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Duty, Foreseeability, and Montemayor v. Sebright Products, Inc.

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**DUTY, FORESEEABILITY, AND
MONTMAYOR V. SEBRIGHT PRODUCTS, INC.**

*Mike Steenson**

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In *Montemayor v. Sebright Products, Inc.*,¹ a perfect storm of events led to the plaintiff’s devastating injuries and the lawsuit before the court. The plaintiff, a laborer for VZ Hogs, a family-owned company that raises hogs and produces hog feed, was seriously injured while attempting to manually relieve a jam in an extruder manufactured by Sebright Products, Inc.² The extruder was used to crush food containers with a hydraulic ram.³ The liquid from the containers was siphoned off and a hydraulically powered press (plenum) crushed the containers and pushed them out of through a discharge chute and into a separate compacting machine.⁴ Montemayor was in the machine with another employee, attempting to relieve a jam, when a co-employee, unaware Montemayor was in the machine, activated it in an attempt to relieve the jam.⁵ That

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1. 898 N.W.2d 623 (Minn. 2017).

2. *Id.* at 625.

3. *Id.*

4. *Id.*

5. *Id.* at 626.

caused the plenum to descend on Montemayor's legs, crushing them. Both legs had to be amputated above the knee.⁶

Montemayor sued Sebright, alleging that the design of the extruder was defective and that the warnings on the machine were inadequate.⁷ The district court granted Sebright's motion for summary judgment, concluding that the injury to Montemayor was not foreseeable.⁸ The court of appeals affirmed.⁹

On appeal, the supreme court reversed in a four-three decision. Justice McKeig, writing for the court, framed the case:

In this case, two long-established rules come together. First, in a negligence case, when the issue of reasonable foreseeability of the injury is close, it should be decided by the jury. Second, on a motion for summary judgment, all facts and the inferences arising from them must be considered in the light most favorable to the non-moving party.¹⁰

In a split decision, the supreme court reversed the court of appeals. Taking "the evidence and inferences in the light most favorable to Montemayor," the court concluded that "reasonable persons might differ as to the foreseeability of Montemayor's injury," making it "a 'close case' in which foreseeability must be resolved by the jury."¹¹ Three justices dissented from that conclusion.¹²

Montemayor is yet another in a long line of Minnesota cases dealing with the issue of foreseeability in tort law.¹³ The key issue concerned whether Sebright owed a duty to Montemayor.¹⁴

6. *Id.* at 627.

7. *Id.*

8. *Id.* at 625.

9. *Montemayor v. Sebright Prods., Inc.*, No. A15-1188, 2016 WL 1175089 (Minn. Ct. App. Mar. 28, 2016).

10. 898 N.W.2d at 625.

11. *Id.*

12. Chief Justice Gildea dissented, joined by Justices Anderson and Stras. *Id.* at 633-34, 642.

13. See Mike Steenson, *The Domagala Dilemma—Domagala v. Rolland*, 39 WM. MITCHELL L. REV. 633 (2013); Mike Steenson, *Minnesota Negligence Law and the Restatement (Third) of Torts: Liability for Physical and Emotional Harms*, 37 WM. MITCHELL L. REV. 1055 (2011).

14. The foreseeability issue may also arise in the court's consideration of the breach and proximate cause issues as well, which further complicates the analysis of torts cases.

The rough framework for evaluating the duty issue in negligence cases is relatively clear, at least insofar as the cases generally require a foreseeable risk of injury to a foreseeable plaintiff before a duty will be imposed on a defendant.¹⁵ The variance in foreseeability standards and in the application of those standards in cases involving summary judgment motions to dismiss for lack of foreseeability, complicates development of an even-handed approach to the issue, however. It does seem to be clear that in “close cases” the foreseeability issue will be for the jury. As *Montemayor* illustrates, there is some disagreement about what it takes for that tag to apply.

Montemayor might be read as just one more example in the “close cases” line of decisions, or, read more broadly, it might be seen as an adjustment of the judge-jury relationship that perhaps portends a softening of the summary judgment hammer that often precludes resolution of the foreseeability issue by the trier of fact.

This essay examines that issue in detail. The first part analyzes the legal framework of the majority. The second does the same with the dissenting opinion. Part three focuses on the “close cases” rubric. The court’s recent decision in *Senogles v. Carlson*¹⁶ is introduced in that discussion. That case is important to the analysis because, although it involved the duty of a landowner, the court split along the same lines as it did in *Montemayor*, with the majority concluding that the foreseeability of harm to an injured child was a jury issue. The fourth part considers the question of whether a jury should be specifically instructed on the foreseeability issue and if so, what such an instruction might look like. Part five considers the question of whether foreseeability should be part of the duty determination. Part six is the conclusion.

1. THE MAJORITY—THE LEGAL FRAMEWORK

The majority’s analytical path for analyzing the foreseeability issue was standard.

15. Doe 169 v. Brandon, 845 N.W.2d 174, 178 (Minn. 2014), quoting Domagala v. Rolland, 805 N.W.2d 14, 23 (Minn. 2011), quoting 1 J.D. LEE & BARRY A. LINDAHL, MODERN TORT LAW: LIABILITY & LITIGATION § 3.48 (2d ed.2003).

16. No. A15-2039, 2017 WL 4273816 (Minn. 2017).

- In products liability cases design and warning theories are separate, but in both cases duty turns on foreseeability of injury.¹⁷
- Duty is generally a legal question for the court, but if there is a specific factual dispute over a manufacturer's awareness of a risk of injury, the foreseeability issue is for the jury.¹⁸
- The test for foreseeability is whether, given the defendant's conduct, "it was objectively reasonable to expect the specific danger causing the plaintiff's injury."¹⁹
- To determine foreseeability, "we look to the defendant's conduct and ask whether it was objectively reasonable to expect the specific danger causing the plaintiff's injury."²⁰
- There is no duty in cases where as a matter of public policy the connection between the alleged negligent act and the injury is too remote to impose liability.²¹
- "[T]he precise nature and manner' of the injury does not have to be foreseeable; rather the issue is "whether 'the possibility of an accident was clear to the person of ordinary prudence.'"²²
- "[A]s a matter of law . . . an injury is not reasonably foreseeable when the 'undisputed facts, considered together,' establish that the connection between the defendant's conduct and the plaintiff's injury was 'too attenuated.'"²³

17. *Montemayor v. Sebright Products*, 989 N.W.2d 623, 629 (Minn. 2017) (citing *Domagala v. Rolland*, 805 N.W.2d 14, 26 (Minn. 2011)).

18. *Id.* at 629 (citing *Huber v. Niagara Mach. & Tool Works*, 430 N.W.2d 465, 467 (Minn. 1988)).

19. *Id.* at 629 (quoting *Domagala v. Rolland*, 805 N.W.2d 14, 27 (Minn. 2011)).

20. *Id.*

21. *Id.* at 629 (quoting *Domagala*, 805 N.W.2d at 27).

22. *Id.* at 629 (quoting *Domagala*, 805 N.W.2d at 27).

23. *Montemayor*, 989 N.W.2d at 629 (quoting *Doe 169 v. Brandon*, 845 N.W.2d 174, 179 (Minn. 2014)).

- If “‘reasonable persons might differ as to whether the evidence’ establishes that the injury was foreseeable,”²⁴ the court has “consistently submitted the issue to the jury.”²⁵
- “[I]t is well established that manufacturers can be held liable despite intervening circumstances—such as an employer’s comparative negligence, a plaintiff’s failure to heed warnings, and the disabling of safety devices—if such circumstances were also foreseeable.”²⁶

The key issue in the case concerned the obligation of the manufacturer to anticipate the employer’s errors that led to the assessment of \$18,000 in fines for MNOSHA violations.²⁷ The violations included improper training in the safe operation of the equipment involved in the accident; failing to lock out the extruder prior to attempts by employees to clear the jam, even though the employer had a written lock out program; and failure of the operator to verify that all employees were clear of the machine before starting it.²⁸

In addressing the foreseeability of injury notwithstanding VZ Hogs’ intervening conduct, the court relied on a trilogy of cases it perceived to be sufficiently equivalent to justify denying the defendant’s motion for summary judgment: *Parks v. Allis-Chalmers Corp.*,²⁹ *Bursch v. Beardsley & Piper*,³⁰ and *Bilotta v. Kelley Co.*³¹

The court placed primary reliance on its opinion in *Parks*, which it found to be “strikingly similar on the facts.”³² The plaintiff in that case was injured while in the process of attempting to unclog a jam

24. *Id.* at 630 (citing *Bjerke v. Johnson*, 742 N.W.2d 660, 668 (Minn. 2007)); see also *Ill. Farmers Ins. Co. v. Tapemark Co.*, 273 N.W.2d 630, 636–37 (Minn. 1978).

25. *Id.*

26. *Montemayor*, 989 N.W.2d at 630 (citing *Germann v. F.L. Smithe Mach. Co.*, 395 N.W.2d 922, 925 (Minn. 1986)).

27. *Id.* at 627.

28. *Id.*

29. 289 N.W.2d 456 (Minn. 1979).

30. 971 F.2d 108 (8th Cir. 1992).

31. 346 N.W.2d 616 (Minn. 1984).

32. *Montemayor*, 898 N.W.2d at 630.

caused by corn stalks in his father's forage harvester.³³ The supreme court held that the defendant could have anticipated that machine users would manually unclog the machine because it did not provide a mechanical means of unclogging it; that it could also foresee that the machine would be unclogged while the power was connected; and that it would involve an operator handling corn stalks close to whirling feed rolls, which were accessible through a chute door which could be opened with the power on due to the absence of a safety lock interlock device that would have prevented the door from opening while the power was on.³⁴ The court concluded that "[t]he jury could find that defendant knew, or in the exercise of reasonable care should have known, that some users would leave the power connected while unclogging."³⁵

The second case was *Bursch v. Beardsley & Piper*.³⁶ The plaintiff, a foundry worker at the DeZurik foundry, was seriously injured while operating a core-making machine at the foundry when his right hand and forearm were crushed and burned as he attempted to align the parts of a core-box.³⁷ The accident was due to a combination of inadequate training of the employees who worked on the machine, failure of the key employees involved, including the plaintiff, to read the machine manual, or to follow the safety procedures in the manual.³⁸ The plaintiff sued DeZurik, alleging that Beardsley negligently designed the machine and failed to provide adequate warnings.³⁹ The jury found for the plaintiff on the negligent design theory and assigned 76 percent of the fault to DeZurik, 20 percent to Beardsley, and 4 percent to the plaintiff. Damages were set at \$888,000.⁴⁰

Beardsley argued on appeal that the trial court did not abuse its discretion in refusing to instruct the jury on superseding cause.⁴¹

33. *Parks v. Allis-Chalmers Corp.*, 289 N.W.2d 456, 457 (Minn. 1979).

34. *Id.* at 459.

35. *Id.* at 459.

36. 971 F.2d 108 (8th Cir. 1992).

37. *Id.* at 110.

38. *Id.* at 110.

39. *Id.*

40. *Id.*

41. Minnesota's pattern jury instruction on superseding cause reads as follows:
Definition of "superseding cause"

However, a cause is not a direct cause when there is a superseding cause.

A cause is a superseding cause when four conditions are present:

The Eighth Circuit held that it was not error for the trial court to refuse to give that instruction because the evidence supported the conclusion that the intervening actions of the co-employees were foreseeable to the defendant.⁴²

-
1. It happened after the original (negligence)(fault); and
 2. It did not happen because of the original (negligence)(fault); and
 3. It changed the natural course of events by making the result different from what it would have been; and
 4. The original wrongdoer could not have reasonably anticipated this event.

4 MINN. PRAC., JURY INSTR. GUIDES--CIVIL CIVJIG 27.20 (6th ed. 2014).

42. *Bursch*, 971 F.2d at 112–13. The court carefully evaluated the actions and inactions of DeZurik, Bursch, and Bursch’s co-employees in arriving at its conclusion:

We find no abuse in the present case because the evidence presented at trial failed to support the conclusion that DeZurik’s negligence was not reasonably foreseeable. Regarding Bursch’s training, Beardsley & Piper could have foreseen that DeZurik would not give the manual to Bursch, Richter, or Burger. The manual was technical in nature and contained more information than an operator or foreman needed. Moreover, it was foreseeable that the person training Bursch might not be familiar with the manual either. Beardsley & Piper’s own expert admitted that it was common practice in the industry to have existing operators train new ones.

As to machine maintenance, Beardsley & Piper reasonably could have foreseen that DeZurik would not maintain the machine in the strict manner recommended in the operating manual. The environment in a foundry is extremely abrasive and sand regularly accumulates on important parts of the core-making machine, including the blowplate. Beardsley & Piper’s expert acknowledged that some of the manual’s maintenance instructions—such as check every nut, bolt and screw, every day—were not to be taken literally and that even with proper maintenance, valves could still develop leaks.

Beardsley & Piper further argues that even if DeZurik’s negligent training and maintenance were foreseeable, Richter’s failure to activate the correct valve was not, and, as such, was a superseding cause of at least part of Bursch’s injuries. According to Beardsley & Piper, this conclusion *113 necessarily flows from the jury’s finding in its favor on the Bursches’ failure to warn claim. We disagree. It certainly was foreseeable that another employee might attempt to rescue Bursch and it was also foreseeable that, in the confusion of the moment, the employee might accidentally activate the wrong valve regardless of how the controls were labeled. The jury’s finding on the failure to warn claim, therefore, does not alter the foreseeability of Richter’s mistake.

The majority also relied on *Bilotta v. Kelley Co.*,⁴³ a case in which the plaintiff was severely injured when he was pinned at the neck against a doorjamb by a forklift truck that tipped over at a loading dock at the warehouse where he worked.⁴⁴ The warehouse lessee, Safelite, chose between dock designs, rejecting a design with a safety device that would have prevented the injury that occurred when the dockboard shifted.⁴⁵ One of the issues in the case was whether the trial court erred in refusing to instruct the jury on superseding cause.⁴⁶ The supreme court held that it did not.⁴⁷

As in *Montemayor*, there were OSHA violations by Safelite, but the court in *Bilotta* made two important points in rejecting the argument that those actions were unforeseeable.⁴⁸ The first was that an intervening cause cannot be a superseding cause if the intervening conduct is foreseeable.⁴⁹ The court initially established the broad proposition that “OSHA violations cannot be considered superseding causes which relieve a manufacturer of its duty to produce a safe product,”⁵⁰ but then apparently qualified that statement by noting that in the specific case the appellant’s quality control manager wrote an article stating that high employee turnover made it difficult to ensure that the necessary employee safety education was being accomplished.⁵¹ The court concluded that “[c]learly, OSHA violations in these circumstances were reasonably foreseeable and thus do not constitute [a] superseding cause. . . .”⁵²

The second key point was that OSHA violations should not automatically supersede a manufacturer’s responsibility to design a safe product. Rather, OSHA violations “are adequately taken into consideration in the comparative-fault formula.”⁵³ In fact, as the

43. 346 N.W.2d 616 (Minn. 1984).

44. *Id.* at 620.

45. *Id.*

46. *Id.* at 621.

47. *Id.*

48. *Id.* at 625.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* (citing *Ruberg v. Skelly Oil Co.*, 297 N.W.2d 746, 750 (Minn. 1980)).

53. *Id.* (citing Minn. Stat. § 604.01 (1982)).

court noted, comparative responsibility was reflected in the jury's verdict, which assigned 40 percent of the fault to Safelite.⁵⁴

The second point appears to return to the broader, less fact-specific position on superseding cause. Comparative fault puts pressure on common law rules that result in all-or-nothing ameliorative determinations, some of which might work to the benefit of plaintiffs and some to defendants. The critical point is that given the application of comparative fault principles, it becomes less necessary to use superseding cause as an absolute bar when a third party's negligence may be taken into consideration, along with the fault of the product manufacturer.⁵⁵

The majority in *Montemayor* saw several undisputed circumstances that established "that Sebright had, or should have had, some awareness of the risk of Montemayor's injury."⁵⁶ They included the fact that Sebright knew that workers would sometimes enter the extruder to perform maintenance on the extruder, and that the manual instructions provided a means of unjamming the

54. *Id.*

55. The Third Restatement takes the position that:

Plaintiff's negligence is defined by the applicable standard for a defendant's negligence. Special ameliorative doctrines for defining plaintiff's negligence are abolished." As examples, the ameliorative doctrines that are abolished include last clear chance and avoidable consequences. The comments note that comparative fault may also affect what constitutes a superseding cause, although it acknowledges that the superseding cause issue is beyond the scope of the comparative fault Restatement.

RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 3, cmt. c (Am. Law Inst. 2000) cmt. c. The Reporters' Note explains:

Rules of legal cause and scope of liability are beyond the scope of this Restatement. Nevertheless, comparative negligence may have an effect on those rules, especially when they are based on a judgment that the egregious culpability of an intervening cause relieves an earlier, less culpable actor from liability. This all-or-nothing approach is undermined by the premise of comparative responsibility: that the factfinder should compare on a sliding scale the responsibility of all actors who caused an injury. Rather than totally absolve an earlier cause under a rule about superseding causes, the factfinder could just adjust the percentages assigned to the parties. . . Thus, the underlying premise of comparative responsibility may affect those doctrines. Nevertheless, they are beyond the scope of this Restatement.

Id. cmt. b, Reporters' Note (citations omitted).

56. *Montemayor*, 898 N.W.2d at 631.

extruder from the control panel.⁵⁷ While the trial court found it unforeseeable that there would be simultaneous use of the two methods of unjamming the extruder, the majority noted that the machine was designed so the control panel could be relocated, but without instructions that it should be placed to permit operators to see the dangerous parts of the extruder.⁵⁸ The court concluded that a reasonable person could find that Sebright should have foreseen the possibility that the extruder would be operated from the control panel while a worker was in the extruder.⁵⁹ Finally, the court noted the disagreement among the experts on the foreseeability of the accident.⁶⁰

Because it was a “close case,”⁶¹ the majority held that it had to be resolved by the jury, rather than the court.⁶² In so holding the opinion rejected the dissent’s declaration that it was making “bad law”:

[T]his result is consistent with our longstanding precedent . . . Moreover, a jury may ultimately find that Montemayor’s injury was not reasonably foreseeable, that Sebright was not negligent, or that others were. And manufacturers may still avoid the burden of going to trial when the evidence does not present a factual dispute or a “close case” for the factfinder to resolve. But this is a close case. Were we to end it, we would have to “weigh facts or determine the credibility of affidavits and other evidence.” . . . That role is properly reserved for the jury.⁶³

57. *Id.*

58. *Id.*

59. *Id.* at 631–32.

60. *Id.* at 633.

61. *Id.*

62. *Id.*

63. *Id.* The court specifically noted that it did not intend to alter the standards applicable to motions for summary judgment:

We agree with the dissent that the “close cases” standard does not change our summary judgment standard for questions of foreseeability. It merely reinforces the notion that, in determining whether a dispute of material fact exists, all inferences arising from the evidence must be resolved in favor of the nonmoving party. . . In other words, a case is “close” not only when the evidence presents an explicit dispute of material fact, but also when “reasonable persons might draw different conclusions from the evidence.”

Id. at 629 n. 3.

2. THE DISSENT—THE LEGAL FRAMEWORK

Justice Gildea opened her dissenting opinion with this broadside:

The circumstances of this case are both disturbing and tragic. But it is not reasonable, as a matter of law, common sense, or public policy, to expect a manufacturer to foresee—absent any admissible evidence—that the safety device it installed on the machine would be disabled and that an employer would violate multiple safety regulations in using the machine. As the district court said, “bad facts can lead to bad law.” The facts of this case are most certainly bad, and the majority has written bad law. Because the majority has written bad law, I respectfully dissent.⁶⁴

The dissent’s framework for analyzing the duty issue was roughly similar to the majority’s:

- “[T]he duty to exercise reasonable care arises from the probability or foreseeability of injury to the plaintiff.”⁶⁵
- “Whether a manufacturer owes a duty is ‘a question of law for the court—not one for jury resolution.’”⁶⁶
- The manufacturer’s duty is to design “‘a reasonably safe product.’”⁶⁷
- The manufacturer has a duty to warn if it is foreseeable “‘to the manufacturer that the product would be used in a dangerous manner,’”⁶⁸ but there is no duty to “‘warn of an improper use that could not have been foreseen.’”⁶⁹

The dissent’s analysis of the controlling authority differed from the majority’s. The dissent took as its text the court’s opinion in

64. *Id.* at 633–34.

65. *Id.* at 634 (quoting *Domagala v. Rolland*, 805 N.W.2d 14, 26 (Minn. 2011)).

66. *Id.* (quoting *Germann v. F.L. Smithe Mach. Co.*, 395 N.W.2d 922, 924 (Minn. 1986)).

67. *Id.* (quoting *Bilotta v. Kelley Co.*, 346 N.W.2d 616, 624 (Minn. 1984)).

68. *Huber v. Niagara Mach. & Tool Works*, 430 N.W.2d 465, 467 (Minn. 1998).

69. *Montemayor*, 898 N.W.2d at 634. (quoting *Frey v. Montgomery Ward & Co.*, 258 N.W.2d 782, 788 (Minn. 1977)).

*Huber v. Niagara Machine & Tool Works*⁷⁰ in analyzing the foreseeability issue. In that case an employer was injured when his foot hit an unguarded foot switch on a punch press he was operating.⁷¹ The employer failed to comply with OSHA regulations in ensuring that the proper point of operation safety devices were operable on the foot switch.⁷² The dissent emphasized the court's holding in that case that the manufacturer could not reasonably foresee that the employer would fail to comply with the OSHA regulations, and that as a consequence the manufacturer "had 'no duty to insure the use of such safety devices' and 'no duty to warn about possible dangers of failing to provide proper point of operation safety mechanisms.'"⁷³

Applying *Huber*, the dissent concluded "that Sebright had no duty as a matter of law . . . because it was not reasonably foreseeable that VZ Hogs would fail to comply with OSHA regulations covering the safe operation of the extruder."⁷⁴

Huber is a little more complicated than that, however. The plaintiff in that case, an employee of the R & M Manufacturing Co., suffered a serious injury to his hand while operating a punch press manufactured by Niagara Machine and Tool Works.⁷⁵ The press was equipped with a foot pedal manufactured by Allen Bradley Co.⁷⁶ The injury occurred when the plaintiff's foot slipped and came down on the activating pedal while he was straightening a warped piece of metal in the press.⁷⁷ The machine came with protective safety devices on all sides of the pedal, but sometime before the accident the front guard had been removed.⁷⁸ The plaintiff had been warned not to operate the press with his hands in the die area.⁷⁹ There was a warning to the same effect on the machine.⁸⁰

70. 430 N.W.2d 465 (Minn. 1988).

71. *Id.* at 466.

72. *Id.* at 467.

73. Montemayor, 898 N.W.2d at 635–36 (quoting *Huber v. Niagara Machine & Tool Works*, 430 N.W.2d 465, 468 (Minn. 1998)).

74. *Id.* at 636.

75. *Huber*, 430 N.W.2d at 466.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

Huber brought suit against Niagara and Allen Bradley, alleging various theories, including negligent design of the press and foot switch and failure to warn of dangers associated with the machine.⁸¹ The claim against Allen Bradley was reduced to failure to warn only. Allen Bradley moved for summary judgment on that theory. The trial court granted the motion.⁸² The court of appeals reversed.⁸³ The supreme court reversed the court of appeals.⁸⁴

The issue was whether a component manufacturer has a “duty to warn users of its product that safety devices permanently attached to the product should not be moved and that extra safety precautions—which are the responsibility of the user’s employer, not the component manufacturer.”⁸⁵

The majority distinguished *Huber* in a footnote, primarily because that case involved a manufacturer of a component part, noting that the case was carefully limited the those facts and that the court in *Huber*, stating that “[t]his reasoning does not conflict with our prior decisions establishing that the manufacturer of a *finished product* has a duty to warn ultimate users of dangers presented by its product and this duty may not be delegated to an intermediary.”⁸⁶

In part two of its opinion the *Montemayor* dissent carefully sifted the evidence in concluding that there was an insufficient factual dispute to justify withholding summary judgment. The court found no factual disputes in the expert reports because the plaintiff’s report simply made a conclusory statement that Sebright should have been able to foresee VZ Hogs’ failure to train its employees.⁸⁷ The lack of a factual basis for the opinion, which was set out in a letter to the plaintiff’s attorney, was labeled inadmissible hearsay, leading the dissent to conclude that there was no evidence of foreseeability.⁸⁸

In summary, there is less of a disagreement about the controlling legal standards than the application of the standards to the specific

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 466-67.

86. *Montemayor*, 898 N.W.2d at 631 n. 4 (quoting *Huber*, 430 N.W.2d at 468 n.2).

87. *Id.* at 637.

88. *Id.* at 638-40.

facts of the case. That focuses more sharply the key dispute in the case, one in which both the majority and dissent carefully examined the evidence in determining whether there was a sufficient question to conclude that it was a “close case” that justified submission of the foreseeability issue to the jury.

3. CLOSE CASES

In *Doe v. Brandon*,⁸⁹ a 2014 decision involving the issue of whether a church district council should have foreseen the sexual misconduct of a volunteer minister when it renewed his credentials, the supreme court held that the trial court did not err in granting summary judgment to the district council. The issue was whether the minister’s conduct was foreseeable.

In cases involving harm caused by a third person to the plaintiff, a defendant owes no duty to guard against that harm unless there is a special relationship between the defendant and the plaintiff (or between the defendant and the third person), or if the defendant creates a foreseeable risk of injury to the plaintiff.⁹⁰ In an opinion written by Justice Lillehaug, the court in *Doe* resolved that issue in favor of the defendant, noting, in a footnote, that Minnesota case law states, without explanation, “that in close cases, foreseeability as it relates to duty is a jury question.”⁹¹

As the court noted in *Doe*, the provenance of the “close cases” statement is unclear. The dissent in *Montemayor* pegs it to *Lundgren v. Fultz*, in 1984.⁹² In *Senogles v. Carlson*, decided a little over two months after *Montemayor*, Justice Lillehaug doubled down on the “close cases” language in concluding that the foreseeability issue is for the jury.⁹³ One of the issues in *Senogles* was whether a landowner should have foreseen the potential risk to his four-year-old grandchild who nearly drowned while a visitor at a family party on property that abutted the Mississippi River.⁹⁴

89. 845 N.W.2d 174, 178 (Minn. 2014).

90. *Id.*

91. *Id.* at 178 n.2.

92. 354 N.W.2d 25 (Minn. 1984).

93. *Senogles v. Carlson*, 902 N.W.2d 38, at 43 (Minn. 2017). Justice Anderson emphasized in his dissent that this does not change the basic summary judgment standard. *Id.* at 49–51.

94. *Id.* at 43. The court initially acknowledged that a landowner owes a duty of reasonable care to entrants on land, *see Peterson v. Balach*, 199 N.W.2d 639

The defendant moved for summary judgment. The trial court granted the motion because the injury to the child was not foreseeable. The court of appeals affirmed, but on the grounds that the danger was obvious to a child.⁹⁵ The supreme court reversed. The court first declined the defendant's invitation "to adopt a categorical rule that the danger of swimming unattended in any Minnesota river, lake, or pool is necessarily obvious to all children, no matter how young and inexperienced."⁹⁶ Then, because there were disputed facts concerning the child's experience and opposing inferences that could be drawn as to whether he appreciated the danger in returning to the river after having swum there earlier, the court held that the obviousness issue was for the trier of fact.⁹⁷

That left the issue of whether the injury was foreseeable to the defendant, even assuming that the danger presented by the water was obvious. The court noted the dissent's argument⁹⁸ that it was unforeseeable as a matter of law that the child would be unnoticed when he walked back to the river,⁹⁹ but rejected it because "any parent of a mobile 4-year-old child will understand the proclivity of young children to wander off quickly to pursue whatever curiosity intrigues them," and "the opportunity to wander existed because the children were playing in an unfenced area away from the adults."¹⁰⁰ The court concluded that the facts and the reasonable inferences

(Minn. 1972), but then ramped the duty down, running it through the pinch point in Restatement (Second) of Torts § 343A (1965), which focuses first on whether a danger is obvious to an entrant and second, if it is, whether injury to the entrant is foreseeable notwithstanding the obviousness. *Id.* at 42.

95. *Senogles v. Carlson*, No. A15-2039, 2016 WL 3659314, at *3 (Minn. Ct. App. July 11, 2016) ("We conclude that Carlson did not owe a duty to Shawn to protect him from the danger of the river because the danger of the river was open and obvious to Shawn").

96. *Id.* at 47.

97. *Senogles v. Carlson*, 902 N.W.2d 38, at 48. The defendant urged the court to adopt "a new rule of law that a Minnesota landowner owes no duty of care to a child entrant if the child enters the land accompanied by a parent or guardian, no matter how foreseeable the harm." The court rejected the argument. *Id.* at 48.

98. *Id.* at 52 ("Given the voluminous case law recognizing the obviousness of the danger of water, the risk of the Mississippi River was obvious to an objectively reasonable child of 4 years and 8 months").

99. *Id.* at 54 n.13.

100. *Id.*

from them make the issue of foreseeability a close one to be decided by a jury.¹⁰¹

Senogles becomes an important complement to *Montemayor* in determining the substance of the “close case” tag. If a “close case” determination is simply a proxy for a determination that there is an issue over which reasonable minds might differ, it does not change the basic approach to summary judgment motions based on a lack of foreseeability.

The *Montemayor* dissent did not see it that way. The dissent’s perception is that the majority’s statement that summary judgment is inappropriate even when there is no explicit factual dispute, if reasonable minds could differ based on the inference to be drawn from those facts, is simply wrong.¹⁰² The essence of the criticism appears to be that the majority split what was a unitary standard into two separate elements.

It is not clear that was the majority’s intent. It appears not so much to be suggesting a “new rule,” as a different way of viewing “old law” in summary judgment cases where the issue is foreseeability of harm. The key part of the majority opinion, the “new rule,” is its statement that even absent “an explicit factual dispute in the record,” the foreseeability issue still is for the jury because the case is a “close case” where “reasonable minds might differ” on that issue. Inferences are difficult to separate from the underlying facts that support them and, as the court has consistently recognized, the law does not favor one form of evidence over the other, nor should it when the question is whether reasonable minds can differ on an inference as opposed to the underlying facts that may or may not support the inference. That seems to be all the *Montemayor* majority is saying.¹⁰³ *Senogles* reinforces that view. The *Montemayor/Senogles* “close case” view seems to require nothing more, but, very importantly, it also seems to require nothing

101. *Id.* at 48.

102. *Montemayor v. Sebright Products, Inc.*, 898 N.W.2d 623 at 640 and n.7.

103. The court’s reference to *Ill. Farmers Ins. Co. v. Tapemark Co.*, 273 N.W.2d 630, 637 (Minn. 1978) appears to establish that the court is referring to the inferences that may be drawn from established facts. *Montemayor v. Sebright Products, Inc.*, 898 N.W.2d 623 at 629.

less. A motion for summary judgment should not be a substitute for a trial.¹⁰⁴

The cases effectively push the summary judgment barometer to increase the pressure to find foreseeability a jury issue when either the direct facts and/or inferences to be drawn from those facts are in dispute, with *Montemayor/Senogles* providing rough factual guidelines for making that determination.¹⁰⁵

4. SHOULD THE JURY BE INSTRUCTED ON FORESEEABILITY?

In “close cases” the court has held that the foreseeability issue is for the jury, but it has not provided further guidance on the issue. A pair of 1969 Minnesota Supreme Court decisions written by Justice Rogosheske clearly state that a party requesting a jury instruction on foreseeability should be entitled to that instruction if it is timely made.

In *Lommen v. Adolphson & Peterson Construction Co.*,¹⁰⁶ a case involving an injury sustained by the plaintiff in a construction accident when he fell from scaffolding when a handhold the defendant’s employees had installed came loose. The jury found for the plaintiff and the trial court entered judgment for the plaintiff. On appeal, the supreme court affirmed, rejecting the defendant that the injury was not foreseeable as a matter of law. The court also rejected the defendant’s argument that the jury should have been instructed on foreseeability. That claim was rejected because the defendant did not specifically request a foreseeability instruction and held that the trial court’s instruction to the jury based on the pattern jury instruction on negligence full and fairly stated the applicable law. The court also stated that under the circumstances of the case, “a trial court would have been well advised to grant it to aid the jury’s understanding of the defendant’s theory of the case.”¹⁰⁷

In *Berry v. Haertel*,¹⁰⁸ a city employee went to the defendant’s store to buy hay for use on a city construction project. While there, he was injured when he fell through a wooden floor while obtaining

104. See *C.O. v. Doe*, 757 N.W.2d 343, 350 (Minn. 2008); *Bixler v. J.C. Penney Co.*, 376 N.W.2d 209, 215 (Minn. 1985); *Utecht v. Shopko Dep’t Store*, 324 N.W.2d 652,653 (Minn. 1982); *Olson v. Kozlowski*, 311 N.W.2d 851, 852 (Minn. 1981).

105. See the Appendix.

106. 168 N.W.2d 673 (Minn. 1969).

107. *Id.* at 677.

108. 170 N.W.2d 558 (Minn. 1969).

the hay. Following entry of judgment on a jury verdict for the plaintiff, the defendant appealed, arguing in part that the trial court should have instructed the jury on his theory of the case, which emphasized the foreseeability of the risk and his notice of a dangerous condition. The supreme court rejected the argument because the defendant did not specifically request the trial court to give that instruction. The court also stated that “the trial court might have been well advised to give such an instruction had defendant properly requested,” while also noting that the instruction given on the duty of a possessor of land to business invitees accurately stated the law.¹⁰⁹

Neither *Berry* nor *Lommen* involved specific requests by the defendants for a foreseeability instruction, but the court suggests that such an instruction would be appropriate if requested. If the foreseeability issue is the key to the case, and central to the defense, is there any reason why the jury should not be instructed on the issue? An instruction on foreseeability and a special verdict question on the issue could be decisive. If a jury found a particular risk to be foreseeable it would proceed to consider whether the defendant was negligent in creating that risk. If the jury found that the risk was not foreseeable that would be the end of the case.

Montemayor/Senogles does not specifically state that there should be a jury instruction on foreseeability, but the court in *Senogles* does seem to indicate that foreseeability is a separate issue, perhaps antecedent to, the breach and proximate cause issues, when it stated its conclusion that the defendant was not precluded “from arguing to the jury that, because he understood that Shawn was to be supervised by others, [he] could not foresee the danger to Shawn, . . . was not negligent, or [that his actions] were not the proximate cause of Shawn’s injury.”¹¹⁰ *Montemayor* suggests the same, in noting that “a jury may ultimately find that Montemayor’s injury was not reasonably foreseeable, that Sebright was not negligent, or that others were.”¹¹¹

If a jury is instructed on foreseeability, the next issue is what standard should be applied to the issue. There are varying

109. *Id.* at 562.

110. *Senogles v. Carlson*, 902 N.W.2d 38, at 48.

111. 898 N.W.2d at 633.

formulations in the Minnesota cases.¹¹² A standard that has recently gained currency¹¹³ is the formulation in *Whiteford ex rel. Whiteford v. Yamaha Motor Corp.*, which states the standard as “whether the specific danger was objectively reasonable to expect, not simply whether it was within the realm of any conceivable possibility.”¹¹⁴

The Civil Jury Instruction Guides suggests a more general standard, if there is to be an instruction on foreseeability. In brackets, to ensure that it will not be a rote instruction in a negligence case, it provides that:

An injury is foreseeable if a reasonable person in the same or similar circumstances would have foreseen it. The exact way an injury occurred does not have to be foreseeable.¹¹⁵

The correlative special verdict question, the first one in a negligence case, would ask whether the injury to the plaintiff was foreseeable to the defendant. An affirmative answer would prompt the jury to answer the breach of duty issue.

Of course, in taking the position that foreseeability is a question for the jury, it could be that the court really means only that the breach issue, including foreseeability, is a jury issue. The pattern jury instruction on negligence says nothing about foreseeability, but nothing prevents argument on that issue, as noted in *Montemayor/Senogles*.

5. SHOULD FORESEEABILITY EVEN BE PART OF THE DUTY DETERMINATION?

Courts often say that duty is a question of law for the court and because foreseeability of risk is a predicate, that question has to be first resolved by the courts to determine whether a duty exists. No foreseeability, no duty. But what happens if foreseeability is removed from the duty determination?

112. See Mike Steenson, *Minnesota Negligence Law and the Restatement (Third) of Torts: Liability for Physical and Emotional Harm*, 37 WM. MITCHELL L. REV. 1055 (2011).

113. *Id.* at 1102.

114. 582 N.W.2d 916, 918 (Minn. 1998).

115. 4 MINN. PRAC., JURY INSTR. GUIDES—CIVIL, CIVJIG 25.10 (6th ed. 2014).

Section 7 of the Restatement (Third) of Torts: Liability for Physical and Emotional Harm provides that “An actor ordinarily has a duty to exercise reasonable care when the actor’s conduct creates a risk of physical harm.”¹¹⁶ It removes foreseeability from the duty determination and places it squarely in the breach issue.¹¹⁷ The intent of section 7 in removing foreseeability from the duty determination is to clarify the role of courts and juries. Foreseeability is an essential part of the breach determination. The consequence is that courts may be more likely to defer to juries for resolution of the foreseeability issue, rather than effectively trying a case in order to decide whether an injury is foreseeable.

There are categorical cases in which courts will hold that there is no duty. In products liability cases, for example, a court may hold as a matter of law that as a general proposition a prescription drug manufacturer’s duty is owed only to the prescribing physician and not to the general public.¹¹⁸ Or, as in *Senogles*, the court might reject a suggested categorical rule on duty, as it did in refusing to adopt “a rule that the danger of swimming unattended in any Minnesota river, lake, or pool is necessarily obvious to all children, no matter how young and inexperienced.”¹¹⁹

According to the Restatement, a no duty determination is a purely legal question that liability should not be imposed on a

116. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 7 (a) (Am. Law. Inst. 2010). Subpart (b) accounts for limitations on liability: “In exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases, a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification.” *Id.* § 7(b).

117. Section 3 provides that:

A person acts negligently if the person does not exercise reasonable care under all the circumstances. Primary factors to consider in ascertaining whether the person’s conduct lacks reasonable care are the foreseeable likelihood that the person’s conduct will result in harm, the foreseeable severity of any harm that may ensue, and the burden of precautions to eliminate or reduce the risk of harm.

Id. § 3.

118. *Id.* at cmt. i. For two examples of courts adopting the Restatement and removing foreseeability from the duty determination, see *Thompson v. Kaczinski*, 774 N.W.2d 829 (Iowa 2009); *A.W. v. Lancaster County Sch. Dist.*, 784 N.W.2d 907 (Neb. 2010).

119. 902 N.W.2d 38 at 47.

certain category of potential defendants. The comments explain further:

Such a ruling should be explained and justified based on articulated policies or principles that justify exempting these actors from liability or modifying the ordinary duty of reasonable care. These reasons of policy and principle do not depend on the foreseeability of harm based on the specific facts of a case. They should be articulated directly without obscuring references to foreseeability.¹²⁰

The Restatement points out that in “conducting its analysis, the court may take into account factors that might escape the jury’s attention in a particular case, such as the overall social impact of imposing a significant precautionary obligation on a class of actors.”¹²¹ Foreseeability is not included.¹²² Where “reasonable minds could differ about the competing risks and burdens or the foreseeability of the risks in a specific case . . . courts should not use duty and no-duty determinations to substitute their evaluation for that of the factfinder.”¹²³

There are cases where a court may conclude that there is no *breach* of duty as a matter of law, however. In those cases, however, it is clear that the determination is based on the specific facts of a case, rather than principle or policy. Those decisions lack the precedential value of categorical decisions on the duty issue, however, and should be understood as such.

The dissents in *Montemayor* and *Senogles* almost seem to be doing that in concluding that the plaintiffs’ injuries were not foreseeable, but if that analysis is effectively a breach analysis, a question arises as to why the dissents’ interpretation of the facts and inferences drawn from those facts should trump the views of jurors on the issue. The dissents illustrate the reason why the Restatement eliminated foreseeability from the duty determination.

Taking the position of the Restatement is not far removed from what the court effectively accomplished in *Montemayor* and *Senogles*, however, by a tightening in the application of summary judgment standards.

120. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 7, cmt. i (2010).

121. *Id.*

122. *Id.* at cmt. j.

123. *Id.*

With *Montemayor/Senogles*, a “rule” effectively emerges stating not quite that an employer’s intervening actions can never be a superseding cause, but that it will be extremely difficult to establish that it is on a motion for summary judgment.

CONCLUSION

The closeness of the decisions in *Montemayor* and *Senogles* effectively highlights a difference not so much in the basic legal standards that apply in resolving motions for summary judgment that argue a particular injury is not foreseeable as it does in a difference in judicial attitudes toward the role of judge and jury in making that determination. Even if the legal standards are not altered in the cases, the summary judgment envelope has certainly been pushed to make it more likely that summary judgment will not be granted in these sorts of cases.

In *Foss v. Kincade*,¹²⁴ a 2009 decision, Justice Paul Anderson suggested that “in most cases the question of foreseeability is an issue for the jury.”¹²⁵ That part of *Foss* was questioned by Justice G. Barry Anderson in *Domagala v. Rolland*,¹²⁶ who also noted that close cases should be resolved by the jury, but also, citing *Alholm v. Wilt*,¹²⁷ an innkeeper’s liability case, that foreseeability is more properly resolved by the court.¹²⁸

One might wonder whether the court has now effectively returned to the court’s observation in *Foss*.

124. 766 N.W.2d 317 (Minn. 2009).

125. *Id.* at 322–23.

126. 805 N.W.2d 14, 27 n.3 (Minn. 2011).

127. 394 N.W.2d 488, 491 n.5 (Minn. 1986).

128. *Domagala*, 805 N.W.2d at 37 n.3.

APPENDIX
THE SUMMARY JUDGMENT METER

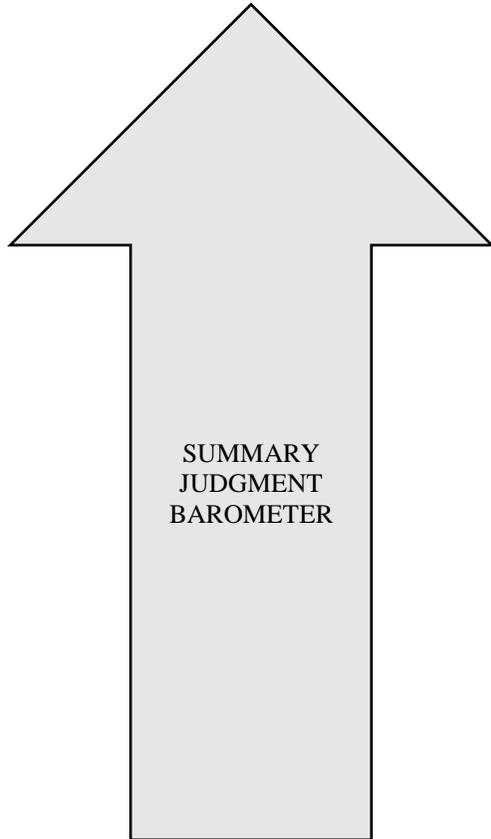
Any number of cases could be placed on the summary judgment meter. The closer the facts of the case to *Montemayor*, the more likely that summary judgment on the basis of foreseeability will be denied. The closer to *Huber*, the more likely the motion will be granted. This is obvious, but I liked the graphic.

Montemayor/Senogles

Parks

Bilotta

Huber



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