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State of Minnesota
In Supreme Court

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APPELLATE COURTS

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

Appellants,

vs.

JEREMY KINCADE AND STEPHANIE KINCADE,

Respondents,

and

PEGGY FOSS,

Third-Party Respondent.

APPELLANTS' BRIEF AND INDEX

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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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I. **STATEMENT OF LEGAL ISSUES**

- A. Does a property owner owe a duty of care to a young child invited onto the property with a parent?

The Minnesota Court of Appeals ruled in the negative, affirming the trial court and relying substantially on the presence of the child's parent to absolve the property owner of duty.

Apposite Case Law

Canada by and through Landy v. McCarthy, 567 N.W.2d 496 (Minn. 1997)

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. was severely injured when a book case fell on him while he played in the home of the Defendants.

Plaintiff David Foss, Sr. commenced litigation on behalf of his son against the Kincades asserting claims of common law negligence. The Kincades, in turn, commenced third party claims against Margaret "Peggy" Foss, mother of David Foss, Jr.

In district court, the Kincades moved for summary judgment, contending they owed no duty of care with respect to the empty book case that fell on David Foss, Jr. By order and judgment dated December 21, 2006, the district court granted the Kincades' motion, ruling that the accident that injured young David Foss was not foreseeable.

Plaintiff brought an appeal to the Minnesota Court of Appeals. By decision filed April 8, 2008, the Court of Appeals affirmed the trial court opinion, holding that the Kincades owed no duty to David Foss, Jr. Plaintiff petitioned this Court for review, and by order dated June 18, 2008 that petition was granted. Plaintiff/Appellant requests oral argument.

STATEMENT OF FACTS¹

David Foss, Jr., then just three years old, was a guest in the home of Defendants Jeremy and Stephanie Kincade on October 15, 2003. Peggy Foss Depo., A-73. David Foss, Jr. and two of the Kincade's children played outside together until Stephanie

¹ References to "A-__" are to the Appendix to Appellant's Brief.

Kincade called them into the house. Stephanie Kincade Depo. pg. 39, A-58. After entering the house, the children went into a first floor room where they could not be seen by Stephanie Kincade and Margaret ("Peggy") Foss, who stood talking in the first floor kitchen. Stephanie Kincaid Dep. p. 29, A-55-56.

Unknown to Peggy Foss, an empty book case stood in the adjacent room. See Peggy Foss Dep., p. 50, A-78. A few minutes after the children had come into the house, Ms. Kincade and Ms. Foss heard a noise from the next room. Stephanie Kincade Dep., p. 37, A-58. Upon going into that adjacent room to see what was going on, the two women found two of the other children standing there. Stephanie Kincade Dep., p. 37, A-58. The bookshelf had toppled to the floor, and the women found David Foss, Jr. lay beneath it, seriously injured. Stephanie Kincade Dep., p. 37, 54 A-58, 62 , Peggy Foss Dep., p. 37, A-75; Before finding her badly injured son under it, Peggy Foss had not seen the book case. Peggy Foss Dep., p. 50, A-78.

At the time of the accident, the book case stood empty against the wall in a first floor room in the Kincade house. Jeremy Kincade Dep., pp. 30-31, A-33. The Kincades allowed children access to all areas of their house, including the room where the empty book case stood. Jeremy Kincaid Dep., p. 39, A-35. The Kincades knew that the book case was empty, knew that it was secured to neither the wall nor the floor, and knew that the book case stood on a carpeted floor. Jeremy Kincade Dep., p. 31, 63 A-33, 41. They also knew that objects such as the book case were susceptible to tipping. See, Jeremy

Kincade Dep., p. 30, A-33. Peggy Foss had not seen the book case before the accident. Peggy Foss Dep., p. 50, A-78. The interior of the room where the accident happened was only partly visible from the dining area where Peggy Foss and Stephanie Kincade stood in the moments leading up to the accident. Peggy Foss Dep., p. 50, A-78.

The Kincades had three young children of their own. Jeremy Kincade Dep., p. 32, A-33. They were well-acquainted with young David Foss and knew him to be an "active" young boy, more active, in their estimation, than their own typically active boy. Stephanie Kincade Dep., p. 41-42, A-59.

There is no dispute that a number of simple brackets and braces are available for the purpose of securing tippy book cases such as that involved in the present case. See, Affidavit and Report of Jon Tofte, A-90-95. The danger of toppling associated with furniture items such as the book case in question is widely recognized and often the subject of warnings placed on such items by their manufacturers. Id. After the accident, and after having been notified of a possible claim and being instructed to keep the book case, the Kincades disposed of it. See, Affidavit of Thomas G. Johnson and Ex. A thereto, A-88-89; Jeremy Kincade Depo. p. 49, A-38.

ARGUMENT

SUMMARY OF ARGUMENT

A possessor of property owes a duty of care to children invited in to the premises, and the presence of the child's parent does not eliminate the duty owed.

I. STANDARD OF REVIEW – SUMMARY JUDGMENT

The decision of the trial court granting summary judgment is subject to de novo review on appeal. Prior Lake American v. Mader, 642 N.W.2d 729, 735 (Minn. 2002). The Court reviews anew whether genuine issues of material fact exist. Brookfield Trade Center, Inc. v. County of Ramsey, 609 N.W.2d 868, 874 (Minn. 2000). Likewise, the de novo standard of review applies in considering whether the lower court erred in the application of law.

In reviewing a grant of summary judgment, the nature of the summary judgment procedure must be considered. On summary judgment, the court is not to weigh evidence or substitute its views for those of a jury. See, DHL, Inc. v. Russ, 566 N.W.2d 60, 70 (Minn. 1997). Resort to summary judgment was not intended as a substitute for trial where any genuine issue of material fact exists. Sauter v. Sauter, 244 Minn. 482, 484, 70 N.W.2d 351, 353 (1955).

Here, the district court and Court of Appeals decisions incorrectly ruled that Defendants owed no duty to a young boy invited into their home. In so doing, the lower courts weighed facts and reached their own fact conclusions as to the reasonableness of

Defendant's actions. They also incorrectly absolved the Kincades of any duty primarily because of the presence of Peggy Foss. Accordingly, the trial court and Minnesota Court of Appeals decisions in this matter should be reversed and the case remanded for trial.

II. DEFENDANTS OWED A DUTY OF CARE TO DAVID FOSS, JR.

A. Possessors of Land Owe A Duty of Reasonable Care To All Entrants Upon Their Property.

The analysis of the present matter must begin from the premise of well established Minnesota law that all possessors of property owe a duty to entrants upon such property "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. 11, 162, 199 N.W.2d 639, 642 (1972). The parties to the present case do not dispute this fundamental principle of Minnesota common law. The duty of reasonable care encompasses a duty to take reasonable care to eliminate hazards on the premises and/or to warn an entrant of hazards that exist.

In the present case, however, the trial court ruled that the accident that injured David Foss, Jr. was not foreseeable and that, therefore, Defendants owed no duty to young David or anyone else in connection with the book case that caused the injury.

The Court of Appeals' affirmance focused on the presence of Peggy Foss as the salient fact eliminating any duty on the part of Defendants. Because the presence of the

young boy's mother cannot have the effect of cutting off the fundamental duty of Defendants, the decisions of the trial court and of the Minnesota Court of Appeals must be reversed and this case remanded for a trial wherein a jury should determine the question that lies at the heart of this case --- whether the Defendants acted reasonably in failing to secure their tippy, empty bookshelf and in failing to warn Ms. Foss of the danger it posed.

B. The Kincades Owed David Foss, Jr. At Least The Duty Owed By A Possessor Of Land To A Child Trespasser.

David Foss, Jr. was an invited guest, *not a trespasser* in the Kincade home on the day of the accident. As an invited guest, he had "at least all the rights of a trespasser, and probably some more." Szyplinski v. Midwest Mobile Home, Inc., 308 Minn. 152, 241 N.W.2d 306, at 309, (1976), quoting Peterson v. Richfield Plaza, Inc., 252 Minn. 221, 89 N.W.2d 712, 717 (1958).

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. even under the standard that would apply to a trespassing child.

As set forth in Szyplinski, 241 N.W.2d at 309²:

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*

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.*

² The quoted language from Szyplinski appears in the single-spaced italicized 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.

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.

Under the foregoing analysis, Defendants owed David Foss, Jr. a duty. Plaintiffs must at least be permitted to place the totality of the circumstances in this case before the jury.

C. The Presence of David Foss, Jr.'s Mother In the Kincade House Does Not Negate Defendant's Duty.

Ms. Foss' presence does not eliminate the duty owed by the Kincades. In reported Minnesota cases involving tipping hazards, the presence of a child's parent has not operated to eliminate a landowner's duty. See, e.g. Sziplinski v. Midwest Mobile Home, Inc., 308 Minn. 152, 241 N.W.2d 306 (1976) (applying the *trespasser* standard set forth in the Restatement (2d) of Torts); Attebury v. Jones, 161 Minn. 295, 202 N.W. 337 (1924), on reh'g February 27, 1924. In each of these cases, a child was injured by an object that toppled onto him or her. In each case, the child's parents or elder relatives

were present at the scene. In neither case did this fact operate to eliminate the duty owed by the landowner in question.

Defendants have attempted to distinguish these cases by noting that they involved incidents occurring in a commercial establishment (Sziplinski) and in an amusement center (Attebury). In each instance, however, the distinctions between these places and the Kincades' home are not significant. The significance of the setting in each of the referenced cases was simply that such settings provided the premises owner with notice that children may be present and may be expected to encounter the tipping hazard in each instance. In the present case, it is not disputed that the Kincades were aware that children were allowed access throughout their home and, on the day in question, were aware that children were moving about the house; hence, as in the Sziplinski and Attebury cases, the Kincades were aware that children could be expected to play in all areas of their house and could therefore be expected to encounter the known hazard presented by the book case. See, Jeremy Kincade Dep., p. 35, 39 A-34, 35.

The decision of the Court of Appeals in this matter brought the issue of the child's parental presence to the forefront. It was in that court's decision that a case not cited by the parties below emerged as substantially determinative. That case, Sirek by Beaumaster v. State of Minnesota Dept. of Natural Resources, 496 N.W.2d 807 (Minn. 1993) does not properly govern the existence of duty in this case.

The Sirek case involved an incident where a young girl, having paused with her family beside a roadway at the end of a trail in a Minnesota State Park, was struck by a car on the roadway when she attempted to cross it. The claims asserted by the Plaintiff in that case were that the layout and maintenance of the trail in its configuration presented users with an allegedly unavoidably risky crossing of a busy roadway. The issue presented was whether the general limited duty owed trespassers applied or whether the heightened duty owed to child trespassers applied. See, Sirek, at 809.

Because the matter involved claims against the State, the applicable standard was that of trespasser because any such tort claim could be made only within the confines of the Minnesota Tort Claims Act, pursuant to which the State may be liable only “for conduct that would entitle a trespasser to damages against a private person.” Sirek, at 809, quoting Minn. Stat. § 3.736, subd. 3(h) (1992). The distinction between the child in Sirek as a trespasser and David Foss, Jr. as an invited entrant is significant. As the Court stated in Sirek, “[t]he rule of law in trespass cases contrasts sharply from the duty or reasonable care owed by most landowners.” Id., at 809.

This Court has recognized the significance of that distinction and used it to distinguish a case involving claims asserted against a private, non-governmental landowner. In Canada by Landy v. McCarthy, 567 N.W.2d 496 (Minn. 1997), the defendant cited Sirek to argue that because of the presence of an injured child’s parent during the time that the child suffered injury, the defendant owed no duty to that child.

See, Canada, 567 N.W.2d at 505. This Court rejected the defendant's argument, stating, in language equally applicable here (Id., at 505):

[Defendant's] reliance on Sirek is misplaced. Tiera [the injured child] was not a trespasser. Further, the Sirek case and its progeny have all been within the context of statutory immunity. Therefore, we conclude that Sirek is inapplicable.

This case, like Canada, must be distinguished from Sirek. Hence, as in Canada, the mere presence of the injured child's parent somewhere on the premises cannot operate to eliminate Defendants' duty.

Also significant in the present analysis is this Court's statement in Canada with regard to the independent and separate duties that may be owed to a child by pertinent actors. To the suggestion that the defendant landowner owed no duty because of the presence of the injured child's parent, this Court stated in Canada that the defendant, the child's mother and the child's grandmother, under whose care the child was during the relevant time, "each owed an independent duty to [the child] and no duty was extinguished by the negligence of another." Canada 567 N.W.2d at 505. Likewise, in the present case, any duty owed by Peggy Foss to her son, and her negligence, if any, do not extinguish the duty owed by the Kincades. The negligence, if any, of Peggy Foss is a matter to be submitted to, compared and decided by a jury. Here, as in Canada, the analysis in Sirek does not eliminate Defendants' duty to David Foss, Jr.

In its decision below the Court of Appeals made reference to another case that, like Sirek is inapposite here. That case is Sunnarborg v. Howard, 581 N.W.2d 397

(Minn. App. 1998). In Sunnarborg a child was the victim of sexual abuse at the hands of her father while the two of them were residing with the child's uncle. In the resulting lawsuit brought on behalf of the child victim, the Plaintiff asserted claims of negligence against the uncle for his failure to protect the child. The issue in the case focused on whether a "special relationship" existed between the uncle and the victim such as would have imposed a duty upon the uncle to protect the child from the abusive acts of the perpetrator.

In its discussion of the issue of whether the uncle-niece relationship and residence of the involved persons established a "special relationship" the court noted that "[a] custodial parent has a special relationship to a dependent and vulnerable child that gives rise to a duty to protect the child from harm." Sunnarborg, 581 N.W.2d at 399, quoting Lundman v. McKown, 530 N.W.2d 807, 820 (Minn. Ct. App. 1995), *review denied* (Minn. May 31, 1995), *cert denied* 516 U.S. 1092 (1996). The circumstances presented in Sunnarborg were entirely different from those presented in the present case, and the court's general statements about a parent's responsibility for a child cannot be stretched so far as to eliminate Defendants' duty here. Notably, Sunnarborg, unlike the present case, did not involve a premises hazard, nor was the hazard in question – a preying sexual abuser – one of the uncle's creation or maintenance. The Sunnarborg case cannot be read to stand for the proposition that in the presence of a parent, no other relevant party owes a young child any duty to eliminate or warn of dangerous conditions on property.

Thus, because the mere presence of Peggy Foss in the Kincade house at the time of the accident cannot cut off the Kincade's duty to young David Foss, Plaintiff must be permitted to place his claims before a jury.

D. The Claimed Obviousness of the Danger to Peggy Foss Does Not Negate Defendant's Duty.

1. The alleged obviousness of danger to a parent may not be imputed to a child.

The Kincades have also argued that the danger presented by the empty, unsecured book case was obvious and that for that reason they owed no duty to take steps to eliminate or warn of the danger. The Kincades are not entitled to shield themselves from duty with the "obvious danger" argument.

No one has suggested that the danger posed by the tippy book case would have been obvious to David Foss, Jr., barely three years old at the time of the accident. Instead, the argument that the danger was obvious ties into the Defendant's contention that they owed no duty because Peggy Foss was present. This argument must fail because it has the effect of imputing claimed negligence of the parent to the child. As noted in the Canada case and discussed above, however, each of the various actors owes an independent duty, and the alleged negligence of one actor does not extinguish the duty of another actor. And, the claimed negligence of a parent may not be imputed to an injured infant. See, Mattson v. Minnesota and N.W.R. Co., 95 Minn. 477, 104 N.W. 443, 448 (1905).

2. The danger posed by the book case would not have been obvious to Peggy Foss.

In this case, moreover, while the danger may have been obvious to persons possessing the Kincade's knowledge, it would *not* have been obvious to Peggy Foss. Peggy Foss testified that she had not seen the book case on the day of the accident. At the time of the accident, and from her position in a different room, Ms. Foss could only see "some" of the room in which the book case stood. Peggy Foss Dep., 50, A-78. The Kincades had recently moved into their house, and to the extent Peggy Foss had been in the home before the day of the accident, there is no evidence that the book case was in the room in question or even in the house on any such prior occasion.

Even if Ms. Foss had actually seen the book case or could have seen the book case from her vantage outside the room, the fact that the Kincades had not taken steps to secure the book case to the wall would not have been apparent to Ms. Foss. Stabilizing screws, straps or brackets for securing the book case would necessarily have been attached to the rear of the unit and the absence or presence of such hardware would not have been visible. In short, simply seeing the book case – even if she *could* have seen it – would not have given Peggy Foss reason to suspect that the item had not been properly secured.

The danger here was obvious to the Kincades. It was *not* obvious to Peggy Foss or others not possessing the Kincades knowledge regarding the book case and its

unsecured condition. For persons other than the Kincades, the danger was latent. Hence, Defendants are not absolved of duty by the claimed obviousness of the hazard. A finding of duty under such circumstances is in keeping with law providing that duty exists, including a duty to warn, with respect to even obvious dangers "when the homeowner can nonetheless anticipate that the dangerous condition will cause physical harm." Betzhold v. Sherwin, 404 N.W.2d 286, 289 (Minn. Ct. App. 1987), citing Peterson v. W.T. Rawleigh Co., 274 Minn. 495, 144 N.W.2d 555, 557-58 (1966).

In addition, even if the hazard were deemed constructively obvious as to Peggy Foss, any failure on her part to identify the danger and protect her son from it goes to her negligence, if any, relative to that of the Kincades. As stated in the Canada case the negligence, if any, of one actor does not extinguish the duty of other actors. See, Canada 567 N.W.2d at 505.

E. The Accident Giving Rise To This Case Was Foreseeable.

The accident that injured David Foss, Jr. was foreseeable. The tipping hazard posed by items such as the relatively tall and narrow book case involved in this matter is well-recognized. It is for that reason that an established market exists for hardware or devices intended to secure such items to walls or otherwise prevent them from falling over. The Kincades actually recognized the tipping potential of an item such as the book case. Jeremy Kincade Dep., p. 30, A-33. The hazard presented by the book case is

clearly one which is generally recognized by persons of ordinary prudence possessing the knowledge that the Kincades possessed.

In addition to their knowledge of the presence of the hazard in question, the Kincades also possessed actual knowledge of the tendency of young children – and David Foss, Jr. in particular – to be “active.” It is a virtual certainty, not an improbability, that a boy scarcely three years of age may at times elude the efforts of his parents to keep him in sight. The Kincades cannot be permitted to disclaim this common knowledge nor to rely upon any contention that a toddler once told not to climb or explore will not, in fact, do so.

In the face of such facts, it cannot be credibly argued that the accident was unforeseeable. This is not a circumstance in which a wildly improbable possibility became reality by coincidence of freakish circumstances. This case involves an instance in which the well-recognized danger of a tall object toppling onto a child occurred when a typically active and inquisitive three year old boy either climbed or bumped a tipsy book case that was not secured. The accident that occurred in this case was, indeed, objectively reasonable to expect and not merely within the realm of “any conceivable possibility”. Compare, Whiteford v. Yamaha Motor Corp., 582 N.W.2d 916, 918 (Minn. 1998) (hazard deemed unforeseeable where, by freak accident, young sled rider struck stationary snowmobile in precisely the right manner so as to suffer a severe cut from

exposed metal on the underside of the machine.) The notion that the events of this case were unforeseeable is simply incorrect and counterintuitive.

To the extent that the Kincades argue that it was unforeseeable that Peggy Foss would not keep young David continually within her sight or would be unable to patrol ahead of him every moment to steer him away from hazards such as the book case that the Kincades may have had in their home, they are arguing a pure fiction. The Kincades, like any parent of a toddler, were aware that unless such a toddler is physically fettered to a parent it is absolutely foreseeable that the child playing with others in a house is likely to encounter hazards that exist while outside the immediate supervision of a parent or other caretaker. And, a parent such as Peggy Foss should be entitled to assume that hazard such as the unsecured book case would not exist in a house inhabited by small children.

There is no reason to immunize the Kincades from the duty of care owed by a landowner to an entrant. Plaintiff's claims should be submitted to a jury pursuant to ordinary standards of negligence, in keeping with the general principles of Peterson v. Balach, 294 Minn. 161, 199 N.W.2d 639 (1972). Young David Foss, Jr. should not be denied the opportunity to present his claims merely because his mother was present on the day of the accident or because injury befell him in a home and not a business establishment.

F. Public policy does not justify elimination of the Kincade's duty.

Public policy considerations cannot be said to call for immunizing a homeowner from duty to secure a known hazard such as the tippy book case involved here. The Kincades suggest that if they are subject to the duty of reasonable care applicable to possessors of land under Minnesota law, they will be required to insure the safety of all guests in their residence and to "childproof" their house. Such a contention is alarmist and fails to recognize that the existence of a duty does not necessarily mean that a finding will ultimately be made that the duty was breached. The existence of a duty means simply that a finder of fact may consider whether, under the applicable facts and circumstances, the defendant met the obligation to act in a reasonable manner in upholding that duty. To immunize a homeowner from even the duty to take reasonable steps to secure hazards located in the home is hardly a desirable policy.

The Kincades would apparently have this Court designate the family home a "duty free" zone in which the possessor would only be obligated to take only whatever protective measures, if any, they subjectively believe are reasonable. That is simply not the law, nor is it desirable policy.

If the homeowner has no duty to take reasonable measures to secure in-home hazards, any visitor invited to a home must, upon crossing the threshold, inspect the entire residence for possible dangers lurking there. Such an obligation is unrealistic and untenable. Surely, it is not an undue burden to require the owner, the person who lives in

and is most familiar with the premises, to take measures that are reasonable for the safety of entrants and where, as here, the owner knows that such entrants may be inquisitive youngsters who are unlikely to recognize hazards that are apparent to the owner, to secure such hazards or bring them to the attention of the child's elders. The imposition of an unrealistic onus of inspection upon a visitor to a private home is out of keeping with authority that entitles a visitor to assume that his or her host has acted reasonably in making the premises safe. See, Sanders v. Boulevard Del., Inc., 277 Minn. 199, 152 N.W.2d 132, 135 (1967).

The question of liability in this case at hand is precisely the sort of question that a jury should answer. A jury of the Kincade's peers can and should evaluate the circumstances. Those jurors can determine whether securing the book case or providing some warning to Ms. Foss would have constituted some sort of unduly burdensome, unreasonable "child proofing" or whether securing the book case would have been something a reasonable person possessing the Kincade's knowledge of the hazard could and should have done.

G. The Issue Of Foreseeability Is A Question For The Jury In This Case.

"Close questions on foreseeability should be submitted to the jury." Lundgren v. Fultz, 354 N.W.2d 25, 28 (Minn. 1984). In this case, it is evident that the Kincade's owed a duty "to use reasonable care for the safety of all such persons invited upon the premises..." Peterson v. Balach, 199 N.W.2d at 642

The Court of Appeals, in its decision below, acknowledged that where the issue of foreseeability is clear, the courts should decide it, but that in closer cases, the issue should be sent to the jury. Decision of the Minnesota Court of Appeals Foss v. Kincade, 746 N.W.2d 912, 916, A-98, citing Whiteford v. Yamaha Motor Corp., 582 N.W.2d at 918. This is a case here, if the existence of the Kincade's duty is not clear, the question must *at least* be submitted to the jury. It should be for the jury, not the court, to evaluate whether or not it is foreseeable that an active toddler might momentarily elude the watchful eye of his mother and encounter a tippy book case in a private home. Here, Plaintiff has presented at least meritorious arguments as to whether the risk of the book case tipping was objectively foreseeable to the Kincades.

Therefore, the issue of foreseeability, if not resolved in Plaintiff's favor as a matter of law, must be submitted to the jury. See, Laske v. Anoka County, 696 N.W.2d 133 (Minn. Ct. App. 2005) review denied, August 16, 2005 (Minn.)

H. The Kincade's Spoliation Of Evidence Should Preclude Summary Judgment In Their Favor.

Where, as here, a defendant has disposed of evidence relevant to the disputed issue of foreseeability that defendant should not be entitled to benefit from a judicial decision that the harm suffered was not foreseeable. "Spoliation" is the destruction of evidence. Wajda v. Kingsbury, 652 N.W.2d 856, 861 (Minn. Ct. App. 2002). In this case, the record indicates that the Kincades were specifically notified of a pending claim relating to the book case, were advised to keep the book case, and nonetheless disposed of it

thereafter. Although the issue was briefed and argued, the trial court did not address the spoliation issue. The Court of Appeals, in its ruling below, concluded that no prejudice resulted from the destruction of the evidence because there was no dispute that it could have been secured to the wall and that its "precise characteristics" were not relevant. In fact, however, the book case itself would be relevant and its loss is prejudicial to Plaintiff.

Because the book case has been destroyed, it cannot be examined to determine if, for example, it was labeled with a warning or directive as to whether it should be allowed to stand without securing hardware or whether it contained any caution against placing it in a location readily accessible to children. Mr. Kincade testified that he did not remember seeing any such warnings on the book case. Jeremy Kincade Dep., p. 28, A-32. Without the book case, Plaintiff is not able to verify whether Mr. Kincade's recollection is accurate.

While it is true that no one disputes the fact that the book case could tip, the Kincades contend that the accident that injured David Foss, Jr. was neither foreseen nor foreseeable by them. If the specific book case in question bore a warning label directing the user not to place the book case in a location frequented by children or directing that it not be used without stabilizing or securing hardware, such labeling would be highly relevant to the question of whether it was reasonable for the Kincades to have anticipated harm from this specific book case and whether it would have been reasonable for them to have followed the directives any such labeling may have given. Similarly, if the specific

book case bore evidence that the Kincades had previously secured it to a wall, that fact would evidence their knowledge of the hazard and speak to the foreseeability of the accident and the reasonableness of the Kincade's actions. Again, because the Kincades have discarded the book case, the presence or absence of any such indicia of foreseeability and reasonableness cannot be known. That loss is prejudicial to Plaintiff; hence, Plaintiff should be entitled to the inference that the discarded book case would tend to reflect knowledge of the hazard, ease of ameliorating the hazard and foreseeability of harm. See, Wajda v. Kingsbury, 652 N.W.2d 856, 861 (Minn. Ct. App. 2002), review denied, November 19, 2002 (Minn.).

CONCLUSION

David Foss, Jr. was injured when a foreseeable risk of harm became reality. The lower court decisions to the contrary incorrectly extinguished the Kincade Defendants' duty based primarily on the presence of young David's mother and based on the faulty premise that the hazard in question was obvious to her. Even if Ms. Foss were found to be negligent in some way, such negligence, if any, does not eliminate the Kincade Defendants' duty. Accordingly, the trial court's grant of summary judgment in favor of the Kincade Defendants and the Minnesota Court of Appeals decision affirming that grant must be reversed and the case remanded for trial.

Dated: 7-11-08

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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 5,695 words, as determined by employing the word counter of the word-processing software, Microsoft Word 2002, used to prepare it.

Dated this 11th day of July, 2008.

Dated: 7-11-08

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