

NO. A07-0313

State of Minnesota
In Supreme Court

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

v.

JEREMY KINCADE AND STEPHANIE KINCADE,
Respondents,

and

PEGGY FOSS,
Third-Party Respondent.

APPELLANTS' REPLY BRIEF

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INTRODUCTION

Respondents contend that they did not owe David Foss, Jr. the ordinary duty of care owed by all possessors of land to entrants. They would have the Court ignore plain indicia of foreseeability of harm to permit the trial court's grant of summary judgment to stand, and they claim that a contrary ruling will radically change the landscape of Minnesota tort law.

Respondents have not, however, articulated any compelling basis to shield them from the common law duty owed by all possessors of land. This is a negligence case. Because this case, like most negligence cases, "involves standards of reasonableness and causation uniquely suited for jury consideration" (Abo El Ela v. State, 468 N.W.2d 580, at 582-583 (Minn. Ct. App. 1991)), summary judgment disposition was inappropriate. The decisions of the trial court and of the Court of Appeals below must be reversed and the case remanded for jury trial.

ARGUMENT

A. There Are Ample Indicia Of Foreseeability In This Case.

Respondents conclude the opening section of their brief with the following statement: "There is nothing in the record to support Appellant's claim that the accident involved here was foreseeable." Respondent's Brief at p. 8. This statement ignores at least the following:

- Respondents were aware of the tipping propensity of the book case in question. A-33.

- Respondents were aware that the book case was not secured to the wall or floor. A-33, A-41.
- Respondents were aware that the book case stood on a carpeted floor. A-33.
- Respondents were aware that the book case was empty. A-33.
- Respondents were aware that children, including their own young children and including David Foss, Jr. were permitted to play throughout the house. A-35.
- Respondents were aware that David Foss, Jr. was an active toddler – sufficiently so aware as to characterize him as more active than their own young son. A-59.
- Respondents are aware or should have been aware of the common tendency of young children to elude the watchful eye of their parents.
- Items such as the book case in this case indisputably pose a tipping hazard precisely because young children tend to climb on them or otherwise play on or around them in such a way as to cause them to tip. A-93,94.
- Items such as the book case in question are the subject of warnings placed by manufacturers against climbing on them or permitting them to be climbed upon. A-94.
- Items such as the book case are commonly fitted with hardware for the purpose of securing them against tipping. A-93-94.
- David Foss, Jr. was injured when the unsecured book case toppled onto him.

Respondents' contention that there is nothing in the record providing any indicia that the accident was foreseeable cannot stand in the face of this record. Respondents seek to confound the term "foreseeable" and to turn it into a mysterious word understandable only to lawyers. The analysis of the issue here must be seasoned with some common sense. So viewed, it cannot be said that there is no basis upon which Respondents could have foreseen, in any reasonably plain meaning of the word, the occurrence of the accident in this case.

It is not required that Respondents have foreseen the particular method in which an accident occurred, only that the possibility of an accident would have been clear to a person of ordinary prudence. See, Oswald by Theis v. Law, 445 N.W.2d 840 at 842 (Minn. Ct. App. 1989), review denied November 15, 1989. (duty found to exist as to claims involving injury to a minor bicyclist who struck a legally parked camper on a street and was injured by protruding turnbuckle hook on the camper which the owner had left exposed.)

The present case is not one, such as Whiteford v. Yamaha Motor Corp., 582 N.W.2d 916 (Minn. 1998), in which circumstances oddly conspired to produce injury. In that case, a young boy, while sledding, ran into a Yamaha snowmobile that happened to be parked near the endpoint of his sled run. He just happened to strike it in just such a way as to pass between the skis of the machine and further happened to strike it in such a way that his face hit a sharp edge or protrusion on the underside of the machine. In contrast to the present case, the factual link between the alleged negligent design or manufacture in that case and the injury was a lengthy diaphanous wisp. The venerable Palsgraf case referenced by Respondents likewise involved a tenuous series of events that one would have been hard pressed to imagine, commencing with an inadvertent dropping of fireworks on rails to a ruckus on the rail platform and the eventual toppling of a scale there which injured the plaintiff. See, Palsgraf v. Long Island Ry. Co., 248 N.Y.S. 339, 162 N.E. 99 (1928).

The Slinker and Meagher cases cited by Respondents lend no support to their position. In Slinker the significant factor mitigating against a finding of foreseeability in that case involving a child who fell off a wall and drowned in Duluth harbor was that “the record was “completely devoid of any evidence from which an inference could reasonably be drawn that the owners or occupiers of the premises involved knew or had any reason to know that children could be expected to play on these grounds any more than it is generally known that they might be found anywhere.” Slinker v. Wallner, 258 Minn. 243, 103 N.W.2d 377 at 383. In the present case, by contrast, the Kincades were specifically aware that children could be expected to play anywhere within their home, including the area where the unsecured book case stood. In addition, there is record evidence of the known propensity of children to climb on book cases of this nature, the empty shelves of such cases presenting a veritable ladder.¹ See Affidavit of Jon Tofte Exhibit, A. – 91-95.

In the Meagher case, the alleged negligence was the stacking of slate boards in a manner and in a place where children might encounter them. The Meagher court noted that “there was nothing about the pile of slate boards which was in any way attractive to

¹ In this case, other specific evidence of knowledge the Respondents may have had regarding the propensity of children to climb such articles may have been lost because Respondents destroyed the book case after having been notified to preserve it. Having disposed of the evidence, Respondents should be charged with this knowledge, if they otherwise attempt to disclaim knowledge of the propensity of young children to find book cases such as that involved in this case an attractive climbing venue.

children.” Meagher v. Hirt, 232 Minn. 336, 45 N.W.2d 563 at 565 (1951). Again, this is by contrast with the matters in the record here which show that the attractiveness of items such as the book case and the tendency of children to climb such items are well recognized. In addition, and by further contrast to the present case, there was no evidence in Meagher that the boards had been incorrectly stacked. There was no evidence that, unless the boards were simply not to be permitted on the site, they could have been stored there in any other manner than they were. Here, the book case, being empty and unsecured, was not being properly displayed or used. Finally, in Meagher the alleged link between the falling boards and the injury was the desire of the injured child in question to reach a piece of chalk that happened to be lying behind the slate boards. The plaintiff there alleged that the defendant should have recognized that a child might want to reach the piece of chalk and that, in attempting to do so, the child might somehow pull on the stacked boards in such a manner that they would fall onto the child. Thus, as alleged there, the child’s interference with the slate boards was not a function of the child’s interest in the boards themselves but of the child’s attempt to reach some other item that the defendant did not even know to be present. The stepping stones between the alleged negligence and the ultimate injury in Meagher are more numerous and separated than the direct path from recognized tipping hazard to injured toddler presented in the case before the Court.

The Pepperling case cited by Respondents involved a child who, at age seven, was more than twice the age of David Foss, Jr. at the relevant time. See, Pepperling v.

Emporium Mercantile Co., 199 Minn. 328, 271 N.W. 584, at 585 (1937). The child injured in Pepperling was likely capable of recognizing that the lid of a propped open cedar chest could fall shut if tampered with. Further, the potential and likely gravity of risk from the lid of an ordinary cedar chest dropping is small when compared to the greater gravity of risk from a toppling book case.

B. Considerations of “Reasonableness” Do Not Eliminate Duty.

Perhaps recognizing that the direct path from the known tipping hazard to the tipping injury in this case renders their argument against foreseeability weak in the face of any ordinary understanding of the term “foreseeable,” Respondents invoke the term “reasonableness” to argue that the burden of taking reasonable care to secure or warn of the book case is too onerous and signals the bugbear of “childproofing.” Thus, they claim, while the accident and resulting injury may have been foreseeable in the ordinary sense of the word, it is not “reasonable” to place any burden upon the land owner to address the hazard.

This argument, however, goes not properly to the subject of duty. Rather, the argument goes to what the standard of care requires of the actor. The question of whether Respondents’ conduct met the standard of care is a question that a panel of jurors composed of the parties’ peers should determine. Just as jurors should determine whether the driver of a car on a highway should or should not have been traveling at a certain speed or did or did not maintain the brakes of their vehicle in a manner that was reasonable, jurors, should determine whether Respondents acted reasonably when they

permitted their unsecured book case to stand empty in a room where children such as David Foss, Jr. would play.

Thus, Appellant's position here does not seek an expansion of the scope of liability for Minnesota homeowners. Neither does it seek, as Respondents protest, the imposition of strict liability upon Minnesota homeowners. Appellant seeks merely the application of tort law as it has existed for years and is entirely consistent with the system of jurisprudence that values and relies upon the deliberations of jurors and their decisions on such matters.

Appellant is not seeking the expansion of Minnesota tort law. He simply seeks the ordinary application of that law, a body of law under which landowners owe an entrant a duty of care to act reasonably in making their premises safe. See, Peterson v. Balach, 294 Minn. 11, 199 N.W.2d 639 at 642 (1972).

Respondents' "reasonableness" argument is the portal through which they seek to allow their view of appropriate public policy to enter into, and ultimately swallow, the discussion of what is plainly foreseeable. Respondents contend that if Appellant is permitted to present his claims to a jury, it will establish a duty to "childproof" the home. This is not so. Again, this case involves a known tipping hazard mixed with the presence of a toddler who, like other such toddlers, would be wont to find the hazard attractive and climbable, a toddler similar to that pictured in the sample warning depicted in the exhibit to the affidavit of expert Jon Tofte found in the record here. See, Affidavit of Jon Tofte, Ex. A, A-94.

However, the parents of young children should not be required to bear the burden of inspecting homes into which they and their children may be invited to discover a hazard such as a book case that is not secured from tipping. In Respondents' view, a child visiting the home of another plays at his or her risk because the homeowner does not even owe a duty to take care with respect to hazards, such as that at issue here, of which the homeowner is actually aware. It is much more sensible to place the fundamental duty to maintain a safe premises upon the owner and occupier of those premises than to excuse them from vigilance and place the primary burden upon the parent of the entrant child.

Under Respondents' view, the young girl in Canada v. McCarthy would have no remedy because requiring the premises owner to have abated or secured the leaded paint she unwittingly consumed would have been an unreasonable exercise in "childproofing." As the Canada case shows, that is not the law of Minnesota. See, Canada by and through Landy v. McCarthy, 567 N.W.2d 496 (Minn. 1997)

Contrary to Respondents' arguments, the sky is not falling. A finding that they have a duty to take reasonable care and the submission of their conduct to a panel of jurors will not impose a duty to "childproof" and will not fracture the backbone of Minnesota tort law.

C. The Fact That David Foss, Jr. Was An Invited Guest And Not A Trespasser Supports A Finding Of Duty.

Respondents point to Appellant's discussion of the child trespasser standard and contend that the duty owed to child trespassers is different from that owed to other

entrants. Respondents miss the point. As an invited guest, David Foss, Jr. 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) (emphasis added). Thus, while Respondents should be found to have owed him a duty under at least the trespasser standard applied in Szyplinski, they certainly owed him a duty as an invited entrant. The duty owed to an invited child cannot be less than the duty owed to a trespassing child.

In this regard, the Sirek case, discussed in Appellant’s initial brief, and as further informed by the analysis in Canada v McCarthy presents a contrast to the present case because the injured child in Sirek was by statute accorded only trespasser status because of the fact that the accident in question implicated the obligations of the State, not a private person. Those obligations, as the Court recognized in Canada are more limited than those which apply to non-state actors. See, Sirek by Beaumaster v. State of Minnesota Dept. of Natural Resources, 496 N.W.2d 807 (Minn. 1993)

D. The Presence Of Peggy Foss Does Not Subsume Respondents’ Duty.

As stated in Appellant’s initial brief, the Canada v. McCarthy case addresses the issue of what impact the presence of a young child’s parent should have in the present analysis. In Canada the hazard of lead paint was one which was or should have been obvious to the injured child’s parent. The statements of the Court in Canada squarely fit the circumstances presented here and compel the same determination by the Court now. The presence of the injured child’s parent does not extinguish Respondent’s duty. See, Canada v. McCarthy, 567 N.W.2d at 505.

It must also be noted that Respondents should be found to have owed David Foss, Jr. a duty, even under the principles articulated in the Court of Appeals' decision below. In reaching its decision, that court stated "the duty of reasonable care owed to all entrants may require homeowners to warn or protect both parent and child from latent dangers in their homes." Foss v. Kincade, 746 N.W.2d 912 at 917 (Minn. Ct. App. 2008).

In this case the danger - though obvious to Respondents who possessed knowledge of the book case's existence, its location in their home, its unsecured condition and its tipping propensity- was latent as to David Foss, Jr. who was simply not old enough to recognize it, and as to Peggy Foss. The record does not establish that she saw or had seen the book case in question either on the day in question or previously. Nor does the record contain evidence that the book case in question was in Respondents' home on any prior occasion when Ms. Foss may have been there. Further, even if there were evidence that she had in fact seen the book case, there is nothing in the record to suggest that she knew or should have known that Respondents had not taken any measures to secure it from tipping. Ms. Foss should not be charged with knowledge of Respondents' failure to secure the book case to the wall or floor. As to David Foss, Jr. and Peggy Foss, the danger of the book case was, in fact, latent. Hence, even under the Court of Appeals' analysis, the presence of Peggy Foss in these circumstances should not have eliminated Respondents' duty.

If Peggy Foss' presence is deemed properly weighed as a factual matter in considering the existence of duty, that presence, on the record before the Court, cannot so

dilute the duty as to eliminate it. And, surely, if the existence of Respondents' duty is not established as a matter of law, the issue must, in light of Canada and the record before the Court, be deemed a close question. As such, it should not be subject of court decision but of jury determination. Lundgren v. Fultz, 354 N.W.2d 25, 28 (Minn. 1984).

E. Respondent's Spoliation Of Evidence Is A Circumstance That Should Be Considered In Evaluating The Existence Of Duty And The Ultimate Question Of Negligence.

Respondents insist that the now-destroyed book case could not yield any evidence pertinent to the foreseeability argument upon which they rely. Respondents cannot be permitted to argue, as they do, that there is nothing in the record to show that they could have anticipated the harm in this case when they have disposed of the instrument of that harm. Contrary to their assertions, Respondents' destruction of the book case is, in fact, prejudicial to Appellant.

If the now destroyed book case bore securing or stabilizing hardware, or fittings for such hardware, or evidence that such hardware had once been attached, such evidence would show not only that Respondents specifically contemplated the danger, but that they had anticipated it and comprehended a responsibility to address it. The presence of a label instructing the user of the book case not to use it without securing it would be likewise compelling evidence of Respondents' reasonable anticipation of the probability of harm under the circumstances. Such evidence would be compelling evidence indeed on the issue of reasonable anticipation of danger. With the destruction of the book case

by Respondents, any such evidence is lost forever. They cannot now be allowed to benefit from this destruction by arguing a dearth of record evidence.

CONCLUSION

Respondents owed David Foss, Jr. a duty to take reasonable care in making their home safe for him, as an invited guest. There are abundant indicia of Respondents' knowledge of the hazard in question, and there is no dispute that simple preventative measures would have eliminated the danger and prevented the serious injury the young boy suffered.

The duty in question is properly borne by Respondents and, contrary to their protests, application of the duty accords with and does not expand Minnesota tort law. The Respondents owed the duty of care, and Appellant should be permitted to present his claims to a jury.

Respectfully submitted,

Dated: 8-26-08

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