

NO. A07-0313

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State of Minnesota  
**In Court of Appeals**

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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.*

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**APPELLANT'S REPLY BRIEF**

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## ARGUMENT

### **I. RESPONDENTS' ATTEMPTS TO AVOID THEIR DUTY OF CARE ARE UNAVAILING; THE SPECIFIC HARM WAS CLEARLY FORESEEABLE**

The accident from which this case arises was the result of a young boy climbing on an empty book case which then tipped onto him. Such accidents are the subjects of warnings that accompany similar items of furniture and are the reason that hardware exists to secure such furnishings. In view of these facts, it simply cannot be said that this accident was unforeseeable.

Respondents' efforts to exempt themselves from their ordinary duty as possessors of property by invoking a "multitude of facts" (Respondents' Brief, at 7) do not succeed. As landowners, the Kincades owed a duty to entrants on their property, including David Foss, Jr.

#### **A. The Jury Should Be Permitted To Weigh The "Multitude Of Facts" Facts And Determine The Issue Of Negligence.**

In contending that the question of foreseeability requires analysis of a "multitude of facts," Respondents illuminate the fact that the trial court's decision here reached into the realm of fact finding where that function should have been left to the jury. Respondents' recitation of the multiplicity of facts they claim are necessary in consideration of the issue of foreseeability shows that the question of negligence should be presented to the jury. Lundgren v. Fultz, 354 N.W.2d 25, 28 (Minn. 1984)

The existence of the various circumstances cited by Respondents and other circumstances not mentioned by them – such as their knowledge of David Foss’ high activity level (- of which they had sufficient awareness to characterize him as more active than their own children<sup>1</sup>) -- the relative ease of securing the book case as compared with the potential danger it posed, the fact that the persons most likely to be injured by the book case are persons least likely to appreciate its danger – do not compel a finding that the accident was unforeseeable. The circumstances instead point clearly to foreseeability. Respondents’ arguments about “multiplicity of facts” do not negate the essential fact that David Foss, Jr. suffered a serious injury from a tippy book case of which the Kincades were aware and which they could easily have secured. The quantity of circumstances supports not a legal determination of no duty, but the reference of the issue of negligence to a panel of jurors.

**B. Under The Circumstances Presented, The Risk Was Or Should Have Been Clear To Respondents But *Would Not* Have Been Obvious To David Foss, Jr. Or His Mother.**

Respondents have argued that because the danger is so obvious, they have no duty to do anything about it. That argument must fail because, taken to its logical conclusion, it means that one’s neglect can be so egregious as to ultimately absolve one of responsibility. Obviousness of a danger does not invariably translate into the absence of duty. Other factors must be considered with respect

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<sup>1</sup> Respondents cannot be permitted to disclaim the common knowledge of the propensity of toddlers such as David Foss, Jr. to climb (see, Respondent’s Brief, p. 7).

to the particular danger in question, including the relative knowledge of the involved actors.

Here, at the time of the accident, Respondents possessed knowledge regarding the book case that neither David Foss nor his mother possessed. First, as all concerned appear to acknowledge, David Foss is not chargeable with any obviousness of the danger. He had barely turned three years old at the time of the accident.

His mother, unlike Respondents, had not seen the book case in Respondent's house before that day. Peggy Foss Dep., p. 50, A-78. There is no evidence she entered the room where the accident occurred before the book case toppled onto her son. There is no evidence that she was aware that the book case was not secured in any fashion. If she had been in Respondent's new house before the day of the accident, there is no evidence that she had seen the book case then nor is there evidence that the book case had even been in the room in question on any of those other occasions.

Respondents, by contrast, possessed all of this knowledge. To them, so informed, the danger was obvious. To David Foss, Jr. and his mother, who lacked equal information and knowledge, the danger lurked. Therefore, Respondent's contention that the obviousness of the danger negates their duty must be rejected.

**C. A Landowner Has A Duty Of Care With Respect Even To Obvious Dangers Where The Landowner Has Reason To Anticipate The Harm Despite Such Obviousness.**

In light of Respondents' superior knowledge regarding the book case, its location, and its unsecured status, they should have anticipated the harm that resulted. A possessor of land may be liable for injury caused to entrants by an activity or condition on the land whose danger is known or obvious if the possessor should anticipate that harm could result despite any such knowledge or obviousness. See, Restatement (Second) of Torts, Section 343A. Even if the Respondent's book case and its unsecured status are assumed to be obvious dangers, Respondents should reasonably have anticipated that an active young boy such as David Foss, Jr. may not apprehend that danger and could be injured by the tipsy furnishing.

**D. A Private Residence Is Not A "Duty Free" Zone.**

There is no authority that would absolve a homeowner of any duty to visitors within the home. Like any possessor of land, Respondents owed an entrant, like David Foss, Jr., a duty to use "reasonable care for all such persons invited upon the premises, ..." Peterson v. Balach, 294 Minn. 161, 164, 199 N.W.2d 639, 642 (1972). Responding to the Attebury v. Jones 161 Minn. 295, 295 N.W.337 (1924), Respondents stretch it too far by suggesting that the determinative factor there was that the establishment at issue was an amusement center and not a private home. That the premises in Attebury was an amusement center was significant in that case not merely in and of itself, but because it helped

establish the defendant's knowledge that children may well encounter the hazard there involved. While Respondents' home is not a commercial amusement center, they, like the Attebury defendant, possessed knowledge that children could be expected to play in all areas of their house (Jeremy Kincade Dep., p. 31, A-33) and would therefore likely encounter the unsecured book case here at issue.

Thus, while the fact that the accident in question occurred at Respondent's home may be a circumstance that factors into the reasonableness of their actions or omissions with respect to the book case and David Foss, Jr., it is not a fact that cuts off the existence of duty. The duty exists.

The question in this case is not truly whether the duty exists, but whether it was breached. A jury must be allowed to make that determination as is ordinarily appropriate in claims of negligence. See, Block v. Target Stores, Inc., 458 N.W.2d 705, 712 (Minn. Ct. App. 1990).

**E. The Erratic Tendencies Of Children Are Not A Basis For Eliminating A Homeowner's Duty.**

It is not extraordinary "child proofing" (Respondents' Brief, at 8) to take simple precautions to secure a tippy book case. It is true that children have ways of getting themselves into trouble in encounters with any number of things. That fact is not, however, an excuse for the failure to take modest steps where possible to address those dangers that can – like the unsecured book case here – be reasonably anticipated and easily eliminated .

The case of Pepperling v. Emporium Mercantile Co., 199 Minn. 328, 271 N.W.584 (1937) cited by Respondents does not state differently. The child

involved in the Pepperling incident was more than twice the age of David Foss, Jr. and likely capable of apprehending the possibility of a propped open chest lid shutting when tampered with. In addition, the potential and gravity of risk from the lid of an ordinary cedar chest dropping is minute compared to the risk of severe injury to a small child from a toppling book case. Respondent's position finds little support in Pepperling.

With respect to a toddler like David Foss, Jr., Respondents essentially take the position that because children may injure themselves on virtually any hazard<sup>2</sup>, however apparently ordinary and benign, a homeowner has no duty to eliminate or warn of *any* hazard. That is not the law.

**F. Negative Evidentiary Inferences Weigh In Appellant's Favor When Considering The Issue Of Duty.**

Respondents argue that their spoliation of evidence cannot influence the analysis of the duty owed by them. However, if, as Respondents argue, a multiplicity of facts must be considered in determining whether the accident was foreseeable, then those facts which might have come to light in an analysis of the book case in question must be deemed to weigh in Appellant's favor.

Respondents cannot be permitted to argue that facts are necessary to determine

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<sup>2</sup> It merits note that the sorts of hazards mentioned in Slinker v. Wallner 258 Minn. 243, 103 N.W.2d 377 (1960), case cited by Respondents are such as inhere in the structure of a residence – stairs, walls, trees, windows. The book case here is dissimilar and, unlike those items enumerated in Slinker, could be readily secured without affecting its ordinary utility.

whether duty exists while arguing that facts that examination of the book case might have revealed are irrelevant because no duty exists. Such an argument is circular.

If the book case in question bore receptive drillings for hardware or straps to secure it, or a manufacturer's warning of some kind, such facts would convincingly contradict Respondents' claim that the tip-over accident that occurred here was somehow unforeseeable. So long as Respondents claim that this accident was unforeseeable to them, such evidence is relevant. Now, because Respondents have disposed of the book case and precluded Appellant's examination of it, Appellants should be entitled to the inference that, if the book case were available to be examined, it would manifest such indicia of foreseeability. Appellants submit that the accident here was manifestly foreseeable by Respondents even without any such indicia. However, under such circumstances, short of establishing negligence in and of itself, Respondents' spoliation should prevent their avoidance of duty to entrants such as David Foss, Jr. and preclude a grant of summary judgment.

**G. Summary Judgment Was Inappropriate As To The Duty To Warn.**

If Respondents were not going to secure the book case, they had a duty to at least disclose its presence and unsecured state to Peggy Foss. As noted above and in Appellant's principal brief, the record does not show that Peggy Foss possessed actual or constructive knowledge of the presence or unsecured condition of book

case that injured her son.<sup>3</sup> The danger of the book case cannot be deemed obvious as to her when she had not seen it and would not necessarily have seen it.

Contrary to Respondents' assertions, the record does not establish that the book case and the fact that it was not secured were plainly visible to Peggy Foss. The record shows that she had not seen it. (Peggy Foss Dep., p. 50, A-78). There is no evidence that she had been in the room where the book case was located on the day of the accident until after the accident. And, even if she *might* have been in the room prior to the day of the accident, there is no evidence that the book case was in the room at any such time.

Respondents' citation to the Michigan federal court case of Beaver v. Howard Miller Clock Co., Inc., 852 F.Supp. 631 (W.D. Mich. 1994) is inapposite. First, the issue in that case involved the duty of a manufacturer in a product liability setting. The question was whether the manufacturer of a grandfather clock had any obligation to provide a warning to the purchaser user of the clock about the possibility of its tipping. The child of the owner of the clock was injured when it was tipped over in the owner's home. The court determined that the danger of the clock tipping was open and obvious to the homeowner such that the manufacturer had no duty to provide a warning.

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<sup>3</sup> Lest there be confusion arising from Respondents' recitation of facts, Peggy Foss had never seen her son climb the book case in question. She testified he had climbed shelves on an entertainment center in her home which did not present a tipping hazard, but which had shelves that could come loose. Peggy Foss Dep., p. 13, A-69.

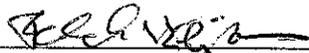
Unlike the present case, the persons claiming a duty to warn in Beaver were persons who had purchased the clock, had placed it in their home, saw it every day and were well aware of its presence. The same may not be said of Peggy Foss in this case.

### Conclusion

The trial Court erred when it decided that the accident in this case was unforeseeable and that Respondents owed David Foss, Jr. no duty to secure the book case that injured him or provide some effective warning that could have prevented the accident. Accordingly, the decision of the trial court should be reversed and this case remanded for trial.

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