

NO. A09-1945

State of Minnesota
In Supreme Court

Bradley J. Domagala,

Respondent,

vs.

Eric Rolland and Rolland Building Corp.,

Appellants.

APPELLANTS' REPLY BRIEF

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INTRODUCTION

The very first sentence of his brief displays Respondent's flawed view of this case: "Plaintiff Bradley Domagala suffered severe and permanent foot injuries when a bucket on the skid loader . . . dropped on Plaintiff's foot." (Respondent's brief p. 1). The skid loader bucket did not "drop" out of the air. Defendant did not release the bucket or cause the bucket to drop. **Plaintiff himself released the bucket, causing it to fall on his own foot.** Plaintiff's actions alone were the cause of his injury.

The special relationship requirement exists for a reason – to limit the situations in which an individual must act affirmatively for the protection of another. Sidestepping the requirement would give rise to an affirmative duty to warn and protect in *any* simple negligence case – just like the case now before the Court.

ARGUMENT

I. THE SPECIAL RELATIONSHIP REQUIREMENT DOES NOT APPLY ONLY TO "INNOCENT BYSTANDERS."

A. The District Court Properly Applied the Special Relationship Standard

An individual generally owes no duty to protect or warn another absent a special relationship between the parties. *See Delgado v. Lohmar*, 289 N.W.2d 479, 483 (Minn. 1979); *Errico v. Southland Corp.*, 509 N.W.2d 585, 587 (Minn. App. 1993); *Donaldson v. Young Women's Christian Association of Duluth*, 539 N.W.2d 789, 792 (Minn. 1995); *Harper v. Herman*, 499 N.W.2d 472, 474 (Minn. 1993); *H.B. ex rel Clark v. Whittmore*, 552 N.W.2d 705, 709 (Minn. 1996) (Appellant's brief, pp. 13, 14, 18, 19). Generally, no duty is imposed on an individual to protect another from harm, even when she "realizes

or should realize that action on [her] part is necessary for another's aid or protection.” *Bjerke v. Johnson*, 742 N.W.2d 660, 665 (Minn. 2007) quoting *Delgado*, 289 N.W.2d at 483.

The district court ruled, as a matter of law, that in the absence of a special relationship between the parties, there was no duty to warn or protect on behalf of Defendant. Plaintiff conceded that there is no such relationship between the parties, and further conceded that the legal principle is sound. What Plaintiff refuses to acknowledge is *the effect of the district court's ruling*. Following the court's ruling on summary judgment, arguments to the jury were properly limited to whether or not Defendant breached a duty of reasonable care. Plaintiff attempted to sidestep the district court's ruling and inject an affirmative duty to warn and protect where no such specific legal duty exists. The district court recognized that Plaintiff's attempts to inject his “duty to warn” theory back into the case circumvented the law and could have confused the jury, noting that “it was plaintiff's own arguments that gave rise to the [jury] instructions at issue to prevent the jury from confusing Plaintiff's arguments with the applicable law.” (ADD. 26-27).

Plaintiff claims that “when a person undertakes any conduct, they must do so in a reasonable manner *that protects others from harm*.” (Respondent's brief, p. 14). This is a misstatement of the law, and Plaintiff provides no authority for this proposition. The addition of an affirmative duty to warn and protect into the common law general duty of reasonable care is indeed *not* a “cornerstone of negligence law.” (Respondent's brief, p.

14). Nonetheless, the court below adopted this new rule of law by creating an affirmative duty to warn where no special relationship exists.

B. Plaintiff's "Innocent Bystander" Exception is Both Flawed and Unrecognized

i. Defendant as innocent bystander

In an attempt to support the erroneous ruling below, Plaintiff gives this new rule of law a specific name – the “innocent bystander” exception. (Respondent’s brief p. 13, 15, 20). The applicable law is clear – “[A]n affirmative duty to warn arises only when a special relationship exists between the parties.” *Harper v. Herman*, 499 N.W. 2d 472, 474 (Minn. 1993). To suggest that this Court adopt yet another exception to the special relationship requirement – that the special relationship requirement giving rise to a duty to protect or warn only “be impressed upon otherwise innocent bystanders under special circumstances” goes far beyond even the Appellate Court’s ruling. (Respondent’s brief p. 13)(emphasis in original). Plaintiff’s attempt to shrink the special relationship requirement so that it applies only to specific cases in specific circumstances is a flat out misunderstanding or misstatement of the law. The “innocent bystander” restriction/term is not present in any of the cases cited in Respondent’s brief, and was not included in the Court of Appeals’ ruling that is under review.

In the cases discussed by Plaintiff, the defendants were not “innocent bystanders.” In each of them, the defendant was sued in a lawsuit because they allegedly did something or failed to do something that caused the plaintiff’s injury. In *Harper*, the boat driver navigated his boat into shallow water, and the plaintiff there argued that by doing

so he created a dangerous condition giving rise to a duty to warn passengers. 499 N.W.2d 472 (Minn. 1993). This Court rejected plaintiff's argument, ruling that there was no exception to the special relationship/duty to warn standard.

Here, Plaintiff claims that *Harper* is inapplicable because the boat driver did not cause the plaintiff to dive off the boat into shallow water, and thus should not be seen as an "innocent bystander." But the boat driver was sued in *Harper* because he allegedly did something that caused the plaintiff's injury – navigating the boat into shallow water. The condition of the boat being located in shallow water no doubt played a role in contributing to the plaintiff's accident and injury. But this Court held that there was no duty on the part of the boat driver to protect from or warn of the passive dangerous condition, absent a special relationship between the parties. Nor was the plaintiff in *Harper* an innocent bystander, because his own independent action in diving off the boat was the ultimate cause of his injury.

Plaintiff's analysis of this Court's ruling in *Harper* is brief and circular. He calls *Harper* a "special relationship case" and states that it is distinguishable because "the boat driver was held to be a typical innocent bystander that did not owe a duty of care." (Respondent's brief, p. 20). This Court made no such ruling. Rather, this Court determined that the special relationship needed to impose a duty to warn about a danger did not exist because the passenger was not vulnerable, had the ability to protect himself, and defendant did not exercise control over the passenger's welfare. This Court's reversal of the Court of Appeals' attempt to expand the special relationship requirement in *Herman* cannot be distinguished from the present matter.

Plaintiff makes no attempt to distinguish the present matter from *H.B. ex rel Clark v. Whittmore*, 552 N.W.2d 705, 707 (Minn. 1996) (Appellant’s brief p. 19-20). In *Whittmore*, the trailer park manager had knowledge of a resident’s abuse of resident minors and criminal history. The alleged dangerous act was the acquiescence of allowing the perpetrator to reside in the park and the failure to protect the minor residents from abuse. Under Plaintiff’s theory, the trailer park manager was not an “innocent bystander,” as his inaction facilitated further abuse. This Court rejected the notion that the park owner had a duty to the residents, as he did not exercise control, entrustment or responsibility over the residents, and no special relationship existed between the manager and the children which gave rise to a duty to protect. *Id.* at 709.

ii. Plaintiff as innocent bystander

If ever there were an “innocent bystander,” it would be a plaintiff who is injured by a dangerous condition *through no fault of their own or action on their own part*. Plaintiff cites to *Zylka v. Leikvoll*, for the notion that the creation of a dangerous condition warrants a warning to others who may be at risk in encountering the condition. 144 N.W.2d 358 (Minn. 1966). As noted in our opening brief, *Zylka* pre-dates the special relationship requirement set forth in the *Delgado* line of cases, and involves a distinctly different set of circumstances. (Appellant’s brief, p. 15-16). *Zylka* involved a truck parked in the middle of a public highway at night – a dangerous condition that would inevitably have been encountered by anyone using the highway. The driver approaching at highway speeds encountering the stalled vehicle on the highway played no part in creating the dangerous condition that caused the accident (the truck blocking the road).

That is not the case here. Domagala's actions caused the accident. The bucket did not *fall*. Domagala *pulled the lever and released it*. Domagala did not approach a dangerous condition that would have inevitably caused harm to anyone who encountered it. Domagala himself performed the only act which caused his injury. It is just as likely that he could have pulled both release levers as it is that he pulled one. Either way, his own actions were unexpected, unannounced and unreasonable.

The same analysis applies to *Hollinbeck v. Downey*, 113 N.W.2d 9 (Minn. 1962) (Respondent's Brief p. 17), where a golfer struck a golf ball and hit a caddy on the practice range. This case also pre-dates the special relationship standard set forth in *Delgado*. More fundamentally, however, the analysis in *Hollinbeck* related specifically to the "duty of a golfer," for obvious reasons. *Id.* at 11. "Driven balls do not always travel in the straight course intended and frequently deflect to the right or left, and thus a rather extensive zone of danger may be created." *Id.* at 12. A golf ball, launched in the air, must inevitably come back to earth. Regardless of the caddy's actions or inactions, the ball would come down and risk striking him - an "innocent bystander" located within the zone of danger.

Here, there was nothing inevitable or specifically dangerous regarding Rolland's operation of the skid loader. Anyone could have encountered the skid loader in its condition at the time of the accident and walked away unscathed. It was never inevitable or foreseeable that the loader bucket would become detached from the loader and fall to the ground. Nothing that Rolland did made it more likely that the bucket would become detached. It was the action of Domagala himself - who was certainly *not* an "innocent

bystander” – that caused the unexpected release of the bucket. He had no assistance in making his decision to pull the lever, and there were no external factors contributing to his accident.

When Plaintiff approached the skid loader, Defendant ceased operations and took his hands off of the controls. This is undisputed. Plaintiff, without invitation and without giving any indication of what he might do, pulled the release lever, thereby dropping the bucket and causing his own injury.¹ Plaintiff is not an innocent bystander. He caused the accident.

II. A DUTY OF REASONABLE CARE DOES NOT EXPRESSLY INCORPORATE A DUTY TO WARN OR PROTECT.

Negligence is the failure to use reasonable care; negligence occurs when a person does something a reasonable person would not do or fails to do something a reasonable person would do. 4 *Minnesota Practice*, CIVJIG 25.10 (2006) (defining “negligence”). The definition of negligence contains no reference to a specific duty to warn or a specific duty to protect. The ruling below that the duty of reasonable care can automatically include a duty to warn is not supported by Plaintiff’s citation to negligence cases which do not include a duty to warn or duty to protect analysis.

For example, Plaintiff cites the unpublished decision in *Welsh v. Keefe*, Nos. Civ. A10-344, A10-417, 2010 WL 4608338 (Minn. App. Nov. 16, 2010) for the notion that a

¹ Plaintiff asserts for the first time that Defendant’s operation of the skid loader was somehow “unique and dangerous.” (Respondent’s brief, p. 6) This factual assertion has no basis in the record before this Court. Plaintiff never produced any evidence – expert opinion or otherwise – indicating that Defendant’s operation of the skid loader somehow deviated from that which is standard in the industry.

duty of reasonable care necessarily includes an affirmative duty to protect others from harm. (Respondent's brief p. 14). But *Welsh* does not say that at all. In *Welsh*, a semi-truck driver operated his vehicle in a manner which caused the truck and trailer to become stuck and block the highway. *Welsh* at *1. The district court granted summary judgment, concluding that there was no special relationship between defendant and plaintiff giving rise to an affirmative duty to warn or protect. *Id.* at *3. The court of appeals reversed in part, ruling that the case could proceed to a jury on the issue of *whether defendant's allegedly negligent driving conduct proximately caused plaintiff's injuries.* *Id.* The plaintiff in *Welsh* didn't even attempt to advance a duty to warn or protect theory – just a common law duty of reasonable care in the operation of the semi-truck.

In the present case, the district court made precisely the same ruling – that, while there was no special relationship between Plaintiff and Defendant giving rise to a duty to warn or protect, the jury would be permitted to consider whether Defendant was negligent in his operation of the skid loader. The jury found that Defendant was not negligent. *Id.* *Welsh* does nothing to advance Plaintiff's argument.

Nor do the cases relating to the duty of a municipality to maintain its roadways. (Respondent's brief p. 18). To be sure, municipalities have duties to warn travelers of known dangerous conditions on public roadways. *Schroeder v. St Louis County*, 708 N.W.2d 497, 511 (Minn. 2006). But this duty to warn arises out of the special laws governing a municipality's duty to those who utilize their roads. "It has long been the established rule in this state, so as to become a fundamental one in our jurisdiction, that a

city is under legal obligation to exercise reasonable care to keep and maintain its streets in a safe condition for public use.” *Henderson v. City of St. Paul*, 216 Minn. 122, 124, 11 N.W.2d 791, 792 (Minn. 1943). Liability arises out of a municipality’s control over city streets and the power to control defects. *Schroeder*, 708 N.W.2d 497 at 510. A municipality’s duty to drivers on its roads has nothing to do with the duty of a skid loader operator on a homeowner’s property.

Plaintiff provides no meaningful analysis or application of the Restatement 2d Torts § 321 (1965), other than to quote illustrations which have not been adopted in any Minnesota case. (Respondent’s brief, p. 18-19). Plaintiff stretches his logic to the breaking point – if (1) the operation of a skid loader is an admittedly dangerous act, and (2) an individual is injured in an accident involving a skid loader, then (3) the individual was injured by a dangerous act. (Respondent’s Brief p. 19-20). Plaintiff repeatedly requests that this Court ignore the fact that there is no evidence that the skid loader was operated in a dangerous manner; instead, it was only Plaintiff’s unexpected interference with the skid loader that caused the bucket to be released and fall. Rolland created no unreasonable risk of harm in his normal operation of the skid loader, and thus Rest. 2d Torts § 321 (1965) has no application here.

III. THE JURY INSTRUCTIONS WERE COMPLETE AND ACCURATE STATEMENTS OF LAW

A. The Applicable Duty of Care was Properly Presented to the Jury.

Plaintiff asserts that Defendant’s “reasonable duty of care did include a duty to protect and a duty to warn, and as such, the district court erred in the inclusion of the “no

duty to protect” and “no duty to warn” jury instructions. (Respondent’s brief, p. 21). But plaintiff doesn’t suggest what standard jury instruction should have been given in place of those that were presented to the jury. The district court made accurate statements of law when it advised the jury that it had determined there was no duty to warn or protect between the parties.

In addition, the jury instruction cases cited by Plaintiff are not apposite here:

In *George v. Estate of Baker*, 724 N.W.2d 1 (Minn. 2006), this Court granted a new trial based on the misstatement of a legal standard in a *curative* instruction which was given after the presentation of jury instructions and closing arguments. The curative instruction was contrary to those that had been presented to the jury and was a misstatement of the law. The instruction was also given the day after the other jury instructions had been presented. *Id.* at 11. Because undue emphasis was given to the conflicting and incorrect curative instruction, the jury may have become confused. A new trial was therefore required. *Id.*

In *Mjos v. Vill of Howard Lake*, 178 N.W.2d 862, 869 (Minn. 1970) the parties and the court agreed upon jury instructions without realizing that recent statutory amendments had significantly changed the law which had been presented to the jury. *Id.* Because the governing *law* had actually changed, the jury instructions were inaccurate and a new trial was warranted.

Finally, in *Frazier v. Burlington N. Santa Fe Corp.*, 788 N.W.2d 770, 778 (Minn. App. 2010), the court of appeals granted a new trial because the jury had allegedly been

erroneously instructed regarding federal preemption. The issue in *Frazier* focused on the inclusion of common law duties which were in direct conflict with statutory duties, which may have confused the jury as to which standard should apply. No such conflicting legal principles exist here. (In addition, the *Frazier* opinion is currently under review by this Court, and therefore is not precedential.)

The examples above are very fact-specific instances in which the lawyers or the court presented jury instructions that were simply incorrect statements of the law in their respective cases. Such is not the case here. Here, the special jury instructions were absolutely necessary because, even in the face of the district court's ruling that there was no duty to warn or protect, Plaintiff insisted that he was still entitled to argue "duty to warn" and "duty to protect" to the jury, and consciously ran afoul of the court's warnings not to refer to such duties. The Plaintiff himself requested a non-standard jury instruction regarding the applicable duty of care, which indicated that "a person has a duty to exercise reasonable care[.]" This standard is not in conflict with any other jury instructions which were presented. None of the special jury instructions were misstatements of law. And they can be viewed as *incomplete* statements of law *only* if this Court affirms the Appellate Court's adoption of the exception to the special relationship standard – an exception which did not exist at the time of trial. This Court refused to adopt such an extension of the law in *Harper*, and should likewise refuse to do so here.

B. The Issues Relating to “Negative” Jury Instructions and Non-Standard Jury Instructions are not Before This Court.

As noted in our opening brief (p. 21), the court below 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. (“[G]iven the district court’s broad discretion in choosing the language of jury instructions, the no-duty-to-warn and no-duty-to-protect instructions were not an abuse of discretion per se because [Rolland] did not owe a *specific* duty to warn or protect [Domagala] in this case.”) (ADD. 12-13). Likewise, the court agreed that the fact that the “duty to warn” and “duty to protect” instructions were framed in the negative was not an abuse of discretion. (“[T]he mere fact that the instructions were framed in the negative does not necessarily reflect an abuse of the district court’s discretion either as they did not misstate the law.”) (ADD. 14). Plaintiff did not seek review of those issues and thus additional discussion is unnecessary. The analysis of the instructions themselves need only address the last assertion by the Appellate Court – that the instructions somehow presented an erroneous impression of the law.

CONCLUSION

Adoption of the Court of Appeals’ new exception to the special relationship requirement would abrogate the existing law, creating different/new duties to protect and warn where none previously existed. The jury was properly instructed regarding the applicable duties of care, and there is no basis to think that it was confused by the instructions. A much more plausible explanation for the jury’s verdict is that it was

obvious that the Plaintiff caused his own injury. The inescapable fact is that, had Plaintiff not pulled the release lever, the skid loader bucket could not have fallen, and this accident would not have occurred. Defendant is not responsible for Plaintiff's independent act, and the jury obviously agreed. The opinion below should be reversed and the judgment for Defendant reinstated.

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