LASKA V. ANOKA COUNTY: A QUEST FOR JUSTICE FOR AN INFANT WHO DIED OF SIDS RESULTING IN APPELLATE COURT FINDING DAY CARE HELPER OWES A DUTY TO PROTECT

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I. INTRODUCTION

The Minnesota Court of Appeals, in a rare ruling, held in *Laska v. Anoka County*[1] that a day care helper owes a duty to protect an infant in day care from foreseeable harm.[2] Infant Hannah Laska died of Sudden Infant Death Syndrome (SIDS) in a licensed day care staffed by the provider and her adult daughter, who had volunteered to help because her mother was caring for more children than her license allowed.[3] When an adult offers to help take care of the children in an overcrowded licensed day care, a parent would think the law would recognize that person owes a duty to care for those children. However, the district court in *Laska*

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1. 696 N.W.2d 133 (Minn. Ct. App. 2005), *rev. denied*, (Minn. Aug. 16, 2005).
2. *Id.* at 139-41.
3. *Id.* at 136-37.

found no such duty was owed under Minnesota law.[4]

The district court's ruling was not surprising. Minnesota courts have been cautious in imposing a duty to protect on businesses for public policy reasons.[5] The issue of whether a duty to protect another person is owed typically arises in two kinds of cases: (1) when the plaintiff is the victim of a crime on the premises of a business or property owner,[6] and (2) when a vulnerable person is in the custody of another and is deprived of the opportunity for self-protection.[7] *Laska* falls in the latter category of cases, in which the courts may find a duty to protect arises if there is a special relationship between the parties.[8] In holding that the day care helper in *Laska* owed no duty to protect Hannah, the district court relied on a Minnesota Supreme Court holding that a landlord owes no duty to protect a tenant from being murdered.[9]

Whether a duty to protect is owed is ultimately a matter of public policy.[10] By reversing the district court's grant of summary judgment to the day care helper in *Laska*, the Minnesota Court of Appeals demonstrated yet again the value Minnesota courts place on protecting vulnerable infants and children.[11]

This Article reviews the prior cases in Minnesota in which the appellate courts have considered whether a duty to protect was

4. Order and Memorandum, Laska v. Anoka County, No. C1-03-8400, at 3 (10th Dist. Ct. Minn. July 6, 2004).

5. *See* Erickson v. Curtis Inv. Co., 447 N.W.2d 165, 168-69 (Minn. 1989).

6. *See id.* at 169-70.

7. *See* Gilbertson v. Leininger, 599 N.W.2d 127, 130-31 (Minn. 1999).

8. *Laska*, 696 N.W.2d at 138 (citing *Gilbertson*, 599 N.W.2d at 130-31; Harper v. Herman, 499 N.W.2d 472, 474 (Minn. 1993)).

9. Order and Memorandum, *supra* note 4 (relying on Funchess v. Cecil Newman Corp., 632 N.W.2d 666 (Minn. 2001) (holding landlord not liable for tenant's murder because the landlord-tenant relationship did not create a special relationship)).

10. *See Funchess*, 632 N.W.2d at 673; *Erickson*, 447 N.W.2d at 169.

11. *See Laska*, 696 N.W.2d at 138 (citing Andrade v. Ellefson, 391 N.W.2d 836, 842 (Minn. 1986) ("[S]mall children in a licensed day care facility are a particular protected class.")); *see also* Radke v. County of Freeborn, 694 N.W.2d 788, 799 (Minn. 2005) (holding county who had received reports of suspected abuse of a child owed a special duty to protect the child under the Child Abuse Reporting Act), *overruling* Hoppe v. Kandiyohi County, 543 N.W.2d 635, 638 (Minn. 1996) (holding there was no cause of action against a county under the Vulnerable Adults Reporting Act for failing to protect a vulnerable adult from financial abuse). As the Minnesota Supreme Court recognized in *Radke*, "[o]ur holding . . . conforms with the majority of other jurisdictions recognizing a duty on the part of social service agencies to investigate reports of child abuse and neglect." 694 N.W.2d at 798.

owed,[12] and analyzes how the court of appeals came to the conclusion that a duty should be recognized in *Laska*,[13] despite the Minnesota courts' reluctance in the past to find a duty to protect.

II. THE HISTORY AND CASES LEADING TO *LASKA*

Minnesota courts hold, as a general rule, that there is no duty to protect another from harm caused by third persons, with narrow exceptions recognized in cases involving innkeepers, common carriers, those who possess land that is open to the public, and those who have custody of another person who is deprived of the opportunity of self-protection.[14] In those instances, the courts find a duty may be owed based on the "special relationship" between the parties.[15] The following is a review of the cases leading up to *Laska*, in which the Minnesota appellate courts have applied the general rule and its exceptions. As set out below, in only three cases prior to *Laska* did the courts hold that a duty was owed.

Twenty years ago, the Minnesota Supreme Court held in *Andrade v. Ellefson* that a county was in a special relationship with the children in a licensed day care giving rise to a duty to protect.[16] In *Andrade*, two seven-month-old boys suffered head injuries at the licensed day care facility.[17] The county had received several complaints from a neighbor about overcrowding at the day care, but the county did little to investigate those complaints.[18] The injured infants' parents sued Anoka County, alleging the county was negligent in conducting licensing inspections, supervising, and investigating complaints about the licensed day care facility.[19]

The Minnesota Supreme Court in *Andrade* recognized that ordinarily a county does not owe a common law duty to prevent a third person from injuring another unless there is a "special relation."[20] Moreover, liability may not be imposed on a municipality for negligence in performing its "many functions in which the government protects the general public" unless the

12. *See infra* Part II.
13. *See infra* Part III.
14. Harper v. Herman, 499 N.W.2d 472, 474 (Minn. 1993) (citing RESTATEMENT (SECOND) OF TORTS § 314A (1965)).
15. *Id.*
16. 391 N.W.2d at 841.
17. *Id.* at 837.
18. *Id.* at 839.
19. *Id.* at 837-38.
20. *Id.* at 841.

municipality owed the plaintiff a "special duty."[21] To determine whether the county in *Andrade* owed a duty to the infants in the day care different than the duty it owed the public in general, the court applied its analysis in *Cracraft v. City of St. Louis Park*.[22] The Minnesota Supreme Court stated the decisive factor giving rise to a special duty in *Andrade* was the statutes and regulations governing day care licensing, which the court held were enacted to protect the "uniquely vulnerable" children in licensed day care facilities.[23]

> [The Public Welfare Licensing Act] clearly mandates that small children in a licensed day care facility are a particular protected class. The class consists of uniquely vulnerable persons: small children, often infants, left by their working parents in a home other than their own, and left in the care of another person for some period of less than 24 hours of the day.[24]

The supreme court concluded the "statutory mandate to protect a certain class . . . [was] so overwhelmingly dominant that we have no difficulty in finding a 'special relation' exists between the county and the small children in the day care homes that it inspects for licensure."[25] The court found that the operation of child day care facilities presents "a high risk of liability exposure," which in turn "underscores the need for adequate inspection."[26]

21. *Id.*

22. 279 N.W.2d 801 (Minn. 1979). The supreme court in *Cracraft* applied a four-part test to determine if a municipality "assumes a special duty owed to certain members of the public" that is distinguishable from the "many functions in which the government protects the general public." *Andrade*, 391 N.W.2d at 841. Factors the court considers include: "(1) actual knowledge by the municipality of the dangerous condition, (2) reasonable reliance on specific representations of the municipality, (3) a statutory duty for municipal protection of a particular class, and (4) municipal action which increases the risk of harm." *Id.* (citing *Cracraft*, 279 N.W.2d at 806-07).

23. *Andrade*, 391 N.W.2d at 842.

24. *Id.*

25. *Id.* at 843.

26. *Id.* Justice Rosalie Wahl, concurring specially, put it this way:

> The rules governing the licensing of family day care homes are detailed and comprehensive . . . . When a county licenses a child care facility, it represents to parents that these demanding standards have been met. This is not a general representation, but a representation that this specific licensee is a suitable person to have charge of children and that this particular facility provides adequate care and surroundings for young children . . . . Licensing standards are of critical importance to parents seeking adequate, nurturing child care and parents rely on enforcement of these rules. Parents who require child care have a special need to rely on the representation of quality indicated by licensing . . . . There is no

Based on its finding of a special relationship between the county and the children in licensed day care facilities, the court held the county owed a special duty to the plaintiffs in *Andrade*.[27]

The Minnesota Supreme Court next held a duty to protect arose in 1989 in *Erickson v. Curtis Investment Co.*[28] In *Erickson*, the plaintiff, who was a customer of a parking ramp owned and operated by the defendants, was assaulted and raped by a third party while in that parking ramp.[29] The court considered whether the defendants owed a duty to protect the customer from criminal assaults by third parties.[30] The court recognized a duty to protect depends on the relationship of the parties and the foreseeability of the harm.[31] The court stated:

> If the law is to impose a duty on A to protect B from C's criminal acts, the law usually looks for a special relationship between A and B, a situation where B has in some way entrusted his or her safety to A and A has accepted that entrustment. This special relationship also assumes that the harm represented by C is something that A is in a position to protect against and should be expected to protect against.[32]

The court in *Erickson* noted that, "the law has been cautious and reluctant to impose a duty to protect" on businesses.[33] "Ultimately, the question is one of policy."[34] The court considered the defendants' policy arguments that law enforcement is a government function and a jury would have to speculate to conclude additional security would have prevented the crime.[35] The court also considered that the parking lot was in a downtown metropolitan area, was dimly lit with low ceilings, and was full of unoccupied cars—conditions which attracted criminal activity.[36] The court concluded these characteristics presented a

> other source through which parents can get reliable information about this essential service than from the county, the licensing and inspection authority.

Id. at 844 (Wahl, J., concurring specially).

27. *Id.* at 843 (majority opinion).
28. 447 N.W.2d 165, 169-70 (Minn. 1989).
29. *Id.* at 166.
30. *Id.* at 168-70.
31. *Id.*
32. *Id.* at 168.
33. *Id.*
34. *Id.* at 169.
35. *Id.*
36. *Id.*

> unique opportunity for criminals and their criminal activities . . . which to some degree is different from that presented out on the street and in the neighborhood generally. We do not think the law should say the operator of a parking ramp owes no duty to protect its customers. Some duty is owed.[37]

Though the court initially stated the existence of a duty to protect from criminal harm depended on the relationship of the parties, the court did not analyze the relationship between the plaintiff and the defendants.[38]

The court also ruled in *Erickson* that the security company hired to patrol the ramp owed the plaintiff a duty to protect her from the criminal assault.[39] The security company argued it did not owe a duty to the plaintiff, who was a customer of the parking ramp and not the adjoining hotel, which hired the security company.[40] The court reasoned the security company undertook a duty to patrol the entire ramp and all of its customers, including the plaintiff.[41] The court relied on *Restatement (Second) of Torts* section 324A to state that liability is imposed "on a defendant who undertakes for another (whether gratuitously or for a consideration) to perform a duty owed by the other to a third person."[42] Thus, when the security company was hired to protect the hotel's customers, it also undertook a duty to protect the

37. *Id.*

38. The court in *Erickson* did not cite or rely on its ruling in *Andrade*. Instead, the court relied on two of its prior rulings and a court of appeals ruling in cases where plaintiffs tried to hold defendants liable for their failure to protect plaintiffs from criminal acts of third parties. *Id.* at 168 (citing Pietila v. Congdon, 362 N.W.2d 328, 333 (Minn. 1985) (holding defendant trustees as possessors of land did not owe duty to prevent murder of nurse of trust beneficiary in beneficiary's home, reasoning "[i]nasmuch as no police force has ever achieved that goal, the plaintiff cannot intend the imposition of an absolute obligation to prevent all crime")); Sylvester v. Nw. Hosp. of Minneapolis, 236 Minn. 384, 43 N.W.2d 17 (1952) (holding hospital owed a duty to protect its patient from assault and injury when it knew or should have known another patient who was staggering and intoxicated was likely to injure other patients, taking into account the vulnerability of the patient and foreseeability of the danger); Roettger v. United Hosps. of St. Paul, Inc., 380 N.W.2d 856 (Minn. Ct. App. 1986) (affirming denial of motion for new trial because there was sufficient evidence the hospital's failure to provide adequate security was a direct cause of patient's injury from assault by hospital trespasser)).

39. *Erickson*, 447 N.W.2d at 170.

40. *Id.*

41. *Id.*

42. *Id.*

parking ramp's customers.[43]

Following the Minnesota Supreme Court's ruling in *Erickson*, Minnesota courts have routinely rejected claims of a duty to protect. For example, in 1993 in *Harper v. Herman*, the supreme court considered whether a boat owner owed his social guest, a twenty-year-old man who was injured when he dove from a boat into shallow water, a duty to tell the guest that the water surrounding the boat was too shallow to dive.[44] The guest argued that a special relationship required the boat owner to protect him when the boat owner, "as a social host, allowed an inexperienced diver on his boat."[45] The court recognized that generally a special relationship giving rise to a duty "is only found on the part of common carriers, innkeepers, possessors of land who hold it open to the public, and persons who have custody of another person under circumstances in which that other person is deprived of normal opportunities of self-protection."[46] The court further noted that in instances where a duty is owed because someone has custody of another person, "the plaintiff is typically in some respect particularly vulnerable and dependent upon the defendant who, correspondingly, holds considerable power over the plaintiff's welfare . . . . Fairness in such cases thus may require the defendant to use his power to help the plaintiff, based upon the plaintiff's expectation of protection . . . ."[47]

The supreme court in *Harper* found that the plaintiff was neither vulnerable nor lacked the ability to protect himself.[48] The court distinguished its prior holding in *Andrade*. "*Andrade* involved a group of plaintiffs who had little opportunity to protect themselves, children in day care, and a defendant to whom the plaintiffs looked for protection. In this case, Harper was not deprived of opportunities to protect himself, and [the boat owner] was not expected to provide protection."[49]

The Minnesota Supreme Court next considered the duty to protect in 1995 in *Donaldson v. Young Women's Christian Ass'n of*

43. *Id.*
44. 499 N.W.2d 472, 473-74 (Minn. 1993).
45. *Id.* at 474.
46. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 314A (1965)).
47. *Id.* at 474 n.2 (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAWS OF TORTS § 56, at 374 (5th ed. 1984)).
48. *Id.* at 474.
49. *Id.* at 475.

Duluth, when it again found no duty was owed.[50] The decedent committed suicide while she was a resident of a Young Women's Christian Association (YWCA) housing facility in Duluth, Minnesota.[51] The decedent had rented a room from the YWCA on a monthly basis.[52] The facility had a front desk that was staffed twenty-four hours a day and handled mail and incoming calls for residents who did not have private phones in their rooms.[53] The YWCA also patrolled the halls of the facility during nighttime hours.[54] Decedent, who had a borderline personality disorder and was being treated by a psychiatrist, committed suicide in her room.[55] There was some evidence the YWCA was aware the decedent was in distress.[56] The supreme court reasoned that even if it assumed the YWCA ran its housing facility like a hotel and a special relationship was thus created similar to that recognized between an innkeeper and guest, that did not necessarily mean the YWCA had a duty to protect decedent from harming herself.[57] Though the court recognized a hospital may have a duty to protect patients from foreseeable suicides, the relationship between the decedent and the YWCA "bore little resemblance to the caretaking relationship of a hospital toward its patients . . . ."[58] The YWCA was not aware of decedent's medical history, did not provide services or have the expertise to treat mental health problems, and did not have custody or control of decedent.[59] Additionally, decedent had not entrusted her care to the YWCA, which in turn did not agree to care for her and was not in a position to protect her from committing suicide.[60] The supreme court concluded "that the relationship between the YWCA and [decedent] lacked the degree of dependence and control necessary to form a special relationship which created a duty on the part of the YWCA to prevent [decedent's] suicide."[61]

50. 539 N.W.2d 789, 793 (Minn. 1995).
51. *Id.* at 790.
52. *Id.* at 791.
53. *Id.* at 791 n.1.
54. *Id.* at 790-91.
55. *Id.* at 791.
56. *Id.*
57. *Id.* at 792.
58. *Id.* at 793.
59. *Id.*
60. *Id.*
61. *Id.*; *see also* Bigos v. Kluender, 611 N.W.2d 816 (Minn. Ct. App. 2000) (holding that a landlord had no duty to warn a tenant not to grill items on balcony

Also in 1995, the Minnesota Court of Appeals recognized a duty of care was owed to a child who died of diabetes because he did not receive medical care. In *Lundman v. McKown*, an eleven-year-old child suffered juvenile onset diabetes but did not receive any medical treatment because the Christian Scientists who cared for him (including his mother) instead believed in providing spiritual treatment through prayer.[62] Because the child's mother and stepfather realized he was very ill, they hired a specially trained Christian Science practitioner to provide spiritual treatment.[63] This practitioner never came to the child's house, but was paid to pray for the child.[64] When the child's condition worsened, the mother and stepfather contacted a committee member of the Christian Science Church, and the committee member in turn contacted the mother church of the Christian Science religion regarding the child's illness.[65] The mother also hired a Christian Science nurse who came to the home and provided prayer and care to the child.[66] After four days of displaying increasingly worsening symptoms of juvenile onset diabetes, the child died without ever receiving any medical treatment because such treatment was against his mother's and stepfather's religious beliefs.[67]

The court of appeals held that the mother of the child had a duty to protect her vulnerable child from harm because she had a special relationship with the child.[68] The court of appeals also analyzed whether a duty was owed by: (1) the child's stepfather, (2) the Christian Science nurse, (3) the Christian Science practitioner hired to pray for the child, (4) a church official who reported the child's illness to the church, (5) a Christian Science nursing home, and (6) the Christian Science church.[69]

The court ruled the stepfather had a special relationship with the child because he assisted the child by calling the church committee member, carrying the child to and from meals, and attending to the helpless child's needs.[70] The court stated:

that started fire because courts are reluctant to impose liability for self-inflicted harm).

62. 530 N.W.2d 807, 814 (Minn. Ct. App. 1995).
63. *Id.*
64. *Id.* at 814, 822-23.
65. *Id.* at 814.
66. *Id.*
67. *Id.* at 813-15.
68. *Id.* at 820.
69. *Id.* at 820-26.
70. *Id.* at 820-21.

"Independent of [the stepfather's] conduct during [the child's] final illness, we believe there also is a presumption that 'custodial' stepparents (and 'visitation' stepparents during visitation) assume special relationship duties to stepchildren."[71] The court concluded the stepfather "was obligated to put [the child's] interests first—above and beyond [the mother's] interest in exercising her religious beliefs," and was obligated to "step forward to rescue" the child.[72]

The court found the Christian Science nurse had a special relationship with the child because the child was helpless and she accepted the responsibility of caring for him, by reading him prayers, comforting him, cleaning him, and attending to his physical care.[73]

> Both indicia of a "special relationship" apply: [the nurse] had significant "custody or control" of [the child] under circumstances where [the child] lacked even his limited minor's capacity for self-protection—that is why mother hired [the nurse]—and she accepted the responsibility to care for [the child] and to protect him by providing professional services in return for cash wages.[74]

The nurse argued she had no duty to advise medical treatment

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71. *Id.*

72. *Id.* at 821; *c.f.* Sunnarborg v. Howard, 581 N.W.2d 397 (Minn. Ct. App. 1997). In *Sunnarborg*, the court of appeals considered whether a minor's uncle was in a special relationship with her, which required him to protect her from being sexually abused by her father. 581 N.W.2d at 398. The uncle had assumed custody of the minor child in his own home, along with responsibilities for making sure she was cared for and attended school. *Id.* at 399. Subsequently, the minor's father moved in with the uncle and began sexually abusing his minor daughter. *Id.* The uncle continued to care for the child while the father lived in his home. *Id.* The court of appeals found the uncle did not owe any duty to protect the child from her father. *Id.* at 399. The court reasoned there had been no legal restriction or termination of the father's parental rights. *Id.* Once the father moved into the uncle's home, the uncle "was in the position of a social host." *Id.* The court further reasoned the father had not imposed any responsibility on the uncle to protect the minor child from her father, nor had the uncle agreed to accept such responsibility. *Id.* The court therefore concluded that when the father was present, no special relationship existed between the minor child and her uncle. *Id.* The court distinguished *Lundman* on grounds the stepfather in that case was married to the child's mother, and the other defendants in *Lundman* who were found to owe a duty had a contractual relationship with the child. *Id.* The court of appeals in *Sunnarborg* affirmed the grant of summary judgment in favor of the uncle on grounds he owed no duty to protect the minor child from being sexually molested by her father. *Id.* at 399-400.

73. *Lundman*, 530 N.W.2d at 821-22.

74. *Id.* at 821.

because that was "antithetical to Christian Science nursing."[75] She further argued the child's parents, not the nurse, decided what care the child should receive.[76] The court rejected both arguments, reasoning the nurse's duty was "to make [the child's] welfare her paramount interest."[77] "During a good part of her involvement, though it was brief, a telephone call to involve a provider of conventional medical care would likely have led to the administration of insulin and would likely have saved [the child's] life."[78]

The *Lundman* court next considered the duty owed by the Christian Science practitioner hired to pray for the child.[79] The practitioner argued his only duty was to pray for the child.[80] The court disagreed because the practitioner "accepted a responsibility to serve [the child] and thereafter, through conversations with the mother and nurse, held considerable power over [the child's] welfare."[81] The court noted the practitioner was in continuous contact with the mother and nurse from the time he was hired until moments before the child's death.[82] The court concluded the practitioner "accepted a professional's responsibility for [the child's] healthcare."[83]

By contrast, the *Lundman* court found no duty was owed to the child by the Christian Science church official who received three telephone calls about the child's health condition and notified church headquarters.[84] The court found no special relationship between the church official and the child because "neither of the two definitions of a 'special relationship' applies; [the church official] never accepted 'power' over [the child], [nor did he assume] a responsibility to protect him."[85] Rather, the church official "declined any personal obligation he might otherwise have assumed" when he told the child's parents to call a professional when they told him they wanted Christian Science care.[86]

75. *Id.*
76. *Id.*
77. *Id.* at 822.
78. *Id.* at 821.
79. *Id.*
80. *Id.*
81. *Id.* at 822.
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.* at 823.
86. *Id.*; *see also* H.B. *ex rel.* Clark v. Whittenmore, 552 N.W.2d 705, 706-09

Moreover, the church official was not in steady contact with the on-scene caregivers, and was not hired to pray for the child, but instead simply had knowledge of his illness.[87] "Mere knowledge of an illness, without either an assumed obligation of care or prior relationship, is insufficient to create a special relationship . . . . To base duty on mere knowledge with power would implicate neighbors, grandparents, and friends."[88] The court noted that basing liability on knowledge and power alone, without first establishing a legal duty was owed, "reduces the question of negligence into a 'but for' causation test," reasoning which has been rejected by the Minnesota Supreme Court.[89]

The court in *Lundman* similarly found no duty was owed by the Christian Science nursing home facility that had received several telephone calls regarding the child's care and sent a nurse to care for him.[90] The court reasoned the nursing home "never assumed 'considerable power' over [the child's] welfare," nor did it accept "any professional responsibility to serve [the child], but simply—without compensation—provided suggestions for care, in contrast to [the nurse] and [the practitioner], the professionals who were hired to actually care for [the child] on an ongoing basis."[91] The court rejected the plaintiff's argument that the nurse sent by the nursing home was an agent of the nursing home because the nursing home did not have any right to control the nurse's actions, the nurse could have refused the referral, there was no contact between the child's parents or the nurse and the nursing home after the nurse was engaged, and the nursing home was not paid for the services the nurse provided to the child.[92]

Finally, the court in *Lundman* found no duty was owed to the child by the Christian Science church.[93] Plaintiff argued the Christian Science nurse and practitioner were agents of the church,

(Minn. 1996) (holding there was no special relationship between trailer park manager and children who were residents of the trailer park in part because the manager rejected the entrustment of their care when she told them to report sexual molestation by another resident to their parents).

87. *Lundman*, 530 N.W.2d at 823.

88. *Id.* at 823-24.

89. *Id.* at 824 (citing Harpster v. Hetherington, 512 N.W.2d 585, 586 (Minn. 1994)).

90. *Id.* at 824-25.

91. *Id.* at 824.

92. *Id.* at 824-25.

93. *Id.* at 825.

and the church authorized their acts.[94] The court rejected this argument on grounds that there "was no evidence that the church had a right to *control* the means and manner" in which the nurse and the practitioner cared for the child.[95] The court found that an agency relationship was not created between the church and the nurse and the practitioner simply because the church listed their names in an advertisement.[96] The court reasoned that, though the Christian Science church could advise its nurses and practitioners that they should suggest medical care when a child's life is threatened, "mere power is not sufficient for the imposition of a duty."[97]

The Minnesota Supreme Court next addressed the question of whether a special relationship resulting in a duty to protect arose in the 1996 case of *H.B. ex rel. Clark v. Whittemore*, when the court ruled no duty was owed.[98] In *Whittemore*, children in a trailer park reported to the trailer park manager that another tenant of the trailer park was sexually assaulting them.[99] The tenant previously told the manager that he had been convicted of a sexual crime in the past.[100] Instead of reporting the children's complaints, the manager told the children to tell their parents.[101] The children reported the assaults to their parents a few weeks later.[102] The parents sued the owners and operators of the trailer park, arguing the manager had a special relationship with their children and owed a duty to protect them from sexual assaults by another tenant

94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.* at 826. The court additionally reasoned:

> [A] church is not a lawn-mower manufacturer that can be found negligent in a products liability case for failing to affix a warning sticker near the blades. As previously noted, the constitutional right to religious freedom includes the authority of churches—not courts—to independently decide matters of faith and doctrine, and for a church as an institution to believe and speak what it will. When it comes to restraining religious *conduct*, it is the obligation of the state, not a church and its agents, to impose and communicate the necessary limitations—to attach the warning sticker. A church always remains free to espouse whatever *religious belief* it chooses; it is the *practices of its adherents* that may be subject to state sanctions.

Id.

98. 552 N.W.2d 705 (Minn. 1996).
99. *Id.* at 707.
100. *Id.*
101. *Id.*
102. *Id.*

because they were vulnerable children.[103] The supreme court held that the manager did not have a special relationship with the children, and thus, did not owe them a duty.[104] The court reasoned that, unlike the vulnerable day care infants in *Andrade*, the trailer park manager in *Whittemore* did not have custody or control of the vulnerable children who were being molested.[105] The court further reasoned that, unlike the defendants in *Erickson*, the manager did not accept the entrustment of the children's care, but rather rejected that entrustment when she told the children to tell their parents about the sexual assaults.[106]

The dissent in *Whittemore* argued that a special relationship giving rise to a duty to protect should be found, stating:

> In order to reach its conclusion, the majority opinion reads *Erickson* to impose a greater duty of care and responsibility on the owner of a parking ramp, relative to its patrons, than upon adults to whom children report criminal sexual abuse. In my view, the majority reads the "parking ramp case" too narrowly, essentially limiting the holding of *Erickson* to its facts. While in *Erickson* we held that a special duty arose because of the unique circumstances that exist in a parking ramp which gave rise to the risk of crime, a risk which the parking ramp operator was in a position to deter, nothing in the opinion suggests that those were the only types of special circumstances which might give rise to a duty.
>
> I conclude, as did the court of appeals in the present case, that there are unusual circumstances, equal to those in *Erickson*, though different, that give rise to a duty on the part of the mobile home park. These special circumstances include: the reports to the park manager by the children that they were being abused; the inability of the children to protect themselves against the ongoing criminal assault; the high level of protection against child sexual abuse afforded by state public policy; and the

103. *Id.* at 709.
104. *Id.* at 709-10.
105. *Id.* at 708-09. The trailer park manager did not provide any care for these children at any time, nor did the parents drop them off at the manager's residence expecting that she would provide their children with care. *See also* D.E.L. v. Blue Earth County, 2004 WL 728090, at *3 (Minn. Ct. App. Apr. 6, 2004) (holding foster parents, not county, had control of foster child, therefore the county owed no duty to protect).
106. *Whittemore*, 552 N.W.2d at 708-09.

> statutory provision that requires that there be a resident caretaker in each mobile home park, with an obligation to "be readily available at all times in case of emergency."[107]

The *Whittemore* majority rejected these arguments by the dissent, reasoning "[a]n adult who does not stand in a caretaking relationship with a child should not have thrust upon her an ill-defined legal responsibility to take 'some reasonable action'—as suggested by the dissent—because the child chose to report mistreatment to her."[108] Though the majority recognized the emotional appeal of the dissent's conclusion that a special relationship existed in *Whittemore*, the majority concluded "none of the bases cited by the dissent for finding a special relationship even remotely falls within the parameters this court has carefully carved out as the outer boundaries for this exception to the common law rule . . . ."[109]

In the 1999 case of *Gilbertson v. Leininger*, the Minnesota Supreme Court held that homeowners did not have a special relationship with a social guest who suffered a head injury at the defendants' home and therefore, the defendants owed no duty to act for the guest's protection.[110] Plaintiff Gilbertson was a Thanksgiving guest at the home of defendant.[111] She drank a bottle of wine and a beer throughout the day and evening, and stayed overnight at defendants' home.[112] The next morning when Gilbertson awoke, defendants noticed she had blood under her nose and had defecated in her pants.[113] They concluded she was still intoxicated.[114] Gilbertson stayed at the defendants' home throughout that day, sleeping.[115] When she awoke later in the afternoon and still had not cleaned herself up, defendants called a nurse who told them to stimulate Gilbertson by giving her caffeine

107. *Id.* at 710 (Gardebring, J., dissenting) (citation omitted).
108. *Id.* at 709 (majority opinion).
109. *Id.* (quoting Harper v. Herman, 499 N.W.2d 472, 474 (Minn. 1993) (defining these parameters to include "common carriers, innkeepers, possessors of land who hold it open to the public, and persons who have custody of another person under circumstances in which that other person is deprived of normal opportunities of self-protection")).
110. 599 N.W.2d 127, 128 (Minn. 1999).
111. *Id.* at 129.
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*

and cleaning her up.[116] Eventually another friend came to the defendants' home, saw Gilbertson's condition, and told them to call 911, which they did.[117] Gilbertson was taken to the hospital, where she was diagnosed with a head injury requiring surgery.[118] Gilbertson sued the defendants on the theory that they should have sought medical treatment for her earlier.[119] She claimed the defendants "had custody of her under circumstances in which she was deprived of normal opportunities of self-protection," thereby creating a duty to protect.[120]

The supreme court disagreed, noting the defendants did not have custody or control of Gilbertson, who was "merely a dinner guest who happened to stay overnight."[121] The court reasoned Gilbertson did not "entrust her health" to defendants, and they "did not accept responsibility to care for Gilbertson's physical condition."[122] The court further recognized that Gilbertson's head injury would have been difficult to diagnose, even by doctors, and that the symptoms mimic those of intoxication.[123] Under those circumstances, the defendants were "not in a position to protect Gilbertson," nor did she reasonably expect such protection.[124] The supreme court concluded defendants owed no duty to protect Gilbertson.[125]

Finally, in 2001, the Minnesota Supreme Court considered the duty owed by a landlord to a tenant to protect the tenant from criminal harm in the case of *Funchess v. Cecil Newman Corp.*[126] The court found that the landlord owed no duty.[127] In *Funchess*,

116. *Id.*
117. *Id.* at 130.
118. *Id.*
119. *Id.*
120. *Id.* at 131.
121. *Id.*; *see* Donaldson v. Young Women's Christian Ass'n of Duluth, 539 N.W.2d 789, 792-93 (Minn. 1995) ("[The] duty [to protect] has most often been found where an institution such as a hospital or jail has physical custody and control of the person to be protected."); Harper v. Herman, 499 N.W.2d 472, 474 (Minn. 1993) (finding no special relationship when the defendant did not hold "considerable power over [plaintiff's] welfare").
122. *Gilbertson*, 599 N.W.2d at 131; *see* H.B. *ex rel.* Clark v. Whittemore, 552 N.W.2d 705, 708-09 (Minn. 1996).
123. *Gilbertson*, 599 N.W.2d at 131.
124. *Id.* at 131-32.
125. *Id.* at 132.
126. 632 N.W.2d 666 (Minn. 2001).
127. *Id.* at 676.

unidentified intruders murdered the decedent in his apartment.[128] Though the landlord was required by decedent's lease agreement to maintain common areas in a safe condition and make repairs within a reasonable amount of time, there was evidence the security locks and intercoms on decedent's apartment building were not in working order in the weeks prior to his death.[129] The trustee for decedent's heirs sued the landlord on the theory that his negligence in failing to repair the locks and intercoms resulted in the intruders being able to enter decedent's apartment building and murder him.[130]

The court noted the general common law rule that a person has no duty to protect others from harm caused by third parties unless there is a special relationship between the parties and the harm is foreseeable.[131] The court recognized the question is ultimately one of public policy.[132] It stated a duty to protect may be imposed on the landlord if (1) decedent entrusted his safety to the landlord; (2) the landlord accepted the entrustment; and (3) the landlord was "in a position to, and should have been expected to protect [decedent] from criminal attack."[133] The court first found there was no special relationship between the landlord and decedent in *Funchess*, rejecting the conclusion of the court of appeals that the landlord had exclusive control over building security, thereby creating a special relationship.[134] The court also was not persuaded that the third element of the test, that the landlord was in a position to and should have been expected to

128. *Id.* at 668.
129. *Id.* at 669-70.
130. *Id.* at 671.
131. *Id.* at 673.
132. *Id.* The court noted:

> In deciding whether a special relationship exists, we look to the following policy considerations: crime prevention is essentially a government function, not a private duty; criminals are unpredictable and bent on defeating security measures; and because the issue arises where existing security precautions have failed, the question will always be whether *further* security measures were required and a property owner will have little idea what is expected of him or her. Further we must consider the relative costs and benefits of imposing a duty—the level of risk balanced against the cost of providing the security that will reduce the risk to that level.

Id. at 673 n.4 (citations omitted).
133. *Id.* at 673; *see* Erickson v. Curtis Inv. Co., 447 N.W.2d 165, 168 (Minn. 1989).
134. *Funchess*, 632 N.W.2d at 674.

protect its tenant, was satisfied either.[135] The court concluded that there was no special relationship between the landlord and tenant imposing on the landlord a duty to protect.[136]

The Minnesota Supreme Court in *Funchess* also rejected the conclusion of the court of appeals that, by providing some security measures, the landlord assumed a duty to maintain those security measures already undertaken to protect decedent.[137] The court recognized the rule that "one who voluntarily assumes a duty will be liable for damages resulting from failure to use reasonable care."[138] As a matter of first impression, the court noted other jurisdictions are split on the issue of whether landlords should be subject to liability because they have taken reasonable measures to provide security to tenants.[139] It stated:

> We are not inclined to establish a rule that would discourage landlords from improving security. Transforming a landlord's gratuitous provision of security measures into a duty to maintain those measures and subjecting the landlord to liability for all harm occasioned by a failure to maintain that security would tend to discourage landlords from instituting security measures for fear of being held liable for the actions of a criminal.[140]

The supreme court reasoned that even if the outside security door was malfunctioning, other security measures were in place, including a security guard and the lock on the door to decedent's apartment, making it impossible for the court to conclude, as required by *Restatement* section 323, that the landlord should have recognized the outdoor security door was necessary for decedent's

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135. *Id.*

136. *Id.*

137. *Id.* at 675.

138. *Id.* at 674 (citing Isler v. Burman, 305 Minn. 288, 295, 232 N.W.2d 818, 822 (1975)). The court further recognized the *Restatement* rule governing an undertaking of a duty, as follows:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
>
> (a) his failure to exercise such care increases the risk of such harm, or
>
> (b) the harm is suffered because of the other's reliance upon the undertaking.

Id. (citing RESTATEMENT (SECOND) OF TORTS § 323 (1965)).

139. *Id.* at 674-75.

140. *Id.* at 675.

protection.[141] The court decided the duty to maintain the security locks and the intercom system did not result in liability being imposed on the landlord for the acts of the criminals who entered decedent's apartment and murdered him.[142] In sum, the supreme court concluded that the landlord owed no duty to protect decedent from his killers.[143]

In only three cases in the past twenty years—*Andrade*, *Erickson*, and *Lundman*—have the Minnesota appellate courts found a duty to protect was owed. In *Andrade* and *Lundman*, the duty arose because the defendants were in a special relationship with vulnerable children. The court in *Erickson* found a duty to protect parking ramp customers from criminal harm arose as a matter of public policy.

Against this backdrop, the court of appeals decided the *Laska* case. In *Laska*, the issue was whether the adult daughter of a licensed day care provider owed a duty to an infant in the day care program when the daughter agreed to help her mother, the provider, care for the children during a period when the mother would be over her licensed capacity in terms of the number and ages of children permitted in her day care program.[144]

III. THE *LASKA* DECISION

Infant Hannah Laska was born in June of 2000.[145] She began attending provider Joyce Jeffrey's day care facility in July of 2000.[146] Jeffrey had a C2 day care license that allowed her to have a maximum of twelve children, of which no more than two children could be infants (under twelve months) or toddlers (twelve to thirty months), of which only one could be an infant.[147] Because Jeffrey

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141. *Id.*

142. *Id.*

143. *Id.*

144. Laska v. Anoka County, 696 N.W.2d 133, 136 (Minn. Ct. App. 2005), *rev. denied*, (Minn. Aug. 16, 2005).

145. *Id.* at 136.

146. *Id.*

147. *Id.* Since 1983, Jeffrey had held a license from Anoka County to operate a day care out of her home. *Id.* Anoka County is authorized by the State of Minnesota to provide such day care licenses pursuant to the promulgated administrative rules for such activities under Minnesota Statutes section 245A.03, subdivision 1 and section 245A.16, subdivision 1. Minnesota Rules 9502.0367 establishes certain child/adult ratios and age-distribution restrictions for the various licenses the State provides to day care providers. Based on these regulations set forth in the rules, in order for Jeffrey to have an additional infant

was going to have one toddler more than her license permitted, Jeffrey applied to Anoka County for a capacity/age distribution variance on August 15, 2000.[148] This variance allowed Jeffrey to have an additional toddler for a ten-day period, between August 21, 2000, and September 3, 2000.[149] As an alternative measure to ensure the health, safety, and protection of the children in the Jeffrey day care facility during the variance period, Jeffrey stated on her variance application that her adult daughter, Ginger Flohaug, would be living at home with her during the variance period and would be helping her care for the children.[150] Anoka County granted Jeffrey's capacity/age distribution variance on August 17, 2000.[151]

Flohaug was Jeffrey's twenty-three-year-old daughter, who had grown up in her family's home surrounded by Jeffrey's day care children since 1983.[152] Flohaug had assisted Jeffrey with the care of the children and had been Jeffrey's helper over the years.[153] Growing up, Flohaug had played with the children, fed them, and changed their diapers.[154] On several prior occasions, Jeffrey had listed Flohaug as a helper on variance applications.[155]

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or toddler, she was required to identify specific measures that would ensure that the health and safety of the children would be protected—in this case, that a second caregiver (her daughter) would be present. *See* MINN. R. 9502.0335, subp. 8a (2005); MINN. R. 9502.0367. The issue of the ratio of adults to children in licensed day care facilities has been central to the issue of child care safety since the Minnesota Department of Human Services promulgated rules regulating day care facilities. *See, e.g.*, Handle With Care, Inc. v. Dep't of Human Servs., 406 N.W.2d 518 (Minn. 1987) (involving challenge to day care regulations adopted by the Department of Human Services despite the Department's failure to comply with statutory study and report requirements).

148. *Laska*, 696 N.W.2d at 136. Under Minnesota Rule 9502.0335, subpart 8, day care providers may request a variance to allow them to exceed their license capacity under certain circumstances.

149. *Laska*, 696 N.W.2d at 136.

150. *Id.* The regulations require a provider who applies for a capacity variance to state alternative measures that would be provided to ensure the health, safety, and protection of the children in the day care. MINN. R. 9502.0335, subp. 8a. Jeffrey wrote on the variance request that "I will have good, reliable help. My daughter is a [physical education] and health teacher who loves kids." *Laska*, 696 N.W.2d at 136.

151. *Laska*, 696 N.W.2d at 136.

152. Appellant's Brief and Appendix at 4, Laska v. Anoka County, 696 N.W.2d 133 (Minn. Ct. App. 2005) (No. A04-1661), 2004 WL 3403980.

153. *Id.* at 5.

154. *Id.*

155. *Laska*, 696 N.W.2d at 136. In 1991 and 1992, Jeffrey had listed Flohaug as a helper on her variance requests. Appellant's Brief, *supra* note 152, at AA 0116-

On August 20, 2000, Flohaug had moved back home after graduating from college.[156] Prior to Flohaug moving back home, Jeffrey had asked Flohaug for assistance with her day care children during the variance period.[157] Flohaug had stated to Jeffrey that she would be "around to help" with Jeffrey's day care.[158] Jeffrey relayed Flohaug's agreement to help with the day care children during the variance period to the county social worker during a re-licensing inspection at Jeffrey's day care on August 14, 2000.[159]

On August 21, 2000, the first date of the variance, Flohaug was present at the Jeffrey day care in the morning.[160] She left the day care around 11:00 a.m. for a job interview and did not return to the day care until two to three hours later.[161] Katherine Laska brought her daughter, infant Hannah, to the Jeffrey day care around noon, before Flohaug had returned from her job interview.[162] Jeffrey put Hannah down for a nap in a rear bedroom around 1:30 p.m.[163] Although day care providers are required to sleep infants in approved cribs[164] and are advised to sleep infants on their backs,[165] Jeffrey placed Hannah on her stomach on top of a thick comforter on an adult bed.[166] Around 2:00 p.m., Flohaug returned to the day care and began helping Jeffrey care for the children.[167] Flohaug also took care of a toddler who fell and cut her forehead.[168] Around 2:00 p.m. to 2:30 p.m., Jeffrey entered the bedroom where Hannah was sleeping to retrieve another child.[169] Neither Jeffrey nor Flohaug checked on Hannah until 4:30 p.m. when Flohaug entered the bedroom to watch television.[170] During a commercial

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156. *Laska*, 696 N.W.2d at 136.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. MINN. R. 9502.0425, subp. 9 (2005).

165. *See* Laska v. Anoka County, No. A05-315, 2005 WL 3470036, at *2 (Minn. Ct. App. Dec. 20, 2005), *rev. denied*, (Minn. Mar. 14, 2006).

166. *Id.* at *3.

167. *Laska*, 696 N.W.2d at 136-37.

168. *Id.* at 137.

169. *Id.*

170. *Id.* However, the court of appeals found that both the police report and coroner's report state that Flohaug informed the police and coroner that "sometime between [3:30 and 4:00] she had gone into the bedroom and that she had heard the baby making some type of crying noise or was just making

break about ten minutes later, she rolled Hannah over and saw that Hannah had "a bluish tinge to the face" and that she was not breathing.[171] Jeffrey performed CPR on Hannah, while Flohaug supervised the rest of the children.[172] The paramedics arrived at the day care, but they were unable to resuscitate Hannah.[173] Hannah was pronounced dead at the hospital.[174]

The Anoka County Coroner's office determined that Hannah's cause of death was Sudden Infant Death Syndrome (SIDS) and that significant conditions contributing to Hannah's death included "prone sleeping position on an adult-type bed."[175] Hannah was only ten weeks old when she died on August 21, 2000.[176]

Laska commenced a wrongful death action alleging claims of negligence and negligence per se against Anoka County, Jeffrey, and Flohaug for the death of Hannah.[177] Flohaug moved for summary judgment, arguing that she owed no duty of care to the children in the Jeffrey day care facility, including Hannah, that she had not breached any duty of care, and that there was no evidence she could have foreseen the harm that occurred to Hannah.[178]

The district court granted Flohaug's summary judgment motion.[179] It ruled that Flohaug did not owe a duty to Hannah because no special relationship existed between Flohaug and Hannah.[180] The district court also found that there was no evidence that Flohaug foresaw the risk of Hannah, an infant, being on an adult bed when she saw Hannah lying on the bed late in the afternoon.[181] Laska appealed the district court's ruling to the court of appeals.[182]

In its opinion issued May 17, 2005, the Minnesota Court of Appeals reversed the district court's ruling and found that Flohaug had assumed a duty of care to Hannah because she had accepted the entrustment of every child in the Jeffrey day care facility,

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nondescript noises in general." *Id.*

171. *Id.*
172. *Id.*; *see also* Appellant's Brief, *supra* note 152, at 8.
173. *Laska*, 696 N.W.2d at 137.
174. *Id.*
175. *Id.* at 136.
176. *Id.* at 136-37.
177. *Id.* at 137.
178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.*
182. *See generally Laska*, 696 N.W.2d at 133.

thereby creating a special relationship with Hannah that day.[183]

Courts have long recognized that an essential element of a negligence claim is that the defendant owed a legal duty of care to the plaintiff.[184] As set out in detail above, Minnesota courts have held that, as a general rule, a person does not owe a duty to protect another from harm caused by third parties.[185] However, a duty to protect can arise in certain cases based on two factors: "(1) the relationship of the parties, and (2) the foreseeability of the risk involved."[186]

A. *First Factor: Special Relationship*

Laska argued that a special relationship existed between Flohaug and Hannah because Hannah was a vulnerable infant in need of protection and because Flohaug had custody and control over Hannah's care on August 21, 2000, while Hannah was present at the Jeffrey day care facility.[187] Laska based her argument on *Lundman v. McKown*, which held that a duty to aid another person exists if there is a special relationship between the parties.[188] The Minnesota Supreme Court has held that a special relationship arises when one person has "custody of another person under circumstances in which that other person is deprived of normal opportunities of self-protection."[189]

The court of appeals in *Laska* relied on two cases, *Donaldson v. Young Women's Christian Ass'n of Duluth* and *Harper v. Herman*, to determine when a plaintiff is considered to be a vulnerable person who is in need of protection from others.[190] In *Donaldson*, the supreme court recognized that a duty may arise when "the plaintiff is in some respect particularly vulnerable and dependent on the defendant, who in turn holds considerable power over the

183. *Id.* at 138-39.
184. *Id.* at 137-38 (citing Lubbers v. Anderson, 539 N.W.2d 398, 401 (Minn. 1995)); *see also* Schweich v. Ziegler, Inc., 463 N.W.2d 722, 729 (Minn. 1990).
185. *See supra* Part II.
186. *Laska*, 696 N.W.2d at 138 (quoting Gilbertson v. Leininger, 599 N.W.2d 127, 130 (Minn. 1999)).
187. Appellant's Brief, *supra* note 152, at 12-13.
188. *Id.* at 12; Lundman v. McKown, 530 N.W.2d 807, 820 (Minn. Ct. App. 1995) (holding that a special relationship can arise among parties when a party is entrusted with the custody of a vulnerable dependent person).
189. *Laska*, 696 N.W.2d at 138 (quoting Harper v. Herman, 499 N.W.2d 472, 474 (Minn. 1993)).
190. *Id.*; *see also* Donaldson v. Young Women's Christian Ass'n of Duluth, 539 N.W.2d 789, 792 (Minn. 1995); *Harper*, 499 N.W.2d at 474-75.

plaintiff's welfare."[191] In contrast, a person who has the ability to protect himself or herself from harm is not vulnerable like in the *Harper* case where the plaintiff was an adult who knew how to protect himself from danger.[192] Based on these cases, the *Laska* court recognized that a duty may be owed "where one person has 'custody of another person under circumstances in which that other person is deprived of normal opportunities of self-protection.'"[193]

Laska argued that Hannah was a vulnerable infant who was in need of protection and that her case was factually analogous to that of the ill child in *Lundman* where the court ruled various adults were in a special relationship with the child and, therefore, owed a duty to him.[194] Laska contended that Hannah was similarly a vulnerable and dependent infant who had no ability to care for herself and who relied on the day care providers at the Jeffrey day care on August 21 to protect her because her parents were not present to provide any protection or care for Hannah.[195]

Flohaug conceded to the court of appeals that Hannah was a vulnerable person.[196] Based on Flohaug's concession, the court of appeals concluded that under *Andrade*, Hannah was a vulnerable infant.[197] In *Andrade*, the supreme court found that "small children in a licensed day care facility are a particular protected class . . . [that] consists of uniquely vulnerable persons: small children, often infants, left by their working parents in a home other than their own, and left in the care of another person for some period of less than 24 hours of the day."[198]

Because the parties did not dispute that Hannah was a vulnerable infant who was unable to protect herself, the only real

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191. *Laska*, 696 N.W.2d at 138 (quoting *Donaldson*, 539 N.W.2d at 792 (holding that low income housing facility had no special relationship with, and thus, no duty to protect a tenant from committing suicide)).

192. *Id.* at 138; *see Harper*, 499 N.W.2d at 474-75 (holding that although boat owner was an experienced boater, the boat owner did not owe a duty to his social guest, a twenty-year-old man, to tell the guest that the water was too shallow to dive, because the social guest was not particularly vulnerable and did not lack the ability to protect himself).

193. *Laska*, 696 N.W.2d at 138 (quoting *Harper*, 499 N.W.2d at 474).

194. *See* Reply Brief of Appellant at 13, *Laska*, 696 N.W.2d 133 (No. A04-1661); *see also supra* text accompanying notes 67 and 82 (analyzing *Lundman*,).

195. *See* Reply Brief of Appellant, *supra* note 194, at 13.

196. *Laska*, 696 N.W.2d at 138.

197. *Id.*

198. *Id.* (quoting Andrade v. Ellefson, 391 N.W.2d 836, 842 (Minn. 1986)).

issues the court needed to address to determine if a special relationship existed between Flohaug and Hannah were (1) whether Hannah's safety had in some way been entrusted to Flohaug, and (2) whether Flohaug accepted the entrustment.[199] The court of appeals framed the issue as "whether, in offering to 'help' her mother in the day care during the variance period beginning August 21, Flohaug accepted the entrustment of the care and custody of the entire group of dependent children, including Hannah."[200]

The court of appeals reviewed the district court's decision to determine whether the district court erred in finding that Laska "did not entrust Hannah's safety to Flohaug."[201] The district court had concluded, based on *Funchess v. Cecil Newman Corp.*, that "[n]o relationship whatsoever existed between Flohaug and [Laska] or Hannah, much less a special relationship.[202] The district court reasoned there was no special relationship between Hannah and Flohaug because Flohaug had never met Hannah or her mother prior to the date of Hannah's death, Flohaug was not present when Hannah arrived that day at Jeffrey's day care, and Flohaug was not present when Jeffrey placed Hannah on the bed for a nap.[203] The court of appeals rejected the district court's conclusion and ruled that Flohaug accepted the entrustment of every child in the day care on August 21, thereby assuming a duty of care to Hannah.[204]

Flohaug argued on appeal that she should not have been expected to care for Hannah and created no special relationship with Hannah for several reasons, including (1) neither Laska nor Jeffrey had entrusted Hannah to her care, (2) she had no prior contact with Laska and was not present when Laska dropped Hannah off at the day care, (3) she lacked "a sufficient degree of contact" with Hannah on August 21, (4) Jeffrey never specifically addressed Hannah's care with Flohaug, (5) Flohaug had never checked on sleeping infants in the past, (6) she was not in a

199. *Id.* at 138-39.

200. *Id.* at 138.

201. *See* Order and Memorandum, *supra* note 4, at 3.

202. *Id.* As set out more fully above, the Minnesota Supreme Court held in *Funchess v. Cecil Newman Corp.*, 632 N.W.2d 666, 674 (Minn. 2001), that a landlord did not have a duty to protect a tenant from being murdered by intruders who entered the tenant's apartment apparently due to broken locks on the security doors and intercoms that did not work.

203. *See* Order and Memorandum, *supra* note 4, at 3.

204. *Laska*, 696 N.W.2d at 138-39.

position to reject Hannah's entrustment because she was never in a position to accept her entrustment, and (7) she never undertook Jeffrey's duty of care to Hannah as evidenced by her lack of contact with Hannah.[205] Moreover, Flohaug contended that the court should focus its review of whether a special relationship arose solely on Flohaug's lack of interaction with Hannah and ignore the fact that Flohaug had provided care for other children in the day care on August 21.[206]

In contrast, Laska argued on appeal that Flohaug had a special relationship with every child in the Jeffrey day care because under *Erickson*, the scope of her duty extended to every child, including Hannah, since each vulnerable child was left in the physical custody and control of Jeffrey and Flohaug on August 21.[207] Laska also relied on *Whittemore* to support her argument that because Flohaug did not refuse to take care of any specific day care children, she accepted the entrustment of and therefore had a special relationship with all of the children in the day care on August 21.[208]

205. Brief and Appendix of Respondents Ginger R. Flohaug f/k/a Ginger R. Jeffrey & Joyce Jeffrey at 11-12, 16, 19-20, *Laska*, 696 N.W.2d 133 (No. A04-1661). Specifically, Flohaug argued that she did not see Hannah until after 4 p.m. when she went into the bedroom where Hannah was napping. *Id.* Flohaug relied on *Lundman*, arguing she, like the church committee member in that case, knew of the danger to the child but did not have a special relationship due to lack of sufficient contact with the child. *Id.* at 15-18 (citing Lundman v. McKown, 530 N.W.2d 807, 820-28 (Minn. Ct. App. 1995)). She also contended that under *Donaldson*, knowledge of a potential harm to a person was not enough to create a legal duty of care to an individual because Flohaug must have a degree of control and dependency necessary to form a special relationship. *Id.* at 16-18 (citing Donaldson v. Young Women's Christian Ass'n of Duluth, 539 N.W.2d 789, 790, 793 (Minn. 1995)).

206. *Id.* at 12.

207. Appellant's Brief, *supra* note 152, at 15-17. Laska argued that the district court improperly relied on *Funchess*, which is distinguishable because that case considered whether a landlord had a duty to protect a tenant from the criminal acts of third persons. *Id.* at 17-18. Laska maintained that the analogous case of *Lundman*, which considered the duty owed to a vulnerable child in the custody and control of various adults, provided a more compelling precedent. *Id.* at 15-18. In *Erickson*, the court held that a security company that agreed to provide security to the particular patrons of a parking ramp also owed a duty to protect all patrons on the premises of the ramp because the security company patrolled the entire parking ramp without limiting its patrol to the particular patrons' vehicles. Erickson v. Curtis Inv. Co., 447 N.W.2d 165, 170 (Minn. 1989).

208. Appellant's Brief *supra* note 152, at 16-17. Flohaug cared for an injured toddler during the afternoon on August 21 by providing her first aid after she tripped on some shoes. *Id.* at 8. Flohaug also testified during her deposition that she handled "chaos control" at the day care that day. *Id.* at 7. In *Whittemore*, the court held that a special relationship was not established between a trailer park

Finally, Laska contended that the proper test to determine the existence of a special relationship under Minnesota law is not the amount of contact Flohaug had with Hannah, but whether Flohaug had custody or control of Hannah.[209]

The court of appeals agreed with Laska and found that Flohaug accepted the entrustment of every child in the Jeffrey day care facility because neither Jeffrey nor Flohaug restricted Flohaug's care to any specific day care children and because Flohaug "subsequently acted in a manner consistent with that acceptance."[210] The court of appeals reasoned:

> [T]he record is clear that Flohaug specifically promised her mother that she would help in the day care during the variance period without indicating that her assistance would be restricted to specific children. The record is also clear that Jeffrey placed no limitation on Flohaug's function when she identified her to the county of the variance application as a "helper." There is no evidence—and Flohaug does not assert—that Flohaug only agreed to care for certain children or rejected the entrustment of

manager who knew that a sex offender lived at the trailer park, and sexually abused children who were residents of the trailer park. H.B. *ex rel.* Clark v. Whittemore, 552 N.W.2d 705, 706-09 (Minn. 1996). The court based its holding on the facts that the manager did not have custody of the children, did not exercise control over their safety, and rejected their entrustment by telling them to report the sexual abuse to their parents. *Id.* at 708-09.

Laska also relied on persuasive cases from other jurisdictions that have recognized that babysitters assume a duty of care to the children for whom they agree to provide care. Reply Brief of Appellant, *supra* note 194, at 10; *see* Standifer v. Pate, 282 So. 2d 261, 262-65 (Ala. 1973) (holding that a volunteer babysitter who undertook the care of an eighteen-month-old child also had assumed a duty of care and was in turn liable for negligently supervising a child that pulled a skillet of hot grease off the counter and burned himself); Barbarishi v. Caruso, 135 A.2d 539, 542 (N.J. Super. Ct. App. Div. 1957) (holding that although a grandmother did not normally have a duty of care to protect her grandchildren from harm, the grandmother assumed this duty when she gratuitously agreed with the children's mother to babysit those grandchildren and was liable when the grandson broke his arm in the washing machine while unsupervised); Zalak v. Carroll, 205 N.E.2d 313, 313-14 (N.Y. 1965) (holding that an uncle and aunt who gratuitously undertook the care of a young child, assumed a duty of reasonable care for the child and were liable for her injuries).

209. Reply Brief of Appellant, *supra* note 194, at 4. Laska argued that *Whittemore*, *Lundman*, and *Donaldson* did not require any particular degree of contact for a special relationship to be established. *Id.* Rather, these cases required the party to be in the custody or control of the defendant. *Id.*; *see* *Whittemore*, 552 N.W.2d at 706-09; *Lundman*, 530 N.W.2d at 813-24; *Donaldson*, 539 N.W.2d at 789.

210. *Laska*, 696 N.W.2d at 139-40.

any child or children.[211]

Consequently, the court of appeals held "that Flohaug assumed a duty of care toward Hannah."[212]

The court of appeals also rejected Flohaug's argument that she did not owe a duty to Hannah because she did not undertake the duties of Jeffrey to Hannah.[213] The court of appeals found that Flohaug voluntarily undertook Jeffrey's duty of care to every child in the Jeffrey day care facility that day, relying on the *Restatement (Second) of Torts* section 324A and *Erickson*.[214] Section 324A provides that a defendant undertakes a duty of care to another when a "defendant . . . undertakes for another (whether gratuitously or for consideration) to perform a duty owed by the other to a third person."[215] The court of appeals reasoned that because Flohaug agreed to help Jeffrey care for Jeffrey's day care children during the variance period, and because Jeffrey owed a duty to every child in the day care, the scope of Flohaug's duty of care was the same as Jeffrey's—a duty to care for every child in Jeffrey's day care on August 21.[216]

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211. *Id.* at 140 (citing *Whittemore*, 552 N.W.2d at 708-09).

212. *Id.*

213. *Id.* Flohaug argued that none of the narrow situations outlined in the *Restatement (Second) of Torts* section 324A applied to the facts of this case and that she never undertook Jeffrey's duty to Hannah as evidenced by her lack of contact with Hannah. Brief of Respondents, *supra* note 205, at 19-20. She argued that her assistance of other children in the day care should be irrelevant when defining her relationship with Hannah because she did not provide any care to Hannah. *Id.*

214. *Laska*, 696 N.W.2d at 139 (quoting Erickson v. Curtis Inv. Co., 447 N.W.2d 165, 170 (Minn. 1989) (quoting RESTATEMENT (SECOND) OF TORTS § 324A (1965))). In *Erickson*, the supreme court adopted *Restatement (Second) of Torts* section 324A. *Id.* at 139.

215. *Id.* (quoting *Erickson*, 447 N.W.2d at 170). *Restatement (Second) of Torts* section 324A provides

> [o]ne who undertakes, gratuitously or for consideration, to render services to another, which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if (a) his failure to exercise reasonable care increases the risk of such harm, or (b) he has undertaken to perform a duty owed by the other to the third person, or (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Minnesota courts have long recognized the principle that "one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully . . . ." State by Humphrey v. Philip Morris, Inc., 551 N.W.2d 490, 493 (Minn. 1996); *see also* Walsh v. Pagra Air Taxi, Inc., 282 N.W.2d 567, 570-71 (Minn. 1979).

216. *Laska*, 696 N.W.2d at 139.

Flohaug further contended that, even if she did agree to help her mother with the day care, she did not owe a duty to Hannah because she did not have any "affirmative interaction" with Hannah prior to finding her not breathing on the bed, and thus she could not have established a special relationship with Hannah.[217] The court of appeals also rejected this argument, reasoning that

> [i]t is true that an affirmative rejection of entrustment prevents a duty of care from arising as to specific individuals. *See Whittemore*, 552 N.W.2d at 708-09. But Flohaug's argument that affirmative interaction is required—in addition to a general acceptance of entrustment as to the day care—to trigger a special relationship between herself and Hannah is without legal support.[218]

Instead, the court of appeals concluded that, as in *Erickson*, Flohaug's interaction with certain children in the day care did not define the scope of her special relationship because she had generally accepted the entrustment of all of the children in the day care facility.[219] "On the day of Hannah's death, Flohaug performed various tasks, including administering first aid to the toddler who cut her head. The record is clear she did not withhold care from any particular child or refuse to perform any necessary task as to any children."[220] The court of appeals therefore ruled that Flohaug did have a special relationship with Hannah because she "voluntarily accepted the custody and control of a group of vulnerable individuals—including Hannah . . . ."[221]

B. Second Factor: Foreseeability of Risk Involved

The court of appeals next considered whether the second factor regarding the foreseeability of the risk of harm to Hannah could be decided as a matter of law by the courts.[222] "In determining whether a danger of injury is foreseeable, courts must consider whether it is objectively reasonable to expect that the specific danger will result in injury, not simply whether it was within

217. *Id.*
218. *Id.* at 139.
219. *Id.* at 139-40.
220. *Id.* at 140.
221. *Id.*
222. *Id.*

the realm of any conceivable possibility."[223] The courts are unable to resolve this issue as a matter of law when the issue is a close case.[224]

Laska argued it was objectively foreseeable that harm or injury to Hannah could occur if Flohaug did not supervise Hannah.[225] The Minnesota Supreme Court held in *Austin v. Metropolitan Life Insurance Co.* that when a court is determining whether a risk of harm is foreseeable, the court must consider the harm that one should anticipate and not merely the harm that actually occurred.[226] Laska argued that Flohaug did not need to foresee the particular injury that occurred to Hannah, only that it could be anticipated that an injury would likely result from Flohaug's negligent act or failure to act.[227] Laska relied on *Andrade*, the numerous protections the legislature has provided for infants in day cares, and Flohaug's knowledge that children had previously been injured in Jeffrey's day care, to support her contention that the risk of harm to Hannah was foreseeable to Flohaug when Flohaug left Hannah unsupervised for hours in an overcrowded day care.[228]

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223. *Id.* (citing Whiteford by Whiteford v. Yamaha Motor Corp., U.S.A, 582 N.W.2d 916, 918 (Minn. 1998)). The district court found that Flohaug did not foresee the risk of harm of Hannah's sleeping on an adult bed until she found Hannah not breathing on the bed. *See* Order and Memorandum, *supra* note 4.

224. *Laska*, 696 N.W.2d at 140.

225. *See* Brief of Respondents, *supra* note 205, at 21.

226. Austin v. Metro. Life Ins. Co., 277 Minn. 214, 217, 152 N.W.2d 136, 138 (1967).

227. *Laska*, 696 N.W.2d at 137-38 (citing Lubbers v. Anderson, 539 N.W.2d 398, 401 (Minn. 1995)).

228. Appellant's Brief, *supra* note 152, at 25 (citing Andrade v. Ellefson, 391 N.W.2d 836, 844 (Minn. 1986) (recognizing that when a day care is overcrowded with very young children, "such overcrowding is per se dangerous") (Wahl, J., concurring)). The State of Minnesota has promulgated regulations for the purpose of protecting vulnerable infants in licensed day care facilities, including requiring caregivers to provide constant supervision of infants. *See* MINN. R. 9502.0325, subp. 1 (2003). Minnesota Rule 9502.0315, subpart 29a, requires a caregiver to be "within sight or hearing of an infant, toddler, or preschooler at all times so that the caregiver is capable of intervening to protect the health and safety of the child." In contrast, the legislature requires less supervision of older children: "For the school age child, [supervision] means a caregiver being available for assistance and care so that the child's health and safety is protected." MINN. R. 9502.0315, subp. 29a. Laska asked that the court determine if these regulations showed that the risk of harm to Hannah was objectively foreseeable to Flohaug if she left Hannah unsupervised for hours. Appellant's Brief, *supra* note 152, at 11; *see also* Kuhl v. Heinen, 672 N.W.2d 590, 593 (Minn. Ct. App. 2003) (recognizing that knowledge of the danger meets the foreseeability requirement).

Flohaug argued she did not foresee any danger in Hannah sleeping on her stomach on an adult bed because she had not received any training on SIDS risk factors.[229] She further contended she did not know that Jeffrey's day care was overcrowded because she did not know it was overcapacity on August 21.[230]

The court of appeals determined that because of the meritorious arguments of both parties, the issue of foreseeability was not so clear that the court could decide the issue as a matter of law.[231]

IV. CONCLUSION

The court of appeals' ruling in *Laska* closely followed the precedents established by the prior rulings of the Minnesota Supreme Court and the Minnesota Court of Appeals. Public policy and the prior case law strongly support Laska's arguments and the court of appeals' ruling that there was a special relationship between Flohaug and Hannah resulting in a duty of care being owed to Hannah.[232] The purpose behind the legislature's regulation of licensed day care facilities is to ensure the safety and well-being of children in day care.[233] Laska successfully argued to the court that parents should be able to entrust the care of their children to day care facilities and know that their children will be safe and properly cared for.[234] Though Minnesota appellate courts rarely find cases in which they will impose a duty to protect, the compelling facts in this case dictated that such a duty must be found.

The *Laska* ruling will not result in a duty being owed by all persons and family members who live in licensed day care facilities, as Flohaug argued at the court of appeals. Instead, the ruling simply affirms previously established law regarding the duty that arises when a defendant has custody and control of a vulnerable person who lacks the ability for self-protection, and the defendant voluntarily agrees to assume a duty of care for that vulnerable person. The court of appeals' decision upholds the public's

229. Brief of Respondents, *supra* note 205, at 14.
230. *Id.*
231. *Laska*, 696 N.W.2d at 141.
232. Appellant's Brief, *supra* note 152, at 27.
233. *Id.* (citing MINN. R. 9502.0325, subp.1).
234. *Laska*, 696 N.W.2d at 141.

expectation that a person who agrees to provide care to children in a day care is liable for her failure to exercise reasonable care when caring for those children.

Following Hannah's death, her parents have fought an uphill battle to obtain justice for their daughter and to ensure that her death results in legal changes that ensure the protection of other vulnerable children in day care facilities throughout the State of Minnesota.[235] Through her battle in the courts, Laska's tragedy has captured media attention that has resulted in legislative change. On Sunday, April 24, 2005, Laska's tragedy was outlined in a front-page story in the *Star Tribune* newspaper as part of a story about safety issues surrounding Minnesota's licensed day care facilities.[236] Laska stated that "[w]e brought this lawsuit . . . for justice for Hannah . . . [a]nd in hopes we can prevent this from happening to someone else's family."[237] This newspaper story brought to the forefront issues facing parents who expect their children to be monitored, supervised, and safe in day cares that are licensed by the government. As stated on the *Star Tribune* editorial page:

> Minnesotans go about life assuming that their state is

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235. There was a second appeal in *Laska* after the district court granted a motion for summary judgment to the defendants Anoka County and the licensing worker who inspected Jeffrey's day care facility prior to Hannah's death, citing Jeffrey for numerous rule violations, including sleeping Hannah on an adult bed instead of in an approved crib. The district court ruled as a matter of law that, because Anoka County could not have shut down Jeffrey's day care in time to prevent Hannah's death, Laska could not prove that the county caused Hannah's death. *See* Laska v. Anoka County, No. A05-315, 2005 WL 3470036, at *1 (Minn. Ct. App. Dec. 20, 2005), *rev. denied*, (Minn. Mar. 14, 2006). Laska argued on appeal that there were facts in dispute; namely, whether monitoring of the day care by the county would have deterred the ongoing rule violations and that this precluded summary judgment on the issue of causation. *Id.* The court of appeals agreed and reversed the district court's grant of summary judgment in favor of the county and the licensing worker and remanded the case for trial. *Id.* at *8. In the second appeal, Jeffrey also challenged the district court's denial of her motion for summary judgment when she argued that the opinion of Laska's medical expert was not admissible because there was no known organic cause of SIDS and it is not generally accepted that the risk factors of sleeping infants on their stomachs on soft surfaces like adult beds can be said to be the "cause" of a SIDS death. *Id.* at *6. The court of appeals affirmed the district court's ruling that the testimony of Laska's medical expert regarding SIDS risk factors is admissible. *Id.* Jeffrey thereafter petitioned the Minnesota Supreme Court for review, but this petition was denied. Order, Laska v. Anoka County, No. A05-315, 2005 WL 3470036 (Minn. Ct. App. Dec. 20, 2005).

236. Jean Hopfensperger, *Star Tribune Special Report Examining Daycare: Child Care, How Safe?*, STAR TRIB. (Minneapolis, Minn.), Apr. 24, 2005, at 1A.

237. *Id.*

> safer, cleaner and more regulated than most places. So for many it came as a shock to open last Sunday's paper and read a special report on child care which disclosed that in Minnesota a day-care center can remain open even after 73 license violations, that an adult can open a day-care operation without knowing even the most basic hazards of Sudden Infant Death Syndrome and that the state requires less training to open a home day-care business than to become a manicurist. . . .
>
> [I]t is plain from Sunday's report that Minnesota now lags behind many of its neighbors.
>
> This state of affairs is especially galling in Minnesota. The state regularly leads the nation in the proportion of working mothers, with nearly three out of four mothers of preschoolers holding jobs outside the home. These women make a huge contribution to the state's economy, and it's disturbing that the state can't guarantee that their children will be safe while they are at work.[238]

The public attention from this media coverage led the Minnesota Legislature to pass a law in July 2005 that requires day cares to prominently post correction orders issued by the counties that document rule violations at day care facilities so that parents are better informed about the quality of care their children are receiving in those day care facilities.[239] The new law also requires additional training for day care providers, and "the state will work to post day care safety records online by early [2006]."[240] Legislators pushed through these changes in the law because providing additional information to parents about licensed day cares "is critical" based on this state having "one of the highest rates of working mothers in the nation."[241]

The *Laska* ruling supports this state's sound public policy of establishing laws that will increase the safety of infants and young children in licensed day care facilities.

238. Editorial, *Child Care Quality: Gaps in the Minnesota System*, STAR TRIB. (Minneapolis, Minn.), Apr. 27, 2005, at 16A.

239. *See* Jean Hopfensperger, *Change for Child Care: New Laws Aim to Enhance Safety by Beefing up Licensing Rules in State*, STAR TRIB. (Minneapolis, Minn.), Jul. 15, 2005, at 1A; Editorial, *supra* note 238, at 16A; *see also* Omnibus Health and Human Services Finance Bill, ch. 4, 2005 Minn. Sess. Law, 1st Spec. Sess.

240. *See* Hopfensperger, *supra* note 236.

241. *Id.*