

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 OF RESPONDENT KEVIN FLYNN**

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## STATEMENT OF ISSUES

- I. **DID THE TRIAL COURT CORRECTLY DETERMINE THAT KEVIN FLYNN ("MR. FLYNN") WAS PREJUDICED BY APPELLANTS' EXPERT'S UNTIMELY AFFIDAVIT?**

The Trial Court determined that it need not consider Appellants' Expert's Affidavit as a sanction for Appellants' violation of the Court's Scheduling Order time deadlines, which materially prejudiced Mr. Flynn.

- II. **DID THE TRIAL COURT CORRECTLY DETERMINE THAT MR. FLYNN OWED NO DUTY TO APPELLANTS?**

The Trial Court held that Mr. Flynn had no duty to Appellants.

- III. **DID THE TRIAL COURT CORRECTLY CONCLUDE THAT APPELLANTS' EXPERT'S AFFIDAVIT FAILED TO ESTABLISH A CAUSAL CONNECTION BETWEEN MR. FLYNN'S PURPORTED NEGLIGENCE AND JOLENE STUEDEMANN'S DEATH?**

The Trial Court held that the Affidavit of Expert Identification failed to establish this causation.

## STATEMENT OF THE CASE

Appellants James D. and Jeanne R. Stuedemann ("Appellants") claim that psychologist Kevin Flynn ("Mr. Flynn") was negligent in his evaluation, care and treatment of Tony Allen Roman Nose ("Roman Nose"). Roman Nose lived at R-Home of Woodbury ("R-Home"), a residential group home for juvenile offenders, which was owned and operated by Robert and Donna Ritter ("the Ritters"). Appellants' Brief at 2.

Roman Nose was a troubled young man who was referred to R-Home from the Lame Deer Indian Reservation in Montana. Id. at 6-7. He had a history of belligerent and sometimes violent behavior. During the night of July 10-11, 2000, Roman Nose raped and murdered Jolene Stuedemann, Appellants' daughter.

Mr. Flynn provided counseling and chemical dependency services for the residents of R-Home. At no time was any resident of R-Home, including Roman Nose, in the custody or charge of Mr. Flynn. He provided no services to Appellants, or to their daughter.

Appellants attempted to make a prima facie case against Mr. Flynn by presenting an Affidavit from their psychologist expert, Dr. Patricia Aletky. This Affidavit was served less than three months before trial, almost two years after this lawsuit was commenced. This tardy service violated the Trial Court's Scheduling Order. Order and Memorandum, 6/29/05 at 12. Appellants' Appendix ("AA") at 76. Appellants did not attempt to obtain an extension of these deadlines before they served Dr. Aletky's Affidavit—they just ignored them.

Under these circumstances, the Trial Court's sanction of excluding Dr. Aletky's Affidavit was appropriate.

In her Affidavit, Dr. Aletky opined that Mr. Flynn failed to meet accepted psychological standards when he provided psychological and chemical dependency services to R-Home on behalf of Roman Nose. Dr. Aletky also postulated that Mr. Flynn could have taken steps to attempt to control Roman Nose's behavior. Nevertheless, as the Trial Court (the Honorable Gary R. Schurrer) pointed out, "the Affidavit does not establish how the implementation of any of these potential control mechanisms would have prevented the death of Ms. Stuedemann even if they had been applied." Id.

Finally, Appellants' expert Affidavit failed to establish a causal connection between Mr. Flynn's alleged negligence and the death of Jolene Stuedemann.

Consequently, the Trial Court correctly dismissed Appellants' claims against Mr. Flynn. This well-considered decision ought to be affirmed on appeal.<sup>1</sup>

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1. Appellants spend 17 pages of their brief detailing Roman Nose's history of misbehavior, the alleged failings of the Ritters and R-Home, and the supposed substandard services rendered by Mr. Flynn. Id. at 6-23. Assuming, arguendo, that these argumentative facts are accurate, they fail to establish that Mr. Flynn had a duty. Moreover, they do not remedy the untimeliness of their expert's affidavit or its substantive deficiencies.

## LEGAL ARGUMENT

### **I. DR. ALETKY'S AFFIDAVIT WAS UNTIMELY, AND THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN REFUSING TO CONSIDER IT.**

This lawsuit was commenced in June of 2003. At that time, Appellants did not name Mr. Flynn as a defendant. Within two weeks, however, R-Home and the Ritters served a third-party complaint on Mr. Flynn, alleging that they relied on his expert advice to their detriment. See AA at 33. However, neither the Ritters nor R-Home believed they needed an expert. Id. at 34. Mr. Flynn disagreed, and brought a motion to dismiss. Minn. Stat. § 145.682, subds. 2-4, 6. On August 3, 2004, the Trial Court dismissed the third-party action, determining that expert testimony was necessary to establish Mr. Flynn's duty, the breach of that duty, and causation. Id. at 31-35.

When Mr. Flynn brought his motion to dismiss, he expected it would be opposed by the Ritters and R-Home. He was surprised, however, that the Motion also met with Appellants' written opposition, since they had not sued or otherwise made a claim against him. At the motion hearing, Appellants' counsel acknowledged that if the third-party action was not dismissed, Appellants would "plead over" against Mr. Flynn. The Trial Court also permitted him to orally oppose Mr. Flynn's Motion.

On February 16, 2005, more than six months after the Trial Court had the dismissal of the third-party action, Appellants served an Amended Complaint, naming Mr. Flynn as a direct defendant. AA at 24-25 (Affidavit of Expert Review). On April 27, 2005, less than three months before trial, Appellants'

expert, Dr. Patricia Aletky, submitted a lengthy Affidavit of Expert Identification. However, in two Scheduling Orders, dated February 2, 2005 and February 16, 2005, the Trial Court had specified that Plaintiffs (Appellants) were to disclose their expert witnesses no later than March 1, 2005. AA 42-45 at 42, 44. Appellants never brought a motion to extend the scheduling order deadlines. AA at 76.

“A trial court’s dismissal of an action for procedural irregularities will be reversed on appeal only if it is shown that the trial court abused its discretion.” Sorenson v. St. Paul Ramsey Medical Center, 457 N.W.2d 188, 190 (Minn. 1990) (citation omitted); Lindberg v. HealthPartners, Inc., 599 N.W.2d 572, 578-79 (Minn. 1999). The Trial Court did not abuse its discretion in this case because, as it pointed out, “[t]he exclusion of an expert opinion is a permitted sanction when the disclosing party has not sought to extend Scheduling Order deadlines prior to their expiration.” AA at 76, citing Anderson v. Rengachary, 608 N.W.2d 843, [849-50] (Minn. 2000).

Since a civil action based on a murder has no statute of limitation, Appellants had plenty of time to prepare a proper Affidavit of Expert Review for their claim of malpractice against Mr. Flynn. They took a risk by not suing him when they commenced this action. It is not unjust to require Appellants to adhere to the Trial Court’s time deadlines.

Appellants made a tactical error by “lying in the weeds,” hoping to benefit from the third-party action against Mr. Flynn. By so doing, they ran the risk that it would be unsuccessful. Since Appellants could have sued Mr. Flynn when they

commenced this lawsuit, the interests of equity and justice are not furthered by allowing them to bring *in seriatim* suits against him. He should not be penalized for a considered tactical decision that turned out to Appellants' disadvantage.

## **II. MR. FLYNN HAD NO DUTY TO CONTROL ROMAN NOSE.**

The law of torts does not typically require a person to protect another from a third person, or to control a third person so that he does not harm another. This rule is succinctly stated in § 314 of the Restatement (Second) of Torts (1965):

The fact that an actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action.

This general rule has several well-recognized exceptions. As Appellants implicitly recognize, the relations listed in § 314A, do not apply in this case. Mr. Flynn is not a common carrier or a possessor of land, and his relationship with Roman Nose was not akin to that of a guardian to a ward.

Section 315 outlines the general principle involved in this case. Titled "Duty to Control Conduct of Third Persons," this section states:

There is no duty so as 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 the other a right to protection.

In this case, the actor was Mr. Flynn, the third person was Roman Nose, and the other was Jolene Stuedemann. Obviously, sub-paragraph (b) does not pertain because no special relation existed between Mr. Flynn and Jolene

Stuedemann. Neither knew about the other. Therefore, Jolene Stuedemann could not have depended on Mr. Flynn to protect her.

Appellants therefore argue that Mr. Flynn fits within sub-paragraph (a). The key question, for purposes of sub-paragraph (a), is whether a "special relation" existed between Mr. Flynn and Roman Nose so that Mr. Flynn had a duty to control him. As will be seen, no such special relation was present.

In §§ 316-320, the Restatement lists certain relations which may impose a duty to control. First, is the duty of a parent to control one's child. Restatement (Second) of Torts § 316 (1965).<sup>2</sup> In § 317, the Restatement specifies that an employer, under some circumstances, has the duty to control the conduct of his

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<sup>2</sup> Appellants argue that Respondents (presumably including Mr. Flynn) had a duty under this Restatement section. The case law, however, is to the contrary. All of these cases pertain to a parent who had an opportunity but failed to control her offspring. Section 316 also does not impose a duty of long-term supervision over the child. Lott v. Strang, 312 Ill. App. 3d 521, 727 N.E.2d 407, 409-10. Furthermore, the parent must of the need to control her child and have the ability and present opportunity to do so. Dinsmore-Poff v. Alvord, 972 P.2d 978, 981 (Alaska 1998). Furthermore, the parent must have more than general notice of the child's dangerous propensities: "General knowledge of past misconduct is

. . . necessary but not sufficient for liability." Id. at 786. Finally, courts have not accepted the argument that a governmental entity acts *in loco parentis* when it assumes custody of a juvenile, thereby rendering it potentially liable under § 316. Sebastian v. State, 93 N.Y.2d 790, 794-96, 720 N.E.2d 878, 880-82 (1999).

In Silberstein v. Cordie, 474 N.W.2d 850 (Minn. Ct. App. 1991) affirmed in part, reversed in part (Minn. 11/26/91), the Minnesota Court of Appeals determined that the parents of a mentally disturbed adult were not entitled to summary judgment because the circumstances presented a jury issue about their ability and opportunity to control him before he committed mayhem. Id. at 855-56. However, the Court of Appeals determined that a defendant mental health provider could not be liable because he could not force the perpetrator to take his anti-psychotic medications. Id. at 855. In this case, Mr. Flynn stands in the position of the Silberstein mental health provider. He could not force Roman Nose to adhere to the care plan; nor did he have the unilateral authority to place Roman Nose in a secure facility.

employee. Under § 318, a possessor of land has a duty to control the conduct of a licensee under some circumstances. None of these exceptions apply here.

Appellants argue, however, that § 319, imposing a duty on those in charge of a person having dangerous propensities, applies to Mr. Flynn. This Restatement section states:

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. (emphasis added)

Thus, to find liability under § 319, there must be evidence that Mr. Flynn had the legal right to control Roman Nose; that he actually controlled him, and that he knew that Roman Nose was likely to commit bodily harm. Bailor v. Salvation Army, 51 F.3d 678, 682 (7<sup>th</sup> Cir. 1995).

Appellants argue that Mr. Flynn “took charge” of Roman Nose. Their argument is largely rhetorical. To the extent it relies upon record evidence, it is based on Mr. Flynn’s psychological and chemical dependency evaluation of Roman Nose, and the formulation of a treatment plan for him. Appellants also note that he performed these same services for many of R-Home’s residents, and that R-Home was Mr. Flynn’s only client.

In order to determine whether Mr. Flynn “took charge” of Roman Nose, it is necessary to define those words. Appellants, however, make no effort to do so. Black’s Law Dictionary, defines “take” in relevant part: “To seize with authority; to confiscate or apprehend ‘take the suspect into custody’” Id. at 1492 (8th ed. 2004). “Charge” is both a verb and a noun. As a noun, charge can mean an assigned duty or task, a responsibility. It can also mean a person or

thing entrusted to another's care. Id. at 248 (definitions 4, 6). As a verb, "charge" can mean "to entrust with responsibilities or duties 'charge the guardian with the ward's care' " Id. (definition 5). Thus, to "take charge" of Roman Nose, Mr. Flynn had to have the authority to seize him, entrusting Roman Nose to his care.

The case law is also helpful in defining these terms. For example, in Johnson v. State, 553 N.W.2d 40 (Minn. 1996), the Minnesota Supreme Court determined that a half-way house had no duty to report that a parolee had not arrived as scheduled. The Supreme Court determined that there is no duty to act for the protection of others unless a special relationship exists. In turn, a special relationship arises only when the defendant has custody of the dangerous person. Id. at 49 (emphasis in original). Since the parolee never arrived there, the half-way house never had custody of him. Therefore, it could not have "taken charge" of him. Id.

The Court then distinguished two other cases. First, in Rum River Lumber Co. v. State, 282 N.W.2d 882 (Minn. 1979), a mentally disturbed juvenile was confined to a locked ward at the Anoka State Hospital. He escaped due to the hospital's negligence, and set a fire which destroyed the plaintiff's property. Id. at 883. Because the juvenile was in custody, the State was responsible for the loss. Id. at 884-86. See also, Restatement (Second) of Torts § 319 (1965), Illustration 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."

Similarly, in Lundgren v. Fultz, 354 N.W.2d 25 (Minn. 1984), a psychiatrist was subject to liability under § 319 of the Restatement of Torts because he affirmatively helped "his patient gain access to deadly weapons." Johnson, at 49 (citation omitted). See also, Lundgren, at 29: "There is a limit to the protection given the discretion in a professional relationship. That limit is exceeded where a psychiatrist places a gun in a potential assassin's hand under the guise of fostering trust between patient and psychiatrist." (emphasis added).

Similarly, in Erickson v. Curtis Investment Co., 432 N.W.2d 199 (Minn. Ct. App. 1988), affirmed on other grounds 447 N.W.2d 165 (Minn. 1989), the Court of Appeals determined that an outpatient alcohol treatment facility was not liable to the plaintiff, who was raped by a parolee, despite the fact that the facility had accepted the parolee on referral. There was no evidence that the facility had any ability to control the perpetrator, since it was a non-custodial residence. As a result, the perpetrator could come and go as he pleased until his midnight curfew

Case law from other jurisdictions demonstrates that a "custodial" relationship is necessary for one to "take charge" of another. In a custodial relationship, the custodian controls and limits the other person's freedom. Black's Law Dictionary 1183 (defining "physical custody").

For example, in Sage v. United States, 974 F. Supp. 851 (E.D. Va. 1997) the court determined that § 319 liability is not applicable, unless there is some sort of custodial relationship "as would exist in a confinement setting . . . "Id. at 860. In Ventura v. Picicci, 227 Ill. App. 865, 592 N.E.2d 368 cert. denied 146 Ill.2d 653, 602 N.E.2d 478 (1992), the court determined that a duty arises under §

319 when the facts show that the defendant has custody of the perpetrator, thus assuming a duty to control him. Id. at 370. In Bartunek v. State, 266 Neb. 454, 666 N.W.2d 435 (2003), the court determined that for purposes of § 319, “takes charge” “is intended to refer to a custodial relationship.” Id. at 462, 666 N.W.2d at 441 (emphasis added). In a custodial relationship, “a custodian is responsible for controlling the person’s activities and is required to, and actually has the legal ability to, take precautions to prevent the person from doing harm.” Id. at 463, 666 N.W.2d at 442 (emphasis added).

The legal right to control the perpetrator’s actions is inherent in the definition of “taking charge.” For example, in Grigalva v. United States, 289 F. Supp. 2d 1372 (M.D. Ga. 2003), the court determined that the requisite control for purposes of § 319 means the defendant has to have the legal authority to confine the dangerous person. Id. at 1378. In Rousey v. United States, 115 F.3d 1394 (6th Cir. 1997), the Court determined that a person has a legal duty to control another only if he has, or can obtain, the legal power to do so. Id. at 398. Similarly, in Bailor, 51 F.3d at 682, the court determined that taking charge requires that the defendant have the legal right to intervene and control the actions of the perpetrator. The same result obtained in Riddle v. Arizona Oncology Services, 186 Ariz. 464, 924 P.2d 468 (Ct. App. 1996), where the court determined that the defendant had no duty to exercise control over a third person unless he had the legal right to exercise such control. Id. at 473. Finally, in Kim v. Multnomah County, 328 Or. 140, 970 P.2d 631 (1998), the court determined: “Implicit in the proposition in Section 319 that one has a ‘duty to exercise

reasonable care to control' a third party that he has 'taken charge of 'to prevent him from doing \* \* \* harm' is the notion that one has the legal ability to take charge of that person." Id. at 147, 970 P.2d at 635 (emphasis added).

In this case, Mr. Flynn had no legal right to control Roman Nose's actions. He did not have Roman Nose in his custody. Therefore, Mr. Flynn never "took charge" of Roman Nose. Consequently, he had no ability to control Roman Nose's actions. As a result, Mr. Flynn had no special relationship with Roman Nose which gave rise to a duty to control his conduct.

Appellants contend, however, that Mr. Flynn could have done more than he did to control Roman Nose. They postulate that a different treatment plan might have worked better, that Mr. Flynn was negligent in failing to revise his treatment plan for Roman Nose, that he abandoned Roman Nose at a critical time, and that Mr. Flynn should have petitioned to have him committed. Appellant's Brief at 41-42.

In the first place, there can't be negligence unless there is a duty. As demonstrated, Mr. Flynn had no duty to Appellants. If Mr. Flynn's evaluation, care, and recommended treatment failed to meet accepted standards, it is his client, Roman Nose or R-Home, not a third-party stranger, who has standing to sue for this negligence. See Kolbe v. State, 661 N.W.2d 142, 147 (Iowa 2003) and Wise v. United States, 8 F.Supp.2d 535, 547 (E.D. Va. 1998) (doctor-patient relationship is not a special relationship requiring the defendant to "take charge").

In addition, Mr. Flynn did not have the unilateral ability to control Roman Nose. He could only make recommendations to the decision-maker. In Kolbe,

the Iowa Supreme Court determined that even if it was foreseeable that the defendant's patient might injure others, his physicians had no duty to third persons because they were not the ultimate decision-makers--they could make recommendations, but they were not the only factors that the decision-maker had to consider in making its discretionary decision. Id., 661 N.W.2d at 147. See also, Grigalva, 289 F. Supp. 2d at 1379 (The power to recommend is not enough to establish liability because the ultimate decision maker is not bound by recommendations; instead, the decision maker has discretion to, and should, consider things other than a healthcare provider's recommendation).

Finally, the fact that Mr. Flynn had some influence over Roman Nose did not impose a duty to control him. A case on point is Kim, where the plaintiff argued that a probation officer had sufficient control over a probationer because the officer could impose sanctions on the probationer, could search his house or person without a warrant, and could cause warrants to be issued for his arrest if he violated the conditions of his probation. In rejecting this argument, the Oregon Supreme Court stated:

Although the existence of those powers demonstrates that probation officers have the ability to compel a probationer's compliance with conditions of his probation, they do not permit the inference that a probation officer can control a probationer's conduct in such a way as to prevent him from harming others. By contrast, in a custodial relationship, a custodian is responsible for controlling the person's activities and is required to, and actually has the legal ability to, take precautions to prevent the person from doing harm.

Id. 328 Or. 147 n.3, 970 P.2d at 635 n.3 (emphasis added).

Furthermore, as the Trial Court pointed out, the rape and murder were not reasonably foreseeable. AA at 72. It is true that Roman Nose had a history of violent behavior. Nothing in his history, however, gave Mr. Flynn reason to suspect that he would rape and murder a stranger. A juvenile is not placed in a residential group home unless he has substantial problems. Many young men in group homes have problems with anger and violence, but it is impossible to predict which ones of them will commit violent acts. In order for Roman Nose's heinous acts to be foreseeable, some record evidence must suggest not only that he might be violent, but also that he would commit this kind of violence. See Dinsmore-Poff, 972 P.2d at 981 and Caldwell v. Youth Ranch, Inc., 132 Idaho 120, 968 P.2d 215, 220 (1998) (Foreseeability means more than possible aggressive tendencies; the violence must be similar to that which later occurred, manifest, and highly likely to occur).

In this case, the Trial Court correctly determined that Mr. Flynn never "took charge" of Roman Nose or had him in custody. AA at 76-77. A prerequisite to a special relationship is a showing that the defendant has exercised control over the perpetrator by taking charge of him. Without a showing that the defendant had the legal ability to control the perpetrator, no special relationship is present. Absent a special relationship, the general rule pertains that the defendant has no duty to control or protect. Since Mr. Flynn never took custody of Roman Nose, he had no duty to protect Jolene Stuedemann or to control Roman Nose, and summary judgment in his favor is properly affirmed.

### **III. DR. ALETKY'S AFFIDAVIT DID NOT ESTABLISH A CAUSAL CONNECTION BETWEEN MR. FLYNN'S PURPORTED NEGLIGENCE AND THE MURDER OF JOLENE STUEDEMANN.**

As a general rule, a health care provider owes no duty to anyone who is not his patient. McElwain v. Van Beek, 447 N.W.2d 442, 445 (Minn. Ct. App. 1989), review denied (Minn. 12/20/89). Neither Appellants nor their daughter entered into a healthcare provider/patient relationship with Mr. Flynn. They never hired him to perform professional services, and he never agreed to do so. Essentially, Appellants argue that this general rule should not pertain in this case, because a healthcare provider/patient relationship is a special relation, entitling them to protection.

A major problem with this position is that a doctor/patient relationship is not encompassed in the Restatement of Torts definition of "special relation". Second, this argument has been made and rejected by a number of courts.

For example, in Wise, the court held that a patient/doctor or a patient/hospital relationship, without more, does not constitute a "special relation" that required either defendant to "take charge" of the perpetrator: "Merely accepting one as a patient and assuming responsibility for his proper treatment does not impose upon the medical care provider a duty to protect others from the dangers posed by the patient, even when the patient specifically warns that he intends to harm another." Id., 8 F. Supp. 2d at 547.

The same result obtained in Kolbe, where the Iowa Supreme Court determined that physicians treating a third party do not have the type of special relationship with him or with plaintiff that would subject them to tort liability:

Rather, the physicians' involvement with Schulte was the same as their involvement would have been with any other patient. The physicians performed medical examinations, treated Schulte for his condition, and advised him of the effects of Stargardt's Disease. This type of involvement is not tantamount to exercising control over the patient or preventing the patient from harming others.

Id. 661 N.W.2d at 146-47 (emphasis added).

Mr. Flynn never "took charge" of Roman Nose. Therefore, even if he was negligent in his evaluation, assessment, care, and treatment of Roman Nose, he breached no duty to Appellants or their daughter.

Furthermore, it is well established that duty is a legal question which is generally an issue for the court to decide as a matter of law. Larson v. Larson, 373 N.W.2d 287, 289 (Minn. 1985); Donaldson v. YWCA of Duluth, 539 N.W.2d 589, 592 (Minn. 1995). As a result, a plaintiff's expert's testimony cannot establish that a defendant has a duty. Conover v. NSP Co., 313 N.W.2d 397, 403, (Minn. 1981); SafeCo Insurance Co. of America v. Dain Bosworth, Inc. 531 N.W.2d 867, 873 (Minn. Ct. App. 1995) ("Finding Dain owed a duty to SafeCo is an issue of law. An affidavit from an expert cannot create a duty where none exists.") Thus, Dr. Aletky's Affidavit cannot create a duty for Mr. Flynn to control Roman Nose or to protect Jolene Stuedemann.

Assuming, arguendo, that a duty existed, the Trial Court correctly determined that Dr. Aletky failed to demonstrate a causal connection between Mr. Flynn's claimed breach in the standard of care and the murder of Jolene Stuedemann.

An expert affidavit is deficient unless the expert establishes "an outline of the chain of causation." Sorenson, 457 N.W.2d at 193. A causation opinion is

insufficient if it is merely a "broad and conclusory statement." Stroud v. Hennepin County Medical Center, 556 N.W.2d 552, 556 (Minn. 1996). Furthermore, an expert's facile declarations do not establish causation. Instead, the gist of expert opinion evidence on the issue of causation must be "that it explains to the jury the 'how' and the 'why' the malpractice caused the injury." Teffeteller v. University of Minnesota, 645 N.W.2d 420, 429 n.4 (Minn. 2002).

In this case, Dr. Aletky provided a "laundry list" of actions that Mr. Flynn could have taken, which might have controlled Roman Nose. As the Trial Court aptly observed, however, "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." AA at 76. Consequently, Dr. Aletky's Affidavit was deficient because it did not show "how" and "why" her recommended interventions would have prevented the murder of Jolene Stuedemann.

### **CONCLUSION**

The Court appropriately sanctioned Appellants failure to comply with expert disclosure deadlines in the Scheduling Order by excluding their expert's affidavit. The Trial Court also correctly determined that Mr. Flynn had no duty. Finally, Appellants' expert disclosure was substantively deficient.

Consequently, the Trial Court properly granted Mr. Flynn's motion for summary judgment. Mr. Flynn respectfully requests that the Court of Appeals affirm this decision.

Dated:

September  
28, 2005

Respectfully submitted,

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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,

**CERTIFICATION OF BRIEF  
LENGTH**

Appellants,

vs.

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

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.

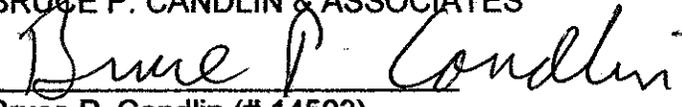
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I hereby certify that this brief conforms to the requirements of Minn. R. Civ.  
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Dated:

September 28, 05

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