CASE NO. A06-0117

MINNESOTA STATE LAW LIBRARY

State of Minnesota
In Supreme Court

AJA BJERKE,

Respondent,

vs.

SUZETTE ELAINE JOHNSON,

Appellant,

and

KENNETH DEAN BOHLMAN,

Defendant.

BRIEF AND APPENDIX OF RESPONDENT AJA BJERKE

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STATEMENT OF ISSUES

I. WHETHER APPELLANT OWED A DUTY TO RESPONDENT, A MINOR CHILD RESIDING IN HER HOME.

A. WHETHER A SPECIAL RELATIONSHIP EXISTED BETWEEN APPELLANT AND RESPONDENT.

The District Court held that no special relationship existed. The Minnesota Court of Appeals reversed the decision of the District Court, finding that Appellant did enter into a special relationship with Respondent.

Apposite Authority:
Andrade v. Ellefson, 391 N.W.2d 836 (Minn. 1986)
Laska v. Anoka County, 696 N.W.2d 133 (Minn. Ct. App. 2005, review denied August 16, 2005)
Restatement (Second) of Torts §324A (1965)
Doe v. Goff, 716 N.E.2d 323 (Ill. 1999)

B. WHETHER THE SEXUAL ABUSE SUFFERED BY THE RESPONDENT WAS FORESEEABLE TO APPELLANT.

The District Court ruled in the negative. The Minnesota Court of Appeals reversed the decision of the District Court, finding that there was enough evidence to raise a genuine issue of material fact on the issue.

Apposite Authority:
Laska v. Anoka County, 696 N.W.2d 133 (Minn. Ct. App. 2005, review denied August 16, 2005)
Connolly v. Nicollet Hotel, 95 N.W.2d 657 (Minn. 1959)

II. WHETHER THE DOCTRINES OF COMPARATIVE FAULT AND PRIMARY ASSUMPTION OF THE RISK ARE PROPER DEFENSES IN A CIVIL SUIT BY A MINOR VICTIM OF SEXUAL ABUSE AGAINST A THIRD-PARTY WHO ALLOWED THE ABUSE TO OCCUR.

The District Court held that Respondent voluntarily assumed the risk of her own actions. The Minnesota Court of Appeals reversed the decision of the District Court on the grounds that consent of a minor is not a defense in a civil suit for damages suffered from sexual abuse.

Apposite Authority:
Minn. Stat. §609.344 (2004)

State v. Steinbrink, 297 N.W.2d 291 (Minn. 1980)
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Christensen v. Royal School District No. 160, 124 P.2d 283 (Wash. 2005)

STATEMENT OF THE CASE

Plaintiff/Respondent Aja Autumn Bjerke (Respondent) commenced this action against Defendant/Appellant Suzette Elaine Johnson (Appellant) and Kenneth Dean Bohlman (Bohlman) in 2002 arising out of a prolonged pattern of sexual abuse she suffered as a teenager while living at the Appellant's home. Bohlman was charged with criminal sexual conduct in approximately June 2002 and was convicted in October of 2004 by a Blue Earth County jury of multiple acts of criminal sexual conduct. The criminal case against Bohlman was presided over by the Honorable Bradley Walker, Blue Earth County District Court. Similarly, the present civil action was blocked to Judge Walker.

On December 20, 2004 Appellant filed a Notice of Motion and Motion moving the District Court for permission to amend her Answer to include the defenses of comparative fault and assumption of the risk. Over Respondent's objection, the District Court granted the motion to amend on January 14, 2005.

By Notice of Motion and Motion dated April 29, 2005, Respondent moved to amend the Complaint to add claims for punitive damages against both defendants. While Respondent's motion was under advisement, Respondent moved for an order of partial summary judgment against Bohlman and striking Appellant's Amended Answer

and the defenses of comparative fault and assumption of the risk. (Plaintiff's Notice of Motion and Motion dated June 27, 2005).

In its Order Re: Pre-Trial Motions dated October 5, 2005, the District Court: (1) granted Respondent's amendment to request punitive damages against Bohlman while, (2) denying Respondent's amendment to request punitive damages against Appellant, (3) denied Respondent's motions for partial summary judgment, and (4) denied Respondent's motion to strike the defenses of comparative negligence (and presumably assumption of the risk). In the same Order, the Court also granted a motion by Appellant for separate trials over the objection of Respondent.

On September 1, 2005, Appellant moved for Summary Judgment arguing a lack of duty owed to Respondent and that she primarily assumed the risk of being sexually abused while a minor. (Appellant's Appendix[1] 21-22).

The District Court granted partial summary judgment dismissing Respondent's claims against Appellant on December 14, 2005, reasoning that Appellant owed no duty to Respondent during the time she resided at Appellant's home as a child and that Respondent primarily assumed the risk of her injuries. (A.A. 23-39). The District Court certified the issues as important and doubtful pursuant to Minnesota Rules of Civil Appellate Procedure 103.03(i). (A.A. 23-39).

In its February 13, 2007 Opinion, the Minnesota Court of Appeals reversed the District Court on both counts. Appellant then petitioned this Court for review and was

[1] Appellant's Appendix refers to the Appendix of Appellant Suzette Elaine Johnson's Supreme Court Brief. All citations to this Appendix shall be hereafter cited as A.A.

granted review by Order on April 25, 2007. (A.A. 56).

STATEMENT OF THE FACTS

In October 2004, Kenneth Dean Bohlman (Bohlman) was found guilty in Blue Earth County District Court of Criminal Sexual Conduct in the First Degree with a specific finding by the jury that it stemmed from multiple acts of sexual abuse committed against Respondent, Aja Autumn Bjerke (Bjerke), as a minor child. *See*, *State v. Bohlman*, 2006 WL 915765 (Minn.App. 2006) (A.A. 1).

Bohlman and Suzette Elaine Johnson, Appellant, are long-time residents of Blue Earth County, and considered by many to be well-respected members of the Lake Crystal/Mankato community. Appellant's father was an attorney in Mankato until his death, and Appellant, herself, is an attorney practicing in Mankato, and a highly respected equestrian.

Appellant met Bohlman in 1982. (S.Johnson[2] 17). The two began a sexual relationship, and Bohlman moved in with Appellant during the winter of 1984. (S.Johnson 18). Appellant and Bohlman lived together at Island Farm, Appellant's 14½-acre horse farm in Blue Earth County, Minnesota. (S.Johnson 19). At Island Farm, Appellant has hosted college-age students from the Hennepin County Vocational School and the University of Minnesota at Waseca. (S.Johnson 20-21). These students were provided with room and board for 8-12 weeks at a time and worked with the horses. (S.Johnson 21-22). In addition to these college students, Appellant also hosted a number

[2] S.Johnson refers to the deposition of Suxette Elaine Johnson taken on December 16, 2004, and attached to the Affidavit of John Riedy of May 9, 2005, as Exhibit A. All citations to this document shall hereafter be cited as S.Johnson.

of younger children aged 13 and up. (S.Johnson 23). These children paid to stay at the farm, take riding lessons and learn about horses. (S.Johnson 24). The younger children – predominately girls - that stayed at Island Farm were selected by Appellant as, according to Bohlman, "[i]t was her farm." (K.Bohlman[3] 13-14).

Appellant set the house rules for these younger girls. Her rules included: no liquor, no foul language, no carrying on with boys, and that the girls would act like ladies. (K.Bohlman 32). Since these girls were wearing Appellant's "colors" and representing Island Farm at various horse shows and fairs, Appellant was concerned with the image the girls presented, and that they met the farm's "standards." (K.Bohlman 32-33). Further, Appellant expected the girls do their homework, go to school, and help with the barn. (S.Johnson 41). If one of the girls was not meeting Appellant's expectations, she would not be allowed to continue at Island Farm. (S.Johnson 42). In specific reference to Bjerke, Appellant testified that "if she had done something that any one of us had thought was out of line, we would have spoken up." (S. Johnson 74).

One of these young ladies, Diane Benedict (n/k/a Diane Koziolek), who also stayed at Island Farm in the 1980's under a similar arrangement testified that she was sexually abused by Bohlman, while under the care of Appellant. (D.Koziolek[4] 10-11, 18-31). Ms. Koziolek was 14 at the time she came to Island Farm, living there for 11

[3] K.Bohlman refers to the deposition of Kenneth Dean Bohlman taken on August 29, 2005, and attached to the Affidavit of John Riedy of May 9, 2005, as Exhibit A. All citations to this document shall hereafter be cited as K.Bohlman.

[4] D.Koziolek refers to the deposition of Diane Koziolek taken on February 24, 2005, and attached to the Affidavit of Kevin J. Wetherille of April 29, 2005, as Exhibit D. All citations to this document shall hereafter be cited as D.Koziolek.

consecutive months in 1987 and 1988. (D.Koziolek 14-16). During that time, Ms. Koziolek recounts multiple occasions when Bohlman touched her inappropriately, including rubbing her between her legs, as well as a series of incidents in which Bohlman purported to sketch her, opening her shirt to expose and touch her bare breasts. (D.Koziolek 18-31, 36-38, 57). These sessions occurred in the bedroom shared by Appellant and Bohlman, with Bohlman locating the drawing pad from the couple's bed. (D.Koziolek 57). During her time at Island Farm, Ms. Koziolek wrote letters, which she relates were closer to a daily journal. (D.Koziolek 32-33). In these letters she discussed her feelings as well as the instances of Bohlman's sexual abuse against her. (D.Koziolek 33). Ms. Koziolek kept these letters on a table on the right hand side of her bed. (D.Koziolek 33). Ms. Koziolek believes that her letters were being read, as they would appear to be straightened up. (D.Koziolek 34).

Additionally, a photograph of an unidentified young naked girl was found in Appellant's home during the criminal matter portraying the young girl posing naked on a bed with a shelf in the background.[5] Ms. Koziolek recognized the bed covering in the photo as the one in Appellant's bedroom. (D.Koziolek 45-46). Arnold Krenz, a longtime friend of Appellant, also recognized the shelf and wallpaper from the photo as items he has seen in the Appellant's home. (A.Krenz[6] 89-93).

[5] The photograph is attached to the Affidavit of Kevin J. Wetherille of April 29, 2005, as Exhibit 1.

[6] A.Krenz refers to the deposition of Arnold Krenz taken on Fenruary 24, 2005, and attached to the affidavit of John Riedy of May 9, 2005, as—according to the Affidavit—Exhibit A. All citations to this document shall hereafter be cited as A.Krenz.

Bjerke (born 4/20/83), first met Bohlman in the spring of 1995, at the age of 13. Bohlman was judging a horse show in which Bjerke was participating. During lunch, Bohlman gave Bjerke some tips on how to improve her equestrian skills and stated that if she wanted to bring her horse to Island Farm, he would provide her with lessons. Shortly thereafter, Bjerke began taking lessons at Island Farm and continued to do so until fall 1995 with the death of her horse. (S.Johnson 42-44). In the fall of 1996, Bjerke acquired another horse, resuming her lessons at Island Farm with Bohlman. (S.Johnson 44).

By spring of 1997, when Bjerke was 14 years of age, her horse was being boarded at Island Farm and she would travel to Island Farm for lessons. (S.Johnson 43). In early 1997, Appellant asked Bjerke's parents if Bjerke would like to spend some time at the farm, as other children had done in the past. (S.Johnson 44). Bohlman acknowledges that he did not have the authority to invite Bjerke or anyone else to stay at Island Farm; Appellant was the only one in a position to say who could stay at the farm and who could not stay there. (K.Bohlman 57). Bohlman further testified in his deposition, that Appellant was the one in the best position to protect Respondent at Island Farm. (K.Bohlman 171).

Bjerke first came to live at Island Farm in July 1997. (S.Johnson 25). During the time spent by Bjerke at Island Farm, Appellant was Steven Bjerke's, Aja Bjerke's father, primary contact. (S.Bjerke[7] 20). Mr. Bjerke testified that "[Appellant] had the paperwork

[7] S.Bjerke refers to the deposition of Steven Bjerke taken on April 8, 2005, and attached to the Affidavit of John Riedy of May 9, 2005, as—according to the Affidavit—Exhibit A. All citations to this document shall hereafter be cited as S.Bjerke

where you signed the paperwork and if there was a medical issue, then they could take her to the hospital there in Mankato." (S.Bjerke 13). Mr. Bjerke also testified that he called Southdale Pediatrics to determine whether he needed to make any arrangements with respect to Bjerke's health care while she was living at Appellant's home. (S.Bjerke 59). Additionally, Bjerke's parents signed an authorization form[8] with the 4-H organization listing the Appellant as contact person, a responsibility that Appellant admits she accepted. (S.Johnson 67). Appellant also acknowledged that she knew Bjerke's parents expected her to watch out for Bjerke during her time at Island Farm. (S.Johnson 46).

Furthermore, Mr. Bjerke testified that he was initially reluctant to allow his daughter to spend time at Island Farm. (S.Bjerke 61). When asked why he finally allowed her to do so, Mr. Bjerke testified that,

> "Over time I guess we felt more secure, I guess, with that. It was never – my security, I guess, was Suzette, I mean, she was the one that had the – to me, she was the one I viewed as being the responsible one..."

(S.Bjerke 61).

During her first stay at Island Farm, Bjerke had planned to stay one week, but ended up staying for two and one-half weeks. (S.Johnson 46). Appellant testified that during the time Bjerke was at the farm, she was expected to do chores, such as, "[f]eed the horses, help clean stalls. If we were baling hay at the time ... she would have been expected to help unload hay with the rest of us. Whatever we were doing [Bjerke] would

[8] This Parent Permit Form for Blue Earth County 4-H is attached to the Supplemental Affidavit of Kevin J. Wetherille dated September 26, 2005, as Exhibit F.

have been expected to participate." (S.Johnson 47). Further, as stated previously, Appellant had certain expectations, rules and regulations for how any young lady who stayed at her farm would behave, as the young ladies represented both Appellant and Island Farm. (K.Bohlman 32-33). In exchange, Appellant provided food and shelter for Bjerke, and Bjerke received lessons on western riding from Bohlman and English riding from Appellant. (S.Johnson 45, 48-49; S.Bjerke 19, 72-73). Johnson acknowledged that this relationship and the responsibilities associated with it continued until Bjerke left Island Farm the final time in October or November of 2001. (S.Johnson 80).

During Bjerke's time at Island Farm, Appellant developed affection for her, claiming that she felt it was appropriate to allow Bjerke to get out of the dysfunctional environment at her parents home, and into the more stable environment of Island Farm. (S.Johnson 63, 91-92). In fact, Appellant mentioned to her friend, Julie Ann Carey, that she wanted to adopt Bjerke. (J.Krenz[9] 44). Appellant also inquired of her friend Dara Stevens, a Blue Earth County Child Protection Worker, about children's rights who are living away from home. (D.Stevens[10] 46).

At the end of the first two and one-half week stay at Island Farm in 1997, Bjerke returned to her home, but continued with her lessons at Island Farm, and continued to accompany Appellant and Bohlman to horse shows. (S.Johnson 47).

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[9] J.Krenz refers to the deposition of Janice Krenz taken on February 24, 2005, and attached the Affidavit of John Riedy of May 29, 2005, as—according to the Affidavit—Exhibit A. All citations to this document shall hereafter be cited as J.Krenz.

[10] D.Stevens refers to the deposition of Dara Stevens taken on April 15, 2005, and attached to the Affidavit of John Riedy of May 9, 2005, as—according to the Affidavit—Exhibit A. All citations to this document shall hereafter be cited as D Stevens.

During the summer of 1997 and continuing through the school year, Bohlman made his first sexual advances toward Bjerke. It began by him rubbing her arms and thighs both above and below her clothing and culminated in Bohlman kissing Bjerke and touching her genitals. On one occasion during the initial two and one-half week stay at Island Farm, Appellant observed Bohlman sitting on the floor with his back against the couch in the living room. (S.Johnson 100). Bjerke was sitting on the couch and began running her fingers through Bohlman's hair. (S.Johnson 100). This lasted for approximately ten to fifteen minutes. (S.Johnson 100). Appellant thought that the interaction between Bohlman and Bjerke did not look right, as it appeared to be conduct that would occur between a boyfriend and girlfriend and may have sexual overtones. (S.Johnson 102). About ten minutes after the incident, Appellant confronted Bohlman and asked him what he thought was going on, and told him that she thought that interaction was not appropriate. (S.Johnson 101). Appellant felt compelled to "keep [her] eyes open" after she witnessed the inappropriate behavior between Bohlman and Bjerke. (S.Johnson 113).

This incident subsequently became a topic of conversation between Appellant and Dara Stevens. (S.Johnson 111). Dara Stevens is a Blue Earth County Child Protection Worker who works with adolescent girls. (D.Stevens 11). Ms. Steven's relayed that their talk was strictly a private conversation between Appellant and Ms. Stevens that was initiated by Appellant. (D.Stevens 45-46). After hearing what had occurred, Ms. Stevens agreed with Appellant's concerns about the inappropriate interaction between Bohlman and Bjerke. (S.Johnson 111-112). Ms. Stevens also expressed concern about her own

observations of Bjerke's behavior around Bohlman. (D.Stevens 48). Ms. Stevens described the behavior between Bohlman and the 14 or 15 year old Bjerke, "as almost being possessive at times...she almost at times seemed possessive of Ken." (D.Stevens 49). Appellant told Ms. Stevens that "yes we are aware of it, yes I am aware of it." (D.Stevens 48).

Continuing through the school year of 1997-98, Bjerke continued to visit Island Farm almost every other weekend, and Bohlman continued to make sexual advances upon her. During this time, the first act of sexual intercourse occurred between Bohlman and Bjerke.

On April 20, 1998, Bjerke turned 15 years of age.

In June 1998, Bjerke returned to Island Farm to spend her summer vacation. (S.Johnson 64). After summer vacation ended, Bjerke continued to come to Island Farm on weekends through the 1998-99 school year, during which Bjerke turned 16 years old. (S.Johnson 68-69). Bjerke again returned to Island Farm and spent the summer of 1999, and continued to come to the farm on weekends during the subsequent school year. (S.Johnson 79). Throughout this time, the criminal record is replete with Bohlman's continued sexual relationship with Bjerke, having oral, anal and vaginal sex with Bjerke in every bedroom in the house, as well as the kitchen, dining room and den.

Between 1997 and the Fall of 2001, when Bjerke left Island Farm for the final time, the Appellant's closest friends repeatedly took note of and had concerns with the relationship that Bohlman had with Bjerke. Julie Ann Carey, a long-time friend of Appellant, testified that she was uncomfortable with the interactions between Bohlman

and Bjerke, and she had conversations with others about her feelings. (J.A.Carey[11] 23-24). Janice Krenz, a friend of Appellant for 25 years, noted many instances of inappropriate touching between Bohlman and Bjerke during the horse shows she attended. (J.Krenz 48-49). Ms. Krenz stated that there was always flirtation between the two that was too affectionate, stating "if my husband would be acting like that with a young girl, I would be slapping him." (J.Krenz 49).

Bjerke's parents also had some concerns about Bjerke's well-being while staying at Island Farm, but Mr. Bjerke said he always he felt "reassured" by talking to Appellant, "in the way she would talk about [Bjerke] and how she always enjoyed being with [Bjerke] and working with [Bjerke]..." (S.Bjerke 24-25). Mr. Bjerke was further reassured by Appellant when discussing Respondent's development, Appellant told him "yes, and we treat [Bjerke] like she's our family also." (S.Bjerke 21).

In January of 2000, Arnold Krenz and Dean Carey went to Island Farm to do some work on Appellant's kitchen. (A.Krenz 22). When Mr. Krenz and Mr. Carey entered the home they witnessed Bjerke run out of the living room and up the stairs and Bohlman walk out of the living room and into his office. (A.Krenz 23; D.Carey[12] 12). Mr. Krenz, the first one through the door, described Bjerke as wearing, "[v]ery little, if anything. I know she had a T-shirt on – or underpants, let's put it that way. I don't know if she had a

[11] J.A.Carey refers to the deposition of Julie Ann Carey taken on July 27, 2005, and attached to the Supplemental Affidavit of Kevin J. Wetherille of August 18, 2005, as Exhibit K All citations to this document shall hereafter be cited as J A.Carey.

[12] D.Carey refers to the deposition of Dean Carey taken on July 27, 2005, and attached to the Supplemental Affidavit of Kevin J Wetherille of August 18, 2005, as Exhibit J. All citations to this document shall hereafter be cited as D Carey.

shirt on or not at that time." (A.Krenz 24). Mr. Carey noted that Bohlman was wearing shorts, but not a shirt. (D.Carey 13).

In late March or early April of 2000, Bjerke began living at Island Farm full-time. (S.Johnson 82).

In April of 2000, Island Farm was hosting a 4-H Judges Clinic. (S.Johnson 104-105). Appellant was standing next to Bohlman who was seated in some bleachers erected for the occasion. (S.Johnson 105). Bjerke walked around Appellant and jumped into Bohlman's lap. (S.Johnson 105). Appellant testified that she found the behavior very odd and again discussed the conduct with Dara Stevens who had also witnessed the interaction. (S.Johnson 105).

In the summer of 2000, Arnold Krenz witnessed inappropriate rubbing between Bohlman and Bjerke in the kitchen of the home, while Appellant sat in the dinning area that was in view of them. (A.Krenz 38-41).

On the day of the funeral of Appellant's father, in August of 2000, Bjerke, Appellant, Bohlman, Janice and Arnold Krenz, and Julie Ann and Dean Carey, all had dinner together. (J.Krenz 14). During the dinner, Ms. Krenz became uncomfortable by the interaction between Bohlman and Bjerke; finding their behavior to be too intimate, characterizing it as if Bohlman had some type of hold on Bjerke. (J.Krenz 14). Julie Ann Carey had a similar reaction to her observation of the interaction between Bohlman and Bjerke during the dinner; she wondered if there was a relationship there; she wondered at the unusual closeness of the relationship; she wondered it was more than a father-daughter relationship. (J.A.Carey 44-47).

Shortly thereafter, in the winter of 2000, Appellant showed up at the home of Janice and Arnold Krenz. (J.Krenz 23-24). Appellant stated that she needed to get out of her house because Bohlman and Bjerke were fooling around on the couch and things were getting "too sexual." (J.Krenz 23). Looking back on this occasion as well as prior conversations with Appellant in which she felt that, "it was sort of like [Appellant] was trying to say it," Ms. Krenz testified in her deposition that, "I think [Appellant] knew – I think she had to have known that something was wrong with the relationship." (J.Krenz 11, 30 & 74-75).

On April 20, 2001, Bjerke turned 18 years old.

During the last weekend of October of the first weekend of November, 2001, Bjerke left Island Farm. (S.Johnson 130). According to Bohlman, Appellant ransacked Bjerke's room at Island Farm immediately prior to the Bjerke and her father removing her personal items from the property. (Bohlman Tape[13] 44-46). Bohlman states that he had a video tape of Bjerke masturbating that he took from her room because Appellant threatened to "throw all this shit out." (Bohlman Tape 45). When Steven Bjerke and Bjerke arrived to retrieve her personal items, Mr. Bjerke confronted Appellant as to why Bjerke's belongings were in Bohlman's room. (S.Bjerke 39). Appellant did not answer Mr. Bjerke's question, instead she just "looked at [him] with as cold of eyes as [he'd] ever seen and didn't even blink, had absolutely no emotion whatsoever." (S.Bjerke 39).

[13] Bohlman Tape refers to the transcript of a taped conversation between Ken Bohlman and Appellant on May 23, 2002, and attached to the Affidavit of Kevin J. Wetherille of April 29, 2005, as Exhibit H. All citations to this document shall hereafter be cited as Bohlman Tape.

Bohlman was charged with five counts of varying degrees of criminal sexual conduct for his sexual abuse of Bjerke. (*See* Memorandum of Judge Bradley C. Walker dated October 5, 2005, Page 4).

At some time after the criminal charges had been filed, Arnold Krenz visited Island Farm and found that all the mattresses in the home were lying out in the front yard. (A.Krenz 45).

Since the charges became public, Appellant has been reluctant to talk with her friends about the relationship between Bohlman and Bjerke, and has gotten defensive when her friends have tried to discuss the observations they had made. Arnold Krenz describes a conversation he and his wife tried to have with Appellant as follows:

> "we sat and visited for awhile and then we got to the point of saying, you know, well the reason – you know, my wife says the reason we called you over here is that we feel Ken is guilty. And the reason why is because I saw it too much going on on the farm,"

(A.Krenz 50).

Appellant refused to hear what the Krenzes had to say, asserting, "'I do not want to know what you saw.'" (A.Krenz 50). Later Appellant admitted to Ms. Krenz that she could handle the sexual relationship between Bohlman and Bjerke, but that some of the allegations would make Bohlman truly a sick man. (J.Krenz 3, 51).

STANDARD OF REVIEW

When reviewing a lower court's grant of summary judgment, the function of the this Court is to determine whether there are any genuine issues of material fact and whether the lower court erred in its application of the law. *Betlach v. Wayzata*

Condominium, 281 N.W.2d 328 (Minn. 1979); *Isles Wellness, Inc. v. Progressive N. Ins. Co.*, 703 N.W.2d 513, 516 (Minn. 2005).

Summary judgment is appropriate "only if, after taking the view of the evidence most favorable to the nonmoving party," the moving party clearly has shown that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Sauter v. Sauter,* 70 N.W.2d 351, 353 (Minn. 1955). A motion for summary judgment should be denied if reasonable persons might draw different conclusions from the evidence presented. *Illinois Farmers Insurance Co., v. Tapemark Co.,* 273 N.W.2d 630, 633 (Minn. 1978).

ARGUMENT

I. APPELLANT OWED RESPONDENT A DUTY TO PROTECT HER FROM SEXUAL ABUSE.

The existence of a legal duty in a negligence case is an issue of law for the court to determine. *Larson v. Larson*, 373 N.W.2d 287, 289 (Minn. 1985). Issues of law are subject to de novo review by appellate courts. *Travelers Ins. Co. v. Tufte,* 435 N.W.2d 824, 827 (Minn. App. 1987). The remaining elements are fact issues for the trier of fact. The District Court held that, as a matter of law, Appellant did not owe a legal duty to Respondent. The Minnesota Court of Appeals reversed the decision of the District Court, finding that Appellant entered into a special relationship with Respondent under Restatement (Second) of Torts §324A.

A. A SPECIAL RELATIONSHIP EXISTED BETWEEN APPELLANT AND RESPONDENT.

1. Minnesota Case Law

Generally, a defendant has no duty to control the conduct of a third person in order to prevent that person from causing injury to another. *Delgado v. Lohmar*, 289 N.W.2d 479, 483 (Minn. 1979). However, such a duty arises in situations in which a special relationship exists between the defendant and the third person which imposes a duty of control, or between the defendant and the other which gives the other the right to protection. *Id; Lundgren v. Fultz*, 354 N.W.2d 25, 27 (Minn. 1984).

It is the existence of this special relationship that is at issue in this case. "A special relationship may be found in situations when one individual has in some way entrusted her safety to another, and the other has accepted that entrustment." *Errico v. Southland Corp.*, 509 N.W.2d 585, 587 (Minn. App. 1993) (citing *Erickson v. Curtis Inv.Co.*, 447 N.W.2d 165, 168 (Minn. 1989). A special relationship is established in situations where one party has custody of another under circumstances that deprive the other of normal opportunities for self-protection. This Court has held that a special relationship exists in cases involving persons entrusted with the care of someone else. *Harper v. Herman,* 499 N.W.2d 472, 474 (Minn. 1993)(citing and adopting the *Restatement (Second) of Torts* §314A (1965)). "Typically, the plaintiff is in some respect particularly vulnerable and dependent on the defendant, who in turn holds considerable power of the plaintiff's welfare." *Meyer v. Lindala,* 675 N.W.2d 635, 639-640 (Minn. App. 2004) (citing *Harper* and *Donaldson v. Young Women's Christian Assoc. of Duluth,*

539 N.W.2d 789, 792 (Minn. 1995)). Specifically, a special relationship exists where one invites an individual onto one's premises and that individual in some way entrusts her safety to the inviter who, in turn, accepts that entrustment. *Id.* at 589 (citing *Erickson* and *Harper*).

a. <u>Minnesota Cases Finding a Special Relationship</u>

Appellant correctly states that there have been four appellate cases in which a special relationship has been found in Minnesota within the last twenty years. Each of these cases is analogous in some way to the case of Bjerke and Appellant. In *Andrade v. Ellefson*, this Court found that Anoka County stood in a special relationship with children in a licensed residential daycare facility. 391 N.W.2d 836 (Minn. 1986). The Court noted of particular importance in *Andrade* the policy set forth in the daycare licensing statutes that were aimed a protecting "the uniquely vulnerable" children in a daycare facility. *Id* at 842. The same policy is present in this case. As stated by the Court of Appeals in this case "Minnesota has unambiguously declared its strong interest in preventing the sexual abuse of children." *See* Minn.Stat. §626.556, subd. 1 (2006). This policy is reflected in the criminal statutes criminalizing sexual contact with children under the age of consent. Of particular note in comparing *Andrade* with the present case is the closeness and nature of the relationship between the child and the other party. In *Andrade* a governmental agency who itself 1) did not provide any day to day care for the children and 2) stood only in a supervisory capacity was found to satisfy the special relationship test. Here, the relationship is much more intimate. Appellant invited Bjerke to her home where she provided shelter, food, vacations, entertainment and general

supervision of Bjerke. Appellant states in her deposition that she: (a) invited Bjerke to come live at Island Farm as other children had done in the past (S.Johnson 44); (b) provided a place for Bjerke to stay and was responsible for feeding her (S.Johnson 45); (c) did the best job she could to protect Bjerke from injury, and acknowledges that Bjerke's parents expected her to do so (S.Johnson 46); (d) expected Bjerke to maintain any school work as well as her work around the farm, since Appellant was providing her with room and board (S.Johnson 84); and acknowledged that this relationship and the responsibilities associated with it continued until Bjerke left Island Farm for good in October or November of 2001 (S.Johnson 80). Furthermore, Bohlman testified that the decision to allow Bjerke to move in, "was [Appellant's] decision, it was her farm." (K.Bohlman 13). For these reasons, this case is even more appropriate for a finding of a special relationship than *Andrade.*

The Supreme Court next found a special relationship between a parking ramp security company and a customer in *Erickson v. Curtis Inv. Co.* 447 N.W.2d 165 (Minn. 1989). In *Erickson*, the Plaintiff was assaulted and raped by a third party while in the defendant's parking ramp. In *Erickson,* this Court stated that a special relationship exists where,

> "[a person] has in some way entrusted his or her safety to [another] and [the other] has accepted that entrustment. This special relationship also assumes that the harm represented by [the third party] is something that [the other] is in a position to protect against and should be expected to protect against." *Id* at 168.

The Court went on to note that ultimately the question of a special relationship is one of public policy. *Id* at 169. The Court reasoned that public policy and Restatement

(Second) of Torts section 324A (discussed below) dictated that a special relationship existed because the security company undertook a duty to protect the ramp's customers. *Id* at 170. Appellant's acceptance of entrustment of the Bjerke's well-being was understood between herself and Bjerke's parents; "We must have discussed or acknowledged that [Bjerke] was going to spend the summer at the farm." (S.Johnson 65). In fact, the Bjerke's parents signed an authorization form with the 4-H organization listing the Appellant as a contact person, a responsibility that Appellant admits she accepted. (S.Johnson 67). Bjerke's father testified that he signed paperwork for Appellant to handle any medical issues that arose while Bjerke was living at Island Farm.

Appellant expected Bjerke to behave pursuant to her expectations. Bjerke was to behave, use appropriate language, and comport herself pursuant to Appellant's rules. Appellant testified that "if [Bjerke] had done something that any one of us had thought was out of line, we would have spoken up." (S.Johnson 74).

Erickson, like *Andrade* supports the existence of a special relationship on the facts before the Court in this case because the relationship between Bjerke and Appellant was closer and more intimate than between a parking lot attendant and customer, and a child and her daycare provider.

The Court of Appeals also recognized the existence of a special relationship in *Lundman v. McKown.* 530 NW.2d 807 (Minn.App. 1995). "A special relationship may...arise where one accepts responsibility to protect another, although there is no initial duty." *Id* at 820. In *Lundman,* the court held that a special relationship existed between a nurse who read prayers, cleaned, comforted and attended to the care of an ill

child. The Court of Appeals reasoned that the Christian Science nurse had accepted responsibility for the child and thus the special relationship test was satisfied. Again, in the present case, Appellant accepted the responsibility for the child that she allowed to live in her home sufficiently enough to establish a special relationship with Bjerke.

The final and most recent case in which a special relationship has been found to exist is *Laska v. Anoka County,* 696 N.W.2d 133 (Minn. Ct. App. 2005) (review denied August 16, 2005). The Court of Appeals found, based upon the analysis in *Andrade, Erickson* and *Lundman*, that a special relationship existed in *Laska* between the daughter of a home day care operator who had agreed to help provide care for the children in the daycare and an infant who died while under that care. Interestingly, the Court of Appeals found a special relationship in *Laska* despite evidence that the defendant never actually provided care for the deceased child, but had provided care for other children in the home.

The present case is even more factually appropriate for a special relationship finding than *Laska* because the Appellant herself accepted entrustment of Bjerke's care. Though the Appellant would have this Court believe that she was an absentee homeowner and did not really provide any care whatsoever for Bjerke, the record is replete with evidence that suggests that the was actively involved in providing care for Bjerke. Appellant said she felt sorry for the Bjerke and that by inviting her to live at Island Farm she was removing the Bjerke from an environment that Appellant felt was dysfunctional for her. Further, Appellant felt compelled to, "keep [her] eyes open" after she witnessed inappropriate behavior between Bohlman and Bjerke very early on in

Bjerke's time at Island Farm. In fact, Appellant considered Bjerke to be a member of her family.

Comparing the facts and analysis of this case to *Laska, Andrade, Erickson* and *Lundman,* cases in which Minnesota has previously recognized special relationships, leads to the conclusion that the relationship between Bjerke and Appellant is appropriate for a finding of a special relationship. The Court of Appeals decision that the Appellant had a special relationship with Bjerke should be affirmed.

b. Minnesota Cases Declining to Find a Special Relationship

The Appellant cites three decisions by this Court that she claims support a reversal of the decision of the Court of Appeals in this case; *Gilbertson v. Leininger*, 599 N.W.2d 127 (Minn. 1999), *H.B. ex. rel. Clark v. Whittemore*, 552 N.W.2d 705 (Minn. 1996) and *Donaldson v. Young Women's Christian Ass'n,* 539 N.W.2d 789 (Minn. 1995). These cases do not support a reversal of the Court of Appeals decision because each is factually and analytically distinguishable from the present case.

In *Gilbertson*, the plaintiff, and adult, spent Thanksgiving evening at the home of the defendants after consuming a bottle of wine and a bottle of beer. 599 N.W.2d at 129. Sometime after the defendants went to sleep the plaintiff fell and hit her head. The plaintiff ultimately was found to have been suffering from a subdural hematoma, and claimed that the defendants had a special relationship with her giving rise to a duty to protect. This Court held that the defendants, "did not have physical custody or control of Gilbertson. Gilbertson was merely a dinner guest who happened to stay overnight." *Id* at 130 (citations omitted) (emphasis added). This Court examined Restatement (Second) of

Torts §314A (1965) in its analysis in *Gilbertson* with particular attention paid to whether the plaintiff was deprived of the normal opportunities of self protection.

The Appellant also argues that this case is analogous to *H.B. ex. rel. Clark v. Whittemore*, where this Court found no special relationship in part because: "Unlike in *Erickson*, here there was no acceptance by Arndt of the children's entrustment; indeed it was specifically rejected when Arndt instructed the children to tell their parents about Whittemore's abuse." 552 N.W.2d at 708-709. This Court distinguished *Clark* from *Andrade* because the children were not in the custody of the defendant and the defendant exercised no control over the children's daily welfare. *Id* at 709.

Finally, the Appellant asks the Court to follow the direction set forth in *Donaldson* This Court again viewed *Donaldson* through the lens of Restatement (Second) of Torts §314A. The key to the Court's analysis was that the YWCA did not have a duty to protect the plaintiff from self-inflicted harm. 539 N.W.2d at 792 (discussing prior decisions involving harm by third persons). Appellant argues that the harm suffered by Bjerke is self-inflicted harm analogous to suicide in *Donaldson*.

Gilbertson, Clark and *Donaldson* are factually distinct from this case. Bjerke was a child whom Appellant invited to live in her home. Appellant provided food, shelter, activities, required Bjerke complete chores and sought and was granted authority to obtain medical care for Bjerke. Bjerke was not a casual adult overnight guest who spent the night on Appellant's couch after drinking too much. Bjerke was given her own bedroom and considered by Appellant to be a member of her family. Here there can be no doubt that Appellant had custody and control over Bjerke during the times that Bjerke

was invited to live at Appellant's home. Bjerke was sexually abused by an individual over 40 years her senior, her harm was not self-inflicted. As a result, Appellant's reliance on *Gilbertson, Clark* and *Donaldson* is misplaced, and this case more closely resembles those where this Court has found a special relationship to exist.

2. Restatement (Second) of Torts §324A

The Minnesota Supreme Court has adopted Restatement (Second) of Torts §324A (1965) which governs the law regarding a party's assumption of a duty of care where no duty previously existed. See *Walsh v. Pagra Air Taxi, Inc.,* 282 N.W.2d 567, 570-71 (Minn. 1979). Section 324A provides that:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
>
> (a) his failure to exercise reasonable care increases the risk of such harm, or
>
> (b) he has undertaken to perform a duty owed by the other to the third person, or
>
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Id.

Section 324A was a basis for a finding of a special relationship in *Erickson* as discussed above. In addition, the Court of Appeals relied, in part, on section 324A to support the existence of a special relationship in *Laska.* 696 N.W.2d at 139. It appears that the Appellant concedes that she indeed undertook to perform a duty to Bjerke, but she asserts that those duties were not sufficient enough to give rise to the special relationship under section 324A.

The facts of this case are clear, the Appellant acted as a parental figure to Bjerke. However, it is not necessary that the Appellant serve in a parental role to have a special relationship under section 324A. *See generally Laska*; *Erickson*, 447 N.W.2d 165. When the facts of this case are boiled down to their most simple nexus, the Appellant voluntarily allowed a child to stay at her home full time for a significant period of time. She provided all shelter and food; she assigned all rules and chores; she sought to be allowed to obtain medical care for Bjerke. The duties performed by Appellant in this case are unquestionably more intimate, personal and necessary for the protection of Bjerke than those found in *Andrade, Erickson, Lundman* and *Laska.*

3. <u>Case Law from Other Jurisdictions</u>

Decisions from other jurisdictions are also instructive on the existence of a special relationship in this case. The New Jersey Superior Court applied the special relationship concept to a situation where a grandmother assumed a duty of care for her grandchildren when she agreed with the children's mother to baby-sit those grandchildren. *Barbarisi v. Caruso,* 135 A.2d 539 (N.J. Super. Ct. App. Div. 1957).

Other jurisdictions have found a duty exists in cases involving voluntary babysitters of children. *Id.; Appell v. Mandel*, 296 S.D.2d 514, 745 N.Y.S.2d 491 (N.Y. 2002); *Zalak v. Carroll*, 15 N.Y.2d 753, 205 N.E.2d 313 (N.Y. 1965); *Standifer v. Pate*, 291 Ala. 434, 282 So.2d 261 (Ala. 1973). Likewise, special relationships have been found between children and negligent parties in cases involving molestation of Boy Scouts during a camping trip, and between employers and children molested by adult

employees. *Doe v. Goff,* 716 N.E.2d 323 (Ill. 1999); *Platson v. NSM, America, Inc.,* 748 N.E.2d 1278 (Ill. App. 2001).

In the present case, Appellant stood in the role, which at a minimum was that of a babysitter, and factually much closer to that of a surrogate parent. Evidence of this is found not only in the testimony of the Bjerke and her parents, but also in the testimony of the two defendants to this action. The record contains pages of deposition testimony by Appellant and Bohlman in which they both testified at length about the nature of the relationship between Appellant and the Bjerke family. There can be no question that Appellant assumed the role of a parent at the time the Bjerke lived at Island Farm. Appellant had rules, expectations, provided room and board, and admitted that Respondent's parents expected that she would look out for Bjerke.

As Respondent's father testified, he trusted Appellant and had every assurance that Appellant treated Bjerke as she would a member of her own family. Appellant thus assumed the role of a parent while Bjerke was at Island Farm. As Bohlman testified, it was Appellant who was in the best position to protect Bjerke while she was at Island Farm.

4. Public Policy Considerations

The Appellant's analysis of public policy considerations ignores the second prong of the duty question in this case, whether the harm to the Plaintiff was foreseeable to the Appellant. In asserting that parent's have no duty to protect minor children if the parent does not know the child is in danger, the Appellant's argument neglects the substantial evidence that the Appellant was aware of the likelihood of the danger of harm to Bjerke.

The facts that lead to the conclusion that the harm to Bjerke was foreseeable are more fully set forth in the analysis of foreseeability below.

The rationale of the Court of Appeals in this case does not lead to the conclusion that parents can "informally relinquish their parental duties" to create a legal duty for a third party. Suggesting that section 324A creates some sort of "parental duty" where none should exist in this case misstates the analysis by the Court of Appeals. The Appellant voluntarily undertook to provide for Bjerke while she stayed at the Appellant's home, and the Appellant recognized that she had a duty to protect Bjerke from harm. This case follows falls squarely in line with the provisions of section 324A. No duty is created by the Court of Appeals in this case other than has been recognized by this Court in *Laska, Erickson, Andrade* and *Lundman.*

It is good public policy to impose upon those who invite young children to live in their homes as members of their family, a duty to protect those children from foreseeable harm. Children, even teenagers, are uniquely vulnerable to the harm suffered by Bjerke, and Minnesota should follow the sound public policy of protecting children from sexual abuse. Individuals who stand idly by in the face of evidence of inappropriate sexual contact with children whom they invite into their homes should be held liable for their lack of action. To hold otherwise would put children at risk for harms of the most horrible kind.

B. THE SEXUAL ABUSE SUFFERED BY RESPONDENT WAS FORESEEABLE TO APPELLANT.

Where a special relationship exists, the duty imposed extends to foreseeable acts. In this case, the test of foreseeability is whether Appellant was aware of facts indicating that Respondent was being exposed to unreasonable risk of harm. *See, Spitzak v. Hylands, Ltd.,* 500 N.W.2d 154, 158 (Minn. App. 1993). More artfully stated, "'[t]he risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to other within the range of apprehension.'" *Connolly v. Nicollet Hotel,* 95 N.W.2d 657, 644 (Minn. 1959) (quoting *Palsgraf v. Long Island R.R.,* 162 N.E. 99, 100 (1928)). In examining foreseeability questions, courts must consider whether it is "objectively reasonable" to expect that the specific danger will result in injury, not simply whether injury was conceivable. *Whiteford v. Yamaha Motor Corp., U.S.A.,* 582 N.W.2d 916, 918 (Minn. 1998).

The District Court granted summary judgment and determined that their was no genuine issue of material fact on the issue of foreseeability. "A material fact is one that will affect the outcome or result of a case." *Laska* at 141 (citing *O'Malley v. Ulland Bros.* 549 N.W.2d 889, 890 (Minn. 1996)). The Court of Appeals reversed the decision of the District Court and held that at least one incident witnessed by the Appellant created a genuine issue of material fact as to whether the risk of sexual abuse was foreseeable. 727 N.W.2d at 191. This incident occurred when the Appellant herself told Janice Krenz that she had to leave her home because Bohlman and Bjerke were being "too sexual." The Court of Appeals held that "the totality of the circumstances on this case...would

permit reasonable people to draw different conclusions about the foreseeability of the harm." *Id* at 192.

The totality of the circumstances in this case precludes issuance of summary judgment on the basis of lack of foreseeability. Appellant had conversations with Dara Stevens regarding the inappropriate nature of the relationship between Bjerke and Bohlman. Appellant herself testified that very early on in Bjerke's stay at Island Farm she witnessed an incident between Bohlman and Bjerke that she felt was not appropriate behavior between a child and an adult male. The depositions of Dean and Julie Ann Carey contained in the record show that inappropriate conduct between Bohlman and Bjerke was a well-known and appreciated fact among their group of friends. Appellant made no comment when confronted with the fact that Bjerke's underwear was found in Bohlman's bedroom. The Court of Appeals correctly determined that the testimony of Janice Krenz, coupled with the cumulative facts of this case creates a question of material fact to survive summary judgment.

II. THE DOCTRINES OF COMPARATIVE FAULT AND PRIMARY ASSUMPTION OF THE RISK ARE NOT PROPER DEFENSES IN A CIVIL SUIT BY A MINOR VICTIM OF SEXUAL ABUSE AGAINST A THIRD PARTY WHO ALLOWED THE ABUSE TO OCCUR.

In its Order for Partial Summary Judgment, the District Court found that Bjerke, who at the time of the sexual abuse was between the ages of 14 and 18, primarily assumed the risk of being harmed from the sexual abuse of Bohlman, and thus her claims were barred. Likewise, in prior motions the District Court also determined that

comparative fault could be attributed to Respondent for the periods of time in which she was sexually abused as a child.

The Court of Appeals reversed the district court, holding that the defense of primary assumption of risk is inapplicable in a civil suit by a minor victim of sexual abuse, and that comparative fault has only limited application in such cases.

A. Minnesota Case Law

Both primary assumption of the risk and comparative fault in this case put the consent of the child victim of sexual abuse at issue, though to differing degrees.

While no Minnesota case has determined whether a child victim of sexual abuse can be held to a degree of fault for being sexually abused, the Minnesota Legislature and Courts have determined that child victims of sexual abuse are a particular class of individuals in need of special protections. In fact, the Minnesota Legislature has recognized that there is an imbalance of power in a sexual relationship between a child and an adult. In response to this awareness, the Legislature enacted criminal statutes providing for criminal penalties when an adult exploits a child sexually. In defining the elements of such criminal exploitation, the legislature determined that the "consent" of the child victim is not a defense. Minn. Stat. §609.344 (2004). The Minnesota criminal sexual conduct statutes preclude defendants from arguing that minor victims of sexual abuse consented to such abuse. This Court has previously held that precluding the defense of consent in such cases "reflects the feeling of society in general that sexual contact by adults with children under 16 is reprehensible whether or not the child consents, because at that age, the child should be deemed incapable of consenting." *State*

v. Steinbrink, 297 N.W.2d 291, 293 (Minn. 1980). The same protection should be afforded to minor victims of sexual abuse in civil actions.

B. The Restatement (Second) of Torts

The Restatement (Second) of Torts provides that to be effective, "consent must be by one who has the capacity to consent or by a person empowered to consent for him." Rest 2d Torts §892A (2)(a) (1979). The comment to subsection (2) states that even when a person is in fact competent to give consent, a statute may prevent the consent from being effective if the statute is found to be intended to give special protection against certain kinds of harm. Therefore, one guilty of statutory rape upon a child under the specified age has no defense to a civil action brought by the child, even though the child did in fact consent, and was in fact fully competent to do so. Rest 2d Torts §892A (2) cmt. b (1965).

The Restatement goes on to provide that if conduct is made criminal in order to protect a certain class of persons irrespective of their consent, the consent of members of that class to the conduct is not effective to bar a tort action. Rest 2d Torts §892C (2) (1965). The comment to §892C subsection (2) explains that the legislative purpose to protect the plaintiff irrespective of her consent must be clear, and statutes will be relatively few in which it will be found. In making the determination as to the purpose, consideration will normally be given to the fact that criminal proceedings alone may not afford an effective deterrent against the conduct or that the proceedings may be facilitated by inducing the injured person to come forward if his consent is made ineffective; or that there is a significant inequality between the situation of the party consenting and the party

guilty of the conduct consented to. The necessary purpose will ordinarily be found when it is apparent that the statute is intended for the protection of a class of persons who, by reason of their immaturity, inexperience or lack of judgment, are unable to protect themselves against the conduct to which they are likely to consent. Rest 2d Torts §892C (2) cmt. e (1965).

As noted earlier, the Minnesota legislature has announced its intent to protect children from sexual abuse in the criminal code. The Appellant cites examples of this Court holding that primary assumption of risk may be applicable to minor victims in tort cases, though these cases do not involve a situation in which the legislature and courts have so strongly expressed a desire to protect children. *See, Greaves v. Galchutt*, 289 Minn. 335, 184 N.W.2d 26 (Minn. 1971); *Toetschinger v. Inhot*, 312 Minn. 59, 250 N.W.2d 204 (Minn. 1971). Bjerke is not arguing that primary assumption of risk and comparative fault are never applicable to children, but that sexual abuse is one area in which such defenses offend common sensibilities as well as existing Minnesota law.

C. Case Law from Other Jurisdictions

While this question may be one of first impression in Minnesota, decisions from the Supreme Courts of other jurisdictions provide valuable insight. The Oregon Supreme Court rejected the contention that a plaintiff's claim for damages in connection with sexual abuse by a Boy Scout troop leader was barred to the extent that his injuries resulted from consensual conduct. The Oregon Court specifically extended to civil cases a criminal statutory provision providing that a person under 18 was incapable of consenting to a sexual act (just like the provisions of the Minnesota criminal statutes).

Wilson v. Tobiassen, 777 P.2d 1379, at 1384, *pet. for rev. denied,* 784 P.2d 441 (1989). In *Doe by Doe v. Greenville Hospital System*, 448 S.E.2d 564 (S.C. Ct. App. 1994) the South Carolina Court of Appeals ruled that a candy striper, under sixteen-years-old and working in a hospital, could not legally consent to sexual intercourse with a thirty-one-year-old hospital employee. Like Minnesota, the South Carolina Criminal Code invalidated consent as a defense to a sexual battery against a minor, and the Court in *Doe* held that that same protection applied in both criminal and civil contexts. The court held:

> As a matter of public policy, the General Assembly has determined a minor under the age of sixteen is not capable of voluntarily consenting to a sexual battery committed by an older person. This is the law of the state whether it is applied in a criminal or civil context.

Id at 566.

South Carolina affirmed the above holding in *Doe v. Orangeburg County School District No. 2:* "consent to the intercourse is simply irrelevant for purposes of determining liability." 518 S.E.2d 259 at 261 (S.C. 1999). The existence of a criminal code provision negating consent as a defense applies both in the criminal and civil context. *Id.* at 262.

Similarly, in *Robinson v. Moore*, 408 S.W.2d 582 (Tex. Ct. App. 1966) the Texas court of appeals explained:

> The [c]ourts in this country have uniformly taken the position that where the defendant's act constitutes a violation of a statute, such as a rape statute fixing the age of consent to intercourse, which has as its primary purpose the protection of a definite class of persons from their own immaturity of judgment, the plaintiff's consent is not a defense to a civil action.

Id at 583.

In a Title IX action brought by a 13-year old student against a school district out of sexual abuse by a 21-year old school employee, the Seventh Circuit Court of Appeals held that it was improper for the trial court to allow the jury to consider the "welcomeness" of the conduct by the child. *Mary M. v. North Lawrence Community School Corporation,* 131 F.3d 1220 (7th Cir. 1997). In *Mary M.* the victim actively hid her relationship with the school employee from others, just as the Appellee argues in this case. Unlike the present case, the sexual abuse in *Mary M.* occurred only once and there was no pattern of long term abuse. The Seventh Circuit held, "[w]elcomeness is an improper inquiry to be made in Title IX cases involved sexual discrimination of elementary school children." *Id.* at 1225. The court reasoned that "children may not even understand that they are being harassed" and,

> "If elementary school children cannot be said to consent to sex in a criminal context, they similarly cannot be said to welcome it in a civil context. To find otherwise would be incongruous...An opposite holding would defeat the purposes of Title IX and make children claiming sexual discrimination...subject to intense scrutiny."

Id. at 1227.

The Utah Supreme Court has also held that consent cannot be used as a defense in a civil action for damages for the sexual abuse of a child. *Elkington v. Foust,* 618 P.2d 37 (Utah 1980). The Utah high court held that allowing such a defense,

> "[w]ould be so contrary to commonly accepted standards of decency and morality that any consensual agreement to engage in such conduct would be rejected by the law as against public policy and void."

Id. at 40.

In *Hutchison v. Luddy,* the Pennsylvania Superior Court upheld the decision of the trial court precluding negligent defendants from asserting defenses of comparative fault. 763 A.2d 826 at 848-849 (Penn. 2000). The court reasoned that because the acts of pedophilic sexual molestation were intentional, the doctrine of comparative negligence has no application. The court held, "[t]he acts that directly caused the harm are, in essence, what must be compared." *Id.* at 848. The court stated,

> Appellants cite no cases, nor did our research reveal any case law, holding that the victim of sexual abuse has a duty to avoid placing himself/herself in the position to be harmed...We agree...that there is no sound reason from the standpoint of public policy for creating law to hold a victim of alleged sexual abuse...has breached a duty to himself.

Id. at 849.

Perhaps most on point however is *Christensen v. Royal School District No. 160,* considered by the Washington state Supreme Court on December 8, 2005. 124 P.2d 283. In *Christensen,* a 13 year-old student who was sexually abused by her teacher brought a civil action for damages against the principal and the district. As in the present case, the Appellant in *Christensen* felt that she was in love with the abuser, and the district and principal sought application of comparative fault to the actions of the child victim. As in Minnesota, Washington's criminal law statutes negated the defense of consent to criminal charges of child sexual abuse. The certified question was whether those protections should be extended to civil actions for damages as well. The Washington Supreme Court, in a majority opinion, held that "the notion that minors are incapable of meaningful consent in a criminal law context

should apply in the civil arena and command a consistent result." *Id.* at 286. The court reasoned:

> "The child, in our view, lacks the capacity to consent to the sexual abuse and is under no duty to protect himself or herself from being abused. An opposite holding would, in our judgment, frustrate the overarching goals of prevention and deterrence of child sexual abuse."

Id. at 288.

Appellant contends that principles of comparative fault are integral to any claim for negligence, and that Minnesota has a history of applying those doctrines to children. However, those cases in Minnesota, like those in Washington, "are not germane to our inquiry, as none involve sexual abuse. The act of sexual abuse is key here. As indicated above, our public policy is directed to protecting children from such abuse." *Id.* at 287.

Like Washington, Colorado courts have held that negligent defendants could not assert that the child victim of sexual abuse consented to the abuse. In *Bohrer v. Dehart,* the plaintiff was sexually abused beginning at age 12 by her youth minister at church. 943 P.2d 1220 (Col. App. 1997). She later brought suit against the minister, the church and the overarching Methodist conference. Again, Colorado's criminal law does not allow consent as a defense to charges of sexual assault on a child and, "[w]e likewise decline to allow the defense, at least in the circumstances presented here." *Id.* at 1227. The Colorado Court reasoned that the defendants' assertions failed because "a child is in no position to exercise independent judgment and evaluate on an equal basis the consequences of such a relationship." *Id.* at 1226.

Because of the unique power imbalance between child victims of sexual abuse and abusers, consent should not be allowed as a defense. *Id.* at 1227.

D. Public Policy Considerations

The public policy set forth by the legislature in Minn. Stat §609.344 is clear and unequivocal; Minnesota will not allow those responsible for the sexual abuse of a minor child to argue that the minor child consented to abuse or that it was "her fault". Minnesota, like other states with similar statutes that protect minor victims of sexual abuse, should extend the protections of those statutes to civil cases brought by victims. This extension is not a radical concept, but a logical extension of existing legislative and public policy intent. If the same protections afforded to victims of such heinous crimes are not extended to civil actions, child victims of criminal sexual abuse will be subject to the pain of being blamed for having been sexually abused, a truly horrific result. As the Seventh Circuit stated in *Mary M.*:

> "[T]he very children bringing the suits would be subject to intense scrutiny regarding their responses to their alleged abusers. Trial transcripts would be replete with insinuations that a child dressed or acted in such a manner as to ask for the very conduct she or he is seeking to redress.

131 F.3d at 1227.

The Appellant argues that failure to apply principles of comparative fault to a negligent defendant in cases involving the sexual abuse of minors results in strict liability for the negligent defendant. The Appellant does not provide any case law from Minnesota, or any other jurisdiction, supporting this argument. "The doctrine of strict liability may be distinguished from negligence or negligence per se in that

liability results without a finding of fault." *Seim v. Garavalia*, 306 N.W.2d 806 at 810 (Minn. 1981). Strict liability precludes any analysis of whether a defendant owes a duty to a plaintiff. Unlike in cases of strict liability, the Appellant in this case is free to try her liability to a jury. While normally the existence of a duty is a matter of law, the analysis above shows that in cases involving special relationships, the foreseeability prong of the analysis of the duty question is generally one of fact. Appellant has the opportunity to argue that the harm to Bjerke was not foreseeable, and if successful, avoid any liability. The Appellant's assertion that precluding the use of comparative fault as a defense results in her facing strict liability is an incorrect statement of law and policy.

Reversal of the Court of Appeals decision on the application of comparative fault will leave child victims, and society, with no incentive to expose those who empower abusers and stand by while children are sexually abused. If the protection of child victims of sexual abuse is sound policy in the criminal realm, where a defendant is afforded every reasonable opportunity to make a defense, it should extend to the civil realm where a defendant is not afforded the same constitutional protections and presumptions. Minnesota's protection of child victims of sexual abuse should not stop at the doorstep of a civil cause of action.

CONCLUSION

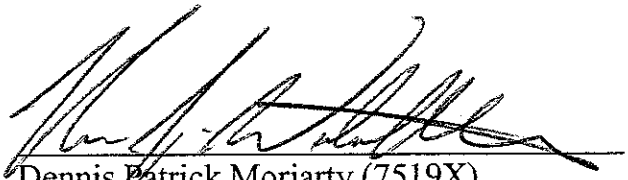
When the Appellant invited teenage girls into her home, often for extended periods of time, she did so recognizing that she would provide them with food, shelter,

chores, discipline and entertainment. Essentially, the Appellant became a home away from home for some of these young girls, including Bjerke. The Appellant owed a duty to those young girls to protect them from foreseeable harm. The Appellant cannot assert that she was somehow removed from this role to avoid liability for the harms suffered by Bjerke. The Court of Appeals correctly found that a special relationship existed between the Appellant and Bjerke, and that there is a genuine issue of fact as to whether the harm suffered by Bjerke was foreseeable to Appellant.

The allocation of fault to a child victim of sexual abuse in a civil action for damages is a matter of first impression in Minnesota. Minnesota's criminal code precludes such assertions in a criminal case, and those provisions should be extended to civil causes of action. The Court of Appeals correctly held that Minnesota has expressed a public policy of protecting child victims of sexual abuse which precludes the application of principles of comparative fault in civil suits brought by child victims of sexual abuse. The rationale of the Court of Appeals is in accord with the decisions of courts in Pennsylvania, Oregon, Colorado, Texas, and others who have extended criminal protections to civil cases. The decision of the Court of Appeals to protect child victims of sexual abuse should be upheld in all respects.

Respectfully submitted,
JASPERS, MORIARTY & WALBURG, P.A.

Dated: 6/22/07



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CERTIFICATION

I certify that this brief conforms to the rules contained in Minn. R. Civ. App. 132.01, subd. 3, for a brief produced using Word 2000 word processing software and contains 10,504 words.

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