
**State of Minnesota
In Supreme Court**

BRADLEY J. DOMAGALA,

Respondent,

vs.

ERIC ROLLAND AND ROLLAND BUILDING CORP.,

Appellants.

RESPONDENT'S BRIEF AND APPENDIX

ECKBERG, LAMMERS, BRIGGS,
WOLFF & VIERLING, P.L.L.P.
Thomas J. Weidner (#208395)
Kevin S. Sandstrom (#0348958)
1809 Northwestern Avenue
Stillwater, Minnesota 55082
Telephone: (651) 439-2878

*Attorneys for Respondent
Bradley J. Domagala*

BASSFORD REMELE, P.A.
Patrick J. Sauter (#95989)
David E. Camarotto (#307208)
33 South Sixth Street
Suite 3800
Minneapolis, Minnesota 55402
Telephone: (612) 376-1626

Attorneys for Appellants

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).

TABLE OF CONTENTS

	Page(s)
TABLE OF AUTHORITIES	ii – iv
INTRODUCTION	1
STATEMENT OF LEGAL ISSUES	2
STATEMENT OF THE CASE.....	5
STATEMENT OF FACTS	6
A. FACTS SURROUNDING THE INCIDENT ON JUNE 23, 2003.	6
B. THE TRIAL COURT DENIES DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT	9
C. JURY INSTRUCTIONS AND JURY DELIBERATIONS.....	9
LEGAL ARGUMENT	11
I. STANDARD OF REVIEW.....	11
II. THE COURT OF APPEALS CORRECTLY HELD THAT WHERE DEFENDANT CREATED A DANGEROUS SITUATION, DEFENDANT OWED PLAINTIFF A REASONABLE DUTY OF CARE THAT INCLUDED PROVIDING A WARNING.....	12
A. Defendant’s reliance on the “special relationship” test is based upon flawed logic, erroneous reasoning, and is nothing more than a diversion.....	12
B. In binding cases and learned treatises over 50 years old, the law imparts a duty to warn upon a defendant who creates a dangerous situation.....	16
C. Defendant’s reliance on special relationship cases, such as <u>Harper v. Herman</u> , is unavailing.....	20
III. THE INCLUSION OF DEFENDANTS’ SPECIAL JURY INSTRUCTIONS ON “NO DUTY TO WARN” AND “NO DUTY TO PROTECT” WERE INAPPROPRIATE AND PREJUDICIAL.....	21
A. Defendant’s special jury instructions are incorrect statements of the duty of care, and errors regarding the duty of care in a negligence case are prejudicial and deemed to warrant reversal.....	21
B. Negative jury instructions that attempt to inform the jury regarding inapplicable concepts of law are disfavored and should be barred.....	24
CONCLUSION.....	27

TABLE OF AUTHORITIES

<u>Minnesota Cases</u>	<u>Page(s)</u>
<i>Barnes v. Northwest Airlines</i> , 233 Minn. 410, 47 N.W.2d 180 (1951)	5, 26, 27
<i>Blatz v. Allina Health Sys.</i> , 622 N.W.2d 376, (Minn. App. 2001).....	14
<i>Cameron v. Evans</i> , 241 Minn. 200, 62 N.W.2d 793 (1954)	26
<i>Christensen v. Pestorious</i> , 189 Minn. 548, 250 N.W. 363	26
<i>Domagala v. Rolland</i> , 787 N.W.2d 662 (Minn. App. 2010)	14
<i>Fallin v. Maplewood-North St. Paul Dist. No. 622</i> , 362 N.W.2d 318 (Minn. 1985)	25
<i>Flom v. Flom</i> , 291 N.W.2d 914 (Minn. 1980)	14
<i>Ford v. GACS, Inc.</i> , 265 F. 3d 670 (8 th Cir. 2001).....	12
<i>Foss v. Kincade</i> , 766 N.W.2d 317 (Minn. 2009)	11
<i>Frazier v. Burlington Northern Santa Fe Corp.</i> , 788 N.W.2d 770 (Minn. App. 2010).....	12, 22
<i>George v. Estate of Baker</i> , 724 N.W.2d 1 (Minn. 2006)	4, 11, 21, 22
<i>H.B. ex rel. Clark v. Whittemore</i> , 552 N.W.2d 705 (Minn. 1996).....	13
<i>Harper v. Herman</i> , 499 N.W.2d 472 (Minn. 1993)	20
<i>Hollinbeck v. Downey</i> , 261 Minn. 481, 113 N.W.2d 9 (1962)	3, 17, 18, 24
<i>Hovey v. Wagoner</i> , 287 Minn. 546, 177 N.W.2d 796 (1970).....	26
<i>Larson v. Larson</i> , 373 N.W.2d 287 (Minn. 1985)	11
<i>Larson v. Township of New Haven, Olmsted County</i> , 282 Minn. 447, 165 N.W.2d 543 (1969).....	18
<i>Lindstrom v. Yellow Taxi Co.</i> , 298 Minn. 224, 214 N.W.2d 672 (1974).....	11
<i>Mix v. City of Minneapolis</i> , 219 Minn. 389, 18 N.W.2d 130 (1945).....	18
<i>Mjos v. Village of Howard Lake</i> , 287 Minn. 427, 178 N.W.2d 862 (1970)	4, 12, 21, 22
<i>Morlock v. St. Paul Guardian Ins. Co.</i> , 650 N.W.2d 154 (Minn. 2002)	11, 22

<i>Nubbe v. Hardy Continental Hotel Sys. Of Minn.</i> , 225 Minn. 496, 31 N.W.2d 332 (1948) ...	4, 24, 27
<i>Ollgaard v. City of Marshall</i> , 208 Minn. 384, 294 N.W. 228 (1940).....	18
<i>Paulson v. Lapa, Inc.</i> , 450 N.W.2d 374, 378 (Minn.App. 1990).....	11
<i>Peterson v. Minneapolis St. Ry. Co.</i> , 226 Minn. 27, 31 N.W.2d 905 (1948).....	14
<i>Piepho v. M. Sigbert-Awes Co.</i> , 152 Minn. 315, 188 N.W. 998 (1922).....	26
<i>Rowe v. Muniye</i> , 674 N.W.2d 761 (Minn. App. 2004)	11
<i>Sandhofer v. Abbott-Northwestern Hospital</i> , 283 N.W.2d 362 (Minn. 1979).....	26
<i>Schroeder v. St. Louis County</i> , 708 N.W.2d 497 (Minn. 2006).....	18
<i>Seim v. Garavalia</i> , 306 N.W.2d 806 (Minn. 1981).....	14
<i>State v. Glidden</i> , 455 N.W.2d 744 (Minn. 1990)	11
<i>State v. Munnell</i> , 344 N.W.2d 883 (Minn. App. 1984).....	14
<i>Swanson v. La Fontaine</i> , 238 Minn. 460, 57 N.W.2d 262 (1953).....	5, 26
<i>Thomsen v. Reibel</i> , 212 Minn. 83, 2 N.W.2d 567 (1942)	26
<i>Welsh v. Keefe</i> , 2010 WL 4608338 at *3 (Minn. App. Nov. 16, 2010).....	15
<i>Wolle v. Jorgenson</i> , 256 Minn. 462, 99 N.W.2d 57 (1959).....	26
<i>Zylka v. Leikvoll</i> , 274 Minn. 435, 144 N.W.2d 358 (1966)	1, 3, 5, 16, 17, 18, 24
<u>Nebraska Cases</u>	<u>Page(s)</u>
<i>Jones v. Foutch</i> , 278 N.W. 2d 572 (Neb. 1979)	24, 25, 27
<i>Smith v. Kellerman</i> , 541 N.W.2d 59 (Neb. 1995).....	24
<u>Virginia Cases</u>	<u>Page(s)</u>
<i>Alexander v. Wrenn</i> , 158 Va. 486, 492, 164 S.E. 715, 717 (1932).....	17
<u>Minnesota Civil Jury Instructions</u>	<u>Page(s)</u>
Minn. CIV. JIG 25.10	27

Treatises and Secondary Sources

Page(s)

Restatement 2d Torts, § 321 (1965) 3, 18, 19

INTRODUCTION

Plaintiff Bradley Domagala suffered severe and permanent foot injuries when a bucket on the skid loader being operated by Defendant Eric Rolland dropped on Plaintiff's foot. Notwithstanding Defendant's fixation on special relationship issues, Plaintiff has never claimed in this matter that a special relationship existed between Plaintiff and Defendant. Rather, from inception, Plaintiff has argued that Defendant's duty of care arose from Defendant's operation of the skid loader and his affirmative creation of an admittedly dangerous situation. Throughout this matter, Defendant has repeatedly attempted to divert the issues at hand by focusing on the inapplicable "special relationship" test. Defendant repeats ad nauseam that no special relationship exists, and thereby concludes, incorrectly, that Defendant did not owe a legal duty to Plaintiff to protect or warn him.

Defendant has admitted that his own unorthodox operation of the skid loader created a "very dangerous" situation. Defendant saw Plaintiff approaching the danger and did nothing to stop Plaintiff from doing so, rather, Defendant essentially invited Plaintiff to approach by signaling it was safe to do so. That dangerous situation ultimately led to Plaintiff's injuries. Defendant's duty of care to Plaintiff arose from Defendant's badly chosen conduct, and just like most other negligence cases, a special relationship test is not at issue. Defendant mistakenly argues that only a special relationship can lead to a "duty to protect" or a "duty to warn." To the contrary, it was held over 50 years ago in *Zylka v. Leikvoll*, 274 Minn. 435, 144 N.W.2d 358 (1966), that a defendant who creates a dangerous situation owes a duty of care to, at least, provide a warning to those that may approach and be injured by the dangerous situation. The holding in *Zylka* has not been overturned, either

expressly or by implication, and remains binding law today. Moreover, a duty to protect others from ones own dangerous conduct is the cornerstone of negligence law.

At the trial in this matter, over Plaintiff's objections, the Judge allowed two erroneous special jury instructions to be put to the jury, namely "no duty to warn" and "no duty to protect." The Trial Court thereby instructed the jury that Defendant owed a duty of reasonable care to Plaintiff, while at the same time incorrectly instructing that Defendant owed no duty to warn Plaintiff of the danger he created, and no duty to protect Plaintiff from the danger. The jury's resulting confusion was evident when the jury asked during deliberations: "Does 'no duty to warn' mean that the Defendant had no obligation to try to keep the Plaintiff away from the skid loader?" The Judge's response was: "I cannot give you further instruction on this. Please rely on the jury instructions provided to you." The jury returned a verdict in favor of Defendant.

The Trial Court denied Plaintiff's post-trial motion for a new trial. The Court of Appeals reversed, holding that: (1) Defendant owed a duty of care to Plaintiff, (2) encompassed within that duty of care was a duty to warn, (3) the Trial Court's jury instructions were erroneous and prejudicial, and (4) Plaintiff was entitled to a new trial in light of the erroneous jury instructions. The Court of Appeals' decision is correct, and should be affirmed by the Supreme Court.

STATEMENT OF LEGAL ISSUES

1. Did the Trial Court commit reversible error of law when it ruled on summary judgment that Defendant had no duty to warn of or protect Plaintiff from the admittedly

dangerous condition that Defendant had created?

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

Trial Court Ruling: In its Order and supporting Memorandum of Law, the Trial Court ruled on summary judgment that Defendants owed no duty to warn as a matter of law. Defendant used this ruling to craft inappropriate special jury instructions in its favor.

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. (RESP. A.00080-89)

Apposite Authority:

Zylka v. Leikvoll, 274 Minn. 435, 144 N.W.2d 358 (1966)

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

Restatement 2d Torts, § 321 (1965)

2. Did the Trial Court commit a reversible error when it allowed Defendant's special jury instructions to be provided to the jury 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.

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: In the pretrial filings, Defendant submitted to the Court two proposed special jury instructions: “No Duty to Protect” and “No Duty to Warn.” (RESP. A.000090 - 000093). In response, Plaintiff submitted a written objection to Defendants’ two proposed special instructions. (RESP. A.000094 - 000096). The matter was orally argued on the first day of trial. (RESP. A.000097 – 102).

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

Preservation for Appeal: This issue was preserved for appeal as follows: (1) Plaintiff filed a written objection to the special instructions (RESP. A.000094); and (2) Plaintiff made a post-trial motion for a new trial based upon the erroneous special instructions, which the Trial Court denied.

Apposite Authority:

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

George v. Estate of Baker, 724 N.W.2d 1, 10 (Minn. 2006)

Mjos v. Vill. of Howard Lake, 287 Minn. 427, 437, 178 N.W.2d 862, 869 (1970)

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).

STATEMENT OF THE CASE

The jury trial was held in this matter from May 18 - 21, 2009. Prior to commencement of trial, the parties argued over the inclusion of two special jury instructions proposed by Defendants entitled “no duty to protect” and “no duty to warn,” which were cobbled from the Trial Court’s order denying summary judgment. Plaintiff objected to the inclusion of the special jury instructions, arguing that those jury instructions were irrelevant, unnecessary, and highly prejudicial against Plaintiff. The Trial Court accepted Defendants’ special jury instructions and provided them to the jury prior to deliberations. The jury returned with a 6-1 verdict finding Defendant was not negligent.

Plaintiff moved for a new trial on June 12, 2009, arguing that the inclusion of Defendants’ proposed jury instructions was erroneous and that the jury was confused by the inclusion of the “no duty to protect” and “no duty to warn” jury instructions. Defendants’ opposed Plaintiff’s motion for a new trial. On September 3, 2009, the Trial Court denied Plaintiff’s motion for a new trial.

Plaintiff appealed the Trial Court’s denial of his Motion for a New Trial. The Court of Appeals reversed, confirming under *Zylka v. Leikvoll* that when Defendant created a dangerous situation, he owed a duty of care to protect Plaintiff as Plaintiff approached the danger, which may include and encompass a duty to provide warning. Thus the Trial Court’s jury instructions were erroneous, prejudicial, and Plaintiff is entitled to a new trial.

STATEMENT OF FACTS

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

Defendant Eric Rolland and his company, Rolland Building Corp. (“Defendant”) owned and operated the skid loader at issue herein. (RESP. A.000004 at 14-15.) Defendant was well versed in the tedious process used to install or detach the skid loader’s bucket and other attachments. (RESP. A.000006 at 21-23). Defendant 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

(RESP. A.000006 at 22:19-23:10; *see also* RESP. A.000031 at 46-47; A..000032 at 52.).

Occasionally, one of the two levers used to secure the bucket or other attachment would become stuck with debris, thereby hampering the detachment process. Upon finding a stuck lever during the detachment process, Defendant’s unique and dangerous method to dislodge the debris was to release the one free lever, climb back into the machine, raise the bucket into the air, and “flutter the hydraulics” to shake the attachment and loosen the debris in the stuck lever. (RESP. A.000007-8 at 26:17-30:16). He would then re-lower the

implement and proceed to remove the debris and release the second lever. (Id.) Defendant testified that for debris to get lodged in the levers and cause them to get stuck was “very common.” (RESP. A..000012 at 45).

On June 23, 2003, Defendant brought his skid loader to Plaintiff’s home in Stillwater, Minnesota, to perform grading and landscaping work to take Plaintiff’s lawn from rough grade to finished grade and prepare it for the placement of sod. (RESP. A.000009 at 33-35; RESP. A.000030 at 43.) The skid loader’s multiple front-end attachments needed to be swapped on several occasions during the project. (RESP. A.000011 at 44; RESP. A.000032 at 51). Throughout the project, Defendant operated the skid loader, while Plaintiff watched the progress. (RESP. A.000011 at 42; RESP. A.000031 at 45.)

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

Towards the end of the project, Defendant needed to swap the bucket attachment for the leveling bar attachment. (RESP. A.000009 at 36). During the detachment process, however, Defendant found that one of the skid loader’s levers was stuck with a rock in the mechanism. (RESP. A.000015 at 57:20-24.) After releasing one of the levers, Defendant utilized his method of getting back into the machine, raising the bucket into the air, and “fluttering” the hydraulics in an attempt to shake the rock loose. (RESP. A.000013 at 52).

Defendant admits that this was a “very dangerous” situation, given that the bucket was raised up in the air with one of the two locking pins disengaged. (RESP. A.000014 at 55:10-20.)

Witnessing Defendant’s actions and realizing there was a problem, Plaintiff approached the skid loader to assist, with his hands raised as was the normal procedure to request a safe approach. (RESP. A.000034 at 58:10-24; A.000035 at 63:2-15.) At that point, with the bucket still raised in the air, Defendant took his hands off of the skid loader’s controls and also put his hands up in the air. (RESP. A.000009 at 36:11-17; RESP. A.000013 at 51:22-53:1; RESP. A.000035 at 63:1-64:10.) Plaintiff understood Defendant’s “hands-up” signal meant it was safe to approach. (RESP. A.000035 at 63:16-64:10). Defendant provided no warning or other indication whatsoever to Plaintiff that he should not approach the skid loader or that the situation was dangerous. (RESP. A.000014 at 54:13-55:9). Plaintiff assumed that Defendant would have told Plaintiff to stop if he was approaching a bad situation, yet Defendant did not say anything. (RESP. A.000036 at 65.)

When Plaintiff 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 to assist in the process. (RESP. A.000035-000036 at 58-65.) The release of the second lever caused the raised bucket to release from the machine and fall onto Plaintiff’s left foot, resulting in severe injury to Plaintiff’s foot, ultimately resulting in the amputation of three of his toes. (RESP. A.000037-000038 at 69-76.)

Plaintiff had never operated a skid loader nor helped attach or detach an implement prior to the incident that injured him. (RESP. A.000034 at 58.) Plaintiff did not realize that

releasing the second lever would cause the bucket to fall, because in prior instances, Defendant 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. (RESP. A.000033 at 55-56).

Defendant admitted that he saw Plaintiff approaching from 15 feet away. (RESP. A.000013 - 000014 at 52-53). Defendant further agreed that as Plaintiff walked towards the skid loader, he 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. (RESP. A.000009 at 36; RESP. A.000013 at 51; RESP. A.000034 at 58; RESP. A.000035 at 63). It is undisputed that Defendant did not provide any warning to Plaintiff.

B. The Trial Court Denies Defendants' Motion for Summary Judgment.

Prior to trial, Defendant moved for summary judgment arguing, among other things, that he owed no duty of care to Plaintiff. (RESP. A.000048-58). Defendant suggested to the Trial Court that Plaintiff's case consisted of the attempted imposition of a special relationship duty of care to protect and to warn, when no such duties existed. (RESP. A.000054 – 000055). Plaintiff argued in response that this matter did not hinge on a special relationship, but rather, upon Defendant's affirmative duty to remedy the dangerous situation he had created, and a duty to warn Plaintiff thereof or otherwise prevent Plaintiff from approaching the dangerous situation. (RESP. A.000059 – 000079). The Trial Court denied Defendants' summary judgment motion, and the matter proceeded to trial. (RESP. A.000080 - 000089).

C. Jury Instructions and Jury Deliberations.

Prior to trial, Defendants served and filed their proposed jury instructions, which included two special jury instructions by Defendant, as follows:

SPECIAL - 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.

SPECIAL - 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.

(RESP. A.000090 - 000093). These instructions were plainly crafted from the Trial Court's denial of summary judgment. Over Plaintiff's objection, the Trial Court allowed Defendants' special instructions and submitted them to the jury. (RESP. A.000103 – 000105 at 95:23-96:17). Following closing arguments, Defendant argued that Plaintiff's closing had contradicted the no duty to warn instruction. At Defendant's behest, the Trial Court repeated the "No Duty to Warn" instruction. (RESP. A.000106 at 157:6-18.)

During deliberations, the jury posed two questions to the Trial Court, one of which included: "Does 'no duty to warn' mean that the [Defendants] had no obligation to try to keep the [Plaintiff] away from the skid loader?" (RESP. A.000107). The Court responded: "I cannot give you further instruction on this. Please rely on the jury instructions provided to you." (*Id.*) The jury returned a verdict in favor of Defendant. (RESP. A.000108 - 000111).

LEGAL ARGUMENT

I. STANDARD OF REVIEW.

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).

Conversely, jury instructions generally rest within the district court’s discretion, and the appellate courts will not reverse based upon erroneous jury instructions absent a clear abuse of discretion. *Paulson v. Lapa, Inc.*, 450 N.W.2d 374, 378 (Minn.App.1990). 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). Such 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). Put another way, if the effect of the erroneous instruction cannot be determined, the non-prevailing party 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). Given the importance of the duty of care in a negligence case, errors of law in the jury instructions regarding those issues will generally warrant a new trial. *George v. Estate of Baker*, 724 N.W.2d 1, 10

(Minn. 2006); *Mjos v. Vill. of Howard Lake*, 287 Minn. 427, 437, 178 N.W.2d 862, 869 (1970); *Frazier v. Burlington N. Santa Fe Corp.*, 788 N.W.2d 770, 778-79 (Minn. App. 2010). 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).

II. THE COURT OF APPEALS CORRECTLY HELD THAT WHERE DEFENDANT CREATED A DANGEROUS SITUATION, DEFENDANT OWED PLAINTIFF A REASONABLE DUTY OF CARE THAT INCLUDED PROVIDING A WARNING.

A. Defendant's reliance on the "special relationship" test is based upon flawed logic, erroneous reasoning, and is nothing more than a diversion.

Defendant's recurring reliance upon the special relationship test is misplaced and unavailing. From the outset of this matter, Defendant has attempted to interject the special relationship test, noting that there is no special relationship between Plaintiff and Defendant. From the start, Plaintiff *agreed* with Defendant and has *never* argued that a special relationship is at issue here. Plaintiff has not suggested at any stage of this matter that a "special relationship" led to Defendant's duty of care. Yet Defendant has, at the trial level, the Court of Appeals, and now at the Supreme Court, raised this issue in detail in a blatant attempt to confuse and divert the issues. The Trial Court was in fact misled by Defendant raising this issue, and as a result, allowed two inappropriate jury instructions of "no duty to warn" and "no duty to protect." The Court of Appeals addressed the special relationship issue as a result of Defendant re-raising it, but appropriately brushed it aside and found that

it did not apply. The Court of Appeals went on to properly hold that Defendant owed a reasonable duty of care to Plaintiff as a result of Defendant's actions, which duty may include the obligation to provide a warning of the dangerous situation that Defendant had affirmatively created. Plaintiff urges the Supreme Court to disregard Defendant's oblique maneuvering and incorrect logic.

A special relationship giving rise to a duty to protect or duty to warn is a duty impressed upon otherwise innocent bystanders under special circumstances. In other words, an innocent bystander without active involvement in some occurrence owes no duty to protect others from danger or provide a warning unless the bystander falls into one of those special categories. *See H.B. ex rel. Clark v. Whittemore*, 552 N.W.2d 705 (Minn. 1996) (mobile home park operator owed no duty of care to children from the criminal acts of a third party). Defendant raised this issue from the very outset in an effort to direct the courts into an error of logic, namely: if a special relationship leads to a duty to protect and a duty to warn, and if no special relationship exists here, then there must be no duty to protect and no duty to warn. True, there is no duty to protect and no duty to warn *on the part of an innocent bystander*. However, the converse is not necessarily nor logically true, namely that it is incorrect to broadly state that absent a special relationship, it is not possible to owe a duty to protect or a duty to warn. The error in Defendant's logic is subtle but apparent. Defendant reasons: if the existence of "A" (special relationship) leads to "B" (duty to warn/protect); and "A" does not exist; then "B" must not exist. This is a deductive fallacy. What Defendant fails to appreciate is that there are scenarios other than "A," in which it is possible for "B" to exist. In other words, a duty to protect and a duty to warn under

negligence law can in fact exist despite the lack of a special relationship, if some other aspect of the matter imposes a duty of care upon the defendant.

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 the time); *State v. Munnell*, 344 N.W.2d 883, 886 (Minn. App. 1984).

Without citation of law, Defendant broadly states there is “no duty to protect” absent a special relationship. To state that no “duty to protect” exists except in the case of a “special relationship” not only misses the mark, but upends the entire core of negligence law, which requires persons to act in a reasonably prudent manner in order to protect others from harm that may occur from such actions. A duty to protect others from danger and injury is the cornerstone of negligence law. “Negligence is a departure from a standard of conduct required by the law for the protection of others against unreasonable risk or harm-a breach of a legal duty.” *Peterson v. Minneapolis St. Ry. Co.*, 226 Minn. 27, 31, 31 N.W.2d 905, 907 (1948) (emphasis added); *see also Seim v. Garavalia*, 306 N.W.2d 806 (Minn. 1981) (same); *Domagala v. Rolland*, 787 N.W.2d 662, 671 (Minn. App. 2010) (same); *Blatz v. Allina Health Sys.*, 622 N.W.2d 376, 383 (Minn. App. 2001)(same).

Generally then, when a person undertakes any conduct, they must do so in a reasonable manner that protects others from harm. Defendant refuses to admit this fact and confuses the issues by repeating over and over that a “duty to protect” and a “duty to

warn” only arise in the context of a special relationship. The Court of Appeals rejected Defendant’s fallacious argument in this matter, and rejected a similar erroneous argument in the recent unpublished case of *Welsh v. Keefe*, where the Court of Appeals noted:

The district court concluded, and Denny and R & K continue to argue on appeal, that there was no special relationship between Denny and Welsh creating a duty on the part of Denny to affirmatively protect Welsh from harm by preventing him from walking out onto the highway. But neither Welsh nor Keefe alleges or relies on the existence of such a special relationship or duty. Rather, they assert an ordinary negligence theory: that Denny negligently operated his semi-trailer truck, thereby creating a hazardous traffic condition, and proximately caused Welsh's injuries. Thus, the central question is simply one of causation: did Denny's allegedly negligent driving conduct proximately cause Welsh's injuries?

2010 WL 4608338 at *3 (Minn. App. Nov. 16, 2010). *Welsh* confirms that a defendant’s arguments about “special relationships,” “no duty to protect,” or “no duty to warn” have no place in a case where the defendant is not an innocent bystander, but instead is an active participant in the conduct that causes harm.

Defendant’s assertions are true only with respect to innocent bystanders. To the contrary, the duties to protect and duty to warn may arise in any case of a person who undertakes some activity that may harm others. Here, Defendant was the operator of the skid loader, and he admits that he created a “very dangerous” situation when he released one of the two locking mechanisms on the bucket and raised it up in the air to loosen some debris. Further, as Plaintiff approached the skid loader in this condition, Defendant put his hands in the air, palms out, which was the signal to indicate it was safe to approach. Defendant effectively invited Plaintiff to approach, rather than warning Plaintiff of the danger, lowering the bucket, or otherwise protecting Plaintiff from the

danger Defendant had created. The Court of Appeals' decision herein has not created any "new exception" nor abrogated the special relationship case law. It has simply and correctly ruled that when a person creates a dangerous situation, they owe a duty to prevent harm to others that may occur. Its decision should be affirmed.

B. In binding cases and learned treatises over 50 years old, the law imparts a duty to warn upon a defendant who creates a dangerous situation.

Notably, this Court has required a duty to warn in previous cases that did not involve a "special relationship." In *Zylka v. Leikvoll*, through a series of unfortunate driving events, a tow truck driver named Leikvoll was pushing a stalled car that ended up immobile and blocking a lane of traffic in the dark. 274 Minn. 435, 144 N.W.2d 358 (1966). It was determined that Leikvoll contributed to creating this dangerous situation, which ultimately resulted in a second car accident that injured the plaintiff. There was a question as to whether Leikvoll took adequate measures to warn oncoming traffic of the traffic lane blockage using lights or flares. The Court held:

We believe, and find support for the proposition, that one's participation in the creation of a hazard need not be negligent for the duty of care to arise. ... A duty then fell upon Leikvoll, not as a volunteer but as one called upon to exercise reasonable care, either to remove the hazard or give adequate warning to others. We find sufficient support in the record upon which the jury could conclude that Leikvoll negligently breached that duty.

274 Minn. at 447, 144 N.W.2d at 367 (emphasis added, footnotes omitted). The Court went on to note the various actions that Leikvoll could have taken to provide a better warning after having contributed to the dangerous situation, and concluded:

The ... testimony would permit the jury to find that, as Cech approached the hazard, his failure to exercise due care was contributed to by

[Leikvoll's] ineffective warning of existing danger.

Id. (emphasis added). Notably, the trial court in *Zylka* provided the following jury instruction, which was found by the Supreme Court on appeal to be proper:

If a person creates or 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 that is reasonably feasible or possible, and to use reasonable care to warn others of the danger while the danger exists.

Id. (emphasis added). *Zylka* is analogous and in fact directly on point in this matter. When one affirmatively creates a dangerous situation, the duty of reasonable care includes a duty to provide a warning to others and to protect them from that danger.

This Court came to a similar holding in *Hollinbeck v. Downey*, 261 Minn. 481, 113 N.W.2d 9 (1962). There, a golfer on a practice range hit a ball into a caddy who was retrieving balls out on the practice range. The caddy was unaware that the golfer was about to hit the ball. This Court held:

If Downey knew, or in the exercise of ordinary care should have known, that plaintiff was in a zone of danger and was unaware of Downey's intention to hit, Downey should have given him a warning or desisted from striking the ball until plaintiff was in a place of safety.

261 Minn. at 486, 113 N.W.2d at 13 (emphasis added). The *Hollinbeck* court quoted with approval the following holding from a Virginia case:

... it is the duty of a golf player to exercise ordinary care to prevent injury to others by a driven ball; that before driving, it is his duty to give timely warning to persons unaware of his intention whom he knows, or in the exercise of ordinary care should have known, are in line, or so close to the line of the intended flight of the ball that danger to them reasonably might be anticipated.

261 Minn. at 484, 113 N.W.2d at 11 (emphasis added, *quoting Alexander v. Wrenn*, 158

Va. 486, 492, 164 S.E. 715, 717 (1932)). Observe that neither *Zylka* nor *Hollinbeck* involved a “special relationship,” rather, the actions of the defendants in contributing towards creating a dangerous situation imparted upon them a duty to provide a warning.

As yet another 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) (Hanson, concurring) (municipality owes duty of care to warn travelers of known dangerous conditions on its roadways, particularly if the danger is one that a municipal employee created); *Mix v. City of Minneapolis*, 219 Minn. 389, 395, 18 N.W.2d 130, 134 (1945) (stating “if, by reason of peculiar facts or circumstances, a pitfall, trap, or snare dangerous to a traveler proceeding with reasonable care is created in respect to a street, a municipality owes a duty to exercise reasonable care to warn or otherwise protect such a traveler for resulting danger.”); *Larson v. Twsp. of New Haven, Olmsted County*, 282 Minn. 447, 454, 165 N.W.2d 543, 547 (1969) (same); *Ollgaard v. City of Marshall*, 208 Minn. 384, 294 N.W. 228 (1940). Notably, the relationship of “municipality and traveler” is not a “special relationship” category in the case law.

Particularly pertinent here is the Restatement 2d 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 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. ... 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 from the Restatement, the author notes that creation of a dangerous situation not only imparts upon the actor a reasonable duty of care, but the duty of care specifically includes a duty to provide a warning of a known dangerous condition that the defendant either created or contributed to creating. That exact scenario occurred in this case, wherein Defendant created an admittedly dangerous situation with the skid loader, saw Plaintiff approaching that situation, and failed to shout a warning or other signal to Plaintiff to not approach.

The foregoing cases and Restatement illustrations aptly demonstrate that upon creating the dangerous situation with the skid loader, Defendant owed a duty of

reasonable care to Plaintiff, and that legal duty included, among other things, a duty to warn. Thus the Trial Court's conclusion that there could not be a duty to warn was a mistake of law, and the inclusion of the "no duty to protect" and "no duty to warn" jury instructions was directly contrary to the actual law. On that basis, the Court of Appeals' reversal and remand for a new trial was correct, and should be affirmed.

C. Defendant's reliance on special relationship cases, such as Harper v. Herman, is unavailing.

Defendant attempts to analogize this case to *Harper v. Herman*, a special relationship case. 499 N.W.2d 472 (Minn. 1993). *Harper v. Herman* is distinguishable. In *Harper*, the Court held the boat owner owed no duty of care when a passenger of the boat suddenly dove off the boat into shallow water, injuring himself. Notably, the boat driver did not create the shallow water, and boats are obviously capable of and expected to operate in all depths of water. The boat driver did not create the danger, and the passenger's unexpected dive into shallow water was thus not the driver's responsibility.

In contrast here, Defendant affirmatively and knowingly created the dangerous situation of the skid loader with its bucket raised in the air and being held in place by only one locking pin, and Defendant essentially invited Plaintiff to approach the danger by providing the hands-up, safe-to-approach signal. In *Harper*, the boat driver's conduct was not at issue, and thus the boat driver was held to be a typical innocent bystander that did not owe a duty of care. Here, Defendant's conduct created the dangerous situation, and thus Defendant was not an innocent bystander. Defendant's actions imparted upon Defendant a duty of care to prevent injury to Plaintiff, thus *Harper* is distinguishable.

III. THE INCLUSION OF DEFENDANTS' SPECIAL JURY INSTRUCTIONS ON "NO DUTY TO WARN" AND "NO DUTY TO PROTECT" WERE INAPPROPRIATE AND PREJUDICIAL.

A. Defendant's special jury instructions are incorrect statements of the duty of care, and errors regarding the duty of care in a negligence case are prejudicial and deemed to warrant reversal.

In this matter, the Trial Court permitted Defendant's two "negative" special jury instructions to be given to the jury- 'no duty to warn' and 'no duty to protect.' Based upon the above analysis, Defendant's reasonable duty of care did include a duty to protect and a duty to warn. As a result, the jury instructions were erroneous and blatantly misstate the law. As this Court has noted:

[A] court errs if it gives a jury instruction that materially misstates the law. Such an error does not necessitate a new trial unless the error was prejudicial. A jury instruction is prejudicial if a more accurate instruction would have changed the outcome in the case. If the effect of the erroneous instruction cannot be determined, we will give the complainant the benefit of the doubt by granting a new trial.

George v. Estate of Baker, 724 N.W.2d 1, 10 (Minn. 2006). In *George*, a negligence case, the jury was given an incorrect instruction on the duty of care. *Id.* at 5. The Court noted: "Because it is analytically and practically possible that the erroneous standard of care instruction affected the jury's causation analysis, we hold that the ... instruction was reversible error and remand the case for a new trial on ... liability." *Id.* at 11.

Similarly in *Mjos*, another negligence case, the court held that an error of law in the duty of care instructions was reversible error warranting a new trial. *Mjos v. Vill. of*

Howard Lake, 287 Minn. 427, 437, 178 N.W.2d 862, 869 (1970) (dram shop case where instruction regarding element of proof used phrase “obviously intoxicated” whereas statute had been amended to read solely “intoxicated.”). Much like this matter, the jury in *Mjos* asked during deliberations for clarification specifically relating to the erroneous instruction, and the trial court re-read the erroneous instruction. *Id.* That error of law and its apparent effect on the jury’s outcome was deemed to warrant a new trial. *Id.*

The Court of Appeals reached a similar result in the recent case of *Frazier*, wherein a jury instruction that misstated the duty of care in a negligence action was held to warrant a new trial. *Frazier v. Burlington N. Santa Fe Corp.*, 788 N.W.2d 770, 778-79 (Minn. App. 2010). The erroneous instruction affected BNSF’s substantial right to a fair trial, and the court was “compelled to conclude that, to ensure fairness and the integrity of this judicial proceeding, BNSF is entitled to a new liability trial.” *Id.* at 781.

The holdings in *George*, *Mjos*, and *Frazier* all illustrate the importance of correct jury instructions on the duty of care. In each of those cases, the erroneous duty of care instruction warranted a new trial. The same holds true here, where the Trial Court provided two jury instructions that directly contradicted the law. The resulting prejudice to Plaintiff is palpable, and demands a new trial. At the very least, if the effect of the erroneous instruction cannot be determined, the Plaintiff is 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).

Over and above the fact that the instructions here patently misstated the duty of care, they were additionally framed in the negative, attempted to advise the jury as to law that both sides agree did *not* apply in this matter, and badly confused the jury. Thus the

instructions were particularly prejudicial. Three jury instructions were directly contradictory of each other. The Trial Court provided the following three instructions:

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.

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.

(See A 056 (emphasis added).) As noted previously, any duty of care owed to a Plaintiff is tantamount to a duty to protect the Plaintiff from harm. The Trial Court correctly instructed the jury regarding Defendant's duty of care based upon his creation of a dangerous situation. Yet in the same breath, the Trial Court instructed that Defendant did not owe a duty to protect Plaintiff. It is inconceivable as to how Defendant can owe a duty of care to prevent harm to Plaintiff, yet at the same time not owe a duty to 'protect' Plaintiff. The 'no duty to protect' instruction is an incorrect statement of the law, and constitutes reversible error.

Likewise, the Trial Court instructed that Defendant owed a duty of care to prevent harm to Plaintiff from the admittedly dangerous situation, yet instructed “that no duty to warn exists in this case and you must not consider such a duty in your deliberation in this case.” The ‘no duty to warn’ instruction was equally erroneous, and led to reversible error. As held in *Zylka v. Leikvoll*, 274 Minn. 435, 144 N.W.2d 358 (1966) and *Hollinbeck v. Downey*, 261, Minn. 481, 113 N.W.2d 9 (1962), the reasonable duty of care when one creates a dangerous situation includes a duty to provide a warning.

The Trial Court’s erroneous instructions on the critical duty of care issue rises to the level of prejudice that could have affected the outcome of this matter, and warrants a new trial. The Court of Appeals so held, and its decision should be affirmed.

B. Negative jury instructions that attempt to inform the jury regarding inapplicable concepts of law are disfavored and should be barred.

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).

Regarding negative jury instructions, the Minnesota Supreme Court held in *Nubbe* that the exclusion of a negative jury instruction was proper. *Nubbe v. Hardy Cont’l 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 further 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 is sufficient, and "it need not be buttressed by express exclusion of nonapplicable principles of law." *Id.* (emphasis added).

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

[T]he 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 distraction (sic) (3) or both." ... 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). A virtually identical fact pattern occurred here, where the Trial Court allowed Defendant's two negative jury instructions, and the jury was confused and asked questions about the negative instructions during deliberations. Plaintiff was prejudiced and is entitled to a new trial.

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-N. St. Paul Dist. No. 622*, 362

N.W.2d 318, 322 (Minn. 1985); *Sandhofer v. Abbott-Nw. Hosp.*, 283 N.W.2d 362, 367 (Minn. 1979); *Cameron v. Evans*, 241 Minn. 200, 208-09, 62 N.W.2d 793, 798-99 (1954) (“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*, the plaintiff was granted a new trial where the trial court allowed an erroneous instruction on an issue that did not apply. 238 Minn. 460, 461, 57 N.W.2d 262 (1953). The Supreme Court gave the following caution:

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 stated, that is all that is required.

Id. at 469. This Court has stated on numerous occasions that it is not advisable to blindly provide 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). Special instructions tend to give prominence to and emphasize particular facts disclosed by the

evidence, thus singling out elements or views in the case. *Barnes*, 233 Minn. at 420, 47 N.W.2d at 187. Model jury instructions are crafted to avoid this very problem.

Here, the Trial Court 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 Defendants' case. The Trial Court confused and misled the jury by providing instructions that were not appropriate or relevant to Defendant's breach of the duty 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 erroneous, argumentative and misleading. Although perhaps correct if applied to innocent bystanders, the Defendant here was not an innocent bystander, but rather was an active participant who created a dangerous situation. The standard jury instruction for negligence would have sufficed in this case. *See* Minn. CIV JIG 25.10. Much like *Nubbe v. Hardy Cont'l, supra*, and *Jones v. Foutch, supra*, the Defendant's special jury instructions in this matter constitute reversible error and warrant a new trial.

CONCLUSION

Based upon the foregoing, Plaintiff 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 Defendants did owe a duty as a matter of law to warn Plaintiff of the impending danger, and that the jury be so instructed.

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

Dated:

1-17-11

By:


Thomas J. Weidner, Esq. (#208395)

Kevin S. Sandstrom (#348958)

1809 Northwestern Avenue

Stillwater, MN 55082

(651) 439-2878

*Attorneys for Plaintiff/Respondent Bradley
Domagala*

FORMAT CERTIFICATION

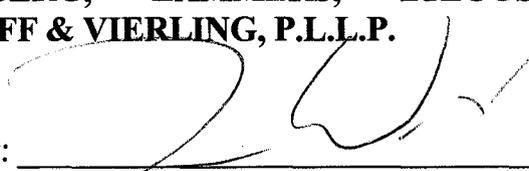
The undersigned hereby certifies pursuant to Minn. R. Civ. App. P. 132.01, subd. 3(c), that the word count of the foregoing brief of Plaintiff Bradley Domagala, including footnotes, but exclusive of pages containing the Table of Contents and the Table of Authorities, is **8,373**. The Brief complies 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:

1-17-11

By:


Thomas J. Weidner, Esq. (#208395)

Kevin S. Sandstrom (#348958)

*Attorneys for Plaintiff/Respondent Bradley
Domagala*