

No. A05-1524

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**STATE OF MINNESOTA  
IN COURT OF APPEALS**

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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.

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**APPELLANTS' REPLY BRIEF**

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## FACTS

1. Roman Nose's Treatment and Consequences from August 1999 to July 10, 2000. At page 5 of its Brief, R-Home alleges that “[d]uring the next eleven months” Roman Nose “participated” in each of the four programs recommended by Kevin Flynn in his “Clinical Assessment and Treatment Plan” of August 6, 1999 [Vande Vegte Aff. *Ex 9*, p. 7]. This allegation is supported by a single cite to the Affidavit of Robert Ritter at “R.3” of its Appendix.

To the extent that R-Home there intended to imply that Roman Nose's participation in these four programs was either enthusiastic or continuous throughout Roman Nose's final admission to R-Home, such would be a gross distortion. First, the ONLY records respondents have to substantiate any attendance at anything are Flynn's treatment records. As to those, appellants' expert, Patricia Aletky, Ph.D., L.P., has sharply criticized them, together with his treatment plan, as inadequate. [Vande Vegte Aff. *Ex 13*, pp. 7-10; 12-13].

Robert Ritter relies upon inadmissible hearsay in his affidavit to claim that Roman Nose attended AA meetings in Woodbury. [R-Home Brief, R. 3-4]. However, in his deposition he admitted to having no information as to dates of attendance, the place of attendance or the number of times Roman Nose allegedly attended. [Id., *Ex 7*, R. Ritter Dep. pp. 65-66].

Next, the record shows that Roman Nose received no treatment of any kind after Flynn became ill in April of 2000. Moreover, Roman Nose's “whereabouts” was frequently at issue, an admittedly genuine cause for concern as to the potential for violent behavior.

[Id., *Ex I*, Donna Ritter Dep pp. 141-42].

R-Home also asserts that Roman Nose's "...progress was evaluated and discussed..." during weekly group meetings and that his "transgressions were met with consequences from the R-Home staff...". [R-Home Brief p. 6]. Yet, Donna Ritter admitted that by July 10, 2000, Roman Nose had failed to meet R-Home's published "program description" goals of accepting adult direction, sharing feelings and interacting positively with peers. [Vande Vegte Aff. *Ex I* - Donna Ritter Dep. p. 178]. R-Home's very own progress records and group home file for Roman Nose graphically document his escalating defiance and violence. Little, if anything, however, is said in these records regarding consequences for this deterioration. On the other hand, Roman Nose's documented sociopathic behaviors just went on and on, unabated. Such is hardly a defense.

Based upon Daniel Ritter's vague and unsubstantiated assertions, R-Home further claims that Roman Nose "...passed more than 20 additional drug tests between January 2000 and July 2000." [R-Home Brief, p. 7 and R. 20-23]. The tests were not done through a laboratory and were simple tests administered at the R-Home. There is little, if any, foundation for their validity or existence. And, Daniel Ritter testified "[t]hat's always why I tested him" in answer to a question as to whether he ever tested Roman Nose when he lied about his whereabouts when away from R-Home. [R-Home Brief, R. 20]. This would mean that if Mr. Ritter's twenty to thirty tests testimony is to be believed, there were an equal number of separate AWOL incidents during the same time frame. Indeed, Robert Ritter

admitted that Roman Nose took unauthorized time away from R-Home based upon how he felt on any given day, i.e., he tended to go AWOL [Vande Vegte Aff., *Ex 7*, R. Ritter Dep. pp. 127-28].

In the end, however, there can be no dispute that Roman Nose was severely chemically dependent and that he never received active treatment for this condition. His treatment for anger management was Flynn, alone.<sup>1</sup> After he got sick there was none. Appellants' expert witness, Dr. Aletky, has testified that such was a crucial failure from the beginning to the end of Roman Nose's final R-Home admission - a failure that would and did inevitably cause Roman Nose to return to chemical use and violent conduct. [*Id.*, *Ex 13*, pp. 6-10; 16-17].

2. "Severe Emotional Disturbance". That phrase has a specific statutory definition as found in Minn. Stat. § 245.4871(2000).<sup>2</sup> The Ritters take great issue with its use. They claim it "should be disregarded" and that "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. [Ritters' Brief p. 21].

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<sup>1</sup>Three "Peaceful Alternatives" classes that Roman Nose disdained in the midst of his growing emotional disturbance is not treatment.

<sup>2</sup>Minn. Stat. § 245.4871 subd. 5 defines the phrase "child with severe emotional disturbance" to include one who has been admitted for residential treatment for an emotional disturbance through the interstate compact; or who has a professional diagnosis of depression; or who is at risk of harming others; or who, due to emotional disturbance, has significantly impaired home, school or community functioning for at least a year. Roman Nose fit all of these.

Never mind, then, Roman Nose's history of severe chemical dependency since age 5 or his physical and mental abuse by alcoholic parents as documented in Flynn's August 6, 1999, "Clinical Assessment and Treatment Plan". [Vande Vegte Aff. *Ex 9*, p. 2-3]. Never mind, then, Roman Nose's history of violence and intimidation as his *modus operandi* for purposes of projecting his persona to others. Never mind, then, the aggravated baseball bat assault of June 21, 1999. Never mind, then, the 1997 MMPI that demonstrated to Flynn, himself, that Roman Nose had "anger" and a "poorly developed conscience"; was "frustrated for social standards"; "impulsive" and at "high risk for CD" (all causing a need to be monitored for violent potential [Id., *Ex 15* Flynn Dep. pp. 94-101; *Ex 29*]).<sup>3</sup>

Never mind also that Flynn answered "yes" [not the "might" response the Ritters claim at page 21 of their Brief] to the question of whether additional information from the Ritters as to Roman Nose's deterioration would have caused him to consider "a suggestion to the Ritters that he [Roman Nose] needs more supervision than they can give him" [Id., *Ex 15* Flynn Dep. pp. 215-16]. Never mind also Flynn's admission that he told Roman Nose "...if he drinks he will get into big trouble..." and "...end up in prison" [Affidavit of James King and p. A188 thereto]. And, of course, never mind Flynn's acknowledgment that Roman Nose's deterioration and ideations [including his "I remember" poem] demonstrated

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<sup>3</sup>This MMPI demonstrated to Dr. Altetky that Roman Nose was a sociopathic personality type typical "... of the violent criminals who populate our prisons." [Id., *Ex 13*, p. 5].

his capacity for lethal violence. [Id., *Ex 15* Flynn Dep 251-52].<sup>4</sup>

3. “After all, Roman Nose’s problems are typical of all residents of a Rule 8 group home.” [Ritters’ Brief p. 20]. None of the other group home boys demonstrated any history of potentially lethal violence. None of the other boys murdered or attempted to murder anyone. The Ritters also know that only a “handful” of the estimated eight to nine hundred children they had serviced over the years had presenting histories similar to Roman Nose. Moreover, Donna Ritter admitted that children who did not abide by R-Home’s policies and goals, including abstinence and improvement in their behavior patterns, presented a higher risk of violence. [Id., *Ex 1* Donna Ritter Dep. pp. 217-220]. As above noted, she knew that Roman Nose had not met R-Home’s goals or expectations.

And, year 2000 Woodbury police records of calls to the involved group home demonstrate a total of 12 calls. Six of those pertained to Roman Nose. Three involved his assaultive conduct. One involved his overdose on Dramamine. One involved a computer fraud investigation. And the last involved his “runaway” of July 10, 2000. [Id., *Ex 26*].

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<sup>4</sup>The Ritters claim that there is no proof that there was any knowledge about the “I remember” poem. Nevertheless, one of the investigating police officers, Sgt. Todd Jagodzinski, obtained the poem from Roman Nose’s R-Home file on July 14, 2000, while taking investigative data from Cynthia Bruss. [Vande Vegte Aff. *Ex 33* Jagodzinski Dep pp. 87-88]. They also decry any claim to knowledge of Roman Nose’s “The Mind of a Serial Killer” wall poster. Yet, Bruss admitted daily access to Roman Nose’s room and the right to exclude inappropriate materials. [Id., *Ex 24* Bruss Dep. 94-95]. If R-Home did not know of these things, they certainly should have known of them. Section 319 of the Restatement [Second] of Torts only requires constructive knowledge of violent tendencies.

These admissions and records, together with all of the R-Home documentation of Roman Nose's escalating chemical dependency, impulsivity, violence and intimidation, illuminate the unreasonable risk that Roman Nose would engage in a tragically violent act. There is not one shred of evidence that such risk was typical of other group home residents.

### **LEGAL ARGUMENT**

1. Public Policy Considerations. It appears that respondents hope to convince this court that, for policy reasons, their type of business ought to receive special treatment because they assist troubled teens. To the extent that policy arguments are truly relevant to this inquiry, certainly appellants recognize the social utility of Rule 8 group homes. But that is only half the equation. The countervailing social consideration - public safety - is no less important. While respondents' arguments parrot those of the trial court, they have made no showing, whatsoever, that § 319 liability is inimical to their very existence. To the contrary, the threat of liability will encourage group home operators to act responsibly and by such reasonable operation, their residents will benefit. If, on the other hand, group home operators are to escape liability under § 319 because the law perceives them as some sort of "sacred cow", they will be encouraged to act unreasonably, at once eroding their clients' development/safety and the safety of the public.

An enlightening passage from the Minn. Rule 9545.1410 demonstrates that group homes are just one tool in society's armamentarium to combat the serious problem of emotionally disturbed children. It reads, in part, as follows:

...Group homes provide a type of care that is not available through traditional foster families or institutions. Group homes are not meant to replace either of these types of care but present a unique opportunity to combine different aspects of treatment from both resources. ...The facility is **community based**, and the program is community oriented.

...Group home care should be used on a **selective basis** as a treatment of choice. The group home should **not be considered a panacea** for the care of children. It is a distinct resource in its own right that is part of the whole broad spectrum of resources available to children. [emphasis added]

Because the group home is, in fact, community based and oriented, the question of whether a violent child should be an appropriate participant is a very important issue. As Minn. Rule 9545.1410 states, group homes are to be used on a “selective basis” as they are no “panacea” and they are not intended to supplant either the foster family system or “institutions”. It is submitted, that where, as here, a resident repeatedly demonstrates himself to be a danger to other residents and to outside members of the community, the involved group home operator must be constrained by a duty to protect others, as is provided by *Restatement of Torts [Second]* § 319. Part of that duty has to be one of careful self-examination when it comes to the question of whether children like Tony Roman Nose belong elsewhere. Or, if the group home is to be the modality of choice, then the imposition of *effective* treatment and consequences on pain of expulsion to a higher level of security must apply.

2. Proximate Cause and “Legal Cause”; “But For” Causation. Respondents accuse appellants of neglecting the “legal cause” element of proximate cause.

Appellants begin their rebuttal by citation to a passage from *Dunnell's Minnesota Digest*, NEGLIGENCE § 6.00a (4<sup>th</sup> Ed.):

A proximate cause must always be a cause in fact. However, the fact that an injury would not have happened but for the act of the defendant does not necessitate the conclusion that such act was the proximate cause of the injury. The jural or legal cause is what must be sought in determining and fixing liability. The word proximate, for want of a better one, is generally used to designate such a legal cause. It is often synonymous with direct or immediate. **Inaction where a duty requires action or increasing the dangers to which a person is ordinarily exposed may be a proximate cause of an injury. A given act may be a proximate cause of a given result although there is no physical contact or impact. It is not necessary that it be the sole or even a predominant cause. Time is not a controlling consideration in determining proximate cause. Thus, the result need not be near the cause, in point of time, to be proximate.** [emphasis added].

It seems to appellants that this passage is quite appropriate as applied to this particular matter. They have argued throughout this case that respondents' failures, i.e., inactions and increasing of dangers, were substantial contributing factors to this murder. The lack of physical contact or impact with Jolene Stuedemann by anyone other than Roman Nose does not diminish the causation - legal or factual. Even if Roman Nose's conduct is seen as the predominant cause, such would not exclude respondents' failures from proximate cause. And, the separation in time between Roman Nose's unauthorized absence on July 10, 2000, and the murder of Jolene Stuedemann, likewise, cannot rule out proximate cause.

Appellants here cite the case Block v. Target Stores, Inc., 458 N.W.2d 705 (Minn.App. 1990), *review denied* (Minn. Sept. 28, 1990). Block involved a store customer

who was injured when he fell from a skateboard. It held that when a merchant knows or has reason to know that customers are testing skateboards in its store, resulting injury is foreseeable and that proffered but excluded expert testimony on viable prevention methods was improperly excluded. These preventative steps included installation of proper flooring materials, warning signs and lighting. Also locking up the skateboards could have served to prevent the injury. The Block court separately discussed each of these preventative measures and concluded that, as to each, a jury could reasonably conclude that the failure to use it constituted a breach of duty to “exercise reasonable care for the safety of customers” [458 N.W.2d at 711-712]. In addition, the court concluded that a jury could reasonably conclude that each such failure proximately caused the injury. [Id.]

The legal duty in this case is similar to that in Block in so far as both cases involve a duty of **prevention**. The causation issues are similar for the same reason. Whenever any duty of prevention exists, culpable failures to meet that duty will likely be remote in time and circumstance from the injury itself. They generally will not involve direct contact between the putative tortfeasor and the victim. They generally will involve either an inaction or conduct which enhances the danger to others. And, they may not even be the predominant factual cause. Nevertheless, and as above cited from *Dunnell's*, Minnesota law does not rule out causal negligence in such cases.

Here, a jury could reasonably conclude that given Roman Nose's history, respondents violated their duty of prevention by failing to refuse his re-admission in August of 1999

following his drunken baseball bat assault of June 21, 1999; by failing to insist that he have active treatment for his obvious chemical dependency and emotional problems; by failing to discharge him to a higher level of security in the face of escalation; by failing to impose effective disciplinary measures upon him for his law breaking, rules violations, AWOL's, violence and chemical use; by failing to provide for his treatment needs after Flynn's illness and while his deteriorations were the most manifest; by failing to secure the assistance of the juvenile court when the opportunity presented itself; by failing to abide by the Maltreatment of Minors Act; and by failing to collect him from the streets of Woodbury when he went AWOL in an angry state of mind on July 10, 2000. Just as easily, a jury could conclude that any or all of those breaches proximately caused Jolene Stuedemann's death.

The Block Court also noted the following without equivocation:

Questions of negligence and proximate cause are generally factual matters for a jury to decide. *Schrader v. Kreisel*, 232 Minn. 238, 241, 45 N.W.2d 395, 397 (1950). “[I]t is only in the clearest of cases that the question of negligence becomes one of law.” *Martinco v. Hastings*, 265 Minn. 490, 501, 122 N.W.2d 631, 640 (1963).

458 N.W.2d at 712 [emphasis added].

In R-Home's Brief [pp.12-15], it attempts to equate Lewellin v. Huber, 465 N.W.2d 62 (Minn. 1991) with the instant case to make it one of those “clearest of cases”. This is utterly without basis as Lewellin involved the attempted application of an absolute liability or “special” liability statute to remote causation facts. By contrast this case is nothing more than a common law negligence case with a § 319 duty. The public policies behind

application of an absolute liability created by statute and common law negligence are far different. Assuming the statutory factual predicates are in place, the owner of a dog is bereft of liability defenses under the “dog bite” statute. This gives rise to a need to limit its application only to situations clearly falling within the scope of the statute’s intended protection. This simply is not so in common law negligence - a ubiquitous cause of action if ever there was one. Factual and affirmative liability defenses abound.

More to the point, however, respondents citation to Lewellin is a dangerous proposition for them because the Supreme Court stated its agreement with the Court of Appeals’ dissenting opinion that, indeed, the possibility of a viable common law negligence claim still existed. Observing that the “dog bite” statute was not the exclusive remedy under the facts of the case, the Court said:

Also available to an injured claimant is a cause of action against the dog owner for common law negligence. *See, Lyman v. Alt*, 266 N.W.2d 504, 508 (Minn. 1978). In a common law negligence action, the claimant can recover from the dog owner by proving the dog owner failed to use reasonable care in controlling the dog. **In this common law setting, the traditional concept of causation governs, i.e., all injuries naturally and proximately resulting from the negligence.**

465 N.W.2d at 65 [emphasis added].<sup>5</sup>

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<sup>5</sup>R-Home also cites Kryzer v. Champlin American Legion, 494 N.W.2d 35 (Minn. 1992), a case involving an attempted use of the “dram shop” act where an illegally served, intoxicated patron was injured in the process of being forcibly removed by a bar employee. Thus, Kryzer also involved a statutory, not a common law theory of recovery. The Supreme Court refused to extend proximate cause for making an illegal liquor sale to the patron’s injury since her fact of intoxication had nothing to do with the means by

The Lewellin Court ordered a remand to permit a common law negligence claim based on these facts: The dog owners left town giving a sixteen year old girl charge of their puppy. It had a known propensity to crawl into the front seat when in the car. They did so without warning of this tendency and without giving instructions on their prior use of the rear seat belt to keep the dog in the back seat. The girl then drove with the dog unrestrained in the back seat. The driver was distracted as the puppy came into the front seat. She then ran over a small boy on the side of the road, killing him.

The Lewellin Court remanded even though the dog owners' negligence was remote in time and circumstance from the injury; there was no contact between the owners and the victim; the dog owners' negligence may not have been the predominant cause of the victims's death; and their negligence involved only an inaction or an increasing of the risk to others. Appellants are entitled to no less.

But, R-Home next retreats into accusations that appellants are engaging in prohibited "but for" proximate cause analysis. [R-Home Brief, pp. 15-18]. There are two salient points in response. First, the "but for" card can be played any time the plaintiff's theory of negligence revolves around a duty to act reasonably for the safety of others. For instance, respondents' "but for" argument would apply with equal force to the untaken preventive measures in Block and Lewellin. Yet, those cases withstood causation analysis on common

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which she was removed. Similar to Lewellin, however, the Court noted that the means by which she was removed "...may give rise to liability under the common law." [494 N.W.2d at 38].

law negligence theories. Likewise, the same specious “but for” argument can be made in any duty to warn case - whether it be a products liability case, premises liability case or even medical malpractice case.

Appellants are not arguing for a “but for” standard of legal cause. What they are arguing is that each of the failures they have identified in this case bore a legally recognizable factual relationship to Jolene Stuedemann’s death. They may be multiple and progressive in nature, but their accumulation over time is a causation asset, not a causation liability. What the law seeks, without having a great deal of additional clarity to offer, is causal facts that are “direct” and “substantial”. *4 Minnesota Practice, Jury Instruction Guides - Civil, 4<sup>th</sup> Ed.*, CivJig 27.10. Whether respondents’ failures are “direct” and “substantial” factors in Jolene Stuedemann’s murder are clearly questions of fact. Respondents owed a duty to “...take reasonable care to control [Roman Nose] to prevent him from doing...harm.” *Restatement [Second] of Torts* § 319. It is only within the context of that duty, and its breach, that proximate cause can be analyzed in this case. Respondents seek to take unfair advantage of that context.

Second, “but for” analysis has been rejected as the standard for determining legal cause but it has not been banished from the face of the earth in causation analysis. If a causal fact is such that the injury would not have happened without it, does that mean it is eliminated in its entirety from having any relevance to the causation issue? Certainly not. Indeed, it must bear a “but for” relationship to the injury just to meet the “causation in fact”

element of proximate cause. Again, *Dunnells Minnesota Digest* is consulted:

The rule that the proximate cause of an injury is the cause without which the injury would not have occurred is the oldest test of proximate cause. It is not of much value, except as a statement of the axiomatic truth that the legal or proximate cause must always be a cause in fact.

*Dunnell's Minnesota Digest*, NEGLIGENCE § 6.01a (4<sup>th</sup> Ed.).

Respondents' added criticism that appellants' causation arguments go only to causation in a "philosophic" sense amounts to a gross trivialization of the effect their own conduct and failures. They attempt to exonerate themselves by pointing to other events over which they had no control, including the emptiness of the Stuedemann home, the consumption of alcohol and drugs at the unsupervised Reiman residence, the failure of the police to investigate the runaway report until the next morning "...and other reasons known only to Mr. Roman Nose." [R-Home Brief, p. 23]. But respondents had the ability to control Roman Nose in ways that would have either prevented Roman Nose's participation in these circumstances or otherwise made them harmless.

If Roman Nose was excluded from the group home either by way of refusal or expulsion these events would have no meaning. If Roman Nose received proper treatment his desire to take drugs/alcohol and to explode in angry outbursts would have, arguably, been controlled as he would have had far greater insight into the dangers that his own personality posed to himself and others. If Roman Nose had been subjected to consistent and effective disciplinary measures, he would not have been AWOL on July 10<sup>th</sup> and 11<sup>th</sup>. Respondents

had the ability take reasonable steps to prevent him from being a violent person. They simply failed to discharge that duty in the face of a known and growing risk. Those failures meet the test for proximate cause.

3. Ability to Control Roman Nose. Ritters argue that they are not permitted to physically restrain their residents, and therefore, had no ability to “control” Roman Nose. They have pointed to no statute or regulation which imposes such a rule. Nevertheless, and assuming, *arguendo*, that this is so, this argument ignores their failure to use all of the other viable control mechanisms that appellants have exposed in this case. Moreover, if the lack of ability to physically restrain truly handcuffs their ability to discipline, then common sense would dictate that a Rule 8 group home is an inappropriate venue to assist one such as Roman Nose. Their claim that other group home residents have chemical dependency and anger issues begs the question of Roman Nose’s singularity and his intractable attitude towards group home rules, sobriety and the rights of others to be free from violence and intimidation.

Ritters also argue that Roman Nose was free to leave the group home and go back to the reservation any time he so desired and that “no court had ordered him to remain at R-Home.” [Ritter Brief, p. 19]. They make this argument as a means of trying to demonstrate that they did not “control” him. This argument is ridiculous. First, Roman Nose was a juvenile whose custody was committed to the tribal court. In turn the tribal court’s social services contracted with R-Home to take custody of Roman Nose. R-Home’s own discharge

policy stated that residents were to be "...discharged if they pose a threat to staff or other residents and their continued presence in the group home affects the safety of the group home." It also stated that "[a]ll discharges will be provided a referral". [Vande Vegte Aff. *Ex 30*, p. 5].

Second, genuine fact issues exist over the claim that an unsupervised juvenile could simply voluntarily leave the group home. Daniel Ritter's typed notes of April 25, 2000, describe an altercation between him and Roman Nose in which Roman Nose told him "he wants to get kicked out of here so he can go home." Daniel Ritter next wrote that "I told him to wait until tomorrow morning and I would call Althea and have her make arrangements to have Tony removed...". [Id., *Ex 23* p. A177]. Clearly, Roman Nose was not just free to leave. Respondents also claim to have had a policy of calling the police whenever there was a "runaway". Roman Nose was also on probation with the juvenile court. Respondents claim that they could and did take over twenty drug tests from Roman Nose. Their argument, under these and many other circumstances of control, that they did not have effective control rights over him truly tests the bounds of credulity.

4. Foreseeability. The Ritters also contend that there is no foreseeability. In a transparent but clever effort to bolster this defense, they argue that Roman Nose had no known prior history of sexual predation. They claim that mere chemical dependency and anger issues were not sufficient to put respondents on notice of the risk of rape and murder. But, Jolene Stuedemann did not die as a result of sexual contact. The rape did not kill her.

What killed her was a highly intoxicated, enraged Roman Nose who had picked up an object capable of inflicting serious bodily harm, i.e., a screw driver, which he then used to repeatedly stab her. Respondents were, indeed, on notice of this type of rage and violence as a result of the 1999 baseball bat assault. That, alone, creates the foreseeability of a felonious homicide.

But, without any corresponding citation to the factual record, the Ritters claim that “...the Montana court determined the baseball bat incident was not serious enough to warrant confinement...” and that appellants have shown nothing to suggest they had any basis to refuse Roman Nose’s return. [Ritter Brief, p. 20]. This is just not true. Roman Nose spent weeks in jail after the June 21, 1999, aggravated assault. “[D]ue to the seriousness of the crime” the tribal authorities also referred the matter to the FBI. [Vande Vegte Aff. *Ex 5* (Woodbury police 7/14/00 interview of Althea Foote - tribal social worker); *see also Ex 9* p. 2 (Flynn 8/3/99 “Clinical Assessment and Treatment Plan”)]. The tribal authorities could not understand why a federal charge was not forthcoming. [Id., *Ex 22*, p. A78 (Truax/DHS 8/3/00 interview of Althea Foote)]. Robert Ritter, himself, documented Roman Nose’s incarceration and the involvement of the FBI as a result of this incident. [Id., *Ex 8*]. These are the circumstances under which respondents not only knew of the incident, but knew of its seriousness.

Once, again, Minnesota law does not demand that foreseeability be as specific as respondents would have. In Connolly v. Nicollet Hotel, 95 N.W.2d 657, 664 (Minn. 1959),

the Supreme Court said:

For the risk of injury to be within the defendants' "range of apprehension", it is not necessary that the defendants should have notice of the particular method in which an accident would occur, if the possibility of an accident was clear to the person of ordinary prudence.

In Erickson v. Curtis Investment Co., 447 N.W.2d 165, 170 (Minn. 1989), it said:

The likelihood of harm is, of course, an important factor. Here, for example, the defendants point out that there had never been a sexual assault in the ramp prior to the plaintiff's case, an important consideration. On the other hand, in this instance, it would appear that the jury might consider the likelihood of the appreciable increase in criminal activity breeding crimes of violence.

In Ponticas v. K.M.S. Investments, 331 N.W.2d 907, 912 (Minn. 1983), it said:

We first dispose of the foreseeability argument. We have often held that negligence is not to be determined by whether the particular injury was foreseeable. Connolly v. Nicollet Hotel, 254 Minn. 373, 381-82, 95 N.W.2d 657, 664 (1959); Albertson v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co., 242 Minn. 50, 64, 64 N.W.2d 175 (1954). The jury, as finder in fact, could have found, as it did, that it was reasonably foreseeable that a person with a history of offenses of violence could commit another violent crime, notwithstanding the history would not have shown him to ever have committed the particular type of offense.

And, in Priewe v. Bartz, 83 N.W.2d 116, 120 (Minn. 1957), it said:

[A]uthorities recognize that drunken behavior is unpredictable; also that slight irritations, real or imaginary, may cause outbursts of anger and lead to aggressive acts.

5. Respondents' Reliance upon Foreign Case Law. All respondents have sought precedential refuge in foreign case law. It is submitted that they do this because the law of Minnesota so clearly supports § 319 liability in this case. That said, appellants cite:

A. Texas Home Management, Inc. v. Peavy, 89 S.W.3d 30 (Texas 2002).

There the plaintiffs' daughter was murdered by a mildly retarded juvenile with some criminal history [mostly minor assaults and property crimes but one where he waived a gun] who was committed to the custody of a county mental health authority. It selected the defendant, a private "intermediate care facility", as the facility in charge of his care. The juvenile committed the murder while away from the facility on an unsupervised home visit. Even though the facility no longer had control over the juvenile at the time of the murder, the plaintiffs successfully argued that the facility knew he needed close supervision to keep him out of trouble, and yet, allowed him to visit his home where it knew he would not be effectively supervised. Also, the Texas Supreme Court positively recognized the plaintiffs' argument that the defendant facility "...was not sufficient to control..." this juvenile. It noted the lack of any evidence that the facility had made any attempt have him discharged to a "...more appropriate facility". [89 S.W.3d at 35].

The Peavy Court also assessed the subject of foreseeability and held that the defendant had "...failed to establish as a matter of law that [the juvenile's] unsupervised visits did not present an unreasonable and foreseeable risk of harm to others.". [Id. at 39]. Finally, it balanced the public policy considerations involved in imposing a duty of care. The facility

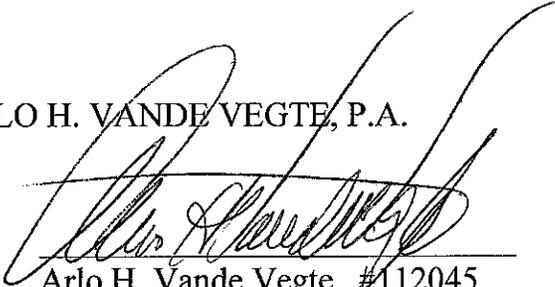
had argued that imposition of duty would adversely affect the availability of services for the mentally retarded. Against this, the Court weighed “...an important interest in protecting the public from dangerous individuals...”. It decided that:

It is not unreasonable to expect a facility that takes charge of persons likely to harm others to ‘exercise reasonable care in its operation to avoid foreseeable attacks by its charges upon third persons.’ *Nova Univ., Inc. v. Wagner*, 491 So.2d 1116, 1118 (Fla. 1986).

[Id.].

B. E.P and W. P. v. DEB, 604 N.W.2d 7 (S. Dak. 1999). There the South Dakota Supreme Court reversed summary dismissal of a § 319 claim against two state social service employees where a sexually deviant foster child sexually abused another foster child placed in the same foster care family. It held that the department of social services had sufficient “control” over the assailant to meet the “taken charge” aspect of § 319 liability. The agency had legal custody and supervisory rights and made several in-person and telephonic contacts. [604 N.W.2d at 15]. It also held the assault to be foreseeable to the social workers, but not to the foster parents. The former knew of the sexual deviancy. The foster parents were never so advised.

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