

NO. A07-0313

State of Minnesota
 In Court of Appeals

DAVID CHARLES FOSS, AS PARENT AND NATURAL
 GUARDIAN OF DAVID GERALD WARREN FOSS,
 MINOR CHILD, AND DAVID CHARLES FOSS,
 INDIVIDUALLY,

Appellant,

vs.

JEREMY KINCADE AND STEPHANIE KINCADE,

Respondents,

and

PEGGY FOSS,

Third-Party Respondent.

APPELLANT'S BRIEF AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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STATEMENT OF LEGAL ISSUES

- I. Whether a homeowner owes guests a duty of reasonable care to secure a furnishing that presents a recognized tipping hazard or to warn guests of such a hazard?

Trial court held in the negative.

Apposite Case Law

Peterson v. Balach, 294 Minn. 161, 199 N.W.2d 639 (1972)

Szyplinski v. Midwest Mobile Home, Inc., 308 Minn. 152, 241 N.W.2d 306 (1976)

STATEMENT OF THE CASE

David Foss, Jr. suffered a severe head injury when a bookcase owned by Defendants Jeremy and Stephanie Kincaid and located in the house toppled onto him.

Plaintiff David Foss, Sr., on behalf of his son, commenced litigation against the Kincades asserting claims of common law negligence and seeking recovery for damages resulting from David Foss, Jr.'s injury.

Defendants moved the district court for summary judgment, contending that they owed no duty of care with respect to the empty bookcase. By order and judgment dated December 21, 2006, the district court, Hon. Gerald J. Wolf presiding, granted Defendants' motion, ruling that Defendants owed no duty to David Foss, Jr. or any other pertinent person relative to the bookcase.

STATEMENT OF FACTS

On October 15, 2003, then three-year-old David Foss, Jr. and his mother, Peggy, visited the home of family friends Jeremy and Stephanie Kincaid. A- 73. Little David and two of the Kincaid children played together outside until Stephanie Kincaid called the children in. Stephanie Kincaid Dep., p. 34, A- 74. One or two minutes after the children came in, Stephanie Kincaid and Peggy Foss heard a "thump" in a nearby room. Stephanie Kincaid Dep., p. 37, A- 75. Ms. Foss and Ms. Kincaid went into the next room to find the bookcase lying down, two of the Kincaid children standing there, and David Foss, Jr. not to be seen. Stephanie Kincaid Dep., p. 37, p. 54, A - 75, A - 79. Upon lifting up the fallen bookcase, the two women discovered David beneath it, seriously injured. Stephanie Kincaid Dep., p. 37 (A- 75) 54 (A-79). Before then, Peggy Foss had not seen the bookcase. Peggy Foss Dep. p. 50, A-76.

The Kincades had moved into their house approximately two weeks before the date of the incident. Jeremy Kincaid Dep., p. 19, A-30. The bookcase was among the items the Kincades moved in with them; at the time of the accident, it stood empty against a wall in a main floor

room in the house. Jeremy Kincade Dep., p. 30-31, A- 33. The Kincades allowed children access to all areas of their house, including the room where the book case stood. Jeremy Kincade Dep., p. 39, A-35. The Kincades knew that the bookcase was empty and knew that it was secured neither to the wall nor to the floor. Jeremy Kincade Dep., p. 31, A-33. They also knew that, at the time of the accident, the bookcase stood on a carpeted floor. Jeremy Kincade Dep., p. 63, A-41. And, the Kincades knew that objects such as the bookcase could tip over. Jeremy Kincade Dep., p. 30, A- 33.

The Kincades had three young children of their own. Jeremy Kincade Dep., p. 32, A- 33. They knew David Foss, Jr. to be an active young boy. Stephanie Kincade Dep., p. 41, A- 36. In fact, they perceived him to be more active than their own typically active boy. Stephanie Kincade Dep., pp. 41-42, A - 36.

A number of relatively simple brackets and braces are available for the specific purpose of securing tippy furniture items against falls. Affidavit and report of Jon Tofte, A-90 - 95. Tipping dangers associated with furniture items such as the Kincade's book case are widely recognized and often the subject of warnings placed on such items by their manufacturers. Id.

The book case in question has not been the subject of any examination. After the accident in this case, after an investigator for the Plaintiffs had requested (and been denied) the opportunity to examine the book case (Stephanie Kincade Dep., p. 20, A- 53), and after Plaintiffs' counsel had been assured by a representative of their insurer that the Kincades had been told to keep the book case, (see, Affidavit of Thomas G. Johnson and Exhibit A thereto, A-88 -89) the Kincades disposed of it. See, Jeremy Kincade Dep., p. 49, A-38.

* * * * *

ARGUMENT

HOMEOWNERS OWE GUESTS A DUTY TO SECURE RECOGNIZED TIPPING HAZARDS OR WARN OF SUCH HAZARDS.

The trial court granted summary judgment in this case on the grounds that an accident resulting from what the Defendants and the trial court have characterized as an “obvious danger” was not foreseeable. That ruling must be reversed because it is inconsistent with the law and the record in this case.

Standard of Review: the trial court’s grant of summary judgment is reviewed de novo.

The trial court’s grant of summary judgment is reviewed de novo, viewing the evidence in the light most favorable to the non-moving party. Prior Lake American v. Mader, 642 N.W.2d 729, 735 (Minn. 2002). The Court reviews de novo whether genuine issues of material fact exist (Brookfield Trade Center, Inc. v. County of Ramsey, 609 N.W.2d 868, 874 (Minn. 2000)) and likewise considers, de novo, whether the district court erred in its application of the law. Art Goebel, Inc. v. North Suburban Agencies, Inc., 567 N.W.2d 511, 515 (Minn. 1997). Under such de novo review, it is apparent that the trial court erred when it granted Defendants’ motion for summary judgment on the grounds that the injury to David Foss, Jr. was unforeseeable.

Under Minnesota law, possessors of property owe a duty of care to entrants.

This case involves the application of the Minnesota common law of negligence as applied to property owners. Under that law, a possessor of property has a duty, with respect to entrants on the land, “to use reasonable care for the safety of all such persons invited upon the premises, regardless of the status of the individuals.” Peterson v. Balach, 294 Minn. 161, 164, 199 N.W.2d 639, 642 (1972). In Peterson the court disposed of traditional distinctions that had more rigidly

defined duties owed by possessors of land to entrants based on the entrants' status as "invitees" or "licensees." See, Id., 199 N.W.2d at 642. The Peterson statement of the applicable duty has remained essentially unchanged since that case was decided. See, Louis v. Louis, 636 N.W.2d 314, at 318 (Minn. 2001), ("since 1972, we have consistently held that a landowner has a duty to use 'reasonable care for the safety of all such persons invited upon the premises.'")

Admittedly, a property owner has no duty to guard against unforeseeable catastrophes; however, the tipping of an unsecured, empty book case in the presence of an active, curious child is not such an event. The record in this case shows that the Defendants possessed actual knowledge of the tipping hazard and that accidents of exactly the sort that occurred here are widely recognized dangers for which simple and effective precautions may be taken. Accordingly, Defendants owed Plaintiff a duty of care and a jury must be permitted to consider whether Defendants breached that duty.

The accident that injured David Foss, Jr. was foreseeable

David Foss, Jr. suffered an injury when an empty bookcase in Defendants' home toppled onto him. This accident was foreseeable. Defendants in fact argued to the trial court that the danger was not merely foreseeable but was obvious.

The tipping hazard presented by items such as relatively narrow and tall book cases and similar furnishings is well- recognized. There is, in fact, an established market for devices that are intended to secure such items to walls or otherwise prevent them from falling over in the manner that the Kincade's book case tipped onto three-year-old David Foss, Jr. See, Affidavit of Jon Tofte and attached report, A-90 - 95. The Kincades, too, actually recognized the tipping potential of an item such as the book case. Jeremy Kincade Dep., p. 30, A-33. Thus, the hazard at issue in this case is one which is generally recognized by persons of ordinary prudence and was actually recognized by Defendants.

Despite these facts, the trial court in this case ruled that the accident was not foreseeable because, the court stated, it was not objectively reasonable to expect that the specific danger would result in injury. Order and Memorandum, p. 3, A - 1 - 4. Where the issues of duty and foreseeability are concerned, however, it is not necessary that the defendant actor have foreseen the particular method in which an accident may occur; it is sufficient that the possibility of an accident be clear to a person of ordinary prudence. Oswald by Thies v. Law, 445 N.W.2d 840, 842 (Minn. Ct. App. 1989) review denied, November 15, 1989. Here, while the Kincades have stated they did not, subjectively, believe that the bookcase posed a danger, the fact that they knew it could tip and were aware of the presence of children in the house demonstrates that the possibility of an accident would have been objectively clear to them as persons of presumably ordinary prudence.

The trial court also characterized the possibility of a three-year-old climbing on such furniture as an “unexpected act” (Order and Memorandum, p. 3, A-1 -4). That statement contradicts common knowledge regarding toddlers such as David Foss, Jr. as well as the record evidence showing that the danger of young children climbing on furniture is specifically known and is one of the reasons that stabilizing hardware for such furnishings is made available and that tip-over warnings that specifically reference climbing are placed on furniture products of the kind involved in this case. See, Affidavit and Report of Jon Tofte, A-90 - 95. Further, while the Kincades professed not to have contemplated that young David Foss might climb something such as the book case, they were admittedly well-acquainted with him, sufficiently so to offer the opinion that he was more “active” than their own children.

This is *not* a circumstance in which a wildly improbable possibility became reality by a coincidence of freakish circumstances. This case involves an instance in which the well-recognized danger of a tall piece of furniture toppling onto a child occurred when a typically

active three-year-old boy either climbed on or bumped a tipsy book case that was not secured. The trial court's ruling that these events were, as a matter of law, unforeseeable, is simply incorrect.

Defendants owed David Foss, Jr. a duty of care even under a trespasser standard.

In Szyplinski v. Midwest Mobile Home, Inc., 308 Minn. 152, 241 N.W.2d 306 (1976) the Minnesota Supreme Court analyzed a tip-over accident and upheld a jury verdict finding the property owner negligent. In Szyplinski a three year-old girl toppled a snowmobile shop lift onto herself while in the defendant's store with her parents. Applying the law as it existed before the Peterson v. Balach decision; the Court set forth the Restatement (2d) of Torts formulation for analysis applicable to *trespassing* children. Applying that analysis here, it is evident that Defendants are subject to liability for the injuries to David Foss, Jr.

As set forth in Szyplinski, 241 N.W.2d at 309¹:

A possessor of land is subject to liability for physical harm to children trespassing thereon if:

- a.) the place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass and

Here, David Foss, Jr. was an invited guest in the Kincade home where, as the Kincade's acknowledge, children were allowed free reign and access to all rooms, including the room in which the book case stood.

- b.) the condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, and

¹ The quoted language from Szyplinski appears in the single-spaced text denoted by the lower-case letters a-e. References to the facts of the present case appear in the double-spaced text following each lettered paragraph.

In this case, the Kincades were aware of the presence of the book case, knew it to be unsecured and recognized the fact that it could tip. They have, in fact, characterized it as an obvious danger.

- c.) the children, because of their youth, do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, and

David Foss, Jr., age three at the time of the accident, did not recognize or appreciate the risk posed by the book case.

- d.) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight when compared to the risk to children involved.

The book case could have been simply secured to a wall, lain on its side or, as was done after the accident, ostensibly for reasons unrelated to the accident, removed to the garage.

Alternatively, children's access to the room where the book case stood could have been limited.

- e.) the possessor fails to exercise reasonable care to eliminate the danger or otherwise protect the children.

The Kincades took no measures to eliminate the danger.

As the Szyplinski court stated, “[a] child who is a licensee has at least all the rights of a trespasser and probably some more.” Szyplinski, 241 N.W.2d at 309, quoting Peterson v. Richfield Plaza, Inc., 252 Minn. 221, 89 N.W.2d 712, 717 (1958). Under the foregoing analysis, Plaintiffs must at least be permitted to place the totality of the circumstances in this case before the jury.

Claimed obviousness of the danger to Peggy Foss does not negate Defendants' duty.

Here, the trial court determined that the danger of the tipping book case was obvious, or should have been obvious, to Peggy Foss and that the obviousness of the danger to her eliminates

any duty Defendants may otherwise have had to take steps to protect against or warn of the danger. See, Memorandum and Order, pp.3-4, A- 1 - 4.

Defendants are not entitled to the “obviousness” shield. First, as to David Foss, Jr. himself, a child of his extreme youth is not chargeable with the ability to recognize the danger he encountered in this case. Defendants have not, in fact, argued that the boy could be so charged; instead, they have contended that Peggy Foss should have recognized the danger and that her presence somehow cuts off their duty to the boy.

Such arguments essentially impute the claimed negligence of the parent to the injured infant. The law does not, however, impute to an infant the negligence, if any, of his parent. See, Mattson v. Minnesota and N.W.R. Co., 95 Minn. 477, 104 N.W. 443, 448 (1905).

As well, reported Minnesota cases involving objects tipping onto children have not held the presence of a parent or other responsible adult to negate duty as a matter of law. In Atterbury v. Jones, 161 Minn. 295, 202 N.W. 337 (1924), on reh’g., February 27, 1925, a young girl of about David Foss, Jr.’s age toppled a slot or vending machine onto herself at an amusement center. She did so “while two elder members of her party were sitting nearby and otherwise engaged ...” Id., 161 Minn. 296, 202 N.W. at 337. The presence of these “elders” did not extinguish the defendant’s duty in that case, and the court reversed the trial court’s grant of judgment in favor of the defendants.

Similarly, in the Szyplinski case discussed above, the three year-old girl upon whom a snowmobile shop lift tipped was in the defendant’s store with her parents. The accident occurred when she tipped the lift onto herself while her parents were otherwise occupied at the store counter nearby. See, Szyplinski, 308 Minn. at 154, 241 N.W.2d at 308. Again, the fact that the young girl’s parents were present did not negate the defendant’s duty. Thus, the presence of

Peggy Foss at the Kincade home at the time of the accident in this case cannot be deemed to eliminate Defendant's duty in this case.

Further, even if the obviousness of a danger to Peggy Foss could somehow be permitted to affect the analysis of Defendants' duty to her son, the record does not contain evidence that the danger was or should have been obvious to her. There is no evidence, for example, that Peggy Foss had actually seen or could see the bookshelf before the incident. She testified that she did not recall ever seeing the bookshelf before the day of the accident. Peggy Foss Dep., p. 50, A- 78. Hence, there is no evidence that Ms. Foss had actual knowledge of the presence of the book case before it fell onto her son.

Ms. Foss also testified that, from her position outside the room in which the accident happened one could see only "some" of the interior of the room in which the book case stood, not all of it, Peggy Foss Dep. p. 50 A-78. Thus, there is inadequate evidence to support a contention by Defendants that she possessed even constructive knowledge of the presence of the book case in the room, much less knowledge of its unsecured condition.

Even if she were determined to have actually seen the book case, or even if it was determined that she *could* have seen the book case from her location outside the room, the fact that the book case was not secured – to the wall or otherwise – would not have been readily apparent to Peggy Foss. Stabilizing screws, straps or brackets affixing the book case to a wall would have necessarily been attached to the rear of the unit and their presence or absence would not have been visible to Ms. Foss. Simply seeing the book case – even if she could have seen it from her vantage – Ms. Foss would not have had reason to suspect that it had not been secured.

At minimum, the question of the existence of a duty in this case is a close one that should be submitted to the jury.

It is only in the clearest of cases that the typically fact-intensive questions of negligence can be determined as a matter of law. Block v. Target Stores, Inc., 458 N.W.2d 705, 712 (Minn. Ct. App. 1990), review denied, September 28, 1990. This case is not such a case.

It is evident that the Kincade's owed a duty with respect to the danger presented by their empty book case. However, *if any* question remains as to whether the scope of their duty included an obligation to secure or otherwise address the danger posed by the book case, that question must be submitted to the jury.

"Close questions on foreseeability should be submitted to the jury." Lundgren v. Fultz, 354 N.W.2d 25, 28 (Minn. 1984). Here, a number of facts preclude the finding that, as a matter of law, the Kincades owed David Foss, Jr. no duty. David Foss, Jr. was a guest of the Kincades, not a trespasser. He was inside their home lawfully and with their express permission. The Kincades, though they have stated they did not personally regard the book case as a danger – at least not to their children – have acknowledged an awareness that objects such as their book case were susceptible to tipping. Jeremy Kincade Dep., p. 30, A-33. They were aware of the status of their book case as unsecured, empty and standing on a carpeted surface on the day in question. They acknowledged their awareness that young David Foss was a very active three-year-old. Stephanie Kincade Dep., p. 41, A-59.

Further, even if obviousness of the danger to Peggy Foss is somehow a factor in the duty owed to David Foss, Jr., there is a question of fact as to whether Peggy Foss was aware of or should have been aware of the danger presented by the book case. The facts show that Peggy Foss had not seen the book case in the house before that day and had not seen it before she found it atop her badly injured son. It is not at all clear that the book case in an adjacent room was visible to Peggy Foss from her position in the kitchen.

Thus, the issue of foreseeability, whether it relates to the nature of the hazard and the knowledge of Defendants, or whether affected somehow by the presence of a parent, cannot be decided as a matter of law in Defendants' favor. At minimum, the issue of foreseeability in this case is a question of fact that must be submitted to the jury.

The Defendants' spoliation of evidence entitles Plaintiffs to inferences against Defendants which weigh against the grant of summary judgment.

Disposal of evidence when a party knows or should know that the evidence should be preserved for a future litigation constitutes spoliation of evidence. Patton v. Newmar Corp., 538 N.W.2d 116 at 119 (Minn. 1995). A finding of spoliation by a party in control of evidence permits and warrants sanctions against that party, including adverse inferences. See, Wajda v. Kingsbury, 652 N.W.2d 856, 861 (Minn. Ct. App. 2002), review denied, November 19, 2002. In this case, with notice of a possible claim arising from the book case falling on David Foss, Jr., Defendants disposed of the book case. Consequently, the book case cannot be examined to determine whether, for example, it was fitted with screws or other hardware or devices intended to permit it to be secured against the wall or floor. The presence of such hardware or devices would further speak to the issues of both Defendants' knowledge of the hazard and of the ease of minimizing or eliminating the hazard.

As a result of Defendants' disposing of the book case, Plaintiffs have been deprived of such evidence. Plaintiffs should receive the benefit of inferences that if the book case were available, its configuration would tend to reflect both knowledge of the hazard and ease of ameliorating the tipping danger. Thus, under the present circumstances the Defendants' spoliation of evidence weighs heavily against Defendants' contention that they owed Plaintiffs no duty and is further reason to permit Plaintiffs to submit the issue of Defendants' negligence to a jury.

CONCLUSION

The injury David Foss, Jr. suffered when Defendants' book case fell on him was the result of risks not merely foreseeable but actually foreseen. A danger cannot be, as Defendants have claimed, both obvious and unforeseeable. Plaintiff must be permitted to present his case to a jury. The trial court's summary judgment decision must be reversed and this case remanded for trial.

Respectfully submitted:

Dated: March 6, 2007

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