

NO. A09-1945

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State of Minnesota  
*In Court of Appeals*

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Bradley J. Domagala,

*Appellant,*

vs.

Eric Rolland and Rolland Building Corp.,

*Respondents.*

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**RESPONDENTS' BRIEF 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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## ISSUES ON APPEAL

### I. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR IN INCLUDING JURY INSTRUCTIONS THAT ACCURATELY STATED THE LAW?

The district court held that the jury instructions correctly and fairly stated the law, and were necessary to prevent the jury confusion, given Plaintiff's arguments.

#### **Apposite Authority:**

*Aholm 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)

### II. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR IN REPEATING ACCURATE JURY INSTRUCTIONS FOLLOWING PLAINTIFF'S COUNSEL'S MISSTATEMENTS OF THE LAW IN CLOSING ARGUMENT?

This issue was neither raised nor ruled on by the district court, and was not raised in Plaintiff's motion for new trial.

#### **Apposite Authority:**

*Hansen v. Barrett*, 186 F. Supp. 527 (D. Minn. 1960)

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

### III. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR IN RULING ON SUMMARY JUDGMENT THAT DEFENDANTS HAD NO DUTY TO WARN PLAINTIFF OF THE RISKS INHERENT TO THE SKID LOADER?

The district court held that no special relationship existed between the parties and that Plaintiff's theory of a product liability duty to warn did not apply to this case.

#### **Apposite Authority:**

*Larson v. Larson*, 373 N.W.2d 287 (Minn. 1985)

*Erickson v. Curtis Inv. Co.*, 447 N.W.2d 165, 168-69 (Minn. 1989)

*Errico v. Southland Corp.*, 509 N.W.2d 585, 587 (Minn. App. 1993)

4A David F. Herr & Roger S. Haydock, *Minnesota Practice Series - Jury Instruction Guides - Civil*, Cat. 75 (4th ed. 2007).

## STATEMENT OF THE CASE

This personal injury litigation arises out of an accident which occurred while Defendant Eric Rolland was performing landscaping/grading work at Plaintiff Bradley Domagala's home in Stillwater, Minnesota on June 23, 2003. Plaintiff was injured when he voluntarily and without warning approached the skid loader operated by Defendant, and pulled a lever which released the loader's bucket. This action caused the bucket to fall and land on Plaintiff's foot.

In February 2009, Defendants moved for summary judgment, asserting that in the absence of a special relationship between the parties, there was no duty to warn of any risks or dangers related to the operation of the skid loader, and no duty to protect against an unreasonable risk of injury. The district court agreed, finding that no duty to warn or protect existed between the parties, and dismissed such claims. The district court refused to dismiss the negligence claims, however, ruling that Defendant Domagala had a duty to act with reasonable care in the creation of a dangerous situation and a duty to act with reasonable care in the operation of the loader. These negligence issues proceeded to jury trial.

In pretrial proceedings in May 2009, Defendants requested that the district court include two jury instructions stating the law of the case following the court's ruling on summary judgment – that there was no applicable duty to warn or to protect. The court agreed that such instructions were appropriate and in conformance with the law.

In response, Plaintiff put the Court and counsel on notice of his intent to argue that a duty to warn could be inferred from a duty of reasonable care. He then both highlighted

and misstated that law of the case to the jury. As a result of Plaintiff's counsel's actions, the trial court found it necessary to repeat several jury instructions to the jury prior to deliberations. (RA 4-5).

The jury found that Defendants were not negligent in the operation of the skid loader. (A000109). Appellant's motion for a new trial was denied. (RA 1)

## **STATEMENT OF FACTS**

### **1. 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. (A000002, p. 6). Plaintiff Bradley Domagala is married to Rolland's cousin; he asked Rolland to perform some grading work around the Domagala home. (A000008-9, pp. 31, 32-33). Rolland brought his New Holland LX985 skid steer loader along with the forks, bucket and leveling bar implements to the Domagala home. (A000010, p. 38). Domagala watched as Rolland removed and attached implements on the loader on 2-5 occasions before the accident occurred. (A000011, pp. 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. (A000012, pp. 46-48). Rolland would 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. (A000012-15, pp. 48-49).

When the incident occurred, Rolland had been working for a number of 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. (A000013, p. 52). The boom was raised approximately 10-20 inches off the ground, and Rolland manipulated the controls in order to “flutter” the hydraulics (shake them lightly and quickly) in an attempt to remove the debris that was caught in the lever. (A000013-14, pp. 52, 56).

Rolland then became aware that Domagala had approached and was approximately 10-15 feet away, walking directly towards the loader. (A000013-14, pp. 52-53). Rolland did not know why Domagala was approaching him, and was surprised that he was so close to the loader. (A000014, pp. 53-55). Rolland took his hands off of the controls to indicate that he would cease operating the loader while Domagala was near the machine. (A000013-14, pp. 52-53). Rolland did not ask Domagala for help and did not instruct him to do anything. (A000016, pp. 62-64). Before Rolland could say anything, Domagala suddenly reached up and pulled the implement release lever which caused the bucket to fall to the ground. (A000015, p. 60). Domagala’s left foot was struck by the cutting edge of the bucket. (A000016, p. 62). Domagala admitted: “I don’t know that I gave any indication that I was going to pull the lever.” (Domagala dep. p. 65 A000036).

## **2. PROCEDURAL FACTS**

### **a. Defendant’s Motion for Summary Judgment**

Domagala initiated a lawsuit against Rolland, 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. In his Complaint dated March 27, 2008 Domagala asserted, among other things:

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, RA 60).

That Defendant Eric Rolland failed to warn Plaintiff of the dangers associated with trying to unlatch the Skid Steer's bucket. (*Id.*, Count XI). (RA 60).

Defendants moved for summary judgment on both causes of action, asserting that there was no relationship between the parties that would give rise to a duty to protect or a duty to warn. In response, Plaintiff argued at length that a special relationship was not necessary to establish a duty of care, and "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." (RA 8).

The district court correctly applied controlling Minnesota law and held that Rolland had no duty to protect or warn Domagala:

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.

(A000085)(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.

(A000088)(emphasis added).

The district court denied summary judgment on the negligence issues, 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. 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, RA 14).

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[.]” (A000094-95) 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 and the court denied Plaintiff's motion.

Then, despite the district court's decision to give the instructions on the applicable law, Plaintiff advised the court that he intended to represent to the jury that a warning or "reasonable offering" by Rolland to Domagala would have stopped Domagala from approaching the skid loader. (RA 20-22).

Defendants, in turn brought a motion *in limine* requesting that if Plaintiff's counsel attempted to refer to a duty to warn or a duty to protect in the presentation of Plaintiff's case, then the court should provide a curative instruction. (RA 56-57, RA 23-29). The court denied the motion but added 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.

(RA 29).

Prior to closing argument, Defendants' requested special instructions were given to the jury, along with other instructions including those on negligence and reasonable care. Plaintiff requested the following additional instruction also be included:

#### 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.

(RA 32-33; RA 14).

Plaintiff's request was not for a standard jury instruction, but for one specifically adopting language included in the court's summary judgment Order. *Id.* Over Defendants' objections, Plaintiff's motion was granted and Plaintiff's requested instruction was also given. *Id.*

c. **Plaintiff's Argument at Trial**

During Plaintiff's closing arguments, repeated reference was made to the explanation of "the whole law" as it relates to applicable duties in this case. (RA 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. (RA 38). Defendants objected, as Plaintiff's argument implied that a warning should have been provided in order to prevent Domagala from approaching. (RA 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. (RA 40-43). Plaintiff initially correctly acknowledged to the jury that there was no duty to warn and no duty to protect. (RA 41). Then, however, either intentionally or unintentionally, counsel misstated the application of the law of the case, inferring that such restrictions on duties *do not apply* to this case. (RA 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.

(RA 45)(emphasis added).

After Plaintiff's closing argument, the parties approached the bench, and the court determined that it was necessary to clarify a number of issues raised during closing argument. (RA 48). The court noted that Plaintiff had incorrectly characterized the jury's voir dire responses. (RA 48). 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. (RA 49). The court then proceeded to reiterate 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). (RA 49-50) The jury was then released for deliberations.

**d. Plaintiff's Counsel's Actions During Deliberations**

During deliberations, one juror posed a written question:<sup>1</sup> "Does 'no duty to warn' mean that the Defendant had no obligation to try to keep the plaintiff away from the skid loader?" (A000107). 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

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<sup>1</sup> While Plaintiff states (Appellant's Brief, p. 26) that the *jury* submitted the question, the question submitted during the deliberations was made by only *one juror*, as evidenced in the last note received from the jury: "The questions are being asked by John Smith. The final statements are false and not true." (RA 54).

to you.” (RA 53) Plaintiff’s counsel was given the opportunity to request clarification and/or to provide additional explanation, and chose not to do so. Instead, counsel simply communicated via email: “I’m ok with the Judge’s answers.” (RA 55).

e. **Plaintiff’s Motion for New Trial**

The jury found that Defendants were not negligent. (A000109). 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. The court ruled that the instructions were applicable and at issue at trial, especially in light of the explicit statement that Plaintiff 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.

(RA 4). Plaintiff’s motion for new trial was properly denied.

**ARGUMENT**

A motion for a new trial should be granted “cautiously and sparingly and only in the furtherance of substantial justice.” *State by Spannaus v. Northwest Airlines, Inc.* 413 N.W.2d 514, 528 (Minn. App. 1987) (citation omitted). Furthermore, the trial court has broad discretion in deciding whether a new trial is required. The trial court's decision to

grant or deny a motion for a new trial will not be reversed absent a clear abuse of discretion. *Westbrook State Bank v. Johnson*, 358 N.W.2d 422, 425-26 (Minn. App. 1984) (citing *Connolly v. Nicollet Hotel*, 258 Minn. 405, 407, 104 N.W.2d 721, 724 (Minn. 1960)). *Helwig v. Olson*, 376 N.W.2d 763, 765 (Minn. App. 1985).

**1. THE TRIAL COURT CORRECTLY INCLUDED JURY INSTRUCTIONS WHICH ACCURATELY SET FORTH THE LAW OF THE CASE**

**A. Accuracy of Instructions**

As stated in the district court's post trial Order and Memorandum, "the District Court has considerable latitude in choosing jury instructions, which includes a wide discretion 'in determining the propriety of a specific instruction.'" *Aholm 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 party is entitled to an instruction setting forth his theory of the case if there is evidence to support it and if it is in accordance with applicable law." *Poppenhagen v. Sornsin Constr. Co.*, 220 N.W.2d 281, 286 (Minn. 1974); see also *Kirsebom v. Connelly*, 486 N.W.2d 172, 174 (Minn. App. 1992); *Albert v. Paper Calmenson & Co.*, 515 N.W.2d 59, 66 (Minn. App. 1994). "If the Court undertakes in its charge to concisely sum up and formulate the law which is to govern the jury in its deliberations, it is its duty to cover every legal question involved." *Kurstelska v. Jackson*, 93 N.W.1054, 1055 (Minn. 1903). *Id.*

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); *Russell v. Johnson*, 608 N.W.2d 895, 898

(Minn. App. 2000). A party may not attack a jury instruction “by lifting a single sentence or word from its context,” but instead the instructions “must be construed as a whole and tested from the standpoint of its total impact on the jury.” *Lindstrom v. Yellow Taxi Co.*, 214 N.W.2d 672, 676 (Minn. 1974). (RA 4). The district court noted further that “Minnesota Courts have found that while a negative instruction may not be preferable, it does not give rise to a finding of error per se. *Hernandez v. Renville Public School District No. 654*, 542 N.W.2d 671, 674 (Minn. App. 1996) (RA 4).

Plaintiff cites the foreign case of *Jones v. Foutch*, 278 N.W.2d 572 (Neb. 1979), for the general notion that the trial court should rely on standard jury instructions rather than attempt to provide substitute definitions or instructions that might cause confusion with the jury. *Id.* at 579-80. *Foutch* is readily distinguished in that it addressed an improper instruction regarding the standard for the jury to consider in determining gross negligence on the part of the defendant. The Nebraska court held that the disputed instructions included abstract statements of the law taken out of context from prior cases which were not intended to instruct juries on other cases. *Id.* at 259. Because the definition offered to the jury was incomplete and it isolated one element of the claim it could have confused and mislead the jury. *Id.*

Here, Plaintiff concedes that the instructions given were correct statements of Minnesota law. (Appellant’s brief, p. 21). The instructions were complete and contained accurate recitations of the law. The instructions were not cobbled together from disjointed facts or from irrelevant or incomplete cases. Rather, they were taken from the black letter Minnesota law, based upon the language in the district court’s ruling on

summary judgment. That the instructions were postured in the negative rather than the positive has no bearing on the appropriateness of the instructions.

In *Nubbe v. Hardy Continental Hotel Sys. Of Minn.*, 31 N.W.2d 332 (Minn. 1948), a premises liability action, the court held that it was not reversible error to refuse to instruct the jury that a defendant “is not the insurer of the safety of the premises.” *Id.* at 336. Plaintiff erroneously claims that this somehow supports the notion that “negative” jury instructions are improper in Minnesota. (Appellant’s brief, p. 19) But that is not the holding in *Nubbe*. The *Nubbe* Court specifically explained its ruling, stating that: “Although defendant’s request was **entirely proper** and, if granted, would by contrast **have reasonably contributed to the clarity of the charge**, we cannot say that the trial court’s refusal to so to instruct was erroneous or prejudicial.” *Id.* (emphasis added). In short, the court ruled that while it would have been helpful to include the instruction in the charge to the jury, it was not reversible error to exclude the instruction. *Nubbe* does not serve to support Plaintiff’s position. If anything, it supports Defendants’ position – that the court properly included the instructions on duty to warn and duty to protect in order to reasonably contribute to the clarity of the charge to the jury.

Plaintiff also cites *Swanson v. La Fontane*, 57 N.W.2d 262 (Minn. 1953) for the general notion that additional instructions emphasizing one party’s view of the law need not be submitted to the jury. (Appellant’s brief, p. 20). *Swanson*, however, was not

remanded because of the jury instructions that the court gave or failed to give.<sup>2</sup> Indeed, after determining that remand was appropriate on other grounds, the court specifically noted that the court's refusal to give specific requested instructions was *not* error. *Id.* The case does not address the appropriateness of including applicable and controlling law. *Swanson*, while not entirely inapposite, certainly does not support reversal.

Finally, Plaintiff contradicted his own arguments that law found in court decisions or textbooks should not be provided to a jury (Appellant's brief, p. 21). Plaintiff also requested and was granted his own special jury instruction on the duty of care based on the creation of a dangerous situation. (RA 32-33). Plaintiff requested that the language from the district court's summary judgment Order be included as a jury instruction, and his request was granted. Just like the request made by Defendants, Plaintiff's jury instruction request was an accurate statement of the law of the case, and was included in the instructions upon Plaintiff's request. The instructions to the jury were clear and accurate statements of the law of the case and the law of the State, and were properly presented to the jury.

#### **B. Applicability of Instructions**

Plaintiff also argues that the instructions related to "duty to protect" and "duty to warn" were unnecessary and addressed issues that do not apply to this case. As the district court noted, however, "[d]espite the Court finding on summary judgment that

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<sup>2</sup> *Swanson* was remanded for a new trial because even though there was no evidence of contributory negligence, the issue of contributory negligence was submitted to the jury. 57 N.W.2d at 267.

such duties did not legally exist in this case, these duties became the focal point during discussions between the parties and the Court throughout the trial.” (RA 4).

Plaintiff next cites *Peterson v. BASF Corp.*, 711 N.W.2d 470, 484 (Minn. 2006) for the notion that inapplicable laws should not be included as jury instructions. (Appellant’s Memorandum, pp. 6-7). The district court correctly noted that the lawsuit in *Peterson* was based upon defendant’s deceptive advertising and marketing. (RA 4). When the case came to trial, defendant requested several special jury instructions based upon FIFRA regulations, relating to the labeling of products. *Peterson*, 711 N.W.2d at 483. The district court refused to instruct the jury in such a manner and the appellate courts affirmed, finding the instructions were inapplicable *because the case did not involve claims of deceptive labeling*, but rather deceptive nonlabel conduct. *Id.* at 484. (RA 4).

Here, however, whether duties to protect and warn existed between Rolland and Domagala was one of the key issues in this case. The district court correctly applied the law in Minnesota, and made a concrete determination that *no* duty to warn and *no* duty to protect existed between the parties. In light of Plaintiff’s proposed (and erroneous) argument that the jury might find that “a warning could be inclusive of the duty of

reasonable care,”<sup>3</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.

**2. THERE IS NO BASIS TO THINK THAT THE SPECIAL JURY INSTRUCTIONS CONFUSED THE JURY**

Plaintiff briefly asserts that the jury instructions somehow confused the jury as to the applicable law of the case, thus warranting a new trial. (Appellant’s brief, pp. 25-26). 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.” (RA 5)

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). Plaintiff cites *Zurko v. Gilquist*, 62 N.W.2d 351 (Minn. 1954) as a case was remanded due to the inclusion of a jury instruction that may have confused the jury. *Zurko* was a motor vehicle accident case in which the plaintiff asserted that the defendant should have driven at a reduced speed due to special hazards in the vicinity of the accident. The trial court provided Minn. Stat. § 169.14 on special hazards, but then added a directly conflicting instruction: “At the time and place of the accident under this situation, a speed of 50 miles an hour

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<sup>3</sup> (Plaintiff’s Objection to Defendants’ Jury Instructions, A000096, p. 2) At no time has Plaintiff produced authority for the notion that a jury may find a duty to protect or a duty to warn after the court has conclusively ruled 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).

was a lawful speed.” The Minnesota Supreme Court held that this additional instruction could have been understood by the jury as an instruction to disregard the “special hazard” language of Minn. Stat. § 169.14. Since the determination to be made by the jury was whether or not special hazards warranted Defendant’s reduction in speed, the conflicting instructions were confusing and thus a new trial was granted. *Id.* at 353-4.

There is no evidence that the charge to the jury in this case communicated an erroneous understanding of controlling principles of law. One juror 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 do not apply to only 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 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.

### **3. REPETITION OF JURY INSTRUCTIONS AFTER CLOSING ARGUMENTS DID NOT RESULT IN ERROR AND WAS REQUIRED BY PLAINTIFF’S ACTIONS DURING CLOSING ARGUMENTS**

At the close of evidence, the district court read the jury instructions to the jury. Defendants then gave their closing argument. The parties had been previously advised by

the court that if Plaintiff referenced a duty to warn or a duty to protect and the court believed that it was necessary to repeat jury instructions in order to clarify the applicable law, it would do so. Restating law that controls the case being tried does not merit a complaint of “overemphasis,” and such a restatement in the interest of clarity does not constitute an error in the charge to the jury. *Hansen v. Barrett*, 186 F. Supp. 527, 532 (D. Minn. 1960).

Under the guise of presenting the jury “the whole law,” Appellant’s counsel addressed the jury instructions and intertwined the definitions and applications of various duties, definitions, and obligations of the parties. In its Order denying Plaintiff’s motion for a new trial, the district court recognized that at the conclusion of Plaintiff’s closing argument, Defendants objected to Plaintiff’s characterization of the applicable law. (RA 5, RA 45-46) Following Plaintiff’s closing, the Court proceeded to repeat a number of jury instructions. The Court reminded the jury regarding their responses during voir dire. It repeated that the arguments of counsel are not evidence. It advised that what the attorneys saw about the law is not evidence. It repeated the jury instruction related to “no duty to warn.” It repeated the jury instruction related to the duty based on the creation of a dangerous situation. It repeated the basic definition of negligence and reasonable care.

No specific weight was afforded to any of the paragraphs re-read by the Court. Specific facts of the case were not repeated, and distinctions between the parties’ arguments were not addressed. The Court, in its discretion, repeated several instructions and definitions in order to provide clarity. It read one instruction that had been requested by Plaintiff, one that had been requested by Defendants, and one standard instruction. It

did not emphasize one party's theory of the case and did not allude to facts which supported either party's position. Finally, as noted in the district court's Order on Plaintiff's motion for new trial: "In fact, it was Plaintiff's own arguments that gave rise to the instructions at issue to prevent the jury from confusing Appellant's arguments with the applicable law." (RA 5).

Plaintiff either accidentally or intentionally misstated the applicable law in his closing argument in his attempt to explain "the whole law" to the jury. This necessitated the Court's reading of the *actual* law, so that there would be no confusion. The Court did not commit prejudicial or reversible error in repeating the instructions.

**4. THE TRIAL COURT PROPERLY CONCLUDED THAT DEFENDANTS HAD NO DUTY TO WARN PLAINTIFF REGARDING THE RISKS ASSOCIATED WITH THE SKID LOADER**

On summary judgment the district court held that no duty to warn existed between Rolland and Domagala relative to the operation of the skid loader. Plaintiff's claim was based purely on product liability theory, and did not acknowledge the "special relationship" requirement giving rise to an affirmative duty to act.

On appeal from summary judgment, the reviewing court must determine whether there are any genuine issues of material fact and whether the district court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). Although appellate courts view the evidence in the light most favorable to the party against whom judgment was granted, summary judgment is appropriate against a party who fails to establish the existence of an element essential to its case. *Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn.1995).

In a negligence action, a defendant is entitled to summary judgment when the record reflects a “complete lack of proof on an essential element of the Plaintiff’s claim.” *Lubbers*, 539 N.W.2d 398, 401. To prove negligence, a Plaintiff must show (1) a duty of care existed; (2) that duty was breached; (3) an injury was sustained; and (4) breach of the duty proximately caused the injury. *Id.* Whether a duty exists is a question of law, which appellate courts review de novo. *Larson v. Larson*, 373 N.W.2d 287, 289 (Minn. 1985).

**A. No Special Relationship Exists Between the Parties**

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 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).

Plaintiff made no attempt to address the application of this standard, and ignored this obvious prerequisite to a duty to warn between parties.<sup>4</sup> Instead, Plaintiff attempts to establish a wholly new and unprecedented doctrine in Minnesota by requesting that this Court recognize an affirmative duty to warn where no special relationship exists.

Plaintiff cites *Rauscher v. Payne*, 188 N.W. 1017 (Minn. 1922) for the notion that one has a duty of ordinary care to avoid creating dangerous conditions for others. *Id. at*

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<sup>4</sup> The “special relationship” standard was also ignored in Plaintiff’s response to Defendants’ motion for summary judgment, thus requiring very little analysis by the District Court. (RA 4-5, RA8).

1019. (Appellant's brief, pp. 30-31). The opinion in *Rauscher* contains no reference to and no analysis of a duty to warn. *Rauscher* explicitly addresses only a duty of ordinary care – nothing else. *Rauscher* does not state implicitly or explicitly that a duty to warn is encapsulated within a duty of ordinary care. Rolland's duty to Domagala, if any, was the duty to use ordinary care in the operation of the skid loader. The jury found that Rolland did just that. That finding absolved him of liability.

Plaintiff next cites limited language from *Cairl v. State*, 323 N.W.2d 20, 25 (Minn. 1982), which held that there is a duty for those who create foreseeable peril, not readily discovered by endangered persons, to warn them of such potential peril. (Appellant's brief, p. 34). But in *Cairl*, the express prerequisite to determining whether the harm was foreseeable was premised upon the finding that a *special relationship* existed between the parties:

As a general rule at common law a person owed no duty to control the conduct of another. *See* Restatement (Second) of Torts § 315 (1965). In addition, a person owed **no duty to warn** those endangered by the conduct of another. *Id.* § 314 comment c. The courts, however, have carved out an exception to this rule in cases where defendant stands in some **special relationship** to either the person whose conduct needs to be controlled or to the foreseeable victim of that conduct. *See Id.* §§ 315-320; *cf. Skillings v. Allen*, 143 Minn. 323, 173 N.W. 663 (1919) (doctor-patient relationship sufficient to support duty of care to patient's family). We think that defendants in this case, in particular those defendants from the Minnesota Learning Center who were charged with the care and treatment of Tom Connolly, did occupy the requisite special relationship with Tom Connolly such that under certain circumstances, discussed *infra*, they would be under a duty to warn third persons of Tom Connolly's dangerous propensities. *See Tarasoff v. Regents of University of California*, 17 Cal.3d 425, 551 P.2d 334, 131

Cal.Rptr. 14 (1976). Accordingly, **when we speak of a duty to warn we speak in terms of having first found the requisite special relationship to exist.**

*Cairl*, 323 N.W. at 25, n. 7 (Minn. 1982) (emphasis added). Plaintiff's reliance on *Cairl* is misplaced. Plaintiff cannot establish that a special relationship existed which required Rolland to warn Domagala of any dangers associated with the skid loader. Without this relationship, there is no duty to warn.

**B. This is Not a Product Liability Case**

Plaintiff also includes a synopsis of products liability cases in support of the assertion that Rolland had a duty to warn Domagala of the dangers associated with interference of the operation of the skid loader. Without any supporting analysis or argument, Plaintiff simply asserts that “[t]his matter is similarly analogous to a product liability action.” (Appellant’s brief, p. 33). It is not.

Products liability theory only applies to manufacturers and other commercial sellers and distributors who are engaged in the business of selling or otherwise distributing the type of product that harmed the plaintiff. 4A David F. Herr & Roger S. Haydock, *Minnesota Practice Series - Jury Instruction Guides - Civil*, Cat. 75 (4th ed. 2007). Plaintiff has not asserted a claim against the manufacturer or supplier of the skid loader. None of the cases cited by Plaintiff for this notion are applicable or relevant on the facts of this case. In each of the cases cited by Plaintiff, a claim was brought against the manufacturer or supplier of a product or piece of machinery for the failure to warn the user/operator of dangers associated with the use of a product. Because Defendants are

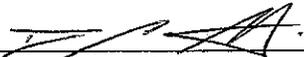
not the manufacturers or suppliers of the skid loader, and because no defect in the skid loader is alleged, Plaintiff's attempt to shoehorn the facts of this case into a product liability theory was unsuccessful at the district court level and should be similarly discarded here. (A000088).

### CONCLUSION

Plaintiff acted independently when he pulled the lever that released the skid loader bucket that fell on his foot. With no special relationship between the parties, Defendants did not owe a duty to warn or a duty to protect. The district court fairly and appropriately exercised its discretion in including special jury instructions requested by both parties that were accurate statements of law. Defendants respectfully request that the judgment below be affirmed in all aspects.

**BASSFORD REMELE**  
*A Professional Association*

Dated: March 10, 2010

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