

STATE OF MINNESOTA
IN COURT OF APPEALS

Appellate Court Case No. A09-1945

Bradley J. Domagala,

Appellant,

v.

Eric Rolland and Rolland Building Corp.,

Respondents,

REPLY BRIEF OF APPELLANT

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INTRODUCTION

Respondent attempts to uphold the Trial Court's actions by suggesting that the Trial Court's finding on summary judgment of no special relationship between the parties somehow necessitated its special jury instructions of "No Duty to Warn" and "No Duty to Protect." Respondent cites to various authority that jury instructions are generally within the trial court's discretion, while attempting to skirt the numerous authorities proffered by Appellant stating that special jury instructions cobbled together from case law, and negative jury instructions stating what the law *is not*, are highly disfavored.

Without a doubt, Respondent's special jury instructions of "No Duty to Warn" and "No Duty to Protect" were erroneous, unnecessary, and improper. They are directly contradictory to the other instructions, particularly the jury instruction that the Trial Court allowed providing that Respondent had a duty to prevent harm based upon the creation of a dangerous situation. The Trial Court's actions in this matter rose to the level of an abuse of discretion and an error of law, and the Court of Appeals should reverse and remand this matter for a new trial with a directive to exclude those instructions, and with a directive that Appellant may argue that Respondent's ordinary duty of reasonable care may include both an obligation to protect and an obligation to warn.

ARGUMENT

I. The Trial Court's inclusion of the 'No Duty to Warn' and 'No Duty to Protect' did constitute an abuse of discretion and an error of law warranting reversal.

The Trial Court allowed four instructions relating to duties of care to go to the jury. It provided the standard instruction regarding an ordinary duty of reasonable care in negligence, a special instruction that Respondent had a duty of care to prevent harm based upon the creation of a dangerous situation, and Respondent's proffered special instructions of "No Duty to Warn" and "No Duty to Protect." Simply put, the instructions directly contradict each other, and are therefore erroneous. It is impossible for Respondent to owe a duty of care to prevent harm to Appellant based upon the creation of a dangerous situation, while at the same time, not owing either a duty to warn or a duty to protect Appellant. One cannot prevent harm without either providing a warning or taking some action to protect.

Respondent fails to appreciate the general cause of action for negligence, i.e. a duty to act with the care a reasonable person would use in the same or similar circumstances. Respondent emphasizes the lack of a "special relationship" in this case, and is fixated upon the Trial Court's ruling on summary judgment that no special duty to warn or special duty to protect exists. Respondent uses flawed logic in this matter. Respondent's logic is as follows: (1) a special relationship results in a duty to warn and a duty to protect; (2) no special relationship exists in this case; therefore (3) Respondent must not have owed any duty to warn or any duty to protect Appellant. To the contrary, a duty to protect may arise in circumstances other than a special relationship, thus Respondent's logic is faulty. The Trial Court expressly ruled on summary judgment that Respondent had a duty to prevent

harm based upon his creation of a dangerous situation, and this ruling is equivalent to a duty to protect.

Appellant reiterates to the Court that the “special relationship” test is only relevant to impart a duty of care to act upon an otherwise *innocent bystander* to protect against the injurious actions of third parties. *See* Rest. 2d Torts § 314 (1965). The Restatement provides: “The fact that the [defendant] realizes or should realize that action on his part is necessary for another’s aid or protection does not of itself impose upon him a duty to take such action.” *Id.* However, this well-established rule has exceptions, and does not apply to a party who actively creates a dangerous situation, notably, “The actor’s prior conduct, whether tortious or innocent, may have created a situation of peril to the other, as a result of which the actor is under a duty to act to prevent harm, as stated in §§ 321 and 322.” *Id.* at Cmt. A (emphasis added). Accordingly, Restatement of Torts § 321 provides as follows:

(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.

Restatement (Second) Torts, § 321 (1965). Likewise, the Restatement (First) of Torts, § 321 contains a similar provision:

If the actor does an act, which at the time he has no reason to believe will involve an unreasonable risk of causing bodily harm to another, but which, because of a change of circumstances or fuller knowledge acquired by the actor, he subsequently realizes or should realize as involving such a risk, the actor is under a duty to use reasonable care to prevent the risk from taking effect.

Restatement Torts, § 321 (1934). Thus a party who creates a dangerous situation owes a duty to others to prevent harm from that dangerous situation. The Trial Court so ruled on summary judgment that Respondent owed just such a duty.

In this case, Respondent was not an innocent bystander, and the 'special relationship' case law is irrelevant. Rather, Respondent was the active operator of the dangerous equipment at issue, the skid loader, and Respondent in fact created the dangerous situation of the skid loader bucket dangling in the air and attached by only one of its two locking pins. Appellant fully admits that a "special relationship" is not at issue, but that does not relieve Respondent's duty of care to act in this circumstance and *prevent the harm from occurring*. The Trial Court somewhat realized this fact by allowing this matter to proceed past summary judgment and to the jury upon a general duty of reasonable care, as well as a duty of care based upon the creation of a dangerous situation. However, the Trial Court committed a serious error by accepting Respondent's irrelevant and contradictory "No Duty to Warn" and "No Duty to Protect" instructions.

Appellant suggests that both Respondent and the Trial Court misapprehended the law and Appellant's arguments on summary judgment. Although no special relationship existed that would have created a special duty to protect or a special duty to warn, a general duty of ordinary reasonable care did exist. The Trial Court held that Respondent actively owed an ordinary duty of reasonable care to prevent harm to Appellant from the dangerous instrumentality that Respondent was operating, e.g. the skid loader, plus a duty of care based upon the creation of a dangerous situation. Thus the question for the jury became: since Respondent was in fact subject to a duty of reasonable care and a duty to prevent

harm, then what would a reasonable person do, or not do, under the same or similar circumstances to prevent injury to Appellant? This is the overarching principle with which the jury had to contend.

Appellant strongly suggests that a reasonable person under the same or similar circumstances as Respondent, sitting in the operator's seat of the skid loader, might shout a warning to Appellant who was approaching the dangerous situation. Or perhaps the reasonable person in Respondent's same circumstances might have shooed Appellant back by frantically waving his hands to indicate "stay back." The point being that Respondent was required to take some form of specific action to prevent harm to Appellant based upon Respondent's duty of reasonable care. Respondent clearly fails to appreciate this distinction, as did the Trial Court when it accepted Respondent's "No Duty to Warn" and "No Duty to Protect" instructions.

Appellant contends that a duty to warn may be encompassed within Respondent's ordinary duty of reasonable care. Thus a "No Duty to Warn" instruction was inappropriate. In fact, even more egregious is Respondent's "No Duty to Protect" instruction, as Respondent absolutely did owe a duty to protect Appellant. Once the Trial Court determined that Respondent owed a reasonable duty of care to Appellant and a duty to prevent harm to Appellant, that ruling is tantamount to a holding that Respondent in fact did owe a duty to protect Appellant. How can Respondent owe a duty of care to Appellant, while at the same time owing neither a duty to warn nor a duty to protect? What action was Respondent expected to take under his ordinary duty of reasonable care if Respondent did not owe a duty to warn or protect?

In immediate succession, the Trial Court provided the following two directly contradictory instructions to the jury:

Duty of Care Based on the Creation of a Dangerous Situation

If a person created an unreasonable risk of causing physical harm to another, that person has a duty to exercise reasonable care to prevent the risk from taking effect. This duty applies even though at the time of the creation of the unreasonable risk, the person had no reason to believe that it will involve such risk.

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 deliberations in this case.

(See RA 14 (underlining added).)

It is certainly not possible that one can both owe a duty to prevent a risk from taking effect, but at the same time, not owe a duty to protect another person. The Trial Court's instructions simply do not make sense, are self-conflicting, and erroneously state the law.

Notably, the "Duty of Care Based on the Creation of a Dangerous Situation" instruction is Appellant's requested special instruction based upon the Trial Court's summary judgment ruling, which was in turn based upon the Restatement Second of Torts § 321 as noted above. Respondent's brief seems to suggest that because the Trial Court allowed the special instructions of both sides, that this equalized the playing field and the result should be affirmed. Nothing is further from the truth. In fact, in the first instance, Appellant requested only the standard negligence instruction, CIVJIG 25.10. (See A.000094-96.) This was clearly noted in both Appellant's requested jury instructions, as

well as Appellant's objection to Respondent's special instructions. Only after the Trial Court ruled, over Appellant's objection, that it would provide the "No Duty to Warn" and "No Duty to Protect" instructions did Appellant request his own special instruction. (See RA 32-33.) To be sure, the most appropriate instructions in this case regarding duty of care would have been solely the standard CIVJIG 25.10 duty of care instruction, as initially requested by Appellant. See *Christensen v. Pectorious*, 189 Minn. 548, 551, 250 N.W. 363, 364 (1933) (noting: "We have discouraged the reading from opinions in charging the jury. ... Again we disapprove the practice. The language used by this court in an opinion is usually not the language appropriate to an instruction. ... The practice is again discouraged in the hope that it will cease before it results in the necessary granting of new trials."); *Jones v. Foutch*, 278 N.W.2d 572 (Neb. 1979).

At every opportunity where Appellant attempted to argue what Respondent's duty of reasonable care entailed, Respondent's counsel attempted to object that such arguments by Appellant constituted an improper suggestion of a duty to warn or a duty to protect. Thus Respondent in effect sought and continues to seek to hamstring Appellant by his inclusion of the improper "No Duty to Warn" and "No Duty to Protect" instructions. For example, during closing arguments, Appellant argued that Respondent could have waved his hands to prevent Appellant from approaching the skid loader. (See RA 37-38) Respondent objected and a sidebar was conducted. (Id.) The Trial Court overruled the objection and allowed Appellant's closing to continue without a curative instruction. Even so, in Respondent's appellate brief, Respondent argues that: "Counsel [for Appellant] indicated that [Respondent] could have waved his hands, indicating 'no,' to warn [Appellant] not to

approach the skid loader. ... Defendants objected, as Plaintiff's argument implied that a warning should have been provided in order to prevent Domagala from approaching." (See Resp. Brief at 8.) To Respondent, every conceivable duty of action that Appellant might have suggested to the jury would fall within Respondent's "No Duty to Warn" and "No Duty to Protect," thereby warranting Respondent's objection and thoroughly confusing the jury.

The Trial Court's instructions to the jury (which combined an ordinary duty of care, a particular duty of care to prevent harm based upon the creation of a dangerous situation, plus no duty to warn, and no duty to protect), are completely contradictory and nonsensical. Although Respondent's special instructions in the abstract may constitute accurate statements of the law where no special relationship exists, Appellant has never conceded that they constituted accurate statements of the law in this case, and in fact, they were incorrect, highly inappropriate to provide to the jury, caused confusion, and constituted an abuse of discretion and reversible error.

The Trial Court completely muddled the issues before the jury by allowing Respondent's irrelevant instructions of "No Duty to Warn" and "No Duty to Protect." Notably, Respondent attempts to veil its obvious transgression throughout his appellate brief by misleadingly phrasing these instructions in the positive as "Duty to Warn" and "Duty to Protect," when in fact at trial Respondent entitled them in the negative as "*No* Duty to Warn" and "*No* Duty to Protect," and they were so entitled when presented to the jury.

As Respondent repeatedly cites throughout its brief, the jury instructions must "as a whole convey to the jury a clear and correct understanding of the law of the case." *Barnes*

v. Northwest Airlines, Inc., 233 Minn. 410, 421, 47 N.W.2d 180, 187 (1951). The instructions given here did not do so, and instead informed the jury as to what admittedly was not the law of the case. Providing the jury with instructions regarding what is not the law of the case constitutes reversible error. Respondent badly misconstrues the holding in *Jones v. Foutch*, 278 N.W.2d 572 (Neb. 1979), which, although it is a Nebraska case, is virtually directly on point in this matter.

Conversely, Respondent attempts to rely upon the case of *Hernandez v. Renville Public School Dist. No. 654*, 542 N.W.2d 671 (Minn. App. 1996) for a contrary holding. (See Resp. Br. at 12.) Inspection of *Hernandez* demonstrates that it is distinguishable. *Hernandez* involved a young child who was injured after falling from playground equipment at her school, whereafter an action was brought against the school for failure to supervise. Amongst others, the *Hernandez* court allowed the following instruction to the jury:

Tri-Valley and its teachers had an obligation to use ordinary care and to protect its students from injuries which could reasonably have been foreseen and could have been prevented by the use of ordinary care. However, there is no requirement of constant supervision of all of the movement of all pupils at all times.

Hernandez, 542 N.W.2d at 673. After a verdict in favor of the school, plaintiff appealed. The plaintiff objected to the final sentence of the aforesaid instruction. Thus the claimed error was a single qualifying sentence within an otherwise proper duty of care instruction. Although the Court of Appeals strongly cautioned against including such a statement, it

reluctantly held that no reversible error had occurred.¹ *Id.* Thus *Hernandez* involved only a single inappropriate sentence intermixed within an otherwise proper instruction. Conversely here, the Trial Court allowed two complete stand-alone instructions which were inappropriate regarding “No Duty to Warn” and “No Duty to Protect,” and then the Trial Court re-read those instructions after the closing arguments. The circumstances at issue here are far more egregious than *Hernandez*.

The authorities are replete with cautions from the appellate courts that self-spun jury instructions are disfavored, and negative jury instructions are objectionable. See *Jones v. Foutch*, 278 N.W.2d 572 (Neb. 1979) (negative jury instruction held to be erroneous and an abuse of discretion); *Smith v. Kellerman*, 541 N.W.2d 59 (Neb. 1995) (disapproving negative jury instructions); *Nubbe v. Hardy Continental Hotel Sys. Of Minn.*, 225 Minn. 496, 502-03, 31 N.W.2d 332, 336 (1948) (exclusion of a negative jury instruction was proper); *Hovey v. Wagoner*, 287 Minn. 546, 548-49, 177 N.W.2d 796, 798 (1970) (special instructions requested by counsel based upon statements from reported case law are disfavored). The Trial Court’s inclusion of Respondent’s “No Duty to Warn” and “No Duty to Protect” instructions went far beyond the bounds of its discretion in creating the jury instructions, are erroneous, and warrant reversal.

¹ The Court of Appeals in *Hernandez* noted: “We agree that in a negligent supervision case involving very young children it is preferable to avoid the instruction that a school has no duty to supervise all children at all times. The better practice may be to instruct the jury that the school must exercise ordinary care to protect students from foreseeable injuries.” 542 N.W.2d at 674 (emphasis added).

II. The Trial Court's repetition of the negative jury instructions highlighted these improper instructions to the jury, which confused the jury and did constitute reversible error.

Appellant has already described in detail why the "No Duty to Warn" and "No Duty to Protect" instructions were erroneous. The Trial Court's repetition of these instructions after closing argument only served to further emphasize them and compound the error. The record is clear that the jury was confused.

The jury's question to the Trial Court during deliberations demonstrates the jury's confusion and resultant prejudice to Appellant. They asked: "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) Respondent attempts to minimize this question by incorrectly suggesting that only a single juror, John Smith, asked the question of the Trial Court, thereby somehow inferring that the remainder of the jurors were not confused. (Resp. Brief at p.9, n.1 & p.17 .) Respondent has badly misstated the record. The jury's note that asks: "Does 'no duty to warn' mean that the [Respondents] had no obligation to try to keep the [Appellant] away from the skid loader?" **is in fact signed by the jury foreperson, Ms. Heather Nelsen, on behalf of the entire jury, rather than Mr. John Smith, the juror who later dissented from the verdict.** However, it should also be noted that later during deliberations, Juror Smith asked three additional questions of the judge,² to which the

² Juror Smith, the lone holdout from the final verdict, propounded the following additional questions and statements to the Trial Court later during deliberations:

- 1. Is "the incident" the action of the plaintiff pulling the lever? If not, please define the scope of "the incident"**

remaining six jurors submitted a note to the judge stating “The questions are being asked by John Smith. The final statements are false and not true.” (RA.54) Also of note is the fact that Mr. John Smith refused to sign the jury verdict, and the jury was permitted to render a 6 out of 7 majority verdict because they deliberated for more than six hours. (See Verdict Trial Transcr. Of 5/21/09 at 2-6.) Thus not only did the jury foreperson submit a question to the judge on behalf of the *entire jury*, but a single holdout juror refused to even sign the verdict. Respondent has falsely presented the factual record to this Court. The juror confusion in this matter is palpable, and warrants reversal.

Respondent also suggests that no jury confusion occurred because Appellant’s counsel acquiesced to the Trial Court’s generic response to the jury’s question about the ‘No Duty to Warn’ instruction, rather than demanding clarification. (See Resp. Brief at 10.) The fact of the matter is that Appellant had already made numerous objections to the “No Duty to Warn” instruction, and decided that there was little hope of curing the Trial Court’s previous errors and the resulting jury confusion with further instructions or ‘clarifications’ during deliberations. Appellant simply hoped to avoid compounding the confusion by not further instructing the jury or further emphasizing any aspect of the “No Duty to Warn” or

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- 2. Is it reasonable for the jury to conclude that the defendant is negligent by reason of making no attempt to keep plaintiff away from the skid loader even though this point was never argued in court?**

 - 3. Jury deliberations have broken down into personal attacks (verbal); jury foreperson has three times refused to forward questions of mine to the judge; I don’t feel my presence on the jury is productive at this point. John Smith – these are my thoughts & statements only**

(See Mr. Smith’s hand-written notes during deliberations, not included in either party’s appendices.)

“No Duty to Protect” instructions. Appellant’s acquiescence to the Trial Court’s generic response does not somehow remedy the errors that occurred. A new trial remains necessary.

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 protect Appellant and to warn Appellant of the impending danger, and that the jury be so instructed.

Dated: 3/23/10

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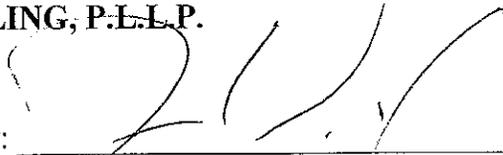
The undersigned hereby certifies pursuant to Minn. R. Civ. App. P. 132.01, subd. 3(c), that the word count of the foregoing brief of Appellant Bradley Domagala, including footnotes, but exclusive of pages containing the Table of Contents and the Table of Authorities, is **3,553**. The Brief complies with the typeface requirements of the rules and was prepared, and the word count was made, using Microsoft Word.

**ECKBERG, LAMMERS, BRIGGS, WOLFF
& VIERLING, P.L.L.P.**

Dated: _____

3/23/10

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