 1984), both the access to the murderer’s guns and the murder, itself, occurred while the murderer was an outpatient. He was not legally committed as mentally ill, and he was living independently at both of those times. Reportedly, he was in remission from his paranoid schizophrenia. He was merely under the defendant psychiatrist’s medical care. The Supreme Court held that the psychiatrist, nevertheless, had a legal duty to the murderer’s random victim to protect her from

---

<sup>19</sup>The Rum River arsonist had no prior history of arson. His foreseeability “rap sheet” was as detailed by the Supreme Court as follows:

The patient had escaped or been absent without leave in a 2-month period no less than 6 or 7 times. He had demonstrated a tendency to engage in violent acts by kicking a female patient, breaking electrical outlets and radiators, throwing chairs, throwing objects at persons and threatening the staff.

[282 N.W.2d at 884].

Roman Nose’s history of repeated AWOL’s, together with his potentially lethal aggravated assault, multiple injurious assaults, damage to property, threats and incitations to violence is no less predictive of a catastrophic result.

injury. Lundgren v. Fultz, then, is quite literally a no level of security § 319 case.

In Huttner v. State, 637 N.W.2d 278 (Minn.App. 2001), *review denied* (Minn. Nov. 13, 2001), the murderer was, at the time of his crimes, living alone in a subsidized apartment. He was out of the state hospital at Anoka on “provisional discharge”. Only one person was responsible for monitoring his status, and that was a county social worker who checked up on him once or twice a week. Thus, the security involved was off-site and remote despite the intensity of the social worker’s monitoring program. This court recognized the triable issues of fact associated with the duty in that case. [637 N.W.2d at 285-86 Fn 4].

Roman Nose, on the other hand, was a juvenile in the actual, daily physical custody of R-Home and the Ritters. He lived in their group home. He was, purportedly, subject to their constant supervision. After April 11, 2000, he was under juvenile court restrictions. R-Home’s “Policies and Procedures” manual contains a “Control and Discipline Policy” with the following language: “The residents presence and behavior will be monitored on a 24-hour basis by staff...” [Affidavit of Arlo H. Vande Vegte, **Exhibit 30**, p. 28]. Somehow, Roman Nose was exempted.

At the time of the murder, Roman Nose was under house restriction and, theoretically, not permitted to leave. Nevertheless, he did and the house parents watched him go. The Ritters condoned it by not having him picked up as soon as he left. Their refusal/failure to prevent Roman Nose from acting with gross impunity as to their own house rules simply cannot be permitted to rise to the level of a legal protection as the trial court, apparently,

would have. Rather, it should condemn them, or at least, provide appellants an opportunity to submit their conduct to the scrutiny of a jury. In any event, the facts show that respondents held a far greater opportunity to monitor/control Roman Nose than either the psychiatrist in Lundgren v. Fultz or the social worker in Huttner v. State held with respect to their charges.

Having improperly assumed its “much higher level of security” posture, the trial court next turned to public policy. It claimed that imposition of liability in this case could affect “...the entire state juvenile system...” in such a way as to cause “...[e]normous issues of liability...” that could “...result in the collapse and failure of the system”. [A-70].

Appellants take great issue with the trial court’s speculative and unfounded value judgments. First, the sky will not fall because negligent group home operators are held to an already established duty of accountability under § 319. Second, public policy should never countenance wholesale failure to control violent juveniles out of fear that civil liability might deleteriously affect the system - especially when a privately owned, *for profit*, group home is involved. Hopefully, the threat of civil liability would work to cause the opposite result so as to promote public safety.

But, the trial court perceived the role of group homes as “...an important factor in addressing the needs of juveniles who, almost by definition, often encounter issues regarding chemical dependency and anger. [A-70]. The problem with this “boys will be boys” attitude is that Roman Nose, by history and experience, was singular. Respondents knew this. Donna Ritter testified that “probably a handful” out of hundreds of group home residents had

histories similar to Roman Nose's. (Id., **Exhibit 1**, Donna Ritter Dep. 216-218). He was, prior to the rape and murder of Jolene Stuedemann, an unindicted violent felon suffering from untreated, chronic chemical dependency and the untreated emotional left-overs of physical abuse and neglect as a small child. His ability to process compassion and regret were seriously impaired. He simply did not belong in a Rule 8 group home. He belonged in actual, active treatment and/or incarceration. Kevin Flynn acknowledged as much if Roman Nose could not control his anger and his chemical dependency. Appellants' expert, Dr. Aletky, opined that Roman Nose's return to serious chemical abuse and violent behavior was inevitable given the circumstances of August 1999 to July 2000.

Yet, the trial court virtually winked away Roman Nose's law breaking and violent history. For instance, in its discussion of what it considered to be the "essential" facts the court noted that Roman Nose left the group home without permission on July 10, 2000. It did observe that he was "...known to have a history of assaultive behavior, especially if under the influence of alcohol." [A-65 to 66]. However, the trial court wrote that Roman Nose had been re-admitted to R-Home in the summer of 1999 without ever making specific mention of the June 21, 1999, aggravated baseball bat assault at the Lame Deer reservation. That assault not only threatened the victims's life, it gave respondents clear notice of Roman Nose's potential for lethal violence. The trial court's disinterest in that subject is, indeed, troublesome.

The trial court next observed that while away from the group home on July 10, 2000, Roman Nose was seen by house parent, Cindy Bruss, in the company of another resident and

that Roman Nose was reported as a runaway at 11:00 p.m. [A-66]. Nowhere does the court mention that Bruss could have collected him from the streets or had him arrested, but chose, instead, to drive home without any meaningful contact. Nowhere does the court mention that Bruss was told by the Ritters not to call the police even after Roman Nose failed to return to the group home with the other resident. It was only upon her third inquiry to the Ritters on July 10<sup>th</sup> that she was authorized to report him. By then it was far too late as Jolene Stuedemann's rape and murder had already become an eventuality.

Furthermore, nowhere does the trial court mention Roman Nose's anger when he left the group home that night or his habit of going AWOL at his own whim. Nowhere does it discuss Roman Nose's rampant, untreated chemical dependency/anger. Instead, the trial court found it significant that when Roman Nose left the group home that night he was, by the court's view, sober. [A-75]. Appellants' response to this is obvious - he was not sober for long if, indeed, he was so when he left. Easy access to alcohol and drugs while in the company of other teen-agers is so well understood by society as to require no further comment.

In the end, it appears that the trial court believes that there should/could be no duty and that group homes should, for public policy reasons, enjoy immunity from civil liability. But, there is no statutory or common law basis for this and the trial court cites none. To the contrary, this court has held that private treatment and foster care facilities are not entitled to any of the state or municipal immunities found in Chapters 3 and 466 of Minnesota Statutes.

*Cf.*, Koelln v. Nexus Residential Treatment Facility, 494 N.W.2d 914, 917-22 (Minn.App. 1993), *review denied* (Minn. Mar. 22, 1993) [no discretionary or quasi-judicial immunity available for private treatment facility that allowed convicted sex offender to escape and commit rape]; L.G. v. Barber, 1999 Minn.App. LEXIS 839 and M.H. v. Barber, 1999 Minn.App. LEXIS 602 (A-55 to 62; A-63 to 77) [non-profit corporation placing children in foster care did not have governmental immunity for sexual assaults upon foster child and friend of foster child]. As a result, the concept of legal duty under § 319 must be upheld and re-affirmed.

Alternatively, appellants argued a “special relationship” duty under *Restatement (Second) of Torts* § 316. That section reads as follows:

A parent is under a duty to exercise reasonable care so as to control his minor child as to prevent it from intentionally harming others or from so conducting itself as to create an unreasonable risk of bodily harm to them, if the parent (a) knows or has reason to know that he has the ability to control the child, and (b) knows or should know of the necessity and opportunity for exercising such control.

The trial court also held that § 316 is of no help to appellants’ wrongful death claim. Again, it cited to the comments and concluded that § 316 is limited to situations where the parental authority places “an instrumentality” into the hands of the minor while knowing the minor cannot safely use it [citing to Republic Vanguard Insurance Co. v. Buehl, 204 N.W.2d 426 (Minn. 1973)].

However narrow the § 316 duty may be, it is not so narrow as to apply only to situations involving “an instrumentality” utilized by a dangerous child due to the parent’s negligence. The parameters of the duty are set, instead, by facts demonstrating that the parents have “...both the opportunity and the ability to control the child.” Silberstein v. Cordie, 474 N.W.2d 850, 856 (Minn.App. 1991), *review granted in part and denied in part* (Minn. Nov. 26, 1991). Also, the child’s proclivity for violence needs to be in place. Silberstein v. Cordie imposed a duty where the parents could foresee “harm to a member of the general public.” [Id.]. Fact issues pervade each of these questions under § 316.

2. Foreseeability. The trial court’s next holding was that the murder of Jolene Stuedemann was not foreseeable. It said that respondents could not have foreseen the “magnitude of violence inflicted by Mr. Roman Nose” upon appellant’s daughter. [A-72]. This error is further cause for close discussion.

Assuming that by “magnitude of violence” the trial court meant the sheer ferocity and force of violence inflicted [three dozen stab wounds; blows to the head; stuffing of materials into the oral cavity; and rape], then the next question to arise is simply this - at precisely what point, given Roman Nose’s history, did foreseeability start and stop? Would it have been foreseeable, for instance, to expect that Roman Nose, while AWOL and angry, would become intoxicated? Based on the facts of this case the answer to that is clearly affirmative. That being the case, then the next question is: Would it be foreseeable that while AWOL, angry and intoxicated Roman Nose would physically attack someone in a state of rage? Again, it most

certainly would be given his history and background.

With those foreseeabilities in mind the impossibility of drawing a bright line by which to stop foreseeability through application of the trial court's "magnitude of violence" theory comes to the forefront. Rage and alcohol make a dangerous cocktail, to say the least. Anyone knows that. It is also common knowledge that blows delivered under such conditions are not measured blows. They are, instead, visceral and viscious responses to overpowering emotional stimuli. In Roman Nose's case, such primordial urges were known to be lingering at or near the surface even when he was sober.

Thus, respondents had every reason to worry that, while intoxicated, he was capable of just about anything, including murder. Beating another into unconsciousness with his bare hands; ramming another's head into a wall; or kicking another person in the head are actions that Roman Nose could easily have been expected to do. Death or serious injury as a result of any of those manifestations of such rage would not be far off. But, even though he was known to have punched, kneed, crushed, thrown sharp objects, destroyed property, bullied and threatened others while sober, and even though he was known to have previously used a deadly weapon to inflict a potentially lethal blow to the head while intoxicated, the trial court excused the respondents from foreseeability, apparently, because the projection of his rage toward Jolene Stuedemann was perceived to be higher than previously demonstrated. Nevertheless, common experience tells us that severe emotional disturbance, when coupled with a moderate to well-muscled young man subjecting another to full force blows, has the

undeniable capability of resulting in deadly consequences. Adding drugs/alcohol only increases that likelihood. Such is the stuff of foreseeability, not the specific means by which deadly force is applied.

In Sayers v. Beltrami County, 472 N.W.2d 656 (Minn.App. 1991), a toddler foster child filed an action against the county and the foster parents after the child (who was hyperactive and left without supervision at the time of injury) severely injured his arm in a washing machine at the foster home. This court reversed summary judgment, *inter alia*, on foreseeability grounds giving the following explanation:

The trial court granted summary judgment in part because it determined that the county had no direct control over the washing machine used by the Winds, and could not foresee an injury to the child in contact with that appliance. **Foreseeability does not require that the tortfeasor be able to foresee the exact nature of the plaintiff's injuries or the precise manner in which they occur.** *Foss v. Chicago, B & Q Ry Co.*, 151 Minn. 506, 508, 187 N.W. 609, 610 (1922). (emphasis added)

[472 N.W.2d at 664].

The Sayers court went on to hold that there was ample evidence of foreseeability and duty and it noted that by summary judgment standards the evidence must be viewed in the light most favorable to the appellants. [*Id.*, at 664-65]. The “exact nature” of Jolene Stuedemann’s injuries and the “precise manner” of their occurrence simply is not required. All that is necessary is knowledge, or reason to know, of Roman Nose’s violent proclivities.

In Rum River, the escaped arsonist had never before been known to commit arson. As above footnoted, his foreseeability “rap sheet” was similar to, but even less violent than,

Roman Nose's. A foreseeability statement akin to that cited from Sayers v. Beltrami County, above, was made by the Supreme Court in Rum River, i.e., "[d]efendants are misguided in stating that the specific conduct by the third party must be foreseeable". [282 N.W.2d at 884]. In fact the Rum River Court characterized the history of going AWOL, kicking a female patient, breaking things and throwing things at people as "abundant" evidence of the patient's "potential for harm" and the unreasonable, foreseeable risk he created for purposes of rejecting a superceding cause defense. The Court also had no trouble imposing duty.

Similarly, in Lundgren v. Fultz and Huttner v. State neither assailant had ever previously killed or attempted to kill anyone and the "magnitude of violence" directed at their murder victims was disproportionate to any previously demonstrated. In Huttner v. State, *supra*, this court noted that the murderer's prior history of explosive outbursts when not controlled by psychotropic medications created an arguable level of foreseeability sufficient to go to the jury. Citing to Lundgren v. Fultz, 354 N.W.2d 25, 27 (Minn. 1984) it said "[c]lose questions of foreseeability should be given to the jury." [637 N.W.2d at 285 Fn 4].

In this case, and piled upon his known history of violence, there is also evidence that Roman Nose had engaged in homicidal and assaultive ideation [spiral binder found by police containing "...several pages...that mention killing and other violent acts..."; "The Mind of a Serial Killer" poster taken from his room (Affidavit of Arlo H. Vande Vegte, **Exhibit 27**); the "I remember" poem found in his group home file (Id., **Exhibit 28**).

There is evidence of severe chemical dependency since the age of 5 [with “daily” use] and childhood physical abuse and neglect by alcoholic parents (Id., **Exhibit 9**). There is evidence that Roman Nose’s history of these things was unparalleled except for “probably a handful” of other group home residents from the several hundreds of such residents serviced by the Ritters over the years (Id., **Exhibit 1**, Donna Ritter Dep. 216-218). There is evidence that Flynn, himself, would have considered him capable of rape and murder had he been advised of Roman Nose’s escalating behaviors in the last few months before the crimes (Id., **Exhibit 15**, Flynn Dep 213-16; 251-52). There is evidence that Flynn did specifically tell Roman Nose that “...if he drinks he will get in big trouble...” and “...end up in prison.” (Affidavit of James Klinger and p. A188 thereto). There is evidence that Roman Nose’s MMPI demonstrated a sociopathic personality type with a stunted conscience typical of the violent inmates who populate the prisons. (Affidavit of Arlo H. Vande Vegte, **Exhibit 15**, Flynn Dep 101-103; **Exhibit 13** [Dr. Aletky Affidavit] p. 5)

All in all, then, the facts in this case overwhelmingly demonstrate duty and foreseeability of harm to others in the absence of reasonable attempts to control Roman Nose’s dangerous conduct. The breach of that duty leads directly into discussion of the issue of causation.

**B. Causation.** The trial court then held that there is no causation as a matter of law. It is well-established that a negligence case requires the plaintiff to prove (1) duty, (2) breach of duty, (3) injury and (4) causation. It is also well-established that the non-moving

party must demonstrate more than mere doubts as to material facts when opposing summary judgment. Carlisle v. City of Minneapolis, 437 N.W.2d 712, 715 (Minn.App. 1989). The evidence in proof cannot just suggest a possibility, it must justify sound and honest inferences. Thus, the evidence in support of causation must be genuine evidence and should not be conflicting. Where the evidence sustains with equal justification, two or more inconsistent inferences so that one inference does not reasonably preponderate over the other, the complainant has failed to establish an honest inference sufficient to support a recovery. E.H. Renner & Sons, Inc. v. Primus, 295 Minn. 240, 243, 203 N.W.2d 832, 835 (1973).

Those are the standards that justify holding, as a matter of law, that causation has not been established. Otherwise, causation is generally a question of fact. Pluwak v. Lindberg, 268 Minn. 524, 528-29, 130 N.W.2d 134, 135-36 (1964). The trial court here did something else entirely. Instead of looking for an honest inference, based upon the large volume of legitimate, admissible proof presented by appellants, including the range of control mechanisms available to respondents that would have prevented Jolene Stuedemann's rape and murder, it chose, instead, to ignore all of it in favor of the following:

The record indicates Mr. Roman Nose left the group home at approximately 8:00 p.m. and was apparently not under the influence of intoxicants and was reported as a runaway to the Woodbury Police Department at approximately 11:00 p.m. In those intervening hours, Mr. Roman Nose encountered Reiman and Stuedemann, drank alcohol and used drugs, traveled to the home of Ms. Stuedemann and ultimately engaged in intentional criminal acts which resulted in her death. Any actions taken or not taken by R-Home were not the proximate cause of Jolene Stuedemann's murder. The proximate cause of her death was

Tony Roman Nose. Even a lengthy and voluminous recitation of actions which should or should not have been taken regarding Mr. Roman Nose extending over many months and even years does not change that indisputable fact. [A-75].

Once, again, the trial court has made a value judgment that is beyond justification.

Indeed, appellants' extensive evidence of control mechanisms is not conflicting. It is not speculative. Quite to the contrary, it is clear, consistent and undisputed. And, it forms a preponderance easily sufficient to draw an honest inference that through their failure to take reasonable steps to prevent Roman Nose from harming others [as § 319 requires], respondents provided Roman Nose, whose violent tendencies were known, an open opportunity to commit these grievous crimes. Appellants daresay that, given this record, the open opportunity for him to harm others occurred on multiple occasions from August of 1999 to July 10, 2000, as he repeatedly engaged in violence, went AWOL and used chemicals - all without serious consequence. He was not sent to treatment. He was not given over to the juvenile court with an accurate history. He was not discharged to a more restrictive environment. He was not committed as chemically dependent. He was not even treated at the group home after March. Respondents' failures facilitated Roman Nose's access to his victims.

But, by the trial court's standards, respondents could not have stopped him upon his leaving the group home on July 10th. None of the Minnesota cases applying a § 319 duty demand that level of control. Likewise, none of those cases could have ever survived summary judgment by such standards. In Rum River, the hospital would have been exempt from causal fault the instant the arsonist escaped unnoticed. In Lundgren v. Fultz and Huttner

v. State the killers' already independent living status would have intervened to cut off causation. Yet, those cases all held otherwise. That has to mean something within the § 319 arena and it certainly does. The application of proximate cause is not limited to fault-creating conduct that is temporally close to the injury. If that were the case, no plaintiff in a products liability case could ever prevail. The fault-creating conduct here occurred continuously from August of 1999, until July 10, 2000.

Had Roman Nose not even been an R-Home resident on July 10, 2000, his opportunity to kill Jolene Stuedemann would have been non-existent. Also, he would not have killed her had he been properly controlled/treated so as to remain at the group home that night and/or had he been arrested or picked up from the streets when the clear and present opportunities to do so presented themselves. The trial court has, essentially, refused to recognize either "concurring cause" or respondents' duty of prevention under § 319. That is not the law. The trial court must be reversed.

**II. THE TRIAL COURT ERRED IN DISMISSING THE COMPLAINT AGAINST KEVIN FLYNN.**

The trial court has again dismissed Kevin Flynn from this suit. It held that appellants did not present an expert witness affidavit for more than 180 days following commencement of the suit in violation of Minn. Stat. § 145.682 and did not meet its scheduling order deadline for expert witness disclosure of March 1, 2005. It then said that Dr. Aletky's affidavit failed to establish causation, and it said that Flynn did not take "charge" of Roman Nose under § 319. Appellants will address each of these in turn.

**A. Timeliness.** It is inappropriate to hold appellants to the 180 day standard under Minn. Stat. § 145.682 when appellants did not sue Flynn until mid-March of 2005. It was R-Home that sued him on a contribution and indemnity theory at the beginning of the case. When appellants did bring Flynn into the case, they complied with Minn. Stat. § 145.682.

The trial court's contention that it can sanction appellants for not meeting the March 1, 2005, expert witness disclosure date is grossly unfair and an abuse of discretion. First, despite the fact that suit was commenced in June of 2003, its first scheduling order did not issue until February 2, 2005. This gave appellants less than 30 days to meet the March 1, 2005, deadline. The trial court had, itself, taken from May 28, 2004, until December 14, 2004, to rule on appellants' unopposed motion for juvenile records. It took from August 27, 2004, until December 14, 2004, to rule on appellants' unopposed motion for disclosure of the DHS records. These records were essential parts of Dr. Aletky's factual analysis, which as her affidavit demonstrates, was extensive.

Appellants advised the trial court of the events involving an expert opinion to re-insert Flynn during a telephone conference on February 10, 2005, and by letter of February 17, 2005. [A-46 to 47]. Flynn's counsel was simultaneously kept abreast and made aware of appellants' preparations to re-insert Flynn. He was given an opportunity to challenge a motion to amend to re-insert him and waived it. It is disconcerting, indeed, for the trial court to sanction appellants with a "timeliness" argument when its own lack of timeliness contributed heavily to the delay. This is especially true since Flynn demonstrated absolutely no prejudice from

any delay and fully participated, or had duly noticed opportunity to participate, in all discovery.

**B. Causation.** The trial court ignored Dr. Aletky's causation opinions. It called her control mechanism opinions a "laundry list". It then said "... the affidavit does not establish how the implementation of any of these potential control mechanisms would have prevented the death of Ms. Stuedemann even had they been applied." [A-76].

It is difficult to understand the trial court's comments in view of the specific wording of Dr. Aletky's affidavit in that regard. Her "laundry list" detailed how they would have prevented the murder:

1. Screening Failure. *"Tony would not have been able to perpetrate the crime had he been refused re-admittance to R-Home and in a restrictive setting."* [Affidavit of Arlo H. Vande Vegte, **Exhibit 13** (Aletky Affidavit), p. 16].

2. Treatment Failure. *"Had Tony been properly treated he would have been subjected to a consistently applied system of rewards and consequences, which most likely was the only way to control his behavior given his psychological profile and problems...the unchecked chemical dependency and anger issues, together with the lack of skills for acceptable social/sexual behavior combined to result in Jolene Stuedemann's brutal rape and murder."* [Id., p. 17].

3. Re-Assessment Failure. *"These incidents would have caused a responsible treating psychologist to adjust and intensify the program to meet the patient's needs. This*

would include a decision to seek a much higher level of supervision and treatment than the group home and himself were capable of providing...This did not occur. Mr. Flynn had both persuasive and legal means to accomplish this if the Ritters objected to the discharge...Had he done so, Tony would have been gone from the R-Home on July 10<sup>th</sup> and 11<sup>th</sup> of 2000." [Id., pp. 17-18].

4. Patient Abandonment. "This disturbing failure to abide by standards of care is causally related to the crimes because Mr. Flynn failed to ensure any continuity of care, or any care at all, for Tony after Mr. Flynn got sick in April and May of 2000...Again, had there been proper psychological intervention from April to July of 2000, Tony would have been either in a completely different location and environment or he would have been subject to such structure and discipline as to be unable to commit these awful crimes." [Id., p. 18].

5. Statutory Mandates/Prerogatives. "Commitment under Chapter 253B would have forced the issue and resulted in finding appropriate care. And, due to R-Home's failure to provide Tony with any chemical dependency or psychological services, Tony was being subjected to "neglect" under Minnesota Statute 626.556...Certainly, the failure to provide psychological and medical services mandated Mr. Flynn's report to the Department of Human Services, or to the county child protection agency, or to the police. This, of course, would have launched an investigation...Commitment or neglect proceedings would probably have imposed proper treatment and restrictions onto Tony's ability to move freely, to have access to chemicals and alcohol, and, ultimately, to have access to Jolene Stuedemann." [Id.,

pp. 18-19].

Minn. Stat. § 145.682 demands that a qualified expert give testimony to both negligence and causation. But, it is difficult to imagine a single scenario by which any psychological expert could tie causation to acts of professional negligence in this case if the trial court is correct. Dr. Aletky has given well-reasoned and well-considered opinions on both scores.

Appellants argue that the causation in Lundgren v. Fultz was far more attenuated than here. Dr. Aletky's opinions were guided by liability standards from Lundgren v. Fultz, *supra*. [Id., p. 4]. Ability to control is the key. The Supreme Court saw that Fultz, the psychiatrist, only had some ability to control his patient's access to guns. Certainly, access could have been gained independent of Fultz. But, he proactively assisted his patient in gaining access under the misguided idea that it would be beneficial to the patient's level of trust in his physician. This factor, alone, was sufficient to create a fact issue on causation.

In the instant case, respondents had regular, daily access to Roman Nose and a "laundry list" of control mechanisms that the psychiatrist in Lundgren v. Fultz did not have. And, on July 10, 2000, respondents proactively allowed Roman Nose to run free also under the misguided notion that it would be therapeutic not to force him to come home. Such misguided disciplinary notions pervade Roman Nose's entire course of law breaking and violence in his last year of residence at R-Home. That is exactly Dr. Aletky's point - Roman Nose needed much more structure than this. The failure to provide it was tantamount to the psychiatrist

recommending that the patient get his guns back.

Moreover, this court recognized the existence of triable fact issues as to control and causation in Huttner v. State, *supra* [fn 4]. In fact the range of control mechanisms available to the social worker were not altogether unlike those available here. The trial court's ruling here simply cannot be reconciled with Huttner either.

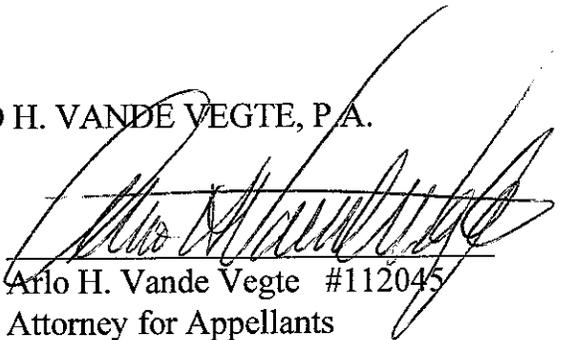
**C. "Taking Charge".** Finally, the trial court's perception that Flynn did not "take charge" of Roman Nose within the intent and meaning of § 319 flies in the face of Flynn's close and direct work with the Ritters in bringing Roman Nose back to R-Home and in providing his care and treatment there. Flynn was R-Home's staff psychologist and R-Home's residents comprised Flynn's entire clinical practice. Flynn was the one and only treating provider for Roman Nose's chemical dependency and anger issues. Flynn also participated in Roman Nose's actual group home life by coming to dinner and meeting in group with the residents each week. In that sense, he had greater charge of Roman Nose than the psychiatrist in Lundgren v. Fultz had. He held an ability to control Roman Nose all as detailed by Dr. Aletky. He owed a § 319 duty which he clearly failed to meet.

### CONCLUSION

For the foregoing reasons, appellants respectfully request that the trial court's judgment of dismissal as to R-Home, the Ritters and Flynn be reversed and that the case be remanded for trial on the merits as to each of them.

ARLO H. VANDE VEGTE, P.A.

BY:

  
Arlo H. Vande Vegte #112045  
Attorney for Appellants  
1850 W. Wayzata Blvd.  
P.O. Box 39  
Long Lake, Minnesota 55356  
952-475-2219

STATE OF MINNESOTA  
IN COURT OF APPEALS

James D. Stuedemann and Jeanne R.  
Stuedemann, as Co-Trustees for the Heirs  
and Next of Kin of Jolene Stuedemann,  
Decedent,

Appellants,

vs.

Tony Allen Roman Nose, R-Home of  
Woodbury, Inc., Robert Ritter and  
Donna Ritter, individually and as  
proprietors of Prolawn Landscaping,  
and Kevin Flynn,

Respondents.

**CERTIFICATION OF BRIEF  
LENGTH**

**APPELLATE COURT CASE NO:  
A05-1524**

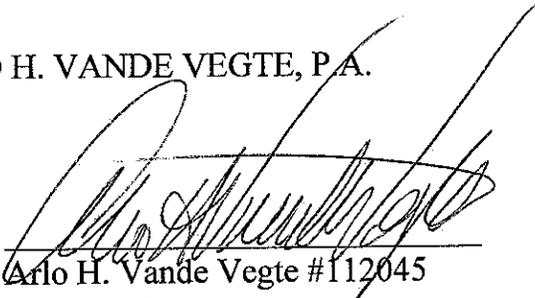
---

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P.  
13201, subs. 1 and 3, for a brief produced with a monospaced font. The length of this brief  
is 12,141 words and 1,056 lines. This brief was prepared using WordPerfect 11.

ARLO H. VANDE VEGTE, P.A.

Dated: August 31, 2005

By:

  
Arlo H. Vande Vegte #112045  
Attorney for Appellants  
1850 W. Wayzata Blvd.  
P.O. Box 39  
Long Lake, MN 55356  
952/475-2219

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).