

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.*

**BRIEF AND APPENDIX OF RESPONDENTS ROBERT AND DONNA RITTER**

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## STATEMENT OF ISSUES

**1. Does a non-custodial group home have a duty to control its resident to prevent him from doing harm to others where it is undisputed that the group home had neither the authority to prevent the resident from leaving nor the ability to control his subsequent behavior?**

The district court held no.

### **Apposite authorities:**

Restatement (Second) of Torts § 319 (1965).

*Lundgren v. Fultz*,  
354 N.W.2d 25 (Minn. 1984).

*Rum River Lumber Co. v. State*,  
282 N.W.2d 882 (Minn. 1979).

*King v. Durham County*,  
439 S.E.2d 771 (N.C. Ct. App. 1994).

**2. Does a non-custodial group home have a duty to control its resident to prevent him from doing harm to others where it is undisputed that the group home did not actively contribute to the resident's criminal conduct?**

The district court held no.

### **Apposite authorities:**

Restatement (Second) of Torts § 316 (1965).

*Republic Vanguard Ins. Co. v. Buehl*,  
295 Minn. 327, 204 N.W.2d 426 (1973).

*Silberstein v. Cordie*,  
474 N.W.2d 850 (Minn. Ct. App. 1991).

**3. Does a non-custodial group home have a duty to control its resident to prevent him from doing harm to others where the harm inflicted was not reasonably foreseeable?**

The district court held no.

**Apposite authorities:**

*Lundgren v. Fultz*,  
354 N.W.2d 25 (Minn. 1984).

*Connolly v. Nicollet Hotel*,  
254 Minn. 373, 95 N.W.2d 657 (1959).

**4. The Ritters adopt the statement of issue and apposite authorities presented by the brief of R-Home with regard to proximate cause. The Ritters will not address Appellants' arguments on proximate cause and will rely on the submission of R-Home.**

## STATEMENT OF CASE

On July 11, 2000, Tony Roman Nose brutally raped and murdered Jolene Stuedemann. At the time of the crime, Roman Nose was a resident of a foster group home operated by Respondent R-Home of Woodbury, Inc. (“R-Home”). (RA 33-37.)<sup>1</sup> Respondents Robert and Donna Ritter (collectively “the Ritters”) were the sole shareholders of R-Home. (*Id.*) Roman Nose was tried and convicted of first-degree murder, and is currently in the custody of the Minnesota Commissioner of Corrections, serving a life sentence without the possibility of parole. (*See* AA 15-16.) The Minnesota Supreme Court has affirmed his conviction. *See State v. Roman Nose*, 667 N.W.2d 386 (Minn. 2003).

In June 2003, Stuedemann’s parents, Appellants James and Jeanne Stuedemann, (“Appellants”) commenced this wrongful death action against Roman Nose, R-Home, and the Ritters.<sup>2</sup> (Compl.) R-Home subsequently filed a third-party complaint against Respondent Kevin Flynn (“Flynn”), an independent licensed psychologist who provided counseling to Roman Nose.<sup>3</sup> (Third Party Compl.) On August 3, 2004, the district court granted Flynn’s motion to dismiss, holding that R-Home and the Ritters had failed to file

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<sup>1</sup> The Ritters’ Appendix will be cited as “RA \_\_.” Appellants’ Appendix will be cited as “AA \_\_.” R-Home’s Appendix will be cited as “R\_\_.”

<sup>2</sup> The Ritters were sued individually and as proprietors of Prolawn Landscaping. Appellants later voluntarily dismissed, with prejudice, all claims against the Ritters “as Proprietors of Prolawn Landscaping,” leaving only claims against the Ritters in their individual capacities. (RA 72-73.)

<sup>3</sup> The third-party complaint also named Gary and Theresa Reiman as third-party defendants. Later, the district court dismissed the third-party complaint against the Reimans pursuant to a stipulation.

an affidavit of expert review, as required by Minn. Stat. § 145.682 (2004). (AA 31-35.) Six months later, however, Appellants filed an amended complaint, bringing Flynn back into this suit. (AA 13-23.)

In April 2004, Appellants moved for partial summary judgment on the issue of whether, as a matter of law, Roman Nose murdered Stuedemann on July 11, 2000. The Ritters also moved for summary judgment, arguing that they did not owe a duty to control Roman Nose. (AA 5-7.) R-Home joined in the Ritters' motion with regard to the issue of duty. (AA 3-4.) Additionally, R-Home brought its own motion for summary judgment, in which the Ritters joined, arguing that Appellants had failed to establish proximate cause. (*Id.*) Flynn moved for summary judgment as well, arguing that the claims against him were barred by res judicata and laches, and that he had no duty to control Roman Nose.

Following a hearing, the Honorable Gary R. Schurrer, Washington County District Court, issued an order granting each of the parties' motions for summary judgment. (AA 63-77.) The court held that (1) as a matter of law and fact, Roman Nose murdered Stuedemann on July 11, 2000; (2) the Ritters and R-Home did not owe a duty to control Roman Nose because R-Home was not a secure facility, it did not place the "instrumentality" of Stuedemann's death into Roman Nose's hands, and the level of violence inflicted upon Stuedemann was not reasonably foreseeable; (3) any actions taken or not taken by R-Home or the Ritters were not the proximate cause of Stuedemann's murder; and (4) the expert affidavit of Dr. Patricia Aletky, which had been filed by Appellants in an effort to comport with Minn. Stat. § 145.682, was untimely and,

alternatively, failed to establish a causal connection between Flynn's alleged negligence and Stuedemann's murder. (AA 65-77.) In sum, the court granted summary judgment to Appellants, finding Roman Nose liable for Stuedemann's death, but also granted the Ritters' and R-Home's motions for summary judgment, finding that no duty to control existed and that Appellants had failed to establish proximate cause. (*Id.*)

At Appellants' request, the district court entered partial judgment under Minn. R. Civ. P. 54.02. (AA 78-79.) This appeal followed.

## STATEMENT OF FACTS

Because this is an appeal from summary judgment, the Ritters and R-Home treat Appellants' allegations as true, to the extent they are supported by the record. The Ritters provide the following Statement of Facts to supplement the facts presented by Appellants.

### **A. Policies And Procedures Applicable To R-Home**

For over twenty-three years, Robert and Donna Ritter have served as foster parents, helping an estimated 800 to 900 children. (RA 35.) In 1997, the Ritters began operating R-Home of Woodbury, Inc., which provided licensed "Rule 8" foster group homes<sup>4</sup> for troubled teenagers. (RA 34-35, 46.) One of these homes was located at 7177 Sherwood Road in Woodbury, Minnesota ("Sherwood Home"), where Tony Roman Nose resided. (RA 35.)

Like other Rule 8 foster group homes, the purpose of Sherwood Home was to provide a "safe and nurturing environment" to assist disadvantaged children in successfully integrating into the community. Minn. R. 9545.1410. (RA 129.) Accordingly, the home provided food, shelter, counseling, guidance, medical care, psychological care, and chemical dependency treatment to children on a 24-hour-a-day basis. (RA 46.) R-Home hired house parents to live in the home and to provide this care.

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<sup>4</sup> At all times relevant to this case, facilities licensed by the Department of Human Services under Minn. R. 9545.1400 to 9545.1480 (1999) were commonly referred to as "Rule 8" group homes. These rules were repealed on July 1, 2005, and were replaced with Minn. R. 2960.0010 to 2960.0710 (2005). The former rules, which were in effect at the time of Stuedemann's murder, will be cited throughout this brief.

(RA 104.) At the time of Stuedemann's death, the house parents at Sherwood Home were Cynthia Bruss and Wayne Borowick.

Generally, residents were referred to R-Home by in-state or out-of-state social services departments. (RA 105.) R-Home's residents were typically experiencing "problems with school, drugs/alcohol, anti-social behavior, anger control and ability [getting] along with others." (RA 106.) Based on the recommendations of a licensed psychologist, R-Home would then formulate individualized treatment plans for each resident in an effort to address these issues. (*Id.*)

Rule 8 group homes are regular homes in residential neighborhoods – they are not locked facilities or otherwise secure. *See* Minn. R. 9545.1470, subp. 1. (RA 22.) Pursuant to the Rule 8 regulations, R-Home's residents attended school, church, and off-site counseling sessions, worked in the community, and could take unaccompanied walks. *See* Minn. R. 9545.1430, subp. 6. (RA 7, 106, 108, 130, 135, 139.)

House parents were authorized to impose "consequences" for a resident's failure to follow the house rules, such as temporarily revoking the privilege of watching TV, playing basketball, or taking a walk. (RA 7.) However, R-Home's discipline policy specifically prohibited staff from using "physical contact" or "physical restraints" to address negative behavior.<sup>5</sup> (RA 65, 129.)

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<sup>5</sup> It is undisputed that a Rule 5 residential treatment program provides a significantly higher level of security than a Rule 8 group home. Rule 5 placement is available for children with "severe emotional disturbance," and those facilities are permitted by law to impose time outs, use physical restrains, implement emergency use of isolation or physical holding, and place a child in a locked unit. Minn. R. 9545.0905, .0995, .1035

## **B. Roman Nose Begins Residing At R-Home**

Tony Roman Nose first came to live at R-Home in 1997 at age fifteen, upon the recommendation and approval of the Lame Deer Indian Reservation and Northern Cheyenne Social Services Department in Montana, his legal guardians. (RA 35.) In June 1999, Roman Nose voluntarily returned to the Lame Deer reservation for the summer. (RA 35-36.) This was not unusual; R-Home residents routinely went home for the summer and returned to R-Home in the fall to attend school. (*Id.*)

In late July, Roman Nose was arrested following an altercation on the reservation, where he hit a man in the head with a baseball bat. (RA 58, 74-75.) Because the Montana judge did not want Roman Nose to stay in jail, he asked Althea Foote, a caseworker from Northern Cheyenne Social Service, to contact R-Home to see if Roman Nose could come back early. (RA 59, 53-55, 74-75.) R-Home agreed, under the conditions that he would attend school, attend Alcoholics Anonymous, and get a job. (RA 59.) John Bradley, a clinical psychologist with Tribal Health, and Kevin Flynn, an independent psychologist who contracted with R-Home, evaluated Roman Nose and approved his placement with R-Home. (RA 36.)

## **C. Roman Nose Returns to R-Home.**

Roman Nose returned to R-Home in August 1999. (*Id.*) Much like the assessments of other R-Home residents, Roman Nose's treatment plan identified problems with drugs and alcohol, truancy, anti-social behaviors, anger outbursts, and

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(1999). (RA 137, 141-142.) These rules have also been repealed, and were replaced with Minn. R. 2960.0010 to 2960.0710 (2005).

conflict with others (RA 26-32.) To address these issues, R-Home implemented the following goals for Roman Nose: (1) achieve total abstinence, (2) graduate from high school, (3) demonstrate honesty and self-respect, (4) control anger, and (5) learn conflict resolution skills. (*Id.*) Flynn recommended that Roman Nose participate in a variety of counseling programs, both at Sherwood Home and in the community, to help him achieve these goals. (*Id.*)

During the next eleven months, Roman Nose attended one-on-one counseling sessions with Flynn, weekly "Solutions" group meetings, and daily house meetings. (RA 36-37.) He also attended weekly Alcoholics Anonymous classes, both at Sherwood Home and in the community. (*Id.*) During this time, Roman Nose started to make progress – he attended school and church, worked in the community, and began dealing with his chemical dependency. (RA 81-85.)

Nevertheless, Roman Nose also had several problems at Sherwood Home, including a fight with a peer at school (RA 86-87) and problems with other R-Home residents. (RA 95-98.) Roman Nose was arrested and charged with fifth-degree assault following a dispute in February 2000, when he closed a dishwasher door on another resident's arm. (RA 88-94.) The record indicates that Roman Nose completed an anger management class as a condition of his probation, but did not complete his work service hours. (*Id.*) In the following months, Roman Nose also had other behavior problems, including refusing to do chores, smoking, and abusing cold medication. (RA 95-98.) He also hit another resident, once in April and once in July, and threw a fork at another resident's face in May. (RA 9, 95-98.) R-Home addressed each of these issues with

appropriate consequences, including loss of privileges and deductions from his allowance. (R 16.)

In June 2000, Roman Nose approached Robert Ritter and told him that he wanted to move out. (RA 69-70.) Roman Nose explained that he wanted to move to Michigan to live with his uncle, and Robert Ritter told him that would be fine. (RA 70.) R-Home's residents must be under the age of eighteen and, because Roman Nose would be turning eighteen in September 2000, it was inevitable that he would be leaving soon. (RA 69-70.) Roman Nose's move to Michigan was approved by the Lame Deer reservation, and Roman Nose planned to leave R-Home on July 17, 2000. (RA 70.)

#### **D. The Events Of July 10, 2000.**

On July 10, 2000, Roman Nose was told that he was not allowed to leave the group home premises as a consequence for stealing cigarettes. (RA 11.) Nevertheless, at approximately 8:00 p.m., Roman Nose and another resident left without permission, telling house parent Wayne Borowick that they were "going for a walk." (See RA 11, 24.) Borowick confronted them and stated that they were not allowed to leave, but did not restrain them because R-Home's policies prohibited him from doing so. (RA 24, 129.)

Borowick then contacted Robert Ritter, who advised him to wait for a short time to see if the boys would return, and if they did not, to call the police and report them as runaways. (RA 24.) Borowick believed waiting was appropriate because, in his experience, boys in this situation would usually return home within an hour. (RA 24-25, 51, 67.) According to house parent Cynthia Bruss, Roman Nose had just made a phone

call to home that had upset him, and she believed that they were going for a walk to talk about it and would come home shortly. (RA 11.)

Within a half hour of their departure, Bruss went to look for the boys, after another resident advised her of their location. (See RA 12-13.) Bruss found them standing outside a nearby residence with some friends. (*Id.*) Based on her years of experience working with teenagers, Bruss did not believe it was appropriate to confront the boys in front of their friends. (*Id.*) Instead, Bruss drove by slowly and made direct eye contact with both boys to give them the clear impression that they should return home immediately. (RA 12.) The other resident responded by returning home approximately 10 to 15 minutes later, but Roman Nose did not. (See RA 13.)

When Roman Nose did not return, Borowick again contacted Robert Ritter who advised him to file a report with the police if Roman Nose did not return shortly. (RA 13, 25.) Bruss and Borowick still believed that Roman Nose would come home on his own. (RA 13-14.) At 11:10 p.m., Bruss called the police and reported Roman Nose as a runaway. (See RA 14.) According to Woodbury Police Investigator Todd Jagodzinski, the police did not investigate the runaway report until the next day. (See RA 4.)

The subsequent police investigation determined that Roman Nose had spent the night of July 10 and early morning of July 11 with friends. (See RA 4.) Around 10:00 p.m., Roman Nose went to the home of Andrew Reiman, who was under court-ordered house arrest. (*Id.*) Stuedemann, Reiman's girlfriend, was also present.<sup>6</sup> (*Id.*)

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<sup>6</sup> Neither the Ritters, Borowick, or Bruss knew Reiman or Stuedemann; nor were they aware that Roman Nose knew them. (See RA 52, 72.)

While there, Roman Nose, Reiman, and Stuedemann drank beer and watched television. *See State v. Roman Nose*, 667 N.W.2d 386, 390 (Minn. 2003). Roman Nose told authorities that he and Stuedemann also smoked marijuana and “did some coke.” *Id.* At his criminal trial, Roman Nose testified that he was sitting on the couch listening to music with his eyes shut and that when he opened his eyes, he saw Reiman and Stuedemann engaging in sexual intercourse. *Id.* Roman Nose claimed that he and Stuedemann then had sex while Reiman slept, but Reiman was certain that this was not true. *Id.*

At approximately 3:30 a.m., Stuedemann left for home while Roman Nose was sleeping. *Id.* Roman Nose then left at about 4:00 a.m., but did not return to the group home until 9:15 a.m. *Id.* (RA 15.) Bruss notified the police of Roman Nose’s return, and a police officer came to R-Home and interviewed Roman Nose. 667 N.W.2d at 390.

After talking with Roman Nose, police responded to a call that resulted in the discovery of Stuedemann’s body. *Id.* An autopsy revealed that Stuedemann had been beaten, stabbed multiple times with a screwdriver, and sexually assaulted. *Id.* Forensic evidence linked Roman Nose to the scene. *Id.* Subsequently, Bruss notified police that she had found blood-stained clothing belonging to Roman Nose in a trash bag in the garage of the group home. *Id.* Additional evidence linking Roman Nose to the crime was also recovered from the kitchen garbage and Roman Nose’s bedroom. *Id.* at 390-91. Roman Nose was convicted of first-degree murder, and is currently in the custody of the Minnesota Commission of Corrections, serving a life sentence without the possibility of parole. *Id.* at 391.

## **ARGUMENT**

Tragic events unfolded at the hands of Roman Nose and resulted in the brutal murder of Jolene Stuedemann. But those events do not give rise to civil liability against R-Home or the Ritters, unless Respondents had an affirmative duty to control Roman Nose from harming others. Minnesota law makes clear that no such duty exists where a defendant lacks the ability to control another and where the harm inflicted is not reasonably foreseeable.

Even when this Court views the evidence in the light most favorable to Appellants, the record unequivocally establishes that the Ritters and R-Home did not have the legal authority to prevent Roman Nose from leaving and had no ability to control his behavior. It is also undisputed that the Ritters and R-Home did not actively contribute to Roman Noses' conduct; Respondents did not give him permission to leave the premises or provide him with drugs, alcohol, or a weapon. Further, the terrible harm Roman Nose inflicted on Stuedemann was not reasonably foreseeable. Based on this record, the district court properly concluded that the Ritters and R-Home did not owe a duty to control Roman Nose. This Court should affirm the district court's decision.

### **I. STANDARD OF REVIEW**

On appeal from summary judgment, this Court asks two questions: (1) whether there are any genuine issues of material fact, and (2) whether the district court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). This court views the evidence in the light most favorable to the party against whom summary judgment was granted. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

The existence of a legal duty is a question of law, which this court reviews *de novo*. *H.B. ex rel. Clark v. Whittemore*, 552 N.W.2d 705, 707 (Minn. 1996). In a negligence action, summary judgment is proper “when the record reflects a complete lack of proof on any of the four essential elements of the claim: (1) the existence of a duty of care; (2) a breach of that duty; (3) an injury; and (4) the breach of the duty being the proximate cause of the injury.” *Schafer v. JLC Food Sys., Inc.*, 695 N.W.2d 570, 573 (Minn. 2005).

Here, the district court based its decision granting summary judgment in favor of the Ritters and R-Home on the elements of duty and proximate cause. To avoid needless repetition, the Ritters’ brief will focus on the element of duty, while R-Home’s brief will address proximate causation.

## **II. THE RITTERS AND R-HOME DID NOT OWE A DUTY TO CONTROL THE ACTIONS OF TONY ROMAN NOSE**

Generally, a person has no duty to control the conduct of another to prevent him or her from causing injury to a third party. *Lundgren v. Fultz*, 354 N.W.2d 25, 27 (Minn. 1984) (citing Restatement (Second) of Torts § 315 (1965)). Such a duty may arise, however, when (1) a “special relationship” exists between (a) the defendant and the person who needs to be controlled, or (b) between the defendant and a third party which gives the third party the right to protection, and (2) the harm is foreseeable. *Errico v. Southland Corp.*, 509 N.W.2d 585, 587 (Minn. Ct. App. 1993). This Court reaches the issue of foreseeability only if the existence of a “special relationship” has first been established. *Id.*

**A. No Duty To Control Exists Under Section 319 Of The Restatement Because The Ritters And R-Home Lacked The Ability To Control Roman Nose**

In support for their argument that a special relationship existed, Appellants primarily rely on the Restatement (Second) of Torts § 319 (1965), which provides:

§ 319. Duty Of Those In Charge Of Person Having Dangerous Propensities

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

The Illustrations to the Restatement explain that the ability to control is implicit in the duty to control.

1. A operates a private hospital for contagious diseases. Through the negligence of the medical staff, B, who is suffering from scarlet fever, is permitted to leave the hospital with the assurance that he is entirely recovered, although his disease is still in an infectious stage. Through the negligence of a guard employed by A, C, a delirious smallpox patient, is permitted to escape. B and C communicate the scarlet fever and smallpox to D and E respectively. A is subject to liability to D and E.

2. A operates a private sanitarium for the insane. Through the negligence of the guards employed by A, B, a homicidal maniac, is permitted to escape. B attacks and causes harm to C. A is subject to liability to C.

Restatement (Second) of Torts § 319, cmt. a, illus. 1, 2 (1965). In both Illustrations, the hospital and sanitarium had the ability to prevent a dangerous patient from leaving, but negligently failed to do so. *Id.* Therefore, the duty to control most commonly arises when a defendant “takes charge” of a dangerous person and, by virtue of locked or guarded facility, has the ability to control his or her actions.

Like the Restatement, Minnesota case law recognizes that “[i]mplicit in the duty to control is the *ability* to control.” *Lundgren*, 354 N.W.2d at 27 (emphasis in original).

For example, in *Rum River Lumber Co. v. State*, 282 N.W.2d 882, 883 (Minn. 1979), a young man with a history of mental illness was committed to a locked ward of the Anoka State Hospital, which had windows protected by security mesh and required staff to visually account for patients every 30 seconds. Nevertheless, the patient escaped and set fire to a nearby lumberyard. *Id.* Affirming the jury's verdict against the hospital, the supreme court held that a duty to control existed because the hospital knew of the patient's dangerous propensities, the harm was foreseeable, and the hospital had the authority and opportunity to control his conduct. *Id.* at 884, 886. Thus, the hospital was liable for failing to exercise its authority to prevent the patient from escaping. *Id.*

The importance of the defendant's ability to control is further illustrated in *Lundgren*, 354 N.W.2d at 26-27, where the dangerous person, Fultz, was initially confined to the psychiatric unit of a hospital, and was then continuously monitored on an outpatient basis by his psychiatrist. Fultz was a paranoid schizophrenic who demonstrated an alarming fixation on handguns and had repeatedly threatened to kill people. *Id.* After his release, the police refused to return Fultz's guns without assurances from Fultz's psychiatrist that Fultz was "cured." *Id.* at 27. The psychiatrist supplied this approval, and Fultz subsequently shot and killed Lundgren in a random attack. *Id.*

In reversing the district court's grant of summary judgment in favor of the psychiatrist, the supreme court held that a fact issue remained as to whether the psychiatrist had the "ability to control" Fultz's access to guns. *Id.* at 27-28. The court held that whether the psychiatrist had the ability to control Fultz's access to guns was a close question because the record showed that the psychiatrist's approval was required

before Fultz could have a gun, and it was within the psychiatrist's ability to deny that approval. Here, on the other hand, the question is not close at all – the record clearly demonstrates that the Ritters were not authorized to physically restrain Roman Nose from leaving R-Home, and they did nothing to affirmatively assist him in gaining access to a deadly weapon, drugs, or alcohol. Therefore, the Ritters lacked the ability to control Roman Nose within the meaning of *Lundgren*.

Appellants argue that *Lundgren* supports their position that a duty to control may be imposed even in the absence of a secure facility. (App. Br. at 26.) This argument is misplaced. Although Fultz was not confined to a locked facility at the time of the murder, the real issue in *Lundgren* was his psychiatrist's "ability to control" Fultz's access to guns. 354 N.W.2d at 27. Here, R-Home's inability to restrain its residents or lock down its facility directly correlates to its inability to control to Roman Nose's actions. See *Erickson v. Curtis Inv. Co.*, 432 N.W.2d 199, 203 (Minn. Ct. App. 1988) (recognizing that "non-custodial" nature of alcohol treatment home, where parolee was "free to go about his business until 12:00 midnight when he was required to be in his room," was relevant to duty-to-control analysis), *aff'd on other grounds*, 447 N.W.2d 165 (Minn. 1989). Therefore, the district court properly held that before a duty to control arises, "a much higher level of security [is needed] than that provided by R-Home." (AA 70.)<sup>7</sup>

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<sup>7</sup> Appellants also rely on *Huttner v. State*, 637 N.W.2d 278 (Minn. Ct. App. 2001) (App. Br. at 27), but the decision has limited applicability to this appeal. The Restatement § 319 is not explicitly discussed, and the court notes that the social worker "had a range of potential control mechanisms available to her." *Id.* at 286, n.3. The decision primarily

Other jurisdictions have also emphasized that ability to control is a determining factor in the existence of a special relationship. For example, in *Bailor v. Salvation Army*, 51 F.3d 678, 683 (7th Cir. 1995), the Seventh Circuit affirmed summary judgment in favor a halfway house, holding that it had no duty to control a federal prisoner who fled the house and violently assaulted and raped a women. The court's decision focused on the home's inability to detain the resident:

Residents were free to leave, provided they signed a sign-out sheet. The facility could not be "locked down" in order to prevent residents from leaving, and individual rooms could be locked only by the residents themselves from inside. In sum, residents could leave the facility at any time, subject only to the consequences that could be imposed by the court or by the Bureau of Prisons. Once Holly left the facility, the Salvation Army could only report the incident to the Bureau of Prisons.

The district court's determination that "the Salvation Army had the responsibly to house Holly in a safe, clean and nurturing environment; but virtually no say-so as to effectuating meaningful control over him" supports the conclusion that the Salvation Army did not possess sufficient control over Holly to create a duty to Ms. Bailor as a matter of law. The limitations on the authority of the halfway house are important and we believe a controlling factor in the relationship between the Salvation Army and Ms. Bailor. The Salvation Army had but limited authority to restrict the activity of Holly and, therefore no realistic opportunity to control Holly's activities with respect to Ms. Bailor.

*Id.*

Furthermore, under facts very similar to the pending appeal, another state court of appeals has held that no duty existed to control the conduct of a minor who left a residential treatment facility without permission. In *King v. Durham County*, 439 S.E.2d

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rests on an analysis of discretionary/ministerial duties of a county social worker. *Id.* at 284-85.

771 (N.C. Ct. App. 1994), the appellate court held that Triangle House, a residential treatment facility for minors with “serious emotional, mental or neurological handicaps accompanied by violent or assaultive behavior,” owed no duty to control a resident who left through an unlocked door, in violation of the facility’s rules, and shot someone to death during the commission of a robbery. *Id.* at 772-73. Although Triangle Home was aware of the minor’s propensity for violence, the court focused on whether the home had the “ability or right to control him.” *Id.* at 775. The appellate court recognized that Triangle Home had an obligation to ensure the safety of the community, and may have had an obligation to report the minor’s absence to the police. *Id.* But the court nevertheless held that Triangle Home did not have “custody” of the minor or the ability to control him because there was no court order requiring his participation in the program, and the home had no legal right to mandate his return to the facility once he left. *Id.* Therefore, Triangle Home was entitled to judgment as a matter of law. *Id.*

These cases are directly on point. R-Home was a Rule 8 group home, not a locked facility. Its residents lived in residential neighborhoods and were frequently away from home attending school, counseling sessions, working, or taking unaccompanied walks. (RA 1, 7, 106, 108, 130, 135.) And while R-Home restricted certain privileges as a consequences for bad behavior, it could not use “physical contact” or “physical restraints” to address negative behavior or to prevent a resident from leaving. (RA 7, 65-66, 129.)

No court had ordered Roman Nose to remain at R-Home. As Robert Ritter recognized, he “could have left any time he wanted to. All he had to do was buy a bus

ticket and go home.” (RA 66.) If a resident decided to leave, the Ritters were only required to provide a referral, usually back to the social services department who placed the child, so that he or she would not end up on the streets. (RA 57A, 105A.) And if a child left before this process was complete, or without permission, R-Home’s only available recourse was to call the police and report him as a runaway. (RA 25, 36.) That is exactly what they did in this case.

Appellants repeatedly argue that Roman Nose “did not belong in a Rule 8 group home” and that a Rule 5 program, with a “higher level of security,” was a more appropriate placement for him. (App. Br. at 17, 20, 29.) They cite Roman Nose’s behavioral problems, chemical dependency, and anger issues to support their position, but this argument fails careful consideration. After all, Roman Nose’s problems are typical of *all* residents of a Rule 8 group home. (RA 106.)

Furthermore, the Ritters’ role in placing Roman Nose at R-Home was minor, at best. Roman Nose’s placement followed two independent psychological evaluations, judicial recommendation, and the involvement of social services. (RA 35-36, 53-55, 58-59.) Ultimately, the Montana court determined the baseball bat incident was not serious enough to warrant confinement and that R-Home was an appropriate placement option. In contrast, Appellants point to nothing in the record suggesting that the Ritters had a basis for rejecting Roman Nose at this time.

Additionally, nothing that Roman Nose did after returning to R-Home in 1999 put the Ritters or R-Home on notice that Rule 8 placement was inappropriate. To the contrary, Roman Nose was following most of the conditions established at intake, and at

times, was even making progress. Certainly, the record contains no evidence that he suffered from “severe emotional disturbance,”<sup>8</sup> such that Rule 5 placement would be appropriate. *See* Minn. R. 9545.0905, subp. 1.<sup>9</sup>

When Flynn was asked if Roman Nose was a candidate for a Rule 5 group home setting, he testified that based on the “information that was given to [him] at that particular time, [he] fe[lt] that [Roman Nose] did not require that type of placement, . . . [he] didn’t even think of sending him over that that Stillwater [Rule 5 program].” (RA 78-79.) Flynn, with the benefit of hindsight and this litigation, also testified he “might” have changed his mind with more information.<sup>10</sup> (*Id.*) However, the undisputed evidence is that Flynn’s psychological evaluation and therapeutic notes did not suggest that a change in placement was recommended or required for Roman Nose.

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<sup>8</sup> Appellants’ allegation that Roman Nose suffered from “severe emotional disturbance” is unsupported by the record and should be disregarded. (App. Br. at 33.)

<sup>9</sup> Appellants allege that the Ritters kept important information from the juvenile court concerning Tony’s history of violence and chemical dependency. (App. Br. at 3,18.) Nothing in the record suggests that the Ritters were given the opportunity to disclose this information but failed to do so, and the record certainly does not suggest that the Ritters mislead the court. (RA 62A.) This Court should reject unsubstantiated allegations.

<sup>10</sup> Flynn went on to testify that if he had known about Roman Nose’s “[c]ontinued deterioration,” he might have considered suggesting to the Ritters that Roman Nose needed more supervision than they could give him. (RA 78-79.) Flynn also stated that if he had known about the poem, he might have considered Roman Nose to be dangerous. (RA 80.) But again, these statements were made with the benefit of hindsight, and nothing in the record suggests that, in July 2000, Flynn or the Ritters knew or should have known that Roman Nose was severely emotionally disturbed and capable of murder or rape.

Finally, the existence of a legal duty is ultimately a question of public policy. *Vaughn v. Northwest Airlines, Inc.*, 558 N.W.2d 736, 742 (Minn. 1997). As the district court recognized, “serious issues of public policy affecting the entire state juvenile system would result if R-Home were to be held to the same level of security as required in state mental hospitals and jails.” (AA 70.) In promulgating the licensing rules, the Department of Human Services recognized that not every disadvantaged or troubled child should be placed in a locked facility. Accordingly, foster group homes were designed to provide a safe and nurturing environment in a residential setting. Minn. R. 9545.1410. Residents were not confined to R-Home by court order. Rather, they came there to work on problem areas, such as chemical dependency and anger, so they could become productive members of society. If a duty to control is imposed on a Rule 8 group home like R-Home, it would be necessary for these homes to alter their structure significantly, so as to more closely resemble a correctional facility. Eventually, it is highly likely that fear of liability would force these homes out of business altogether. Public policy strongly disfavors imposing a duty of control on Rule 8 foster group homes.

In sum, the Ritters were aware that Roman Nose had chemical dependency and anger issues that could lead to assaultive behavior against his male peers. A Rule 8 group home like R-Home is designed to address these concerns, and Roman Nose was placed at R-Home following court intervention and two psychological evaluations. While Roman Nose’s placement at R-Home was appropriate, a foster group home lacks the ability to control its residents in the manner required by *Rum River* and *Lundgren*. Therefore, the

Ritters and R-Home had no duty to control Roman Nose's conduct, and the district court properly granted summary judgment in their favor.

**B. No Duty To Control Exists Under Section 316 Of The Restatement Because The Ritters And R-Home Had No Ability To Control Roman Nose And There Is No Evidence Of Active Misconduct By The Ritters Or R-Home**

Alternatively, Appellants rely on the Restatement (Second) of Torts § 316 (1965), but it does not apply based on the record in this case. That section provides:

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.

*Id.*

Appellants point to no cases applying Section 316 to a foster group home. However, even if we assume that the Ritters and R-Home have the position of a parent and fall under this section of the Restatement, they had no duty to prevent Roman Nose from intentionally harming Stuedemann under the undisputed facts of this case. The duty of a parent to control a child is narrow – “at the very most, the duty arises when the parent has both the opportunity and the ability to control the child.” *Silberstein v. Cordie*, 474 N.W.2d 850, 855-56 (Minn. Ct. App. 1991). For the same reasons discussed in § A, the Ritters had no ability to control Roman Nose, nor did they know of the necessity for exercising such control.

Additionally, Minnesota courts have imposed liability under Section 316 where that liability arose from “active parental misconduct in creating an unreasonable risk of

harm to others by placing an instrumentality into the hands of a minor child who the parents know, or ought to know, is unable to utilize it without endangering innocent parties.” *Republic Vanguard Ins. Co. v. Buehl*, 295 Minn. 327, 332, 204 N.W.2d 426, 429 (1973). Thus, liability is appropriate where, for example, a parent fails to take a .22 rifle away from a six-year-old child who is shooting at a target and unintentionally shoots a pedestrian. Restatement (Second) of Torts § 316, cmt. c, illus. 1 (1965); *see also Clarine v. Addison*, 182 Minn. 310, 312, 234 N.W. 295, 296 (1931). But no “active parental misconduct,” *Buehl*, 295 Minn. at 332, 204 N.W.2d at 429, can be established against the Ritters and R-Home on the undisputed facts presented here.

Appellants cite *Silberstein*, 474 N.W.2d at 856, arguing that liability is appropriate if a child has a known proclivity for violence and harm is foreseeable, but the record facts in *Silberstein* are clearly distinguishable. There, this Court held that issues of material fact precluded summary judgment in favor of the parents on their ability to control their schizophrenic son. *Id.* The court’s decision was based on a record that established: (1) the parents had assumed the day-to-day responsibility of caring for their son, (2) the parents knew that he was not taking his medication and that his delusional thinking had returned, (3) the parents knew their son had made previous threats to kill his victim, and (4) despite this knowledge, the parents went out of town for the weekend and left an unlocked shotgun in their bedroom. *Id.* Thus, the parents’ active misconduct was key to the court’s decision.

Here, on the other hand, the record establishes that the Ritters and R-Home cared for Roman Nose and were aware that he had chemical dependency and anger issues that

resulted in fights with male peers. In stark contrast to the parents in *Silberstein*, the Ritters in this case had no notice or knowledge that Roman Nose had ever threatened or exhibited sexually violent and/or homicidal tendencies toward any women prior to the murder. Nor did the Ritters make drugs, alcohol, or a weapon available to him. *Silberstein* is simply not analogous. Therefore, under the facts and circumstances in this record, the district court correctly held that a duty to control does not arise under Section 316 of the Restatement.

**C. No Duty To Control Exists Because Roman Nose's Actions Were Not Reasonably Foreseeable**

Even where the ability to control exists, the duty to control extends only to situations where the harm is foreseeable. *See Lundgren*, 354 N.W.2d at 27-28. The test of foreseeability is whether the Ritters and R-Home were aware of facts indicating that Stuedemann was being exposed to an unreasonable risk of harm. *See id.* Or, as stated another way:

The common-law test of duty is the probability or foreseeability of injury to the plaintiff. As stated by Chief Justice Cardozo, "The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension."

*Connolly v. Nicollet Hotel*, 254 Minn. 373, 381, 95 N.W.2d 657, 644 (1959).

Appellants argue, quoting *Sayers v. Beltrami County*, 472 N.W.2d 656 (Minn. Ct. App. 1991), *rev'd*, 481 N.W.2d 547 (Minn. 1992), that "[f]oreseeability 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." *See id.* at 664. (App. Br. at 34.) *Sayers* discussed

foreseeability in the context of breach and causation, however, not duty.<sup>11</sup> *Id.* at 664-65; *see also Rum River*, 282 N.W.2d at 884 (stating that foreseeability of specific nature of conduct is relevant in establishing lack of a superseding cause). But even if the “exact nature” of Stuedemann’s murder need not be foreseeable, Appellants oversimplify the analysis by arguing that foreseeability is established merely by the Ritters’ knowledge of Roman Nose’s so-called “violent proclivities.” (App. Br. at 34.)

Unlike the duty to warn, which requires foreseeable harm to a specific victim, the duty to control may arise if there is foreseeable harm to a member of the general public.<sup>12</sup> *Silberstein*, 474 N.W.2d at 856 (citing *Lundgren*, 354 N.W.2d at 29). But the Ritters’ knowledge of Roman Nose’s chemical dependency and anger issues does not automatically translate into knowledge of foreseeable harm to Stuedemann or any other woman that Roman Nose could have met on July 11, 2000.

In *Lundgren*, the supreme court examined the element of foreseeability as follows:

The question is whether it was reasonably foreseeable in July 1970 that (a) the patient would, a year and a half later, refuse his medication and have a reoccurrence of his illness and that (b) in the course of that reoccurrence, he would use his gun to shoot someone.

354 N.W.2d at 28. The court held that issue was a close question because Fultz had twice been observed brandishing handguns in public, his psychiatrist was fully aware of Fultz’s

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<sup>11</sup> On review, the supreme court reversed and reinstated summary judgment in favor of the county, concluding that the county “could have done nothing to avoid the accident” and was not liable as a matter of law. *Sayers*, 481 N.W.2d at 552.

<sup>12</sup> Appellants have conceded that neither the Ritters nor R-Home owed an affirmative duty to warn Stuedemann. (Plaintiffs’ Memorandum in Support of Summary Judgment at p. 42.)

fixation on guns, Fultz had talked of harming others, and the psychiatrist's letter to the police caused the police to return the guns, thereby materially increasing the danger that Fultz posed to the public. *Id.* at 28-29. Thus, *Lundgren* makes clear that the specific facts and circumstances surrounding the patient's prior conduct and the harm ultimately inflicted are relevant to the foreseeability analysis.

Here, the issue of foreseeability is not a close question. The harm caused by Roman Nose's actions – the brutal rape and murder of Stuedemann – was simply not foreseeable to the Ritters and R-Home. Applying the *Lundgren* analysis, the question is whether the Ritters should have reasonably foreseen that, on July 11, 2000, (1) Roman Nose would fail to return home in a short time; (2) while absent, he would come in contact with two minors the Ritters did not know; (3) these minors would gain access to, and use, alcohol, marijuana, and cocaine; (4) the next morning, Roman Nose would somehow end up alone with Stuedemann at her house; and (6) Roman Nose, who had no history of violence toward women, would violently rape and murder Stuedemann by repeatedly stabbing her with a screwdriver.

The facts are horrible and shocking. But, no matter no matter how strongly Appellants depict Roman Nose's "violent tendencies," the unspeakable violence inflicted upon Stuedemann was not foreseeable. First, there is no evidence that Roman Nose had ever left R-Home without permission and then failed to return home. The record shows only that Roman Nose was "dishonest about his whereabouts" at work in January 2000, was talked to about his curfew in February 2000, and skipped school in May 2000. (RA 81-85, 95-98.) But in each situation, Roman Nose initially left R-Home with permission,

he returned home within a reasonable time, and no harm ever arose from these occurrences.

Second, there is no evidence that Roman Nose left R-Home under the influence of any drugs or alcohol, or that it was likely that he would gain access to drugs or alcohol. Although Roman Nose had issues with chemical dependency, it was not as “rampant” and untreated as Appellants allege. (App. Br. at 30.) The record clearly demonstrates that R-Home prohibited the use of drugs or alcohol and that Roman Nose attended chemical dependency counseling. (RA 36-37, 106.) Roman Nose also passed more than 20 drug tests between January 2000 and July 2000. (RA 20-23.)<sup>13</sup>

Finally, and most importantly, the record is completely void of any evidence suggesting that Roman Nose would commit a violent sexual and homicidal assault and murder. The record indicates that Roman Nose had been in several fights with male peers. But none of Roman Nose’s prior assaults, even when under the influence of drugs or alcohol, involved women. (RA 71-72.) Certainly, none of these assaults were motivated by sexual deviance.

Although Appellants state that Roman Nose demonstrated “homicidal ideation,” this allegation is unfounded. (App. Br. at 3, 35.) It is undisputed that Roman Nose never discussed murder or rape while living at R-Home. Appellants suggest that R-Home knew of Roman Nose’s “I remember” poem and his 8 x 10 “The Mind of a Serial Killer” wall-

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<sup>13</sup> Furthermore, even if the Ritters had somehow known that Roman Nose had gone to Reiman’s home, they did not know that Reiman, who was on house arrest and whose parents were at home, would supply Roman Nose with alcohol. Nor did they have reason to know that Roman Nose would gain access to marijuana and cocaine.

hanging, which police confiscated while executing their search warrant. (*Id.*) But nothing in the record establishes this allegation. To the contrary, Flynn testified that he was not aware of the poem, and Bruss testified that she had never seen the so-called “wall-hanging” or she would have objected to it.<sup>14</sup> (RA 10, 80.) This testimony was never contradicted. Therefore, while Appellants are entitled to inferences in their favor, their unsupported allegations must be disregarded.

In sum, there is simply nothing in the record that made it reasonably foreseeable to the Ritters and R-Home that Roman Nose would commit the unspeakable acts for which he was convicted. In the absence of foreseeability, there can be no duty to control another’s behavior. Therefore, Appellants’ claim that the Ritters and R-Home owed a duty to control the actions of Tony Roman Nose must fail as a matter of law.

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<sup>14</sup> Bruss may not have noticed the picture because, as Officer Jagodzinski described, it was not a picture of a body, but rather an “artsy” silhouette, and the words “the Mind of a Serial Killer” were hardly visible on the picture. (RA 5.)

## CONCLUSION

Unquestionably, Tony Roman Nose brutally ended Jolene Stuedemann's life. Roman Nose has been found liable for her death, and is sentenced to life in prison as punishment for the crime. The law does not support Appellants' position that liability for this crime should be extended to the Ritters and R-Home. Even taking all reasonable inferences in their favor, the record does not establish that the Ritters or R-Home had the ability to control Roman Nose, that they committed any active misconduct, or that Roman Nose's past behavior made this crime reasonably foreseeable. In the absence of these predicates, the law does not impose a duty on one to control the actions of another. Therefore, the Ritters and R-Home respectfully request that this Court to affirm the district court's decision granting summary judgment.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the Minn. R. Civ. App. P. 132.01, subd. 3, for a brief produced using the following font:

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