

NO. A09-1945

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State of Minnesota  
**In Supreme Court**

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Bradley J. Domagala,

*Respondent,*

vs.

Eric Rolland and Rolland Building Corp.,

*Appellants.*

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**APPELLANTS' BRIEF, ADDENDUM, AND APPENDIX**

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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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## LEGAL ISSUES

### **I. Did the Court of Appeals err in holding that, in the absence of a special relationship, a duty of reasonable care may include a duty to warn?**

#### **Apposite Authority:**

*Harper v. Herman*, 499 N.W.2d 472 (Minn. 1990)

*H.B. ex rel. Clark v. Whittemore*, 552 N.W.2d 705 (Minn. 1996).

- a. The issue was raised in the parties' submissions in Defendants' Summary Judgment motion. (Memo. in Support of Defs.' Mot. for Summary Judgment at p.7-8 (May 23, 2009); Pl.'s Memo. in Opp. to Defs.' Mot. for Summary Judgment at p. 11-14 (March 10, 2009); Reply Memo. in Support of Defs.' Motion for Summary Judgment. at p. 2-3 (March 17, 2009).)
- b. The district court ruled that, there being no special relationship, Defendants did not owe Plaintiff either a duty to protect or duty to warn of impending harm. (ADD. 4-5; 8) The Court of Appeals reversed, holding that a duty of reasonable care may include a duty to warn. (ADD. 10)

### **II. Did the Court of Appeals err in ruling that the district court abused its discretion in its jury instructions?**

#### **Apposite Authority:**

*Alholm v. Wilt*, 394 N.W. 2d 488 (Minn. 1986)

*Lindstrom v. Yellow Taxi Co.*, 214 N.W.2d 672 (Minn. 1974)

*Hernandez v. Renville Public School District No. 654*, 542 N.W.2d 671 (Minn. App. 1996)

- a. The issue was raised in Plaintiff's motion for new trial. (Memo. in Support of Pl.'s Mot. for New Trial at p. 6-7 (June 11, 2009); Defs.' Memo. in Opp. to Pl.'s Mot. for New Trial at p. 5 (June 22, 2009); Reply Memo. in Support of Pl's Motion for New Trial. at p. 1-5 (June 24, 2009).)
- b. The district court ruled that the jury instructions were proper and necessary on the facts of this case, that the phrasing of the jury instructions was not improper under Minnesota law, that there was no evidence that the jury was confused, and that it was Plaintiff's own arguments that gave rise to the instructions at issue in order to prevent jury confusion. (ADD. 3-5) The Court of Appeals ruled that the jury instructions misstated the law. (ADD. 21)

## STATEMENT OF THE CASE

The district court ruled on summary judgment that the defendant, an operator of a skid loader, owed no duty to warn or protect the Plaintiff, the owner of the premises on which work was being completed. At trial, the sole claim presented to the jury was whether Defendant breached a duty to act with reasonable care in his operation of the skid loader. Consistent with the summary judgment ruling, the district court included jury instructions indicating there was no duty to warn or protect.

Plaintiff's counsel put the Court and counsel on notice of his intent to argue that a duty to warn could be inferred from or encompassed within a duty of reasonable care. At trial, Plaintiff focused on this issue and misstated the law to the jury. The jury found that Defendant was not negligent in the operation of the skid loader. Plaintiff's motion for a new trial was denied.

On appeal, Plaintiff argued that a duty of reasonable care may include a duty to give a warning to anyone placed at risk by a dangerous situation. The Court of Appeals agreed, and in a published opinion adopted a new exception to the "special relationship" requirement for a duty to warn. Then, applying this new legal rule, the court held that the jury instructions misstated the law and reversed the judgment.

## STATEMENT OF FACTS

### I. THE JUNE 23, 2003 ACCIDENT

Defendant Eric Rolland owns Rolland Building Corp. a construction company that builds and renovates custom homes, and performs landscaping associated with the construction of its properties. (ADD. 2). Plaintiff Bradley Domagala is married to Rolland's cousin; he asked Rolland to perform some grading work around the Domagala home. (ADD. 2).

On June 23, 2003, Rolland brought his New Holland LX985 skid steer loader to the Domagala home along with the various forks, bucket and leveling bar implements. *Id.* Domagala watched as Rolland removed and attached implements on the loader on several occasions before the accident occurred. *Id.* (Referring to Rolland dep. p. 43-44).

During the project, if Domagala needed to speak with Rolland, he would approach the skid loader with his hands up and palms out in order to get Rolland's attention. (Add. 2). Rolland would then lower the bucket, turn off the engine, and remove his ear protection so that he could hear Domagala. He would wait for Domagala to walk away before starting up the machine again. *Id.*

After he had been working on the project for several hours, Rolland was attempting to remove the loader bucket in order to attach the sod bar. Because a rock or debris was stuck in the implement release mechanism, Rolland turned the bucket so that the blade was perpendicular to the ground, in order to put less pressure on the hydraulics. (ADD 3). The boom was raised approximately 10-20 inches off the ground, and Rolland

was manipulating the controls in order to “flutter” the hydraulics (shake them lightly and quickly) in an attempt to shake loose the debris that was caught in the lever. (ADD. 3-4).

Rolland then became aware that Domagala had approached and was approximately 10-15 feet away, walking directly towards the loader. Rolland did not know why Domagala was approaching him, and was surprised that he was so close to the loader. Rolland took his hands off of the controls to indicate that he would cease operating the loader while Domagala was near the machine. *Id.* Rolland did not ask Domagala for help and did not instruct him to do anything. Before Rolland could say anything, Domagala suddenly reached up and pulled the implement release lever which caused the bucket to fall to the ground. *Id.* Domagala’s left foot was struck by the cutting edge of the bucket. Domagala admitted: “I don’t know that I gave any indication that I was going to release the lever.” *Id.* (Referring to Domagala dep. p. 65).

## **II. PROCEDURAL FACTS**

### **A. Rolland’s Motion for Summary Judgment**

Domagala sued Rolland and Rolland Building Corp., claiming that Rolland had failed to protect him from the skid loader and that Rolland had a duty to warn him of the dangers associated with the skid loader:

That Defendant Eric Rolland operated the Skid Steer in a negligent and careless manner so as to cause the bucket on the Skid Steer to fall off the Skid Steer and crush Plaintiff’s foot. (Complaint, Count X, A. 2).

That Defendant Eric Rolland failed to warn Plaintiff of the dangers associated with trying to unlatch the Skid Steer’s bucket. (*Id.*, Count XI). (A. 2).

After discovery, Defendants moved for summary judgment on both causes of action, on the ground that there was no relationship between the parties that would give rise to a duty to protect or a duty to warn. (A. 11-12) In response, Plaintiff argued at length that a special relationship was not necessary to establish a duty of care, and that “Rolland owed a *duty of care to protect* Plaintiff from the dangerous machine under his control, or at the very least, *to warn* Plaintiff of the danger.” (Pls’ memo in Opp. To Defs.’ Mot. For Summary Judgment, p. 8).

The district court held that since there was no special relationship, Rolland had no duty to protect or warn Domagala under controlling Minnesota law:

Defendants in the present case argue no such special relationship exists; thus, the Defendants owed no duty to prevent any harm. Plaintiff does not refute this conclusion \* \* \*. Therefore, **no duty to protect Plaintiff exists** in this case; however, as Plaintiff suggests, a duty of reasonable care may exist under a different premise.

(ADD. 32)(emphasis added).

There remains no assertion that a special relationship exists between the parties in this case that would give rise to a duty to affirmatively act; thus, **Defendants did not owe Plaintiff a duty to warn** of any impending danger associated with the operation of the skid loader.

(ADD. 35)(emphasis added).

The district court denied summary judgment on the negligence claim, however, finding that a duty of reasonable care in the operation of the skid loader applied as well as a duty of reasonable care to prevent an unreasonable risk from causing harm. (ADD. 5-7). The case proceeded to trial on those issues.

## **B. Jury Instructions**

In order to adequately convey the law to the jury, Defendants requested that the following jury instructions be given, based on the district court's summary judgment Order:

### **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 to warn 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 matter and you must not consider such a duty in your deliberation in this case.

(Jury Instructions, A. 56).

In a motion *in limine*, Plaintiff objected to the requested instructions claiming that the law on duty to protect and duty to warn “do not apply to this case.” Plaintiff then put the district court on notice of its position that “it is feasible that the jury might find that the duty of reasonable care **included a warning in order to protect Plaintiff** from the dangerous situation created by Defendants[.]” (A. 17-18). Despite the district court's rulings on summary judgment, Plaintiff asserted that he could still argue that a duty to warn and a duty to protect could be included within the duty of reasonable care. Plaintiff provided no authority for this position. The court denied Plaintiff's motion.

Then again, despite the district court's decision to give the instructions on the applicable law, Plaintiff advised the court that he still intended to argue to the jury that a warning or "reasonable offering" by Rolland to Domagala would have stopped Domagala from approaching the skid loader. (A. 20).

In response, Defendants requested that if Plaintiff's counsel attempted to inject the duty to warn or protect argument into the case, in the face of the court's express ruling that there was no duty to warn or protect, then the court should provide a curative instruction. (A. 16-18, A. 23-29). The court denied the motion but provided the following comments:

What I will be open to the possibility of, is the repeating of the instructions involving the paragraph no duty to warn. I haven't heard any attempt to talk about duty to protect, but no duty to warn and negligence, and reasonable care instructions, which I will read before final argument. *I will entertain the possibility of rereading those instructions if I believe that the line has been crossed.*

(A. 29)(emphasis added).

### **C. Plaintiff's Argument at Trial**

During Plaintiff's closing arguments, counsel did indeed cross the line. Counsel repeatedly referred to the explanation of "the whole law" as it relates to applicable duties in this case. (A. 36, 38, 39, 42, 44, 46). Counsel indicated that Rolland could have waved his hands, indicating "no", to warn Domagala not to approach the skid loader. (A. 37-38). Defendants objected, as Plaintiff's argument implied that a warning should have been provided in order to prevent Domagala from approaching. (A. 38). Plaintiff then proceeded to purposefully and repeatedly address the language of the jury instructions

regarding no duty to warn and no duty to protect. (A. 40-43). Plaintiff initially correctly acknowledged to the jury that there was no legal duty to warn and no duty to protect. (A. 41). Then, however, either intentionally or unintentionally, counsel misstated the district court's rulings, implying that such restrictions on duties *do not apply* to this case. (A. 43). At one point, counsel actually stated the *opposite* of the "no duty to protect" instruction:

It's about responsibility. That's what this is. **Duty to protect.** Duty to act responsibly.

(A. 45)(emphasis added).

After closing arguments, the parties approached the bench, and the court determined it was necessary to clarify a number of issues that had come up during closing argument. (A. 48). The court noted that Plaintiff had incorrectly characterized the jury's voir dire responses. The court reminded the jurors that what the attorneys said during arguments was not evidence. *Id.* The court indicated that what the attorneys had said about the law may be different than that which had been indicated by the court, and that the jury must rely on the law as presented by the court. (A. 49). The court then proceeded to repeat three jury instructions – (1) no duty to warn (special instruction that had been requested by Defendants); (2) duty of care based on the creation of a dangerous situation (special instruction that had been requested by Plaintiff); and (3) negligence and reasonable care (standard jury instruction CIVJIG 25.10). (A. 49-50) The jury was then released for deliberations.

#### **D. Jury Questions During Deliberations**

During deliberations, a written question was posed by the jury: “Does ‘no duty to warn’ mean that the Defendant had no obligation to try to keep the plaintiff away from the skid loader?” (A. 62). The district court consulted with the attorneys as to the proper way to respond to the inquiry, suggesting that the appropriate response to the juror was “I cannot give you further instruction on this. Please rely on the jury instructions provided to you.” (A. 62) Plaintiff’s counsel was given the opportunity to request clarification and/or to provide additional explanation, and expressly chose not to do so. Instead, counsel concurred with the judge’s proposed response: “I’m ok with the Judge’s answers.” (A. 64).

#### **E. Plaintiff’s Motion for New Trial**

The jury found that Defendants were not negligent. (A. 65). Plaintiff moved for new trial, asserting that it was an error of law to include jury instructions on “no duty to warn” and “no duty protect” at trial. (A. 71). The court ruled that the instructions were applicable and at issue at trial, especially in light of counsel’s explicit statement that he intended to argue contrary to the instructions:

[P]rior to trial even commencing, Plaintiff informed the Defendant and the Court that he had an intention of arguing that Defendant’s duty included a duty to warn or protect Plaintiff.

Therefore, the special jury instructions provided were very applicable to the case at bar[.] In fact, it was Plaintiff’s own arguments that gave rise to the instructions at issue to prevent the jury from confusing Plaintiff’s arguments with the applicable law. Further, there is no indication that the phrasing of the duty to warn and the duty to protect

instructions either confused the jury or were improper according to Minnesota law.

(ADD. 26-27). The court denied Plaintiff's motion for new trial and judgment was entered. (ADD. 23).

#### **F. Court of Appeals**

The Court of Appeals first *affirmed* the district court's holding that a duty to warn must be predicated upon the finding of a special relationship between the parties and, absent a special relationship, there existed no specific legal duty to warn or to act affirmatively for the protection of another. (ADD. 8-9). The Court of Appeals also *affirmed* the district court's ruling that Rolland was not a manufacturer or supplier of the skid loader, and thus there existed no duty to warn under products liability principles. (ADD. 9-10). No review was sought of those rulings.

The Court of Appeals then held that even though he owed no duty to warn, Rolland owed Domagala a *general* duty to exercise reasonable care and a duty to prevent harm, *which may include giving a warning*. (ADD. 15). The Court's reasoning was premised upon Section 321 of the Restatement (Second) of Torts (1965) and *Zylka by Zylka v. Leikvoll*, 274 Minn. 435, 144 N.W.2d 358 (1966), both of which pre-date the long line of this Court's decisions establishing and re-affirming the special relationship prerequisite for a duty to warn. The Court of Appeals determined that the district court had abused its discretion in giving the "no duty to protect" and "no duty to warn" instructions, that this was reversible error, and remanded for a new trial in which the "district court [would] instruct the jury that the exercised of reasonable care by a party

who creates a dangerous situation may include warning others of the danger while the danger exists.” (ADD. 21-22).

### **STANDARD OF REVIEW**

The district court determined that Rolland did not have a legal duty to warn Domagala of the dangers associated with the skid loader or to protect Domagala from harm. Because the existence of a legal duty is a question of law, the standard of review is *de novo*. *Bjerke v. Johnson*, 742 N.W.2d 660, 664 (Minn. 2007).

The district court also determined that the use of the duty to warn and duty to protect jury instructions were appropriate statements of law that did not confuse the jury. An abuse of discretion standard of review applies, given the broad latitude granted the district court in determining jury instructions. *Hilligloss v. Cargill, Inc.*, 649 N.W.2d 142, 147 (Minn. 2002).

### **ARGUMENT**

#### **I. ABSENT A SPECIAL RELATIONSHIP BETWEEN THE PARTIES, THERE IS AS A MATTER OF LAW NO DUTY TO WARN.**

##### **A. The Special Relationship Requirement**

The basic elements of a negligence claim are: (1) existence of a duty of care; (2) breach of that duty; (3) proximate causation; and (4) injury. *Schmanski v. Church of St. Casimir of Wells*, 67 N.W.2d 644, 646 (Minn. 1954). The existence of a duty to warn is a question of law. *H.B. ex rel Clark v. Whittmore*, 552 N.W.2d 705, 707 (Minn. 1996).

A person generally has no duty to act for the protection of another person, even if he realizes that action on his part is necessary. *Delgado v. Lohmar*, 289 N.W.2d 479, 483

(Minn. 1979). Minnesota law is well-settled: there is no general duty to warn or protect another unless the harm is foreseeable *and* a special relationship exists between the actor and the person seeking protection. *Erickson v. Curtis Inv. Co.*, 447 N.W.2d 165, 168-69 (Minn. 1989). The existence of a special relationship is a threshold legal question, and the issue of foreseeability need not be reached if no special relationship is found. *Errico v. Southland Corp.*, 509 N.W.2d 585, 587 (Minn. App. 1993).

Usually, a special relationship giving rise to a duty to protect is found only 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 under which that other person is deprived of normal opportunities of self-protection. *Donaldson v. Young Women's Christian Association of Duluth*, 539 N.W.2d 789, 792 (Minn. 1995). To reach the conclusion that a special relationship exists, it must be assumed that the harm to be prevented by the defendant is one that the defendant is in a position to protect against and should be expected to protect against. *Id.*

It is undisputed that no special relationship existed between Domagala and Rolland. (ADD. 8). Domagala made no attempt to address the application of the special relationship standard, and has ignored this obvious prerequisite to a legal duty to warn between parties. Instead, Domagala argued for a wholly new and unprecedented legal rule in Minnesota that would recognize an affirmative duty to warn where no special relationship exists. The Court of Appeals adopted that new rule of law.

**B. There is no Recognized Exception to the Special Relationship Requirement**

The court below cited no authority for the notion that a jury may consider a duty to protect or a duty to warn after the district court has conclusively ruled that no such duties exist. Nonetheless, the published opinion below creates a new exception to the special relationship rule. Ever since *Delgado* and its progeny, no exception to the requirement has ever been recognized in Minnesota.

The lower court relied heavily on *Zylka by Zylka v. Leikvoll*, 274 Minn. 435, 144 N.W.2d 358 (1966), a case that was not cited in the parties' appellate briefs. *Zylka* involved a motor vehicle accident on a dark highway at night. *Id.* at 440-1. The court upheld a jury's finding that a wrecker operator, although not negligent in the creation of a hazard, was negligent in causing an accident because he failed to coordinate efforts with others in managing the situation on the highway, failed to illuminate the accident scene, failed to effectively use illumination devices on his truck or give them to others, and failed to push a disabled vehicle off the highway with his wrecker. *Id.* at 447-48. In *Zylka*, the district court instructed the jury that if a person participates in creating a dangerous situation on a highway, he is under a common law duty to use reasonable care to remove or correct the situation to the extent that it is reasonably feasible or possible, and to warn others of the danger while the danger exists. *Id.* at 447.

It is not surprising that *Zylka* did not address the special relationship standard giving rise to a duty to warn or a duty to protect, since that 1966 decision pre-dates the long line of this Court's case law beginning in 1979 affirming the special relationship

requirement for a duty to warn. *Delgado v. Lohmar*, 289 N.W.2d 479, 483 (Minn. 1979).

In addition, *Zylka* is factually very different from the present case. In *Zylka*, the defendant pushed a vehicle into the middle of a public highway at night, and failed to illuminate the scene. It was foreseeable – if not inevitable – that another vehicle traveling along the same dark highway might collide with the vehicle which had been placed in the middle of the road.

Here, on the other hand, it was Domagala's own independent act - - suddenly approaching the skid loader and pulling the release lever - - that caused the bucket to fall on his foot. Rolland did not drive over Domagala, collide with him, or have anything to do with the act which ultimately dropped the bucket to the ground. Absent Domagala's affirmative and unexpected actions, this accident could not and would not have occurred. Plaintiff was not injured as the result of something Rolland did or did not do in his operation of the machinery. Plaintiff himself pulled a lever, causing the bucket to fall on his own foot. Domagala hurt himself.

The Court of Appeals' citation to Section 321 of the Restatement (Second) of Torts (1965) also doesn't support reversal. Section 321 simply states that when an individual creates 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. Restatement (Second) of Torts §321 (1967). First, other than operating the skid loader, a piece of heavy machinery obviously capable of causing injury, Rolland's actions did not create any unreasonable risk of harm and did not increase the likelihood of injury to anyone.

Again, the bucket could not have fallen had Domagala himself not pulled the release lever. Rolland had no reason to think or anticipate that Domagala would pull the lever.

Second, neither the lower court nor Domagala cited to any published Minnesota case law adopting Section 321 or containing any meaningful analysis of that section in the context of the special relationship requirement. *Zylka* contained no such analysis.

Nor is the Court's lone citation to *Stepnes* helpful. The Court of Appeals' analysis *Stepnes*, was limited to one sentence about how the section did *not* apply: "In addition, Stepnes' failure to establish that [Defendant] both created and failed to remedy the dangerous condition precludes liability under Restatement (Second) of Torts § 321." *Stepnes v. Adams*, 452 N.W.2d 256, 259 (Minn. App. 1990). *Stepnes* focuses primarily upon dismissal of the plaintiff's claims for failure to establish the existence of a special relationship between the parties giving rise to a duty of care. *Id.* at 258-59.

There simply is no recognized or analytically sound exception to the special relationship requirement which can give rise to a duty to warn or a duty to protect on these facts. The Court of Appeals' published opinion creates a new exception to the requirement, holding that absent a special relationship between the parties, there is no duty to warn - - except when there may be. Such an exception threatens to alter the fundamental legal standards governing negligence cases in Minnesota.

**C. Adoption of the Lower Court's Ruling would Eviscerate the Special Relationship Exception**

The Appellate Court's questionable new exception to the special relationship threshold requirement as a controlling principle in negligence cases can only serve to weaken the well settled and oft-cited requirement.

For example, in *Harper v. Herman*, 499 N.W.2d 472 (Minn. 1990) the operator of a boat navigated the boat into shallow water. The boat operator was aware of the shallowness of the water, while his invited passenger was not. *Id.* at 474. Without warning, the passenger dove head first into the shallow water, severing his spinal cord. The passenger sued the boat operator, alleging that the operator owed him a duty of care to warn him that the water was too shallow for diving. The trial court granted summary judgment, ruling that the law imposed no such duty. The court of appeals reversed, finding that the operator owed the passenger a duty of reasonable care, and that the duty of reasonable care included warning the passenger not to dive because the operator knew that the water was "dangerously shallow." *Id.*

This Court reversed, finding that absent the requisite special relationship between the parties, no duty to warn existed. *Id.* The guest was not vulnerable and had the ability to protect himself, and the boat owner did not exercise power over the guest's welfare. Further, the operator's knowledge of the "dangerous condition" was not enough to impose a duty to act affirmatively for the protection of the passenger. "[S]uperior knowledge of a dangerous condition by itself, in the absence of a duty to provide protection, is insufficient to establish liability in negligence." *Id.* For these reasons, this

Court refused to recognize an exception to the special relationship/duty to warn standard, and reinstated the judgment.

But under the new legal standard announced by the Court of Appeals below, the passenger in *Harper* could easily have circumvented the special relationship requirement entirely, simply by alleging that in driving the boat into shallow water, the operator created a dangerous condition, thus requiring a warning. Such an exception would swallow the special relationship rule, and allow a “duty to warn” argument in through the back door where none previously existed.

The reasoning in *Harper* applies directly to this case. Domagala was not in a vulnerable position and had the ability to protect himself, and Rolland in no way exercised power over Domagala’s welfare. Just as the plaintiff in *Harper* voluntarily performed the act of diving off the boat, thereby causing his own injury, so did Domagala here, pulling the release lever which dropped the bucket onto his foot. If Domagala had not pulled the lever – an action that Rolland could not have anticipated – the accident would not have happened and the condition of the skid loader bucket would have been inconsequential. Absent the existence of a special relationship, Rolland did not and does not have an affirmative duty to warn Domagala of the danger of Domagala’s own unexpected actions.

Similarly, in *H.B. ex rel. Clark v. Whittemore*, 552 N.W.2d 705 (Minn. 1996), this court held that a trailer park manager, having no special relationship with children living in the trailer park, owed no duty to protect the children from harm by another resident who had been accused of child abuse, even though the manager had knowledge of the

abuse and of the perpetrator's criminal history. *Id.* at 708. This Court acknowledged that "[i]nstances where a special relationship has created a duty on the part of a defendant to protect a plaintiff typically involve some degree of dependence." *Id.* citing Restatement (Second) of Torts § 314A cmt. B (1965). The trailer park manager in *Whittemore* did not exercise control, entrustment or responsibility over the children tenants of the park, and thus no special relationship arose between the caretaker and the children which would form a basis of a duty on the caretaker to protect the children. *Id.* at 709.

Under the new legal standard created by the court below, the plaintiffs in *Whittemore* could have avoided the special relationship requirement by asserting that the park manager had created a dangerous situation in allowing a known sex offender to live in the trailer park, thus requiring a duty to warn and protect the park residents. This Court has not recognized such an exception to the rule. Domagala was at no time in a vulnerable position and at no time did Rolland agree to take responsibility for Domagala's welfare.

Adoption of the Appellate Court's holding would eviscerate the special relationship requirement. In order to maintain and uphold the well established legal limitations on duties to warn and to protect, this Court must correct the ruling by the Court of Appeals.

## **II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN THE SELECTION OF JURY INSTRUCTIONS**

The district court's jury instructions were well within its broad discretion and did not set forth an erroneous or incomplete statement of the applicable law. There is no

evidence that the jury was confused. The law was correct and the jury instructions were accurate. The court below erred in reversing.

**A. The Use of Non-Standard or “Negative” Instructions Does Not Constitute an Abuse of Discretion.**

The Court of Appeals agreed that the district court’s use of special jury instructions drafted by both parties was appropriate and was not an abuse of discretion per se. (ADD. 13). Likewise, the court agreed that the mere fact that the “duty to warn” and “duty to protect” instructions were framed in the negative was not an abuse of the district court’s discretion as they did not misstate the law. (ADD. 14). The Court of Appeals found only that the district court’s use of the “no duty to protect” and “no duty to warn” instructions hampered Domagala’s permissible argument that the exercise of reasonable care required Rolland to give a warning to Domagala or attempt to prevent Domagala from being harmed by directing him away from the skid loader. (ADD. 21). The analysis of the instructions themselves need only address this last assertion by the Appellate Court – that the instructions somehow presented an erroneous impression of the law.

**B. The Jury Instructions Were Accurate Statements of Minnesota Law.**

The Appellate Court reversed the judgment based solely on the determination that its adoption of the new exception to the special relationship requirement regarding duty to warn and duty to protect rendered the jury instructions incomplete. In the absence of this change in the law by the court below, the jury instructions were correct and proper.

The district court has considerable latitude in choosing jury instructions, which includes a wide discretion ‘in determining the propriety of a specific instruction.’” *Alholm v. Wilt*, 394 N.W. 2d 488, 490 (Minn. 1986); see also *Rowe v. Munye*, 702 N.W.2d 729, 735 (Minn. 2005). (RA 3). A jury instruction that “as a whole convey[s] to the jury a clear and correct understanding of the law of the case” will be upheld on appeal. *Barnes v. Northwest Airlines*, 47 N.W.2d 180, 187 (Minn. 1951).

Whether duties to protect and warn existed between Rolland and Domagala was one of the central issues in this case. The district court correctly applied Minnesota law and made a concrete determination on summary judgment that there was *no* duty to warn and *no* duty to protect. In light of Domagala’s proposed (and erroneous) argument that the jury might find that “a warning could be inclusive of the duty of reasonable care,”<sup>1</sup> it was appropriate and in fact necessary that the court instruct the jury on the applicable law as to which duties did and did not exist as between the parties. As the district court noted: “In fact, it was Plaintiff’s own arguments that gave rise to the instructions at issue to prevent the jury from confusing [Domagala’s] arguments with the applicable law.” (ADD. 26-27).

Domagala proposed a previously unrecognized and untenable argument regarding an exception to the special relationship prerequisite for a duty to warn. The district court

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<sup>1</sup> (A. 16-18). Plaintiff never produced authority for the notion that a jury may find a duty to protect or a duty to warn after the court has ruled as a matter of law that no such duties exist. The question of whether a legal duty exists is a question of law for the court, not the jury, to resolve. See *Bjerke v. Johnson*, 742 N.W.2d 660, 667 n. 4 (Minn. 2007).

correctly provided clear and complete statements of Minnesota law in order to prevent Plaintiff from misstating the law and confusing the jury. The Appellate Court, in its creation of a new exception, retroactively rendered the jury instructions incomplete, as the new law set forth by the Court of Appeals did not exist at the time of trial.

Simply put, the jury instructions can be an incomplete or erroneous statement of Minnesota law only if the Appellate Court correctly created a new exception giving rise to a duty to warn. Under this Court's decisions in *Delgado*, *Harper*, *Whittmore* and other similar cases, the district court did not abuse its discretion and the jury's findings should be reinstated.

**C. There is no basis to believe that the jury instructions confused the jury.**

The district court correctly found that "there is no indication that the phrasing of the duty to warn and the duty to protect instructions either confused the jury or were improper according to Minnesota law." (ADD. 27). It is elementary that a jury charge must be construed as a whole. In other words, it may not be attacked by lifting a single sentence or even a paragraph out of context. *Froden v. Ranzenberger*, 41 N.W.2d 807, 811 (Minn. 1950). No specific weight was afforded to any of the jury instructions in this matter.

There is no evidence that the charge to the jury in this case communicated an erroneous understanding of controlling principles of law. The jury did submit a question regarding the definition of "no duty to warn" during deliberations. The district court offered a standard response without offering additional information, and Plaintiff's counsel agreed that the court's response was appropriate.

Even if taken out of context and considered separately, the instructions at issue are not confusing, inapplicable or erroneous. They are not fact-specific and do not apply only to a unique or uncommon set of circumstances. Plaintiff admits that the instructions are legally accurate. The instructions clearly stated that, while a duty of reasonable care existed, there was no duty to warn or a duty to protect Plaintiff. The district court, well within its authority and discretion, presented these jury instructions, along with those requested by Plaintiff to the jury, and the law as presented to the jury was correct, applicable and sound.

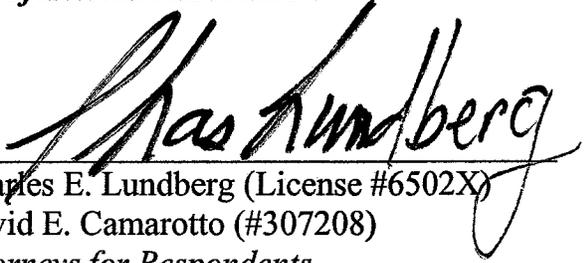
Plaintiff either accidentally or intentionally misstated the applicable law in his closing argument in his attempt to explain “the whole law” to the jury. The court found that this necessitated re-reading the *actual* law, so that there would be no confusion. The Court did not commit prejudicial or reversible error in repeating the instructions.

## CONCLUSION

Domagala acted independently when he pulled the lever that released the skid loader bucket that fell on his foot. There being no special relationship between the parties, Rolland did not owe a duty to warn or protect. The district court fairly and appropriately exercised its discretion in including jury instructions requested by both parties that were accurate statements of law. Under Minnesota law governing "duty to warn," the district court did not abuse its discretion and the jury instructions were complete and clear statements of Minnesota law. The appellate court's ruling should be reversed and the jury's determination reinstated.

**BASSFORD REMELE**  
*A Professional Association*

Dated: December 16, 2010

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