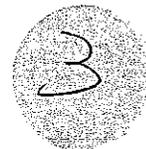


STATE OF MINNESOTA
IN COURT OF APPEALS
Appellate Court Case No. A09-1945

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Bradley J. Domagala,

Appellant,

v.

Eric Rolland and Rolland Building Corp.,

Respondents,

BRIEF AND APPENDIX OF APPELLANT

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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INTRODUCTION

On June 23, 2003, Appellant Bradley Domagala suffered severe and permanent foot injuries when a bucket on the skid loader that Respondent Eric Rolland was operating dropped on Appellant's foot. Respondent Eric Rolland admitted that he created a "very dangerous" situation that ultimately led to Appellant's injuries. Nonetheless, the issue of liability and duties of care owed were heavily litigated in this matter. In February of 2009, Respondents' moved for summary judgment, arguing that Respondents owed no duty of care to Appellant. The Trial Court ruled that although Respondents owed no special duty of care to warn or to protect Appellant, Respondents did owe Plaintiff a general duty of reasonable care in his operation of the skid loader, and a duty of care based on the creation of a dangerous situation. These issues survived summary judgment and were tried by jury trial on May 18-21, 2009.

Included in Respondents' proposed jury instructions were two special instructions that Respondents owed "no duty to warn" and "no duty to protect" Appellant. Despite Appellant's written and oral objections to the inclusion of these inappropriate and irrelevant jury instructions, the Trial Court provided them to the jury. Not only did the Trial Court read these special instructions during the charge to the jury, but after closing arguments, the Trial Court re-read and "highlighted" the "no duty to warn" instruction after the closing arguments. During deliberations, the jury submitted a written question to the Trial Court that demonstrated its confusion over the inclusion of the "no duty to warn" and "no duty to protect" instructions, namely the jury asked: "Does 'no duty to warn' mean that the [Respondents] had no obligation to try to keep the [Appellant] away from the skid loader?"

The Trial Court declined to clarify the instructions. The jury returned a verdict finding that the Respondents were not negligent.

On June 23, 2009, Appellant submitted a motion for a new trial, which was denied by the Trial Court. Appellant now appeals the Trial Court's inclusion of the "no duty to warn" and "no duty to protect" jury instructions, its denial of Appellant's motion for a new trial pursuant to Minn. R. Civ. App. P. 103.03(d), and its grant of summary judgment holding that Respondents owed Appellants no duty to warn of the dangerous situation that Respondents created.

STATEMENT OF LEGAL ISSUES

1. Did the Trial Court commit reversible error when it allowed Respondents' following special jury instructions to be provided to the jury:

No Duty to Protect

A person generally has no duty to act for the protection of another person. A legal duty to protect will be found to exist only if there is a special relationship between the parties and the risk is foreseeable. The Court has ruled, as a matter of law, that no duty to protect exists in this matter and you must not consider such a duty in your deliberation in this case.

No Duty to Warn

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. The Court has ruled, as a matter of law, that no duty to warn exists in this case and you must not consider such a duty in your deliberation in this case.

How issue was raised in Trial Court: Included in their pretrial filings, Respondents submitted to the Court two proposed special jury instructions: “No Duty to Protect” and “No Duty to Warn.” (A.000090 - 000093). In response, Appellant submitted a written objection to Respondents’ two proposed special instructions. (A.000094 - 000096). The matter was orally argued during the first day of trial. (A.000097 – 102).

Trial Court Ruling: The trial court accepted and provided to the jury Respondent’s proposed special jury instructions regarding “No Duty to Protect” and “No Duty to Warn,” despite Appellant’s objections to the instruction.

Preservation for Appeal: This issue was preserved for appeal as follows: (1) Appellant filed a written objection to the special instructions (A.000094); (2) Appellant orally argued against the instructions at the first day of trial (A.000097); and (3) Appellant made a post-trial motion for a new trial based upon the erroneous special instructions (see Pl. Mot. For New Trial).

Apposite Authority:

Nubbe v. Hardy Continental Hotel Sys. Of Minn., 225 Minn. 496, 31 N.W.2d 332 (1948).

Jones v. Foutch, 278 N.W.2d 572 (Neb. 1979)

Barnes v. Northwest Airlines, 233 Minn. 410, 47 N.W.2d 180 (1951)

Swanson v. La Fontaine, 238 Minn. 460, 57. N.W.2d 262 (1953).

2. Did the Trial Court commit reversible error by re-reading and “highlighting” to the jury the “No Duty to Warn” special instruction following closing arguments?

How issue was raised in Trial Court: The Trial Court read the entire charge to the jury before closing arguments. (See Partial Trial Transcript of 5/21/09 at 86-103.) Thereafter, closing arguments were heard. (*Id* at 103-155.) Following the conclusion of closing arguments, *sua sponte*, the Trial Court re-read the instruction to the jury regarding “No Duty to Warn.” (A.000106)

Trial Court Ruling: Because the Trial Court took it upon itself to re-read certain jury instructions after closing argument, no ruling was made at trial on this issue. The Trial Court denied Appellant’s post-trial motion for a new trial based upon erroneous jury instructions.

Preservation for Appeal: This issue was preserved for appeal as follows: (1) Appellant filed a written objection to the special instructions (A.000094); (2) Appellant orally argued against the instructions at the first day of trial (A.000097); and (3) Appellant made a post-trial motion for a new trial based upon the erroneous special instructions (see Pl. Mot. For New Trial).

Apposite Authority:

Nubbe v. Hardy Continental Hotel Sys. Of Minn., 225 Minn. 496, 31 N.W.2d 332 (1948).

Jones v. Foutch, 278 N.W.2d 572 (Neb. 1979)

Barnes v. Northwest Airlines, 233 Minn. 410, 47 N.W.2d 180 (1951)

Swanson v. La Fontaine, 238 Minn. 460, 57. N.W.2d 262 (1953).

3. Did the Trial Court commit reversible error when it ruled on summary judgment that Respondents had no duty to warn Appellant of the admittedly dangerous condition that Respondents had created?

How issue was raised in Trial Court: Respondent brought forth a motion for summary judgment, arguing in part that, as a matter of law, Respondent owed no duty of care to warn Appellant of the dangerous situation. (A.000048-58) Appellant opposed the motion. (A.000059-79)

Trial Court Ruling: In its Order and supporting Memorandum of Law, the Trial Court ruled on summary judgment that Respondents owed no duty to warn as a matter of law.

Preservation for Appeal: Because the Trial Court ruled as a matter of law on summary judgment that no duty to warn existed, the issue is preserved for appeal. (A.00080-89)

Apposite Authority:

Hollinbeck v. Downey, 261 Minn. 481, 113 N.W.2d 9 (1962)

Schroeder v. St. Louis County, 708 N.W.2d 497, 511 (Minn. 2006)

Rauscher v. Payne, 152 Minn. 368, 188 N.W. 1017 (1922)

Restatement 2d Torts, § 321 (1965)

STATEMENT OF THE CASE

On April 12, 2008, Appellant served his Summons and Complaint against Respondents, alleging Respondents' negligently and carelessly operated the skid loader; and Respondents negligently failed to warn Appellant of the dangers associated with Appellants' approach and unlatching of the skid loader's attachment bucket; causing the

skid loader's bucket to fall and crush Appellant's foot. Said Summons and Complaint were filed with the Tenth Judicial District Court, Washington County, Minnesota on June 20, 2008. The matter was assigned to the Honorable B. William Ekstrum.

Respondents' moved for summary judgment on February 23, 2009, alleging that Respondents owed no duty of care to Appellant. Appellant opposed Respondents' motion for summary judgment, arguing that Respondents owed a duty of care to Appellant based on the creation of a dangerous situation and a duty to warn Appellant not to approach the skid loader due to the dangerous situation. On April 23, 2009, the Trial Court denied Respondents' motion for summary judgment and incorporated a supporting Memorandum of Law.

A jury trial was held in this matter from May 18 through 21, 2009. Prior to the trial's commencement, the parties argued over the inclusion of two special jury instructions proposed by Respondents on the issues of "no duty to protect" and "no duty to warn," which were based upon the Trial Court's summary judgment memorandum and order. Appellant submitted his written objection to the inclusion of these jury instructions, arguing that the inclusion of these special jury instructions were irrelevant, unnecessary, and would be highly prejudicial against Appellant. After entertaining brief pretrial oral arguments on the issue, the Trial Court accepted Respondents' special jury instructions and provided them to the jury prior to deliberations. Following trial, the jury returned with a verdict finding Respondent 0% negligent.

Appellant moved for a new trial on June 12, 2009, arguing that the inclusion of Respondents' proposed jury instructions were erroneous and that the jury was confused by

the inclusion of the “no duty to protect” and “no duty to warn” jury instructions. Respondents’ opposed Appellant’s motion for a new trial. On September 3, 2009, the Trial Court denied Appellant’s motion for a new trial.

Appellant now appeals the Trial Court’s denial of his Motion for a New Trial pursuant to Minn. R. Civ. App. P. 103.03(d).

STATEMENT OF FACTS

A. Facts Surrounding the June 23, 2003, Incident.

Respondent Eric Rolland (“Respondent Rolland”) purchased his first skid loader in 1995 and completed a training course on skid loader use and operation. (A.000004 at 13-14). In approximately the year 2000, Respondent Rolland traded in the 1995 skid loader for a newer and larger model, however, the operation and attachment methods for the new skid loader’s implements were identical to those of the 1995 skid loader. (A.000004 at 14-15.)

Respondent Rolland was well versed in the installation and detachment of the skid loader’s bucket and other attachments. (A.000006 at 22-23). Respondent Rolland testified as follows regarding the process of detaching and reinstalling an attachment to the skid loader:

Q: What's the process that you would go through to put an attachment on your machine?

A: When I'm -- if I'm sitting in the machine with the machine running, I would disengage my seat belt from the bar, go out through the front, walk over the bucket, face the machine. It's really the only way you can pull up the levers. You pull one up at a time. The bucket is then released or the attachment. Back in the machine, safety device is on, back up, pull up to your other machine. Hook your hydraulics, hook the saddles in, get everything set right. Get out of the machine, face the machine, put the levers down, and you latch them in. Get back in the machine, slightly lift the boom. You can look

underneath, yep, the pins are through the receivers. You're good to go and you go to work

(A.000006 at 22:19-23:10).

Respondent Rolland further testified about his procedure if one of the two levers used to secure the bucket or other attachments became stuck during the detachment process, whereby he would raise the bucket into the air and "flutter the hydraulics" to loosen the stuck lever. He testified as follows:

Q Did you ever have a situation, when you owned the 885, when one of the levers became stuck and unable to raise while you were attempting to detach equipment?

A Yes.

Q When you had the 885, what would you do to loosen or detach -- I'll say loosen one of those levers that were stuck?

A I would loosen -- I would detach the handle or the one pin that I could get up, I would raise the attachment and you could flutter the hydraulics to shake. And set it back down, get out of the machine. And usually then I could lift the handle to disengage the attachment

...

Q In your experience, what had or what was the cause of a stuck lever?

A Debris, construction site debris.

Q Would you leave the one lever up while you fluttered the hydraulics?

A Typically I would, because it created extra play. So whatever was lodged, would loosen.

Q Was that extra play caused by the one pin not being engaged in the receiver?

A Yes.

(A.000007 at 26:17-27:19).

Q When you would flutter the hydraulics, explain for me, if you would, you sort of moved your hands a little bit up and down. Could you explain for the record what you mean by fluttering the hydraulics?

A It's operated -- the bucket is operated by the feet. And the foot pedal, I would raise the bucket maybe six inches off the ground. And I would just kick that foot and it would shake the bucket, that's the fluttering.

(A.000007 at 28:24 - 29:7.) Respondent Rolland testified that for debris to get lodged in the levers and cause them to get stuck was “very common” and happens “all the time.” (A.000012 at 45).

On June 23, 2003, Respondent Rolland brought the 2000 skid loader, owned by Respondent Rolland Building Corp., to Appellant’s home in Stillwater, Minnesota, to perform some landscaping work. (A.000009 at 33-34). Although Appellant and Respondent Rolland are relatives through marriage, this was the first time that they had worked together. (A.000008 at 31). The several-hours-long project consisted of Respondent Rolland using the skid loader to take Appellant’s lawn from rough grade to finished grade and prepare it for the placement of sod. (A.000009 at p. 33-35; A.000030 at 43.) Throughout the course of the project, Respondent Rolland operated the skid loader, while Appellant watched the progress and picked up rocks and debris from the lawn. (A.000011 at 42; A.000031 at 45.)

During the project, whenever Appellant needed to communicate with Respondent Rolland, he would approach the skid loader with his hands up in the air, palms out, and Respondent Rolland would accordingly also take his hands off of the skid loader controls and put his hands up in the air, showing them to Appellant to indicate his hands were away from the skid loader controls, and therefore it was safe to approach. (A.000012-000013 at 47-50).

The skid loader’s multiple front-end attachments needed to be switched out on several occasions throughout the project. (A.000011 at 44; A.000032 at 51). Appellant witnessed this process, and described it as follows:

[Respondent Rolland] would park the skid loader, have to get out, which entailed the seat belts and he had to crawl out, undo the two levers, crawl back into the machine. Move it, go to the next implement, pull up next to it and get the machine where it was supposed to be and have to get out and then push the levers down.

(A.000031 at 46:24-47:5). Appellant also noted, from his perspective: “When the levers were raised, nothing happened. ... When [Respondent Rolland] would get back onto the machine and then he would either tilt the bucket and then back it away. That’s when [Respondent Rolland] had separation.” (A.000033 at 56:12-16.)

Towards the end of the project, Respondent Rolland needed to switch-out the bucket attachment for the leveling bar attachment. (A.000009 at 36). During the detachment process, however, Respondent Rolland found that one of the skid loader’s levers could not be disengaged due to the lodgment of a rock in the mechanism. (A.000015 at 57:20-24.) After detaching only one of the levers, Respondent Rolland attempted to utilize the method of raising the bucket into the air and “fluttering” the hydraulics in an attempt to shake the rock loose. (A.000013 at 52). Respondent admits that this was a “very dangerous” situation, given that the bucket was raised up in the air with one of the two safety latches disengaged. (A.000014 at 55:10-20.)

Witnessing Respondent Rolland’s actions and realizing there was a problem, Appellant approached the skid loader from a distance of approximately 30 feet. (A.000012 at 46; A.000034-000035 at 58-62.) Appellant walked towards the skid loader with his hands raised, as was his normal procedure to request a safe approach. (A.000035 at 63:2-15.) At that point, Respondent Rolland took his hands off of the skid loader’s controls and also put his hands up in the air. (A.000009 at 36:11-17; A.000013 at 51:22-53:1).

Appellant understood Respondent Rolland's "hands-up" signal meant it was safe to approach. (A.000035 at 63:16-64:10). Respondent Rolland provided no warning or other indication whatsoever to Appellant that he should not approach the skid loader or that the situation was dangerous. (A.000014 at 54:13-55:9). Appellant assumed that Respondent Rolland would have yelled at Appellant to stop if he was walking into a bad situation, yet Respondent Rolland did not say anything to Appellant. (A.000036 at 65.)

When Appellant reached the skid loader, he examined the raised bucket, located the rock stuck in the lever, removed the rock and threw it aside, and proceeded to release the second lever. (A.000035-000036 at 58-65.) Appellant testified that he pulled both levers to aid in Respondent Rolland's efforts to remove the bucket and ensure removal of the rock cured the problem. (A.000034 at 58:10-59:1; A.000035 at 62; A.000036 at 65). The release of the second lever caused the raised bucket to release and fall onto Appellant's left foot, resulting in severe injury to Appellant's foot. (A.000037-000038 at 69-76.) The damage was so severe that in the following weeks, three of Appellant's toes died, became gangrenous, and later had to be amputated. (A.000038 at 75:12-76:13).

Appellant did not realize that releasing the second lever would cause the bucket to fall, because in prior instances, Respondent Rolland not only released the levers, but also was required to get back into the machine and tilt the bucket and back away from the bucket before it was detached. (A.000033 at 55-56). Appellant understood the releasing of the levers to only be one step in the process to get the bucket detached. (A.000033 at 55-56). Appellant had not operated the skid loader nor helped attach or detach an implement prior to the incident that injured him. (A.000034 at 57-58.)

When asked why he didn't warn Appellant of the dangerous situation, Respondent Rolland testified he was unable to do so:

Q Did you say anything to [Appellant] as he approached the machine?

A No.

...

Q Why didn't you say anything to him as he approached?

A I didn't have time.

(A.000014 at 54:13-55:9.) Although Respondent Rolland claims he didn't have time to provide a warning, both Appellant and Respondent Rolland testified that as Appellant walked towards the skid loader, Respondent Rolland had sufficient time to give a 'hands-up' signal to indicate his hands were off of the controls and that it was therefore safe to approach. (A.000009 at 36; A.000013 at 51; A.000034 at 58; A.000035 at 63). Respondent Rolland further admitted that he saw Appellant approaching from 15 feet away. (A.000013 - 000014 at 52-53). In his testimony, Respondent Rolland indicated that he intended to warn Appellant of the dangerous situation:

A All I know is I saw him approaching the machine front on.

Q Did you attempt to give him any type of warning of the dangerous situation?

A I was about to.

Q What type of warning were you about to give?

A Let me handle it (indicating).

Q When you just stated, let me handle it, were you attempting to warn him by saying, let me handle it?

A Yeah. It went through my mind right before it happened.

(A.000015 at 57:8-20.) Appellant stated that he would have expected Respondent Rolland to stop him if the situation was dangerous. Appellant testified during his deposition: "I would assume if somebody was walking into a bad situation, that [Respondent Rolland] would have said something or yelled at me to stop. When he's yelling out of the skid

loader, I could hear him, but he never indicated to stop, by any means.” (A.000036 at 65:11-15.)

B. The Trial Court’s Denial of Respondents’ Motion for Summary Judgment.

Prior to trial, Respondents moved for summary judgment arguing, among other things, that they owed no duty of care to Appellant. (A.000048). Respondent suggested to the Trial Court that Appellant’s case consisted of the attempted imposition of a special relationship duty of care to protect and to warn, when no such duties existed. (A.000054 – 000055). Appellant argued in response that this matter did not hinge on a special relationship, but rather, upon Respondent’s affirmative duty to remedy the dangerous situation he had created, and a duty to warn Appellant thereof or otherwise prevent Appellant from approaching the dangerous situation. (A.000069 – 000077). On April 23, 2009, the Trial Court denied Respondents’ summary judgment motion, and provided a detailed analysis of the applicable duties owed by Respondents to Appellant. (A.000081 - 000089).

The Trial Court’s order denying summary judgment first held that Respondents did not owe a special duty to protect Appellant, because there was no “special relationship” between the parties. (A.000084 – 000085). The Trial Court noted three different circumstances in which a special relationship may be found, but did not find that Appellant and Respondents fit into any of the three circumstances, and therefore ruled that “no duty to

protect [Appellant] exists in this case, however, as [Appellant] suggests, a duty of care may exist under a different premise.” (A.000085).

The Trial Court then ruled on Respondents’ duty of reasonable care owed to Appellant, holding that Respondent Rolland “as an operator of the skid loader, owed a duty to [Appellant] requiring [Respondent Rolland] to act with reasonable care in his operation of the machinery. Whether [Respondent Rolland] acted with the appropriate reasonable care is a question of breach, which should be decided by the Trier of fact.” (A.000086 – 000087).

Next, the Trial Court ruled on Respondents’ duty of care based on the creation of a dangerous situation. (A.000087). The Trial Court found that:

There is no dispute in this case that a skid loader could cause serious injury to a person and use of such machinery could result in the creation of dangerous circumstances. In fact, in his deposition, [Respondent] Rolland admitted that at the time of the accident, it was a very dangerous situation due to the fact that the bucket was in the air, hanging on one pin. As such, [Respondents] also owed [Appellant] a duty of care based upon [Respondents’] actions in creation of a dangerous situation.

(A.000088).

Finally, the Trial Court ruled on Respondents’ duty to warn Appellant, finding that “in determining whether a duty to warn is owed, Minnesota courts use the same analysis as that used to conclude whether a duty to protect exists.” (*Id.*) As the Trial Court previously ruled that there was no special relationship between the parties which would require a duty to protect, it also found that there was no duty to warn, either. (*Id.*)

C. Respondents’ Proposed Jury Instructions.

Three days' prior to trial, Respondents served and filed their proposed Jury Instructions, which included two special jury instructions drafted by Respondent's counsel, as follows:

No Duty to Protect

A person generally has no duty to act for the protection of another person. A legal duty to protect will be found to exist only if there is a special relationship between the parties and the risk is foreseeable. The Court has ruled, as a matter of law, that no duty to protect exists in this matter and you must not consider such a duty in your deliberation in this case.

And

No Duty to Warn

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. The Court has ruled, as a matter of law, that no duty to warn exists in this case and you must not consider such a duty in your deliberation in this case.

(A.000090 - 000093). Appellant interposed a written objection to the inclusion of these special jury instructions, arguing that the inclusion of these jury instructions was unnecessary and would only serve to confuse the jury by providing instructions that are irrelevant and inapplicable. (A.000094 - 000096). Appellant further argued that a jury might find the general duty of reasonable care owed by Respondents could include a warning by Respondents to Appellant in order to shield Appellant from the dangerous situation created by Respondents. (A.000098 - 000099 at 7:15-8:2). Prior to jury selection commencing, the Trial Court entertained oral arguments on the inclusions of the two special jury instructions. (A.000097 - A.000102). Appellant's counsel argued "[t]he duty to protect, and the duty to warn are two separate and distinct duties that don't apply here. The Court

already made its ruling, saying they do not apply here. They should not appear here, then, because they are confusing.” (A.000098 at 7:15-20). Respondents’ counsel argued for the inclusion of the proposed jury instructions. (A.000099 – A.000100 8:15-9:9). Ultimately, the Trial Court allowed Respondents’ special instructions and submitted them to the jury. (A.000103 – 000105 at 95:23-96:17). At the close of evidence, the Court read all of the jury instructions to the jury, including the two special instructions of no duty to protect and no duty to warn. Thereafter, the parties’ counsel made their respective closing arguments.

After the parties’ counsel made their closing arguments, notwithstanding that all of the jury instructions had already been read to the jury, the Trial Court repeated the “no duty to warn” instruction with the following additional statements:

There is [sic] some specific things I am going to highlight regarding no duty to warn. That paragraph reads, and you will have that with you. Special relationship giving rise to a duty is only found on the part of the common carriers, in [sic] keepers, 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 and self protection. The Court has ruled, as a matter of law, that no duty to warn exists in this case, and you must not consider such a duty in your deliberations in this case.

(A.000106 at 157:6-18). Shortly thereafter, the matter was given to the jury for deliberations.

D. The Jury’s Written Question to the Court during deliberations.

During deliberations, the jury posed two written questions to the Trial Court, one of which included: “Does ‘no duty to warn’ mean that the [Respondents] had no obligation to try to keep the [Appellant] away from the skid loader?” (A.000107). The Court simply

responded: "I cannot give you further instruction on this. Please rely on the jury instructions provided to you." (*Id.*) The jury returned a verdict finding Respondents 0% negligent and Appellant 100% negligent. (A.000108 - 000111).

LEGAL ARGUMENT

I. STANDARD OF REVIEW.

An appeal may be taken from an order denying a motion for a new trial. Minn.R.Civ.App.P. 103.03(d). Denying a motion for a new trial on the ground of erroneous jury instructions generally rests within the district court's discretion, and the Appellate Court will not reverse absent a clear abuse of discretion. *Paulson v. Lapa, Inc.*, 450 N.W.2d 374, 378 (Minn.App.1990). Trial courts generally have "considerable latitude" in choosing jury instructions. *Morlock v. St. Paul Guardian Ins. Co.*, 650 N.W.2d 154, 159 (Minn.2002). However, if an erroneous jury instruction destroys the substantial correctness of the charge, causes a miscarriage of justice, or results in substantial prejudice, a new trial is warranted. *Linstrom v. Yellow Taxi Co.*, 298 Minn. 224, 229, 214 N.W.2d 672, 676 (1974). An error is prejudicial if there is a "reasonable likelihood that giving the instruction in question would have had a significant effect on the verdict of the jury." *State v. Glidden*, 455 N.W.2d 744, 747 (Minn. 1990). If a jury instruction "is erroneous and an appellate court is unable to determine whether the error affected the jury, a new trial should be granted." *Rowe v. Munye*, 674 N.W.2d 761, 769 (Minn. App. 2004). The jury should receive jury instructions on issues supported by competent evidence in the record, and the trial court is not required to instruct on issues

that do not find support in the record. *Ford v. GACS, Inc.*, 265 F. 3d 670, 679 (8th Cir. 2001).

Whether a person owes a duty of care “is an issue for the court to determine as a matter of law.” *Larson v. Larson*, 373 N.W.2d 287, 289 (Minn.1985). As a question of law, the existence of a legal duty in a negligence case is reviewed de novo. *Foss v. Kincade*, 766 N.W.2d 317, 320 (Minn. 2009).

II. THE INCLUSION OF RESPONDENTS’ SPECIAL JURY INSTRUCTIONS ON “NO DUTY TO WARN” AND “NO DUTY TO PROTECT” WERE INAPPROPRIATE AND PREJUDICIAL.

In this matter, the Trial Court permitted Respondent’s two so-called “negative” special jury instructions to be given to the jury- ‘no duty to warn’ and ‘no duty to protect.’ Negative jury instructions, informing of what the law does *not* consist of, are inappropriate. *See Jones v. Foutch*, 278 N.W.2d 572 (Neb. 1979) (when applicable and practicable, state jury instructions are to be used when charging the jury, and if it is necessary to draft a special definitional instruction, it should, whenever possible, be placed in an affirmative rather than a negative posture.), *and Smith v. Kellerman*, 541 N.W.2d 59 (Neb. 1995) (disapproving negative jury instructions).

In *Jones v. Foutch*, the trial court permitted a negative jury instruction that excessive speed itself could not constitute gross negligence, which was piecemealed together from Nebraska case law, and did not clearly admonish the jury that excessive speed should be considered together with all other factors. 278 N.W.2d at 579. The Nebraska supreme court noted:

Nevertheless, in this case we feel that the instruction complained of unduly emphasized and isolated one element of negligence which, standing alone, did not constitute gross negligence, without a clear admonition that it should be considered together with all other factors. As a result, it had a tendency to confuse and mislead the jury. Although certainly not determinative of this court's finding, the fact that the jury wrote the following note to the trial judge after submission of the case affords some evidence of corroboration of the same: "We are having trouble clarifying Gross Negligence. It seems that the two parts to the definition contradict each (other). Is Gross Negligence (1) A series of negligent acts (ex 3/out of 4) (sic) or (2) Willful distruction (sic) (3) or both." The trial court responded with supplemental instruction No. 1 as follows: "In answer to your question, the definition of gross negligence is adequately stated in Instructions 18, 19 and 20. The Instructions do not contradict each other, and are the law in the State of Nebraska. You will kindly reread Instructions 18, 19, and 20, because they are not inconsistent." Had the trial court utilized NJI No. 7.51 rather than attempting a piecemeal definition by reciting what gross negligence was not, such confusion probably would not have resulted.

Id. at 579-80 (emphasis added).

Regarding negative jury instructions, the Minnesota Supreme Court held in *Nubbe* that the exclusion of a negative jury instruction was proper. *Nubbe v. Hardy Continental Hotel Sys. Of Minn.*, 225 Minn. 496, 502-03, 31 N.W.2d 332, 336 (1948). *Nubbe* involved a negligence action by a tenant against her landlord for a fall on stairs. The court denied defendant's request that the jury be also instructed that defendant was 'not an insurer of the safety' of the premises. *Id.* The court noted that a charge that presents to the jury the standard definition of negligence in a premises liability action is sufficient, and "it need not be buttressed by express exclusion of nonapplicable principles of law." *Id.* (emphasis added).

Minnesota courts routinely note that, where practical, general jury instructions are preferred to a specific instruction requested by counsel, in order to avoid overemphasis in

favor of a party or jury confusion. *Fallin v. Maplewood-North St. Paul Dist. No. 622*, 362 N.W.2d 318, 322 (Minn. 1985); *Sandhofer v. Abbott-Northwestern Hospital*, 283 N.W.2d 362, 367 (Minn. 1979); *Cameron v. Evans*, 241 Minn. 200, 208-09, 62 N.W.2d 793, 798-99 (1954) (“Usually it is preferable to give a general charge, if practicable, upon the whole law of the case rather than to run the risk of overemphasizing one side of the case or confusing the jury as is often done by giving requested instructions or particularizing upon specific items.”).

In *Swanson v. La Fontaine*, a pedestrian brought an action against an automobile owner when the automobile’s hood blew off and was carried through the air by high wind, causing the pedestrian to sustain severe injuries in running away from the flying hood. 238 Minn. 460, 57. N.W.2d 262 (1953). After a jury verdict in favor of the defendant/automobile owner, the plaintiff/pedestrian moved the trial court for a new trial, alleging that the court provided the jury with an erroneous jury instruction regarding contributory negligence. *Id.* at 461. The Supreme Court found that as there was no evidence of contributory negligence “sufficient to create a jury issues, it was error to submit the issue, and there must be a new trial.” *Id.* at 467. The Supreme Court also gave the following caution to trial courts:

As a practical matter it is usually better for the trial court, after due consideration of the requested instructions, to charge the jury in an orderly, systematic, and consecutive manner in a general charge upon the whole law of the case rather than to run the risk of confusing the jury or overemphasizing one side of the case, as is often done, by giving requested instructions submitted by counsel. Though the requested instructions may be correct, they frequently present a partial, argumentative, and misleading view of the law. Where the law of the case is fully, fairly, and correctly states, that is all that is required.

Id. at 469. The Minnesota Supreme Court has stated on numerous occasions that it is not advisable to blindly read to a jury statements of law found in court decisions or textbooks. *See, e.g., Hovey v. Wagoner*, 287 Minn. 546, 548-49, 177 N.W.2d 796, 798 (1970); *Wolle v. Jorgenson*, 256 Minn. 462, 467, 99 N.W.2d 57, 61 (1959); *Barnes v. Northwest Airlines*, 233 Minn. 410, 420, 47 N.W.2d 180, 187 (1951); *Thomsen v. Reibel*, 212 Minn. 83, 86, 2 N.W.2d 567, 569 (1942); *Christensen v. Pestorious*, 189 Minn. 548, 551, 250 N.W. 363, 364 (1933); *Piepho v. M. Sigbert-Awes Co.*, 152 Minn. 315, 320, 188 N.W. 998, 999 (1922). A court, through its instruction, is not authorized to give prominence to and emphasize particular facts disclosed by the evidence, thus singling out elements or views in the case which were proper for argument and discussion by counsel, but which might very justly be declined to be thus noticed by the court. *Barnes*, 233 Minn. at 420, 47 N.W.2d at 187.

The Trial Court in this matter did exactly what the appellate courts routinely caution against, namely providing specific, negative, and unnecessary jury instructions based upon statements from case law, which overemphasized Respondents' case. Although Respondents' special jury instructions of "no duty to protect" and "no duty to warn" may have been legally accurate,¹ it is entirely unnecessary to instruct the jury as to the law that *does not apply in the case*. The Trial Court confused and misled the jury by providing jury instructions that were not appropriate or relevant to Respondents' breach of their legal duty

¹ The Trial Court ruled on summary judgment that, as a matter of law, Respondent owed no duty of care to warn Appellant. Appellant disagrees and is appealing this ruling. See Section V herein.

of reasonable care and duty of care based on the creation of a dangerous situation. The “no duty to protect” and “no duty to warn” special jury instructions were in fact partial, argumentative and misleading. Just as in the Minnesota case of *Nubbe v. Hardy Continental, supra*, and the Nebraska case of *Jones v. Foutch, supra*, the improper negative jury instructions in this matter constitute prejudicial and reversible error that warrant a new trial.

The standard jury instruction for negligence would have sufficed in this case. The basic definition suggested by the Minnesota Civil Jury Instruction Guides, for negligence and reasonable care is as follows:

Definition of “reasonable care”

Reasonable care is the care a reasonable person would use in the same or similar circumstances.

Definition of “negligence”

Negligence is the failure to use reasonable care.

Ask yourself what a reasonable person would have done in these circumstances. Negligence occurs when a person:

1. Does something a reasonable person would not do; or
2. Fails to do something a reasonable person would do.

Minn. CIV JIG 25.10.

The standard civil jury instructions have been carefully crafted over the years to provide an accurate statement of the law. By providing the jury with this more general charge, the Trial Court would have avoided overemphasizing Respondents’ side of the case. Notably, no standard jury instruction exists regarding ‘no duty to warn’ or ‘no duty to protect,’ instead these instructions were cobbled together by Respondent’s counsel.

A jury instruction is prejudicial if a more accurate instruction would have changed the outcome in the case. *Lewis v Equitable Life Assurance Soc'y of the U.S.*, 389, N.W.2d 876, 885 (Minn.1986). In this case, the outcome very well could have been different if the Trial Court had provided only CIV JIG 25.10 and not Respondents' special jury instructions. It is far more likely that there would have been no confusion by the jury had they simply been charged with CIV JIG 25.10. However, even if the effect of the erroneous instruction cannot be determined, the Appellant is to be given the benefit of the doubt by granting of a new trial. *Morlock v. St. Paul Guardian Ins. Co.*, 650 N.W.2d 154, 159 (Minn. 2002).

In *Peterson v. BASF Corporation*, the Supreme Court affirmed the trial and appellate courts' decision not to include certain jury instructions proposed by BASF Corp. 711 N.W.2d 470, 483 (Minn. 2006). The matter involved a class action lawsuit by farmers against BASF Corp. on allegations of deceptive labeling and marketing. *Id.* at 472. The specific jury instructions proposed by BASF Corp. were found by the appellate court to "not relate directly to the charge before the jury...These topics were more properly the subject of counsel's final argument rather than jury instructions, and the [trial] court did not abuse its discretion in denying the request to include these instructions." *Id.* at 484. The Supreme Court found that the trial court "did not want to confuse the jury with instructions on labeling law when it was not alleged that BASF had labeled incorrectly." *Id.* at 484.

The Trial Court in the matter at bar should have taken the same position that the trial court took in *Peterson* and not allowed Respondents' confusing and inapplicable jury

instructions. Having ruled as a matter of law on summary judgment that there was no duty to warn and no duty to protect, there was no need to give such instructions to the jury. The jury did not need to make any determination in this matter regarding a duty to warn or a duty to protect. Yet the Trial Court allowed those instructions over Appellant's strenuous objection. It would have been appropriate in this case for Respondents to simply have argued their position - that Respondents owed no heightened duty to warn or to protect - through closing arguments and evidence, rather than by specific jury instructions. *Conover v N. States Power Co.*, 313 N.W.2d 397, 402 (Minn.1981) (no reversible error was made when a specific instruction was omitted because each party was permitted to argue its theory of the case).

Providing jury instructions in this matter regarding what duties Respondents did *not* owe to Appellant did not serve to aid the jury's determination of this matter. The jury should only have been instructed as to the duty of care that Respondents did owe to Plaintiff, and have been asked whether such a duty was breached. In his objection to Respondents' proposed special jury instructions, Appellant conceded that the Trial Court had already ruled against him on the issues of Respondents' duty to protect and to warn. The issue before the jury was whether Respondents' were negligent by breaching their duty of reasonable care owed to Plaintiff, a duty that exists as a matter of law as determined by the Trial Court. "No duty to warn" and "no duty to protect" were as inappropriate in this case as a vast array of other legal duties and instructions that did not apply in this matter. The jury should not be instructed regarding inapplicable rules and laws, and in any event, the jury should never be provided inappropriate "negative" jury

instructions as to what does not constitute the law at issue. Certainly, a majority of negligence cases do not include a duty to warn or to protect. However, it is clearly not standard protocol to give such “no duty” instructions in the average automobile accident case or slip-and-fall case, and such instructions were equally inappropriate in this case, and served to be highly prejudicial to Appellant.

Accordingly, Appellant requests that the jury’s verdict be reversed as a result of the Trial Court’s prejudicial error, and that this matter be remanded for a new trial, omitting Respondents’ special jury instructions on “no duty to warn” and “no duty to protect.”

III. THE INCLUSION OF RESPONDENTS’ SPECIAL JURY INSTRUCTIONS CONFUSED THE JURY, CONSTITUTED REVERSIBLE ERROR, AND WARRANTS REMANDING THIS MATTER FOR A NEW TRIAL.

In construing jury charge as a whole, it must be scrutinized and tested from the standpoint of its total impact or impression on the jury, and, if as a whole, its impact gives the jury an erroneous conception of controlling principles of law, then the instruction constitutes a reversible error of law. In *Zurko v. Gilquist*, a new trial was awarded when a jury instruction could have provided an erroneous understanding of the controlling principles of law. *Zurko* at 241 Minn. 1, 5, 62 N.W.2d 351, 354 (Minn. 1954). The Supreme Court goes on to state:

In construing a charge as a whole, its adequacy in correctly setting forth controlling principles of law is to be measured by the meaning it reasonably conveys to the jurors who hear it only once and have no opportunity to examine it in written form. Even though a jury charge may by close inspection be found to be technically correct in its entirety, a new trial

should be granted if its impact upon the jury is likely to convey, and reasonably does convey, an erroneous understanding of controlling principles of law.

Id.

Here, it is clear that the jury was confused by Respondents' special jury instructions. During deliberations, the jury submitted the following question to the court: **"Does 'no duty to warn' mean that the [Respondents] had no obligation to try to keep the [Appellant] away from the skid loader?,"** to which the Trial Court's only response was that it could not give any further instructions on this issue and that they should rely on the jury instructions as provided.

Notably, the proper response to the jury's question is "no," inasmuch as the Trial Court ruled as a matter of law that, having created the dangerous situation with the skid loader, Respondents owed a duty of care as a matter of law to keep Appellant from that dangerous situation. Thus Respondents did in fact have an obligation to try to keep Appellant away from the skid loader. The question then becomes, did Respondent Rolland breach his duty by sitting idle while Appellant approached the dangerous dangling bucket? The jury's question to the Trial Court strikes to the very heart of this matter, and shows the jury's confusion as a result of the Trial Court's "no duty to warn" and "no duty to protect" instructions. The jury's confusion in this matter is palpable, yet the Trial Court chose to ignore it and force the jury to continue deliberating on those same erroneous instructions. The Trial Court's decision to provide prejudicial instructions on legal theories that did not apply in this matter served to confuse and mislead the jury, and constituted a reversible error of law warranting a new trial.

Whatever the jury's thought process, it was influenced by the Trial Court's instructions—and that influence was ultimately prejudicial.

In present matter, the Trial Court provided the jury with a single instruction regarding the duty of care owed, and *two* instructions regarding duties of care *not owed*, despite the fact that there is no need, reason, or purpose for giving any instruction as to a duty of care not owed. Undoubtedly, the overall impression to the jury of such a set of instructions was to give them a misunderstanding of the law. Because no authority existed to warrant the negative instructions as to what the law was not, and because the instructions had a prejudicial effect on an issue vital to this case, this Court should reverse and remand this issue back to the Trial Court for a new trial.

IV. THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT REPEATED THE 'NO DUTY TO WARN' INSTRUCTION AFTER CLOSING ARGUMENTS, THEREBY PLACING UNDUE AND IMPROPER EMPHASIS ON THAT INSTRUCTION.

At the close of evidence, the Trial Court read all of the jury instructions aloud to the jury. Counsel then gave their respective closing arguments. No objections were raised and sustained during the closing arguments. Yet, following the closing arguments, the Trial Court then provided additional comments to the jury regarding 'no duty to warn,' which the Court specifically prefaced with the fact that it was "highlighting" that issue for the jury.

The appellate courts review jury instructions "in their entirety to determine whether they fairly and adequately explain the law of the case." *State v. Peterson*, 673 N.W.2d 482, 486 (Minn.2004). Usually it is preferable to give a general jury charge upon the whole law

of the case, rather than risk confusing the jury or emphasizing one side of the case by emphasizing particular items. *Peterson v. BASF Corp.*, 657 N.W.2d 853, 870 (Minn. App. 2003) (citing *Cameron v. Evans*, 241 Minn. 200, 209, 62 N.W.2d 793, 799 (1954)). Specific instructions requested by party as to party's theory of case should be refused if they are argumentative, or tend, by repetitiveness, to unduly emphasize one side of the issue. *Weiby v. Wente*, 264 N.W.2d 624, 628 (Minn. 1978); *Malik v. Johnson*, 300 Minn. 252, 257, 219 N.W.2d 631, 635 (1974); *Floen v. Sund*, 255 Minn. 211, 215, 96 N.W.2d 563, 567 (1959). Reversal is warranted where the charge to the jury centers the jury's attention upon a mere detail, thereby giving it undue prominence, and thus obscuring the questions really involved. *Geddes v. Van Rhee*, 126 Minn. 517, 520, 148 N.W. 549, 550 (1914). A potentially erroneous jury instruction must be considered, not only in connection with the rest of the charge as a whole, but also with reference to the order in which it was given and what inferences the jury were likely to draw from it. *Id.*

In this matter, the Trial Court not only gave erroneous negative instructions, but also improperly emphasized and focused upon the 'no duty to warn' instruction. After the general charge to the jury, and after closing arguments were completed, the Trial Court improperly re-read the 'no duty to warn' instruction, prefaced by the judge's comment of: "There is [sic] some specific things I am going to highlight regarding no duty to warn." (A.000106 (emphasis added).) The Trial Court purposefully emphasized and improperly centered the jury's attention upon that negative and inapplicable instruction, to the prejudice of Appellant. By giving that instruction a second time after closing arguments were done,

the Trial Court committed prejudicial and reversible error, and the case should be remanded for a new trial.

V. THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT HELD RESPONDENT ROLLAND HAD NO DUTY TO WARN APPELLANT OF THE DANGEROUS SITUATION HE CREATED.

Upon Respondents' motion for summary judgment, the Trial Court held as a matter of law that Respondent Rolland owed no duty of care to warn Appellant of the dangerous situation that Respondent Rolland had created, namely a raised skid loader bucket dangling from a single pin, of which Respondent was in control and Appellant was approaching. The Trial Court's summary judgment ruling regarding the lack of a duty to warn constitutes an error of law.

The test for negligence is the act of doing of something which an ordinarily prudent person would not do, or the failure to do something which an ordinarily prudent person would do under like or similar circumstances. *See Flom v. Flom*, 291 N.W.2d 914, 916 (Minn. 1980) (negligence action brought by wife, who sustained injuries in fall from manually operated merry-go-round in public park, against husband, who was pushing device at time, and city that owned park); *State v. Munnell*, 344 N.W.2d 883, 886 (Minn. App. 1984). Whether a person owes a duty of care in the first place "is an issue for the court to determine as a matter of law." *Larson v. Larson*, 373 N.W.2d 287, 289 (Minn.1985). As a question of law, the existence of a legal duty in a negligence case is reviewed de novo. *Foss v. Kincade*, 766 N.W.2d 317, 320 (Minn. 2009).

A. A Duty to Warn Arises in Numerous Instances, and should be Held as a Matter of Law to Apply in this Case as well.

A duty to warn arises in a number of instances, including premises liability, special relationships, and in the product liability context. For example, a municipality owes a duty of care to warn travelers of known dangerous conditions on public roadways. *Schroeder v. St. Louis County*, 708 N.W.2d 497, 511 (Minn. 2006) (municipality has duty to maintain roads in safe condition, which duty includes warning travelers of dangerous conditions, particularly if the danger is one that a municipal employee created). *See also Hollinbeck v. Downey*, 261 Minn. 481, 486, 113 N.W.2d 9, 12-13 (1962) (golfer who knew caddy was in a zone of danger from his shot had a duty to either shout a warning or desist from hitting his ball).

Remarkably, an employer also owes a duty of care to an employee to warn of unforeseen dangers. *Berg v. Johnson*, 252 Minn. 397, 401, 90 N.W. 2d 918, 921 (1985). Generally, an employer does not owe such a duty of care to a volunteer. *See Evarts v. St. Paul M & M Ry. Co.*, 56 Minn. 141, 57 N.W. 459 (1894). However, if an employer or its servants discover that such volunteer has placed himself in a position of danger, even through his own inexperience, and the servants fail to exercise reasonable care to avert the danger, the employer will be liable. *Id.*, 56 Minn. at 147, 57 N.W. at 460. Nearly ninety years ago it was considered a “well settled” matter of law that a plaintiff, though a trespasser, licensee, or volunteer, may recover for defendant's failure to use ordinary care for the purpose of avoiding injury to plaintiff after becoming aware that plaintiff has put himself in a position of danger that may have been prevented by the defendant. *Rauscher v.*

Payne, 152 Minn. 368, 372, 188 N.W. 1017, 1018-19 (1922). *Rauscher* involved a mailperson climbing onto the engine of a train to deliver a message as it was stopped. *Id.* Before the mailperson could complete his message and depart from the train, the engineer started to move the train. The fireman of the train saw the mailperson, clearly recognizing he wanted to get off, but turned his back and ignored the situation rather than telling the engineer to stop the train. *Id.* The mailperson eventually jumped from the moving train and was injured. *Id.* Finding that the train operators owed a duty of care to the mailperson, the Court held that “whenever a person is by circumstances placed in a position where every one of ordinary sense would recognize that, if he did not use ordinary care in his own conduct with regard to another person, he would cause danger of injury to that person, a duty arises to use ordinary care to avoid such danger.” *Rauscher*, 152 Minn. 372, 188 N.W. 1019.

Much like in *Rauscher*, Respondent Rolland saw that Appellant had placed himself in a position of danger with respect to the instrumentality that Respondent Rolland was operating, namely the skid loader. Respondent Rolland thus owed duty of care to prevent any injury to Appellant. As a matter of common sense and public policy, if the Respondent Rolland could have fulfilled such duty of care and prevented such injury by a shouting a warning to Appellant, then a warning is warranted and owed.

Particularly apposite in this matter is the Restatement Second of Torts, § 321, which provides:

- (1) If the actor does an act, and subsequently realizes or should realize that it has created an unreasonable risk of causing physical harm to another, he is

under a duty to exercise reasonable care to prevent the risk from taking effect.

(2) The rule stated in Subsection (1) applies even though at the time of the act the actor has no reason to believe that it will involve such a risk.

Rest. 2d Torts, § 321 (1965). The reporter's comments and illustrations to § 321 go on to note:

- a. The rule stated in Subsection (1) applies whenever the actor realizes or should realize that his act has created a condition which involves an unreasonable risk of harm to another, or is leading to consequences which involve such a risk. The rule applies whether the original act is tortious or innocent. If the act is negligent, the actor's responsibility continues in the form of a duty to exercise reasonable care to avert the consequences which he recognizes or should recognize as likely to follow. But even where he has had no reason to believe, at the time of the act, that it would involve any unreasonable risk of physical harm to another, he is under a duty to exercise reasonable care when, because of a change of circumstances, or further knowledge of the situation which he has acquired, he realizes or should realize that he has created such a risk.

Illustrations:

1. A is playing golf. He sees no one on or near a putting green and drives to it. While the ball is in the air, B, another player, suddenly appears from a bunker directly in the line of A's drive. **A is under a duty to shout a warning to B.**

2. A, reasonably believing his automobile to be in good order, lends it to B to use on the following day. The same night A's chauffeur tells him that the steering gear is in dangerously bad condition. **A could readily telephone B and warn him of the defective steering gear but neglects to do so.** B drives the car the following day, the steering gear breaks and the car gets out of control, causing a collision with the car of C in which B and C are hurt. **A is subject to liability to B and C.**

Rest. 2d Torts, § 321, cmt. (a) & illustration 1 & 2 (1965).

Notably, in the foregoing Illustrations # 1 & 2 of § 321, the author notes that the duty of care specifically includes a duty to provide a warning of a known dangerous condition

that the negligent party either created or contributed to creating. That exact scenario occurred in this case, wherein Respondent created an admittedly dangerous situation with the skid loader, saw Appellant approaching that situation, and failed to shout any warning or other signal to Appellant to not approach. Respondent's duty of care in this situation included a duty to warn, and as such, the Trial Court's ruling on summary judgment was erroneous.

B. Much like a Product Liability Action, where Respondent has Created a Dangerous Situation, he should be Held to Owe a Duty to Provide a Warning.

This matter is similarly analogous to a product liability action. In the product liability context, the manufacturer or supplier of a product has a duty to warn the user of any foreseeable dangers associated with the product's intended or foreseeable uses. *Gray v Badger Min. Corp.*, 676 N.W.2d 268, 274 (Minn. 2004); *see also Germann v. F.L. Smithe Mach. Co.*, 395 N.W.2d 922, 924 (Minn. 1986) (the duty to warn rests directly on the foreseeability of the injury); *Parks v. Allis-Chalmers Corp.*, 289 N.W.2d 456, 460 (Minn. 1979) (when defendant could reasonably foresee that the machine would at times be used in an improper manner, it was defendant's duty to exercise reasonable care to warn or instruct as to dangers inherent in that manner of use). In the *Gray* case, the Minnesota Supreme Court noted the common-law duty to warn as adopted from the Restatements:

One who supplies directly or through a third person a chattel for another to use, is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be in the vicinity of its probable use, for bodily harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier:

(a) knows, or from facts known to him should realize, that the chattel is or is likely to be dangerous for the use for which it is supplied;

(b) and has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition; and

(c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts, which make it likely to be so.

Id. at 274 (quoting Restatement (Second) of Torts § 388). In a duty to warn case, Comment k to section 388 of the Restatement (Second) of Torts emphasizes the importance of special knowledge of the defendant, stating that a dangerous condition:

may be one which only persons of special experience would realize to be dangerous. In such case, if the supplier, having such special experience, knows that the condition involves danger and has no reason to believe that those who use it will have such special experience as will enable them to perceive the danger, he is required to inform them of the risk of which he himself knows and which he has no reason to suppose that they will realize.

Rest. 2d Torts, § 388, Comment d (1965). *See also Gray v. Badger Min. Corp.*, 676 N.W.2d 268, 277, fn.6 (Minn. 2004) (quoting and relying upon § 388, comment k). As noted in *Gray*, even if the injured party may have some awareness of potential danger, if the defendant has far superior knowledge, that superior knowledge will impart a duty to warn. *See id.*

There exists “a duty upon those who create a foreseeable peril, not readily discoverable by endangered persons, to warn them of such potential peril.” *Cairl v. State*, 323 N.W.2d 20, 25 (Minn. 1982) (quoting *Johnson v. State of California*, 69 Cal.2d 782, 785, 447 P.2d 352, 355 (Cal. 1968) (action against state and certain officials for the release of a violent juvenile parolee without warning to the foster parent with whom the parolee was placed and later injured)).

In this matter, much like a product liability action, Respondents created the dangerous “product,” (i.e. the skid loader with the dangling bucket), and therefore should be held as a matter of law to owe a duty of care to warn Appellant and other foreseeable persons in danger from the dangerous situation. As a matter of public policy, Respondents should not be permitted to create a dangerous situation and then sit idly by as innocent bystanders put themselves in harms way as a result of Respondent Rolland’s conduct. Respondent should be required to provide a warning of the dangerous situation, particularly given the special knowledge that Respondents possessed regarding the “very dangerous” situation, and the fact that Appellant or other persons not trained in the operation of a skid loader, would not realize is dangerous.

Respondent has a duty to act as a reasonable person would act in the same or similar circumstances. *See* Minn. CIV JIG 25.10. As a matter of law, where Respondent Rolland created a dangerous situation with the skid loader and saw Appellant approaching that situation, a reasonable person would and should be required to provide a warning as to the dangers of the situation. This is especially true given the special knowledge of Respondent Rolland and the lack of knowledge by Appellant. Appellant requests a ruling that, as a matter of law, in this scenario, the duty of reasonable care owed by Respondents to Appellant includes a duty to warn of the dangerous situation. As noted in *Cairl*, the law imposes upon those who create a foreseeable peril, not readily discoverable by endangered persons, to warn them of such potential peril. *Cairl v. State*, 323 N.W.2d 20, 25 (Minn. 1982). The same duty should apply to Respondents in this case as a matter of sound legal rationale and public policy.

CONCLUSION

Based upon the foregoing, Appellant respectfully requests that the Court reverse and remand this matter for a new trial, with specific directive that any negative jury instruction on “no duty to warn” or “no duty to protect” be excluded from the jury instructions, and moreover, that the Court hold as a matter of law that Respondents did owe a duty as a matter of law to warn Appellant of the impending danger, and that the jury be so instructed.

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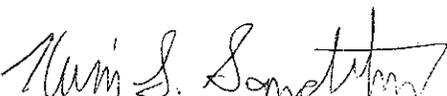
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FORMAT CERTIFICATION

The undersigned hereby certifies pursuant to Minn. R. Civ. App. P. 132.01, subd. 3(c), that the word count of the foregoing brief of Appellant Bradley Domagala, including footnotes, but exclusive of pages containing the Table of Contents and the Table of Authorities, is **10,416**. The Brief complies with the typeface requirements of the rules and was prepared, and the word count was made, using Microsoft Word.

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& VIERLING, P.L.L.P.**

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