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.

RESPONDENTS' BRIEF AND APPENDIX

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STATEMENT OF ISSUES

Does a homeowner owe a duty to warn or protect with respect to an ordinary piece of furniture that does not present a foreseeable risk of injury?

The district court held the Respondents did not owe a duty to protect or warn about the empty bookcase because the harm that resulted was not foreseeable.

Apposite Authorities:

Slinker v. Wallner, 258 Minn. 243, 103 N.W.2d 377 (1960)

Baber v. Dill, 531 N.W.2d 493 (Minn 1995)

Whiteford v. Yamaha Motor Corp., 582 N.W.2d 916 (Minn. 1998)

Stuedemann v. Roman Nose, 713 N.W.2d 79 (Minn. Ct. App. 2006)

STATEMENT OF THE CASE AND FACTS

On October 15, 2003 David Foss, Jr. ("Foss") was injured when he climbed onto an empty bookcase and it fell on top of him. At the time of the accident Foss was with his mother, Peggy Foss, visiting Jeremy and Stephanie Kincade ("the Kincades"). The Kincades had recently purchased the home where the accident occurred and were still in the process of unpacking. (A 32.)[1] Foss and his mother had been to the Kincade home on approximately five occasions prior to the accident. (A 78.) Peggy Foss and Stephanie Kincade had been very close friends for 20 years. (A 67.)

The bookcase that fell was located in a main floor bedroom of the Kincade home. (A 33.) Peggy Foss did not specifically recall seeing the bookcase before the accident, but testified it was "more than likely" that she had been in the bedroom. (A 78.) The bookcase was six feet tall and approximately three feet wide. (A 33.) The bookcase was not secured to the wall or floor. (A 33,59.) At the time of the accident, Foss was playing in the bedroom with his older sister and one of the Kincade children. (A 57.) His mother was several feet away in another room on the main floor of the home. (A 56,75.) The children had just come in from outside and no one knew they were in the bedroom. (A 58,75.) Peggy Foss and Stephanie Kincade were talking in the kitchen when they heard a loud bang. (A 75.) Peggy Foss went into the bedroom and found her son under the bookcase. (A 75.)

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[1] References to "A * are to the Appendix to Appellant's Brief.

It is undisputed that the Kincades and Peggy Foss knew, prior to the accident, that a bookcase could tip. (A 33, 68.) It is also undisputed that none of them considered a bookcase to present a hazard to children. (A 33, 59, 69.) Peggy Foss knew that her son liked to climb on furniture. (A 68-72.) She saw him climb a bookcase in her home three to four months before the accident. (A 68.) She and her husband had previously instructed their son not to climb a bookcase or other furniture on many occasions. (A 71.) Even with this specific knowledge, Peggy Foss did not worry about the bookcase in her own home falling on her son. (A 69.)

Peggy Foss never told the Kincades that her son David climbed furniture. (A 73.) Peggy Foss also acknowledged that it is not standard practice for friends to give specific warnings or safety instructions to friends who visit their home with children. (A 85.) She conceded there are many ways in which children can get hurt inside private homes and agreed that is why parents have to watch their own children. (A 85.) While acknowledging that it is "impossible" to constantly watch young children, Peggy Foss testified that three-year-olds, particularly her son, needed to be supervised "basically all the time." (A 66.)

Following the accident, David Charles Foss ("Appellant"), the father of Foss, commenced this action on behalf of himself and his son. The Complaint alleged, among other things, that the Kincades were negligent for their "failure to secure and stabilize the bookcase, failure to use reasonable care to protect [against] the unreasonable risk of harm posed by the bookcase, and/or the failure to warn of the danger presented by the

bookcase." (R 2.)[2] The Kincades moved the district court for summary judgment on the grounds they did not owe Foss a duty with respect to the bookcase because it did not present a foreseeable risk of harm. (A 5.) By order dated December 21, 2006, the district court, the Honorable Gerald J. Wolf, granted the Kincades' motion. (A 1.) Appellant timely commenced this appeal. (A 96.)

[2] References to "R *" are to the Appendix to Respondents' Brief.

ARGUMENT

I. STANDARD OF REVIEW.

The existence of a legal duty is a question of law. *ServiceMaster of St Cloud v. GAB Bus. Servs., Inc.*, 544 N.W.2d 302, 307 (Minn. 1996); *Louis v. Louis,* 636 N.W.2d 314, 318 (Minn. 2001). Summary judgment is appropriate where there are no genuine issues of material fact and a party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03. Where, as here, the district court's determination was based on the application of law to undisputed facts, the standard of review is *de novo. In re Daniel,* 656 N.W.2d 543, 545 (Minn. 2003).

II. THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT BECAUSE THE KINCADES OWED NO DUTY TO PROTECT AGAINST UNFORSEEABLE HARM.

A. There Is No Duty To Protect Where The Harm Is Not Foreseeable.

A landowner's duty to use reasonable care to protect the safety of all entrants is not absolute. *Baber v. Dill,* 531 N.W.2d 493, 496 (Minn. 1995). The duty only extends to conditions that give rise to a risk of foreseeable harm. *See Erickson v. Curtis Inv. Co.,* 447 N.W.2d 165, 168-69 (Minn. 1989); *Stuedemann v. Roman Nose,* 713 N.W.2d 79, 84 (Minn. Ct. App. 2006). Foreseeability is a threshold issue. *Boone v. Martinez,* 567 N.W.2d 508, 510 (Minn. 1997); *Spitzak v. Hylands, Ltd.*, 500 N.W.2d 154, 158 (Minn. Ct. App. 1993). "When the issue of foreseeability is clear, the courts, as a matter of law, should decide it." *Whiteford v. Yamaha Motor Corp.,* 582 N.W.2d 916, 918 (Minn. 1998).

The test of foreseeability is whether a defendant was aware of facts suggesting that a plaintiff was being exposed to an unreasonable risk of harm. *Spitza,* 500 N.W.2d at 158. In determining whether a danger is foreseeable, courts look at whether the specific damage was objectively reasonable to expect, not simply whether it was within the realm of any conceivable possibility. *Whiteford,* 582 N.W.2d at 918. "The duty to exercise care is dictated by the exigencies of the occasion as they are or should be known." *Austin v. Metro. Life Ins. Co.*, 277 Minn. 214, 217, 152 N.W.2d 136, 138 (1967).

1. The facts and circumstances surrounding this incident compel the finding the risk of harm was not foreseeable.

Foreseeability involves consideration of all the facts surrounding the accident and whether the Kincades knew Foss was being exposed to an unreasonable risk of harm. The accident here involved an ordinary piece of furniture that happened to be tall and slender. (A 47.)[3] Although Peggy Foss and the Kincades, like other reasonable adults, knew that such a bookcase could tip over, none of them considered a bookcase to present a hazard prior to the accident. (A 33, 59, 68-69.) Even after she caught her son climbing a bookcase in her own home three to four months before the accident, Peggy Foss was not worried about a bookcase falling on him. (A 69.) The risk Foss would climb and tip the empty bookcase in the Kincade home was conceivable but not reasonably likely to occur given all of the circumstances involved here. *See Whiteford,* 582 N.W.2d at 918.

[3] The fact there are devices to secure bookcases and other furniture to the wall or floor does not make the bookcase "defective" or equate with a finding that the accident was foreseeable to create a duty.

Appellant asserts that the Court need only consider two facts in determining whether the harm here was foreseeable: (1) the existence of an empty bookcase; and (2) the presence of an active, curious child. (Br. at 4). Contrary to Appellant's assertions, there are many other facts that bear on the question of whether the specific harm that occurred was foreseeable. These include: the fact the accident occurred in a private home not a day care or amusement center; the fact the accident involved an ordinary piece of household furniture that's characteristics were evident; the fact Foss had been outside playing and had only been in the house a few minutes; the fact Foss was playing with other, older children; the fact the Kincades did not know Foss was in the room with the empty bookcase; the fact the Kincades had no knowledge Foss might climb furniture; and, the fact Foss was with his mother and under her care and supervision.

The district court recognized that the accident here resulted from a multitude of facts. The district court correctly considered all of these facts and circumstances in concluding the accident was not foreseeable. The district court noted:

> Simply because it was within the realm of any conceivable possibility that a child may climb on an empty bookcase such as we have in this situation it is not objectively reasonable to expect that a child while under the care of his mother in a private residence would create a duty by the home owners to somehow protect against an unexpected act by the child. Peggy Foss, mother of the child, had a specific knowledge that her son, David G. W. Foss, had a propensity for climbing which was never conveyed to the Kincades.

(A. 3.)

When all of the facts surrounding this accident are considered, as they were by the district court, it is apparent this unfortunate accident was entirely unforeseeable.

Minnesota law does not impose a duty on the Kincades to protect Foss from an accident they could not foresee.

2. The open and obvious condition of the bookcase makes the risk of harm less foreseeable.

Appellant asserts "[a] danger cannot be, as Defendants have claimed, both obvious and unforeseeable." (Br. at 12). This single sentence illustrates the fundamental flaw with the entire premise of Appellant's arguments and highlights exactly why the district court was correct in concluding the Kincades owed no duty. The existence of a duty depends upon the foreseeability of the specific harm not the condition that caused the harm. Where a danger is hidden it is more foreseeable someone will be harmed by it. Conversely, where a danger is open and obvious it is less foreseeable someone will be harmed by it. The district court correctly considered the open and obvious nature of the empty bookcase when determining whether harm to David Foss was foreseeable. An obvious risk does not automatically equal a foreseeable accident.

B. Minnesota Law Does Not Require A Homeowner To Protect An Entrant From Every Conceivable Risk On Their Premises.

1. There is no duty to childproof a home.

There is no such thing as a risk-free home. Minnesota law does not require homeowners to childproof their homes. As the Minnesota Supreme Court stated in *Slinker v. Wallner,* 258 Minn. 243, 249, 103 N.W.2d 377, 382 (1960):

> [T]here is virtually no condition upon any land with which a child may not possibly get himself into trouble. * * * Children may, and do, do practically everything. Unless the possessor is to shoulder the impossible burden of making his land completely child proof, which might mean razing it to the bare earth,

> something more is called for than the general possibility of somehow coming to harm which follows the child everywhere throughout his daily existence.

The *Slinker* court further noted a premises owner "is not bound to guard against every stairway, cellarway, retaining wall, shed, tree and open window on his premises, so that a child cannot climb to a precipitous place and fall off." *Id.* at 250, 382 (citations omitted). In order to create a duty, the condition must give rise to an unreasonable danger and that danger must create a foreseeable risk of injury. *Id.* at 250-251, 382-383.

Appellant suggests that because Foss was known to be an "active" child the Kincades had a greater duty to eliminate every potential hazard in their home. Neither Minnesota law nor common sense support such an argument. If that were true, a homeowner's duty (and potential liability) would extend to everything from open stairways, door jambs, table edges, and hard surfaces to the presence of loose change or a button lying on a dresser. Any and all of these items could conceivably cause injury to any child. This fact does not translate into a heightened duty on the part of homeowners.

In *Pepperling v. Emporium Mercantile Co.,* 199 Minn. 328, 271 N.W. 584 (1937), the district court entered judgment in favor of a store owner where a child injured his fingers when the top of a cedar chest on display in the store fell on them. In rejecting the jury's verdict in favor of the plaintiff, the *Pepperling* court stated:

> We are in accord with the plaintiffs' views that the defendant owed this child ordinary care as an implied invitee in its store and that such ordinary care should take into consideration the normal propensities of children of the plaintiff's age, which at that time was seven years; but on this record we can see no reasonable ground for the defendant to anticipate that the display of these cedar chests, either open or closed upon the floor of its store, would or might result in injury to anyone. Cedar chests are displayed as these were by store-keepers everywhere. To hold that a jury might consider this negligent would go beyond the

> requirements of ordinary care and to establish a rule requiring a very high degree of care upon the part of such storekeeper.

Id. at 330, 271 N.W. at 586. As in *Pepperling,* the Kincades' legal duty was to use reasonable care to protect people who came to their home from foreseeable harm. The Kincades were not obligated to guarantee the safety of their guests from every conceivable risk nor did they have any obligation to childproof their home. Even if they could physically do so, which is likely impossible, the law does not require it.

2. The nature of the premises is a factor in evaluating the foreseeablity of the harm.

The fact this accident occurred in a private residence is significant to the determination of whether the accident was foreseeable. Appellant asserts *Szyplinski v. Midwest Mobile Home Supply Co.,* 308 Minn. 152, 241 N.W.2d 306 (Minn. 1976) supports imposing a duty on the Kincades in this case. In *Szyplinski,* a child was injured in a retail store when a snowmobile lift on display fell on her. Unlike here, in *Szyplinski* there was no indication to the customers that the lift was unstable. While the *Szyplinski* court found, under the unique circumstances of the case, that the owner owed a duty, the court acknowledged that under different facts there may be no duty:

> [T]he question presented is not simply whether appellants knew the display was unstable, but whether they could have discovered the instability by inspection and reasonably have foreseen injury to intermeddling children. While we might on other facts hold as a matter of law that a storekeeper has no reason to anticipate injury from a display, as in *Pepperling v. Emporium Mercantile Co., Inc., supra* (boy closed lid of cedar chest on finger.....)

Id. at 156, 241 N.W.2d at 309.

Appellant also cites *Attebury v. Jones,* 161 Minn. 295, 295 N.W. 337 (1924) to support the proposition that Peggy Foss' presence at the time of the accident does not preclude imposition of a duty on the Kincades. This reliance is misplaced. In *Attebury,* a slot machine in an amusement center fell because it was not properly secured and injured a young child. The *Attebury* court's decision to reverse the directed verdict and submit the question of negligence on the part of the amusement center owner to a jury, did not turn on the presence of a parent at the accident scene. Rather, the *Attebury* court focused on the child-centered nature of the business operation:

> An important circumstance contributing to that conclusion is the fact that the institution where the accident occurred catered to children. Displayed there are many things attractive to the instincts of children. Children congregate there in large numbers, and under those circumstances a jury is not be criticized for finding that instrumentalities likely to become the object of a child's curiosity, and to work injury if unsecured, should be so secured as to prevent any such result.

Id. at 298, 202 N.W. at 338. Although the Supreme Court did not specifically address the issue of duty, the above facts are relevant to the foreseeability requirement.

Unlike the defendants in *Attebury* and *Szyplinski,* the Kincades were not operating an amusement center or retail operation. The Kincades were not operating a daycare center or other business involving the care or entertainment of children. They were homeowners who invited a friend and her children into their home. Peggy Foss admitted it is not "standard practice" for people to give safety lectures to friends who visit in their home. (A 85.) The reason is obvious. Peggy Foss acknowledged that there are all kinds of ways children can get hurt in any home. (A 85.) The unfortunate fact of an accident does not mean anyone is legally responsible.

The district court properly determined the accident was not foreseeable. The presence of an "active" child does require the Kincades to childproof their home in order to protect against every conceivable risk of injury. This is particularly true where the "active" child is in the care and supervision of his mother visiting a family friend's home.

C. Negative Evidentiary Inferences Cannot Create A Duty That Does Not Already Exist.

Appellant attempts to obscure the duty analysis by suggesting that the Kincades' decision to discard the bookcase they no longer needed during the summer of 2004 precludes the court from determining the legal question of duty. Appellant argues that because the Kincades threw the bookcase away he is entitled to the negative evidentiary inference that the bookcase's "configuration would tend to reflect both knowledge of the hazard and ease of ameliorating the tipping hazard" and that these inferences "weigh[] heavily against Defendants' contention that they owed Plaintiffs not duty . . . ." (Br. at 11). The problem with Appellant's argument is that it is undisputed the bookcase did present a tipping hazard and that it could have been fastened to the wall without difficulty. These admitted facts, both of which were fully considered by the district court, do not translate into a legal duty if the risk of harm was not foreseeable.[4]

---

[4] In opposing the Kincades' summary judgment, Appellant argued that he was prejudiced because he could not examine the actual shelf involved in the accident and that this prejudice precluded summary judgment and entitled Appellant to a presumption of negligence. (A 17.) Appellant now advances a new argument- that he is entitled to an inference that the bookcase had screws or other hardware that would have provided notice to the Kincades that it was possible to attach the bookcase to the wall or floor. (Br. at 11) Not only did Appellant fail to present this argument to the district court, but it misses the point.

There is no material dispute as to the physical nature or condition of the bookcase. The parties agree with respect to its dimensions and its configuration is depicted in a photograph. (A 47.) The Kincades knew the bookcase was freestanding and empty. They, and Peggy Foss, knew that a bookcase could tip and fall. (A 33, 68.) None of them, including Peggy Foss who watched her young son climb a bookcase in her own home three to four months before the accident, believed that an empty bookcase presented a likely risk of harm to children. (A 33, 59, 69.) The legal issue is whether a duty should be imposed under these circumstances. The district court correctly recognized that Appellant's inability to inspect the bookcase had no bearing on the question of whether the accident was foreseeable.

A district court is authorized to impose appropriate sanctions for spoliation of evidence based on the potential prejudice to the opposing party. *Patton v. Newmar Corporation,* 538 N.W.2d 116, 119 (Minn. 1995); *Foust v. McFarland,* 698 N.W.2d 24, 30 (Minn. Ct. App. 2005). The district courts generally impose sanctions "where one party gains an evidentiary advantage over the opposing party by failing to preserve evidence." *Foust,* 698 N.W.2d at 30. A party challenging a sanction determination must show the district court abused its discretion. *Wajda v. Kingsbury,* 652 N.W.2d 856, 860 (Minn. Ct. App. 2002). Appellant has made so such showing. More importantly, the absence of the bookcase does not provide any evidentiary advantage to the Kincades. *See Himes v. Woodings-Verona Tool Works, Inc.,* 565 N.W.2d 469, 471 (Minn. Ct. App. 1997)(sanctions for spoliation are only appropriate where one party gains an evidentiary advantage).

The issue before the district court was whether the accident was foreseeable. Under the undisputed facts the existence of the bookcase and the ability to inspect it had no bearing on the issue of foreseeability. In short, the alleged "spoliation" of the bookcase cannot create a duty that does not otherwise exist. The district court acted well within its broad discretion when it rejected Appellant's effort to distract attention away from the critical legal issue of duty.

III. THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT BECAUSE THERE IS NO DUTY TO WARN OF THE OPEN AND OBVIOUS CONDITION OF THE BOOKCASE.

Appellant's duty to warn claim is focused on the claimed duty owed to Peggy Foss. Appellant does not suggest the Kincades had a duty to tell Foss about the presence of the bookcase or that it would have made any difference since his parents had already told him not to climb on bookcases and furniture. Instead, Appellant asserts the Kincades should have provided information about the bookcase to Peggy Foss. The duty to warn (like the claimed duty to secure bookcase to the wall) depends upon the foreseeability of the harm. When the district court concluded the accident was not foreseeable it rendered further analysis of the duty to warn claim moot.

Even if the two claims give rise to separate duties, the failure to warn claim fails as a matter of law because of the open and obvious nature of the empty bookcase. Minnesota follows Section 343A of the Restatement (Second) of Torts which provides:

> A possessor of land is not liable to his invitee for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

Baber, 531 N.W.2d at 496 (quoting Restatement (Second) of Torts § 343A (1965)); *Peterson v. W.T. Rawleigh Co.,* 274 Minn. 495, 496-97, 144 N.W.2d 555, 557 (1966). The rationale behind the open and obvious condition doctrine is that "no one needs notice of what he knows or reasonably may be expected to know." *Baber,* 531 N.W.2d at 496 (quoting *Sowles v. Urschel Lab., Inc.,* 595 F.2d 1361, 1365 (8th Cir. 1979)).

In *Beaver v. Howard Miller Clock Company, Inc.,* 852 F. Supp. 631 (W.D. Mich. 1994), a ten month old child was injured when a grandfather clock tipped over on him. The accident occurred in the child's home and his mother was in a different room at the time of the accident. The court found no duty to warn as a matter of law:

> [T]he fact that a tall, slender piece of furniture may be tipped over if pushed, pulled or played with must be obvious to adults such as Douglas and Carol Beaver [the parents]. * * * Accordingly, the court concludes that Howard Miller had no duty to warn users of this danger.

Id. at 636. Appellant attempts to revive the failure to warn claim by asserting "there is no evidence . . . Peggy Foss had actually seen or could see the bookshelf before the incident." (Br. at 9). Appellant's assertions are not only contrary to the record they are irrelevant.

The test for what constitutes an "obvious" condition is objective; the question is whether the condition and its attendant risk are apparent to a reasonable person, not whether the particular person actually saw the condition and appreciated the risk. *Louis,* 636 N.W.2d at 321 (citing *Munoz v. Applebaum's Food Mkt., Inc.,* 293 Minn. 433, 434, 196 N.W.2d 921, 922 (1972)). Contrary to Appellant's assertions the record clearly evidences that the bookcase and the fact it was not secured to the wall were plainly

visible to Peggy Foss. As a result, the district court properly dismissed Appellant's failure to warn claim as a matter of law.

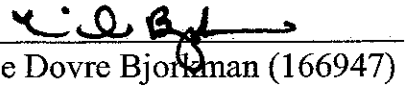
CONCLUSION

A homeowner has no duty to childproof their home against every conceivable risk of injury. The ways in which a child can injure himself or herself on ordinary, everyday conditions are countless. It is not possible for homeowners to protect against every object, condition or circumstance that could conceivably cause injury and Minnesota law does not require them to do so. There are absolutely no facts that make this particular accident foreseeable. As a matter of law and common sense, the Kincades cannot be charged with the duty to have prevented this unlikely accident. The district court properly dismissed Appellant's claims as a matter of law. The Kincades respectfully request that the district court's judgment be affirmed.

Respectfully submitted,

LARSON · KING, LLP

Dated this 9th day of April, 2007.



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CERTIFICATE

Pursuant to Rule 132.01, subd. 3(a)(1), the undersigned set the type of the foregoing memorandum of law in Times New Roman, a proportional, 13-point font, on 8 ½ by 11 inch paper with written matter not exceeding 6 ½ by 9 ½ inches. The resulting principle brief contains 4,108 words, as determined by employing the word counter of the word-processing software, Microsoft Word 2002, used to prepare it.

Dated this 9th day of April, 2007.

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