

the intermediate care facility in this case did not establish as a matter of law that it had no duty, we affirm the court of appeals' judgment in part.¹

I.

Anthony Tyrone Dixon lived with his mother in Houston until he was fourteen. By that time, charges of criminal mischief, evading arrest, theft, and burglary had been filed against him. Rather than prosecute Dixon, the juvenile authorities referred him to the Mental Health and Mental Retardation Authority of Harris County (MHMR) for evaluation. Following diagnostic testing, MHMR determined that Dixon was mildly retarded. MHMR also concluded that he was not dangerous to himself or others. After a hearing, the district court made similar findings and ordered Dixon committed to MHMR's custody for placement. MHMR selected Lakewood House in Nacogdoches, a facility owned and operated by Texas Home Management, Inc. (THM).

Lakewood House is an intermediate care facility, certified under state and federal law to provide services to persons with mental retardation who are eligible to receive medicaid benefits. 42 U.S.C. §§ 1396-1396v; 25 TEX. ADMIN. CODE § 419.207. Under the Medicaid program, the federal government provides matching funds at a percentage of state expenditures for individuals like Dixon, while requiring the provider to comply with federal regulations to qualify for these matching funds. *See* 42 U.S.C. § 1396r-3. Under this program, THM, doing business as Lakewood

¹ The court of appeals' judgment affirmed that portion of the trial court's judgment granting an April 13, 1998 summary judgment, and reversed and remanded that portion of the trial court's judgment granting a June 4, 1997 summary judgment. THM complains in its petition for review only about that portion of the court of appeals' judgment reversing and remanding with respect to the June 4, 1997 summary judgment, and the Peavys do not challenge that portion of the court of appeals' judgment affirming the April 13, 1998 summary judgment. Accordingly, we affirm only that portion of the court of appeals' judgment reversing and remanding with respect to the June 4, 1997 summary judgment.

House, entered into a provider agreement with the State, under which THM agreed to provide for Dixon's care, training, and treatment, and further agreed to follow all applicable federal and state statutes and rules governing intermediate care facilities. *See* 42 C.F.R. §§ 483.410-.480; 25 TEX. ADMIN. CODE § 419.211.

From July 1991 until his arrest for murder in May 1994, Dixon lived at Lakewood House, attending Nacogdoches public schools. During this period, he frequently traveled by bus to Houston to visit his mother on weekends and holidays. Federal regulations encouraged these visits. *See* 42 C.F.R. 483.420(c)(5) ("The facility must promote frequent and informal leaves from the facility for visits, trips, or vacations."). His mother usually requested these visits, which were authorized by an interdisciplinary team² at Lakewood House.

Dixon continued to have behavioral problems while living at Lakewood House. He was verbally and physically abusive to Lakewood House staff, other residents of the facility, and other students at his school. While at school, he was involved in seven separate assaults, resulting in penalties ranging from detention, alternative school, suspension, and referral to law enforcement. In one incident, a fellow student was taken to a hospital for stitches after Dixon cut him with a piece of glass. The record further suggests that Dixon also assaulted other residents at Lakewood House.

Dixon engaged in more extreme criminal conduct during his visits to Houston. During one Christmas vacation there, he was charged with burglary of a habitation. During his spring break vacation in 1993, he was charged with aggravated assault when he brandished a hand gun after being

² "Interdisciplinary team" refers to the "group of mental retardation professionals and paraprofessionals who assess the treatment, training, and habilitation needs of a person with mental retardation and make recommendations for services for that person." TEX. HEALTH & SAFETY CODE § 591.003(8).

caught trespassing on a construction site by the project's supervisor. During the 1993 Thanksgiving holiday, he was apprehended after breaking into an apartment. The week before that, he had been caught shoplifting at a Wal-Mart store. Twice he took cars without the owner's permission. On one of these occasions, he was apparently involved in a high-speed chase. On the other, he damaged his mother's car, prompting her to ask THM to discontinue his home visitation "until she cooled off." Finally, on the weekend of May 15, 1994, just two months after he had damaged his mother's car, Dixon shot and killed Elizabeth Ann Peavy at a Houston convenience store, then stole her car. Although the evidence is conflicting, Dixon's mother testified that she was not expecting him to visit on the weekend of the murder.

After their daughter's tragic death, the Peavys sued THM, alleging that THM was negligent and grossly negligent in breaching its duty to supervise and control Dixon. THM moved for summary judgment, asserting that it owed no duty to prevent Dixon's criminal conduct. The trial court agreed and granted summary judgment, but the court of appeals reversed and remanded. 7 S.W.3d 795. It held that "a special relationship existed between THM and Dixon sufficient to impose a duty on THM to control Dixon's behavior." *Id.* at 800. The court of appeals further concluded that fact questions had been raised about THM's "duty to use reasonable care in determining whether Dixon was allowed to continue unsupervised home visits." *Id.*

II.

Whether a duty exists is a question of law for the court. *Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990). The question of legal duty is a multifaceted issue requiring us to balance a number of factors such as the risk and foreseeability of injury, the social utility of the actor's conduct, the consequences of imposing the burden on the actor, and any other relevant competing individual and social interests implicated by the facts of the case. *Otis Eng'g Corp. v. Clark*, 668 S.W.2d 307, 309 (Tex. 1983); *see also* 1 EDGAR & SALES, TEXAS TORTS & REMEDIES § 1.03[2][b] (2000). Although the formulation and emphasis varies with the facts of each case, three categories of factors have emerged: (1) the relationship between the parties; (2) the reasonable foreseeability of harm to the person injured; and (3) public policy considerations. *See Graff v. Beard*, 858 S.W.2d 918, 920 (Tex. 1993); *Greater Houston Transp.*, 801 S.W.2d at 525.

A.

Generally, there is no duty to control the conduct of others. *Greater Houston Transp.*, 801 S.W.2d at 525. This general rule does not apply when a special relationship exists between an actor and another that imposes upon the actor a duty to control the other's conduct. *Id.*

THM contends that it did not have sufficient control over Dixon to create a special relationship. THM submits that Dixon's only "relationship" was with MHMR, in whose care, custody, and control Dixon had been placed by the court. THM asserts that it agreed only to provide room, board, and treatment for Dixon and that it never agreed to assume responsibility for his behavior. Thus, THM concludes, it had no more right to control Dixon than did the doctor in *Van Horn v. Chambers*, 970 S.W.2d 542, 546-47 (Tex. 1998), in which we concluded that no special relationship existed.

The Peavys allege, however, that through its contract with MHMR, THM agreed to train, treat, care for, and control Dixon, and that these responsibilities created a duty to certain members of the public. The Peavys further allege that THM was negligent in failing to supervise and discipline Dixon, specifically by allowing him “to continue to go on leave to Houston while experiencing increasing behavioral problems.” The Peavys allege that THM knew that Dixon needed close supervision to keep him out of trouble, and yet it allowed him to visit his mother in Houston, where it knew such supervision was lacking.

THM asserts that it had limited authority to control Dixon because the State retained legal custody and both federal and state regulations encouraged his frequent visits to his mother’s home in Houston. We agree that federal and Texas Department of Human Services regulations generally favor such visits, although they do not expressly require them. 42 C.F.R. § 483.420(c)(5) (“The facility must promote frequent and informal leaves from the facility for visits, trips, or vacations.”); 16 Tex. Reg. 3525, 3527 (1991) (formerly 40 TEX. ADMIN. CODE § 27.201(c)(6)) (“No participating facility may engage in any of the following restrictive practices . . . prohibiting an individual from leaving the facility at will except as provided by state law.”). The fact that THM no longer had custody or control of Dixon at the time of the murder does not address whether THM negligently failed to exercise control over Dixon prior to his release to Houston.

THM’s interdisciplinary team approved Dixon’s visit to Houston. THM failed to produce summary judgment evidence that conclusively established that it had no choice but to release Dixon to Houston for a therapeutic visit. Although state and federal regulations encouraged therapeutic visits for Dixon to see his family in Houston, there is no summary judgment evidence that such state

and federal regulations required THM to approve such visits when they presented an unreasonable risk to the safety of others. The dissent contends that state regulations mandated that facilities allow residents an unlimited number of therapeutic visits as well as some extended visits. However, the regulations that the dissent relies on apply only to the conditions for which the intermediate care facility will be reimbursed when the client patient is away from the facility.³ Moreover, these regulations clearly recognize that, rather than being “mandated,” therapeutic visits require authorization by a mental retardation professional and physician approval. 16 Tex. Reg. 3525, 3534-35 (1991) (formerly 40 TEX. ADMIN. CODE § 27.519(b)(2)) (“The individual’s qualified mental retardation professional (QMRP) must authorize and document each therapeutic and extended therapeutic visit, subject to the approval of the physician.”).

Further, there is ample evidence to suggest that an intermediate care facility such as Lakewood House was not sufficient to control Dixon. The Texas Department of Human Services regulations address how a facility can permanently release an individual because of “maladaptive behavior(s) that the facility is unable to address successfully.” 16 Tex. Reg. 3525, 3540 (1991) (formerly 40 TEX. ADMIN. CODE § 27.707(c)(3)). However, there is no summary judgment evidence that THM convened a special committee to review Dixon’s maladaptive behaviors and recommend to the State of Texas his permanent discharge from its facility. *Id.* Although Lakewood House was

³ The regulations state that the Texas Department of Human Services will make vendor payments for intermediate care facility patients who are absent from a facility for therapeutic or extended therapeutic visits when the following criteria are met: (1) the individual program must provide for therapeutic or extended therapeutic visits or both; (2) the individual’s qualified mental retardation professional must authorize and document each therapeutic and extended therapeutic visit, subject to the approval of the physician; (3) each individual is permitted an unlimited number of therapeutic visits per calendar year; (4) each individual is permitted one extended therapeutic visit per calendar year; (5) facility staff remain available; and (6) the facility must make and maintain an accurate record of each visit. 16 Tex. Reg. 3525, 3534-35 (1991) (formerly 40 TEX. ADMIN. CODE § 27.519(b)).

designed and approved as an intermediate care facility, THM continued acceptance of Dixon in its program and continued accepting payments from the State rather than recommending that Dixon be placed in a more appropriate facility.⁴

THM's control over Dixon was greater than the control ordinarily exercised by a physician over a patient. Under its contract with MHMR, THM provided Dixon not only with room and board, but also with a plan for his training and treatment. Professionals employed by THM continually monitored and reported on Dixon's progress to the State. This is a far cry from the limited and specific treatment provided by the defendant doctor in *Van Horn*.

In *Van Horn*, the defendant physician treated a seizure patient for a portion of one day before releasing the patient to a private hospital room. We held that there is no duty of reasonable care toward third parties stemming from the ordinary physician-patient relationship: "Any duty of reasonable care on Dr. Van Horn's part to avoid [negligent misdiagnosis] originates solely through the relationship with, and flows only to, his patient." *Van Horn*, 970 S.W.2d at 545. Here, however, we are not concerned with a physician's duty not to negligently misdiagnose a patient. Rather, we are concerned with the duty to control. As we noted in *Van Horn*, there is generally no relationship between the doctor and patient that would provide the type of control necessary to create a duty to third persons: "Aside from the fact that a physician-patient relationship is not 'special' so as to impose a duty to control, as we have discussed, there is nothing inherent in the relationship that

⁴ We note that THM is the only defendant before us in this case. The question of whether any state agency should be liable is not before us, and we express no opinion in that regard except to agree with the concern expressed in the concurring opinion that apparently no action was taken to remove Dixon from the facility after such an extensive criminal history.

gives a doctor the right to control his patient.” *Id.* at 547. Thus, we concluded that *Otis Engineering*, in which we recognized a duty based on the right to control implicit in the master-servant relationship, does not apply to a case in which there is no inherent right to control another, such as in the ordinary physician-patient relationship. *Id.* But here, in contrast to *Van Horn*, there is a right to control that arises from THM’s contract with the State, which incorporates applicable state and federal regulations and standards. As discussed above, these standards, which THM voluntarily contracted to follow, gave THM the right to control Dixon, and therefore a special relationship existed.⁵

B.

Before imposing a duty of care, however, the risk of harm must be foreseeable. “[T]here is neither a legal nor moral obligation to guard against that which cannot be foreseen” *Houston Lighting & Power Co. v. Brooks*, 336 S.W.2d 603, 606 (Tex. 1960) (quoting *Texas & P. Ry. Co. v. Bigham*, 38 S.W. 162, 163 (Tex. 1896)). Thus, we have described foreseeability as the

⁵ A number of jurisdictions have recognized that one who takes charge of a person who he knows or should know is likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control that person to prevent him from doing such harm. See *Grimm v. Arizona Bd. of Pardons & Paroles*, 564 P.2d 1227 (Ariz. 1977); *Perreira v. State*, 768 P.2d 1198 (Colo. 1989); *Nova Univ., Inc. v. Wagner*, 491 So.2d 1116 (Fla. 1986); *Bradley Cntr., Inc. v. Wessner*, 296 S.E.2d 693 (Ga. 1982); *Sterling v. Bloom*, 723 P.2d 755 (Idaho 1986); *Bailor v. Salvation Army*, 51 F.3d 678 (7th Cir. 1995) (Indiana law); *C.J.W. v. State*, 853 P.2d 4 (Kan. 1993); *Cansler v. State*, 675 P.2d 57 (Kan. 1984); *Davis v. Puryear*, 673 So.2d 1298 (La. App. 1996); *Lamb v. Hopkins*, 492 A.2d 1297 (Md. 1985); *Rum River Lumber Co. v. State*, 282 N.W.2d 882 (Minn. 1979); *Latray v. City of Havre*, 999 P.2d 1010 (Mont. 2000); *Karbel v. Francis*, 709 P.2d 190 (N.M. App. 1985); *Estates of Morgan v. Fairfield Fam. Counseling Ctr.*, 673 N.E.2d 1311 (Ohio 1997); *Buchler v. Oregon Corrections Div.*, 853 P.2d 798 (Or. 1993); *Goryeb v. Com., Dep’t of Public Welfare*, 575 A.2d 545 (Pa. 1990); *E.P. & W.P. v. Riley*, 604 N.W.2d 7 (S.D. 1999); *Higgins v. Salt Lake County*, 855 P.2d 231 (Utah 1993); *Dudley v. Offender Aid & Restoration of Richmond, Inc.*, 401 S.E.2d 878 (Va. 1991); *Hertog v. City of Seattle*, 979 P.2d 400 (Wash. 1999).

“foremost and dominant consideration” in the duty analysis. *El Chico Corp. v. Poole*, 732 S.W.2d 306, 311 (Tex. 1987).

THM argues that it could not have foreseen that Dixon would commit murder while visiting his mother in Houston. THM submits that it had no reason to view Dixon as dangerous because the district court specifically found that he was neither a danger to himself or others when it granted custody to MHMR. However, the district court made that determination in 1991, when Dixon was fourteen. The finding does not establish as a matter of law that seventeen-year-old Dixon was not dangerous in 1994 or that THM should not have reasonably recognized that he had become dangerous by that time.

THM continuously assessed Dixon’s social, psychological, and educational progress in quarterly reports filed with MHMR. THM employed a Qualified Mental Retardation Professional (QMRP), to prepare reports tracking Dixon’s accomplishments and failures during the period.⁶

⁶ In one of these reports, the QMRP noted the following activity:

II. PSYCHOLOGICAL

Documentation from the past quarter indicates four reports of aggression, stealing and cursing (both noted on two occasions), three reports of aggravating others and/or instigating arguments among peers and one report of disruptive behavior at school which resulted in [Dixon] being suspended.... Generally, activity remains at low monthly frequencies and considered to be manageable with the exception of occasional outbursts of aggression requiring implementation of physical restraint procedures. Occasional problems at school continue to be noted.

* * *

IV. SOCIAL

During this reporting period, [Dixon] received 1 phone call from his mother. He went on 2 three day passes and 1 five day pass to his home.... [Dixon] has been on three home visits during the past month. While on Spring Break he was arrested and placed in detention due to aggravated assault. He was involved in a confrontation with an adult and [Dixon] had a gun. He was with his cousin who is in TYC. I have had frequent contact with his mother in regard to his programs. Also, met with his

These reports are at least some evidence that THM was aware of Dixon's dangerous propensities. The Peavys' summary judgment evidence, taken largely from testimony during Dixon's murder trial and THM's own records, documents that Dixon was involved in nineteen assaults, seven other instances of criminal conduct, and nine incidents of verbal threats while he resided at Lakewood House. The summary judgment evidence also indicated that Dixon's behavior was more manageable in a structured environment, and there is evidence that his mother's home was not such an environment. While Dixon engaged in criminal conduct both in Nacogdoches and Houston, there is evidence that the incidents were more serious in Houston. In Nacogdoches, Dixon's misconduct generally consisted of altercations with fellow students at school and with other residents at Lakewood House. His most serious offense involved cutting a fellow student with a piece of glass. On brief visits to Houston, however, Dixon burglarized an apartment and threatened its occupant, trespassed on private property, committed assault with a hand gun, and stole two cars. Viewing the evidence in the light most favorable to the nonmovant, *see Nixon v. Mr. Property Mgmt. Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985), these incidents suggest that Dixon was prone to theft and violence, especially during trips to Houston, where he lacked supervision, and that THM should have foreseen the danger inherent in these trips.

Finally, THM argues that even if it owed some duty of care, that duty was limited to those groups about which THM had specific knowledge that Dixon posed a threat. Specifically, THM submits that he only exhibited violence towards those he knew, either classmates or other Lakewood

social worker from Harris County to discuss his behavior. House management techniques continue to be used to deal with his behaviors. Regular social work contacts have been made and no new needs have been identified.

House residents. Therefore, THM concludes that it could not have foreseen that he posed a danger to Ms. Peavy, a person he did not know.

But THM ignores other evidence suggesting that Dixon posed a danger to total strangers in Houston. The project manager at the Houston construction site where Dixon trespassed testified that he was “scared as hell” when Dixon pointed a gun at him during the 1993 spring break incident. Another stranger, the apartment resident who caught Dixon burglarizing his home, testified about his shock and fear at discovering Dixon hiding behind a shower curtain during Dixon’s 1993 Thanksgiving holiday. While he did not have a weapon on that occasion, Dixon told the man that he had a friend with a gun hiding in a closet. Thus, while Dixon may not have accosted strangers in Nacogdoches as he did in Houston, his life at Lakewood House had more structure and less opportunity for mischief.

The circumstances here are similar to those in *Dudley v. Offender Aid and Restoration of Richmond, Inc.*, 401 S.E.2d 878 (Va. 1991). In that case, a private halfway house accepted a convicted felon for residence under a contract with the Virginia Department of Corrections. Inmates were permitted to leave during the day, but the halfway house was required to monitor their whereabouts. One night, an inmate left the house, broke into a nearby apartment, and strangled a woman to death. Holding that the halfway house owed a duty to the victim, the Virginia Supreme Court wrote that the scope of the duty varied with the circumstances of each case. If the defendant “takes charge” of a person who is dangerous only to a specific individual, the defendant’s duty runs “only to that individual because the risk of injury from a breach of the duty would be foreseeable

only as to that prospective victim.” *Id.* at 883. But the court observed that the duty would more often run to all reasonably within the reach of the dangerous person. *Id.*

Our case is different from *Bailor v. Salvation Army*, 51 F.3d 678 (7th Cir. 1995), in which the Seventh Circuit concluded that a halfway house had no ability and thus no duty to protect the victim of a crime committed by one of its residents. There, the victim lived in a city 150 miles away and was sexually assaulted three days after the prisoner’s escape from the halfway house. *Id.* at 684. Here, Dixon did not escape from Lakewood House; THM released him to visit his mother in Houston, where he then murdered Elizabeth Peavy.

We agree, however, that we must analyze foreseeability in terms of the known danger and the ability to control the third party’s conduct. *Bailor*, 51 F.3d at 684; *see also Estates of Morgan v. Fairfield Fam. Counseling Ctr.*, 673 N.E.2d 1311, 1323 (Ohio 1997) (“[I]t is within the contemplation of the *Restatement* that there will be diverse levels of control which give rise to corresponding degrees of responsibility.”); *Perreira v. State*, 768 P.2d 1198, 1209-16 (Colo. 1989) (scope of duty should be commensurate with the defendant’s degree of control and the extent of the danger); *cf. Lefmark Mgmt. Co. v. Old*, 946 S.W.2d 52, 53-54 (Tex. 1997) (duty is “commensurate with the right of control”). If the party in charge of the dangerous person knew or reasonably should have known of the dangers that person posed, then persons foreseeably exposed to such danger may be owed a duty of care. *Cf. Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995) (one in control of premises has duty of care to protect invitee from known, unreasonable, and foreseeable risk of criminal acts by third parties). This duty may extend only to a specific individual or it may extend to a large class of people, depending on the circumstances. *See* RESTATEMENT (SECOND)

TORTS § 281(b) (1965). Thus, in reversing a summary judgment for an individual allegedly responsible for allowing a drunk to operate a motor vehicle, the Supreme Court of Idaho observed:

Clearly a duty can be owed . . . to a class rather than a single individual. With a drunk driver on the highways, it is strictly a matter of chance who may become his victim. For certain, however, potential victims include those persons in the class of motorists on the same highway.

Sterling v. Bloom, 723 P.2d 755, 769 (Idaho 1986). We expressed a similar view in *Otis Engineering v. Clark*. *Otis Eng'g*, 668 S.W.2d at 311. There, we likewise did not know precisely who the intoxicated employee might injure, but instead focused on the “unreasonable and foreseeable risk of harm to others” created when an employer put its employee on the public roadways in a known drunken condition. *See Greater Houston Transp.*, 801 S.W.2d at 526 (discussing *Otis Engineering*). Here, THM fails to establish as a matter of law that Dixon’s unsupervised visits to Houston did not present an unreasonable and foreseeable risk of harm to others.

C.

Finally, we must consider public policy implications when imposing a duty of care. THM argues that requiring it to control its residents imposes an unreasonable burden that may adversely affect the availability of services for the mentally retarded. To comply with such a duty, Lakewood House would have to be converted into a jail for the mentally retarded, a result contrary to the Legislature’s intent. THM points to the Texas Health and Safety Code’s statement that “[i]t is the public policy of this state that persons with mental retardation have the opportunity to develop to the fullest extent possible their potential for becoming productive members of society.” TEX.

HEALTH & SAFETY CODE § 591.002(a). The Code further states that a person receiving mental retardation services is entitled to a “facility that is the least confining for [his or her] condition” and to services and treatment “in the least intrusive manner reasonably and humanely appropriate to the person’s needs.” *Id.* § 591.005; *see also* § 592.032. Each individual committed to an intermediate care facility for the mentally retarded is also entitled “to a written, individualized habilitation plan developed by appropriate specialists” that is subject to annual or quarterly review depending on the level of services provided by MHMR. *Id.* §§ 592.033(a), 592.034.

Our public policy seeks to integrate persons with mental retardation into society and endeavors to free those individuals from the state’s intrusion to the fullest appropriate extent. But there is also an important interest in protecting the public from dangerous individuals who are already subject to the state’s supervision and control. *See Perreira v. State*, 768 P.2d 1198, 1218 (Colo. 1989) (balancing goal of returning mentally ill persons to productive life against duty to protect public from danger posed by premature release). 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). While the state could retain sufficient control over the details of a facility’s operations to excuse any duty the facility might owe, we conclude that THM’s summary judgment evidence did not establish that degree of authority by MHMR or the court in this instance.

III.

THM failed to establish in the trial court that it lacked the authority or ability to prevent Dixon’s release to Houston. THM further failed to establish that it should not have reasonably

recognized the danger Dixon presented or that it was not foreseeable that a person like Ms. Peavy might be exposed to this danger. Because THM did not establish as a matter of law that it had no duty to reasonably exercise its right to control Dixon, the trial court erred in granting summary judgment. Accordingly, we affirm in part the judgment of the court of appeals.

XAVIER RODRIGUEZ
JUSTICE

OPINION DELIVERED: October 31, 2002