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Fenrich v. The Blake School and Minnesota Tort Law: A Road Map Through Special Relationships, Misfeasance/Nonfeasance, and Duty

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**FENRICH V. THE BLAKE SCHOOL AND MINNESOTA TORT
LAW: A ROAD MAP THROUGH SPECIAL RELATIONSHIPS,
MISFEASANCE/NONFEASANCE, AND DUTY**

Mike Steenson[†]

I. THE FACTS.....	79
II. DUTY AND SPECIAL RELATIONSHIPS	80
<i>A. Special Relationships</i>	81
<i>B. Special Relationships and Fenrich</i>	89
1. <i>In Loco Parentis</i>	91
2. <i>Common Carrier</i>	93
III. DUTY AND FORESEEABLE RISKS	94
<i>A. Assumption of Supervision and Control and the</i> <i>Misfeasance/Nonfeasance Issue</i>	94
IV. DUTY AND FORESEEABILITY	98
<i>A. The Recent Cases</i>	99
<i>B. Foreseeability in Fenrich</i>	101
V. THE TRIAL.....	102
<i>A. Foreseeability</i>	103
VI. CONCLUSION	110

The Minnesota Supreme Court’s recent decision in *Fenrich v. The Blake School* is a short course on Minnesota tort law.¹ Arising out of an accident involving a student-driven car on the way to a post-season athletic event, the case required the court to consider whether the school owed a duty to the two passengers in the other car, one of whom died in the accident.² There were three interrelated duty issues in the case.³ First the court assessed whether the school was in a

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1. 920 N.W.2d 195 (Minn. 2018).

2. *Id.* at 200–01.

3. *Id.* at 201–06.

special relationship with the student, sufficient to trigger a duty to the Fenrichs.⁴ The court held that there was no special relationship between the school and student that would extend to a third party injured by the student's negligence.⁵ Second, the court determined whether the school's role as the facilitator in sending students to the meet constituted misfeasance or nonfeasance.⁶ The court held that the issue had to be resolved at trial.⁷ Finally, the court assessed whether the accident was foreseeable.⁸ The court held that the foreseeability issue presented a close case that had to be resolved by the trier of fact.⁹ The court's remand raises important questions concerning the relationship of judge and jury in the resolution of the key issues in the case.¹⁰

The special relationship issue, misfeasance/nonfeasance issue, and foreseeability issues recur in Minnesota tort law. The purpose of this article is to put the issues in a broader context and evaluate the supreme court's treatment of them in *Fenrich*. Following a short statement of facts, this article considers the duty issues in order.

I. THE FACTS

The case arose out of an accident that resulted in the death of Gary Fenrich and serious injuries to his wife, JeanAnn Fenrich. T.M., a sixteen-year-old student from the Blake School, who were driving with a volunteer coach and two teammates to an out-of-season Nike cross-country meet. The Minnesota State High School League season had ended, and coaches were not permitted to participate in the meet.¹¹ However, the head and assistant coaches assisted the students in preparing for the meet.¹² After exchanging emails with the coaches,

4. *Id.* at 202–03.

5. *Id.*

6. *Id.* at 203.

7. *Id.* at 215 n.4 (holding that the distinction between “misfeasance [and] nonfeasance is a question of law” and “when there are genuine issues about what the defendant did or the responsibilities it assumed, a court may not be able to decide the question by summary judgment on a paper record”).

8. *Id.*

9. *Id.* at 206–07.

10. *Id.* at 205.

11. *Id.*

12. *Id.*

T.M.'s parents agreed to let their son drive.¹³ The student's car crossed the centerline and hit the Fenrichs' car.¹⁴

Fenrich, individually and as her husband's trustee, sued the school, head coach, assistant coach, and volunteer coach.¹⁵ Following the district court's grant of summary judgment for the defendants, the Minnesota Court of Appeals affirmed—although on different grounds—and the Minnesota Supreme Court granted review.¹⁶ The supreme court agreed with the district court and court of appeals concluding, "that the school went beyond passive inaction by assuming supervision and control over its athletic team's trip to Sioux Falls."¹⁷

The district court concluded the school did not owe a duty to the general public to control the conduct of its students.¹⁸ The court of appeals affirmed on the basis that there was insufficient evidence to establish that injury to third parties was foreseeable.¹⁹ The supreme court reversed, holding that foreseeability was a close case and one for the trier of fact to resolve.²⁰ To get to that issue, the court first considered whether there was a special relationship that would impose on the school an affirmative duty to act.²¹ The court next assessed whether the school affirmatively created a risk of injury.²² And finally, the court determined whether the school's conduct created a foreseeable risk of injury.²³

II. DUTY AND SPECIAL RELATIONSHIPS

The court first focused on whether there was a duty based on a special relationship between the school and plaintiff.²⁴

The court began its analysis by noting that there is no general duty to control the conduct of a third person unless there is a special relationship between the defendant and the plaintiff, and the harm the

13. *Id.* at 199.

14. *Id.* at 198.

15. *Id.* at 200.

16. *Id.* at 200–01.

17. *Id.* at 203.

18. *Id.* at 200.

19. *Id.* at 201.

20. *Id.* at 205–07.

21. *Id.* at 202–03.

22. *Id.* at 203–05.

23. *Id.* at 205–07.

24. *Id.* at 202–03. While the court began its analysis with the special relationship issue, that problem would have been avoided had the court first considered whether the school affirmatively created a risk of injury to third persons. *See id.*

plaintiff suffers is foreseeable,²⁵ or where “the defendant’s own conduct creates a foreseeable risk of injury to a foreseeable plaintiff.”²⁶

The issue of misfeasance/nonfeasance is key to determining if a duty is owed. If there is nonfeasance, there is no duty to the third party, absent a rule triggering a duty to act. A special relationship between the defendant and plaintiff²⁷ or the defendant and the person who causes the injury²⁸ acts as a trigger.

A. Special Relationships

A finding that a special relationship exists is not conclusive on the duty issue, however. Rather, the duty requirement is a special relationship *plus*. Justice Simonett explained this in *Erickson v. Curtis Investment Co.*²⁹ The court in *Erickson* stated, “Whether a duty is imposed depends, therefore, on the relationship of the parties and the foreseeable risk involved. Ultimately, the question is one of policy.”³⁰ The special relationship inquiry is compound not singular.

The court’s list of special relationships includes those between parents and their children, masters and servants, possessors of land

25. *Id.* (quoting *Doe 169 v. Brandon*, 845 N.W.2d 174, 178 (Minn. 2014)); *see also* *Lundgren v. Fultz*, 354 N.W.2d 25, 27 (Minn. 1984); *Delgado v. Lohmar*, 289 N.W.2d 479, 483 (Minn. 1979). A duty may also arise where the defendant and person causing the injury are in a special relationship. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 41 (AM. LAW INST. 2010).

26. *Domagala v. Rolland*, 805 N.W.2d 14, 23 (Minn. 2011). The “foreseeable risk of injury to a foreseeable plaintiff” appears for the first time in the *Domagala* case. *See id.*

27. *See Delgado*, 289 N.W.2d at 483.

28. *See Lundgren*, 354 N.W.2d at 27.

29. 447 N.W.2d 165, 168–69 (Minn. 1989).

30. *Id.* In *Erickson*, the court considered the issue of whether the owner and operator of a parking ramp was liable to a ramp customer who was criminally assaulted in the ramp. *Id.* at 168; *see also* *Funchess v. Cecil Newman Corp.*, 632 N.W.2d 666, 673 (Minn. 2001) (discussing that a special relationship between landlord and tenant is not recognized). In *Funchess*, the court reiterated the policy considerations noted in *Erickson*:

[C]rime prevention is essentially a government function, not a private duty; criminals are unpredictable and bent on defeating security measures; and because the issue arises where existing security precautions have failed, the question will always be whether further security measures were required and a property owner will have little idea what is expected of him or her.

Id. at 673 n.4 (citing *Erickson*, 447 N.W.2d at 169).

who hold their property open to the public, and common carriers and their customers.³¹

In *Bjerke v. Johnson*, the supreme court saw special relationships as existing “under any one of three distinct scenarios.”³² The first scenario is based on the status of the parties.³³ The second is where a person, “whether voluntarily or as required by law,” takes custody of another under circumstances where the other person “is deprived of normal opportunities of self-protection.”³⁴ And the third involves cases where a person assumes responsibility for a duty that is owed by one person to a third party. In those cases, a duty arises when the person does the following:

“[U]ndertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things,” and liability will be imposed if (1) his failure to act increases the risk of harm; (2) he undertook a duty owed by the other to the third party; or (3) the harm is suffered because the other or the third person relied on the undertaking.³⁵

While *Bjerke* is a standard statement of the recognized special relationships in Minnesota, the list is not exclusive. The supreme court’s final “special relationship,” the undertaking of a duty, is really a separate duty trigger that is distinct from the other special relationships recognized by the court. The duty does not depend on the relationship of the parties, as do the other special relationships; but, rather, on an agreement to assume a duty that works to the benefit of the plaintiff.

The Restatement (Third) of Torts: Liability for Physical and Emotional Harm provides a useful parallel list for organizing special relationships. The Restatement breaks special relationships into two categories, with some overlap. Section 40 lists the special relationships

31. See *H.B. v. Whittemore*, 552 N.W.2d 705, 708 (Minn. 1996) (citation omitted); *Donaldson v. Young Women’s Christian Ass’n of Duluth*, 539 N.W.2d 789, 792 (Minn. 1995); *Harper v. Herman*, 499 N.W.2d 472, 474 (Minn. 1993).

32. 742 N.W.2d 660, 665 (Minn. 2007). *Bjerke* involved a custodial relationship assumed by the defendant of the teenage plaintiff, who was subject to sexual advances by the defendant’s live-in male friend. See *id.*

33. *Id.* (quoting *Delgado v. Lohmar*, 289 N.W.2d 479, 483–84 (Minn. 1979); RESTATEMENT (SECOND) OF TORTS §§ 314, 315 (AM. LAW INST. 1965)) (“The first arises from the status of the parties, such as ‘parents and children, masters and servants, possessors of land and licensees, [and] common carriers and their customers.’”).

34. *Id.* at 665 (quoting *Harper*, 499 N.W.2d at 474).

35. *Id.* (quoting *Walsh v. Pagra Air Taxi, Inc.*, 282 N.W.2d 567, 571 (Minn. 1979); RESTATEMENT (SECOND) OF TORTS § 324A (AM. LAW INST. 1965)).

between the defendant and the victim that will create a duty.³⁶ Section 41 lists the relationships between the defendant and the person who causes the injury that will impose a duty on the defendant.³⁷

Section 40's list of non-exclusive³⁸ special relationships includes:

- (1) a common carrier with its passengers,
- (2) an innkeeper with its guests,
- (3) a business or other possessor of land that holds its premises open to the public with those who are lawfully on the premises,
- (4) an employer with its employees who, while at work are:
 - (a) in imminent danger; or
 - (b) injured or ill and thereby rendered helpless,
- (5) a school with its students,
- (6) a landlord with its tenants, and
- (7) a custodian with those in its custody, if:
 - (a) the custodian is required by law to take custody or voluntarily takes custody of the other; and
 - (b) the custodian has a superior ability to protect the other.³⁹

The Restatement takes the position that the defendant who is in a special relationship with the plaintiff owes a duty of reasonable care as to risks arising within the scope of that relationship.⁴⁰

The Third Restatement expands on the special relationships listed in the more familiar section 314A of the Second Restatement of Torts,⁴¹ which recognized the first, second, third, and seventh

36. Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 40 (Am. Law Inst. 2010).

37. *Id.* § 41.

38. *Id.* § 40 cmt. o.

39. *Id.* § 40(b). The list is not intended to be exclusive. The comments note, for example, that family relationships are likely to be categorized as a special relationship. *Id.* § 40 cmt. o.

40. *Id.* § 40(a).

41. Restatement (Second) of Torts § 314A (Am. Law Inst. 1965). Section 314A states:

- (1) A common carrier is under a duty to its passengers to take reasonable action
 - (a) to protect them against unreasonable risk of physical harm, and
 - (b) to give them first aid after it knows or has reason to know that they are ill or injured, and to care for them until they can be cared for by others.

relationships on the list, and in section 314B of the Second Restatement of Torts⁴² which recognized the special relationship between employer and employee. Section 40 also replaces section 344, which overlapped with section 314A and imposed a duty of reasonable care on a possessor of land who held it open to the public to avoid injuries to entrants caused by the conduct of third persons.⁴³

The special relationships impose a duty on the defendant to use reasonable care with respect to the risks that arise within the scope of that relationship. That duty includes the duty to guard against the conduct of third persons.⁴⁴

Section 41 covers cases where the actor is in a special relationship with the person who causes harm to the injured person. The “[s]pecial relationships giving rise to the duty . . . include: (1) a parent with dependent children, (2) a custodian with those in its custody, (3) an employer with employees when the employment facilitates the employee’s causing harm to third parties, and (4) a mental-health professional with patients.”⁴⁵

The special relationships noted in the Third Restatement align with the special relationships recognized by the Minnesota Supreme Court. The court has recognized all of the special relationships noted in sections 40 and 41 of the Third Restatement, with the exception of

-
- (2) An innkeeper is under a similar duty to his guests.
 - (3) A possessor of land who holds it open to the public is under a similar duty to members of the public who enter in response to his invitation.
 - (4) One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection is under a similar duty to the other.

Id.

42. *Id.* § 314B.

43. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 40 CMT. A (AM. LAW INST. 2010).

44. *Id.* § 40 cmt. g.

45. *Id.* § 41. As with section 40, the comments note the list is not intended to be exclusive. *Id.* § 41 cmt. i. Section 41 replaces several sections of the Restatement (Second) of Torts, including section 315(a) (no duty to control conduct of a third person absent a special relationship); section 316 (duty of parent to control conduct of child); section 317 (duty of master to control conduct of servant); and section 319 (duty of those in charge of persons having dangerous propensities). *Id.* § 41 cmt. a. However, it adds a new provision covering mental health professionals and their patients to reflect recent developments in case law. *See id.*

the landlord-tenant relationship in section 40(b)(6).⁴⁶ *Fenrich* involved the student-school relationship.⁴⁷

46. This footnote explains in slightly more detail the supreme court's standard list of recognized special relationships. The court has recognized that defendants owe duties to injured persons in different settings, although the court did not specifically label those relationships as "special" relationships. The label is unimportant; the imposition of a duty is. For organizational purposes, this footnote follows the Third Restatement's special relationship list.

(1) a common carrier with its passengers

The supreme court has been consistent in holding that common carriers have a duty to exercise the utmost or highest degree of care for their passengers. *See, e.g., George v. Estate of Baker*, 724 N.W.2d 1, 9–10 (Minn. 2006); *Lindstrom v. Yellow Taxi Co. of Minneapolis*, 298 Minn. 224, 226, 214 N.W.2d 672, 674–75 (1974); *Ford v. Stevens*, 280 Minn. 16, 19, 157 N.W.2d 510, 513 (1968); *Fieve v. Emmeck*, 248 Minn. 122, 126–28, 78 N.W.2d 343, 346–48 (1956); *McKellar v. Yellow Cab Co.*, 148 Minn. 247, 250, 181 N.W. 348, 349 (1921).

(2) an innkeeper with its guests

In *Alholm v. Wilt*, 394 N.W.2d 488, 490 (Minn. 1986), the court recognized that "[t]avern owners in Minnesota have the duty to exercise reasonable care under the circumstances to protect their patrons from injury." The supreme court approved the trial court's jury instructions that required a showing that the proprietor was on notice of the offending party's vicious or dangerous propensities by some act or threat, that the proprietor had an adequate opportunity to act for the protection of the patron who was injured, failed to act reasonably to protect the patron, and finally, that the injury was foreseeable. *Id.* at 489 n.3. As the law evolved, a jury instruction that was approved in recognition of the latitude district courts have in framing instructions seemed to harden into elements. *See Boone v. Martinez*, 567 N.W.2d 508, 510 (Minn. 1997) (citing *Alholm*, 394 N.W.2d at 489 n.3).

In *Henson v. Uptown Drink, LLC.*, 922 N.W.2d 185 (Minn. 2019), the court suggested a less restrictive standard for resolving innkeeper liability cases. The court noted that "when the totality of the facts and circumstances put the innkeeper on notice," it has "held that there [is] a duty based on foreseeability," and, at least in that case, the foreseeability was a question for the trier of fact. *Id.* at 192. The court's reference to *Klingbeil v. Truesdell*, 256 Minn. 360, 363, 98 N.W.2d 134, 138 (1959), in which the court held that "there is ample evidence in the record from which the jury could find that [the patrons] were intoxicated to the point where the proprietor or his servant should have been aware of the fact that their conduct would lead to trouble," and *Mettling v. Mulligan*, 303 Minn. 8, 11 n.3, 225 N.W.2d 825, 828 n.3 (1975), in which the court noted that it has "found liability in tavern owners predicated upon intoxication of the offending patron," frame the innkeeper's duty more broadly than *Boone's Alholm*-based formulation. *See Henson*, 922 N.W.2d at 192.

(3) a business or other possessor of land that holds its premises open to the public with those who are lawfully on the premises

The Minnesota courts have consistently recognized this as a special relationship. The courts' decisions rely on section 314A(3) of the Second Restatement. *See, e.g., Bjerke v. Johnson*, 742 N.W.2d 660, 665 (Minn. 2007). Section 40(b)(3) of the Third Restatement replaces section 314A(3). RESTATEMENT (THIRD) OF TORTS: LIABILITY

FOR PHYSICAL AND EMOTIONAL HARM § 40 cmt. a (AM. LAW INST. 2010). It is important to understand the reach of section 40(b)(3). It “imposes an affirmative duty on a subset of land possessors for certain risks that do not arise from conditions or activities on the land.” *Id.* § 40 cmt. j. It applies, for example, in cases where a customer’s incapacitation is not related to a condition on the land. *Id.* § 40 illus. 4.

The Minnesota Supreme Court has recognized the distinction. In *Louis v. Louis*, 636 N.W.2d 314 (Minn. 2001), a case involving a swimming-pool-slide-accident, the supreme court drew a clear distinction between premises-liability cases and cases involving possessors’ duties arising out of a special relationship. The defendant sought to tie its duty to warn of the dangers involved in using the pool slide to a special relationship, arguing that because there was no special relationship, there was no duty to the plaintiff. *Id.* at 317, 320. The court, however, rejected the argument. *Id.* In cases involving premises liability, there is no need to establish a special relationship. *Id.* at 320–21. The court emphasized that it has “consistently recognized that a duty based on a special relationship theory is separate and distinct from a duty based on a premises liability theory.” *Id.* at 320.

(4) an employer with its employees

Section 40(b)(4) replaces section 314B of the Second Restatement. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 40 cmt. k (AM. LAW INST. 2010). Liability in these cases requires a showing that the employee is in “imminent danger” or is “injured or ill and thereby rendered helpless.” *Id.* § 40(b)(4). The Minnesota Court of Appeals commented on section 314B in *Schmitz v. U.S. Steel Corp.* and noted that a special relationship between employer and employee exists only in cases where “an employee, ‘acting within the scope of his employment, comes into a position of imminent danger of serious harm.’” 831 N.W.2d 656, 679 (Minn. Ct. App. 2013), *aff’d in part and rev’d in part*, 852 N.W.2d 669 (Minn. 2014) (quoting RESTATEMENT (SECOND) OF TORTS § 314B (AM. LAW INST. 1965)). However, the theory will have limited reach because workers’ compensation will reach most cases involving occupational injuries. The Restatement comments note these limitations:

The circumstances in which the affirmative duty imposed in this Subsection might apply have been largely limited to the risk to an employee of a criminal attack by a third party that occurs at the place of employment, an illness or injury suffered by an employee while at work (but not resulting from employment) that renders the employee helpless and in need of emergency care or assistance, and the occasional case that falls through the cracks of workers’-compensation coverage and implicates an affirmative duty as opposed to the ordinary duty imposed by § 7. The cases that fall through the cracks are quite varied because of the variations that exist in different states’ workers’-compensation statutes.

RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 40 cmt. k (AM. LAW INST. 2010).

(5) a school with its students

See infra notes 63–76 and accompanying text.

(6) a landlord with its tenants

Kline v. 1500 Mass. Av. Apartment Corp. is the key case concerning a landlord’s duty to its tenants and tenants’ guests. *See* 439 F.2d 477, 487–88 (D.C. Cir. 1970) (holding a landlord liable for the assault and robbery of tenant when the

landlord knew of similar incidents of crime in common areas in the past due to faulty or nonexistent security, rendering such crime foreseeable). It started a national trend toward recognition of the landlord-tenant relationship as a special relationship. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 40 cmt. m (AM. LAW INST. 2010). Notwithstanding *Kline*, Minnesota law has never recognized a special relationship between a landlord and tenant that gives rise to a landlord's duty to protect a tenant from third parties. In *Funchess v. Cecil Newman Corp.*, 632 N.W.2d 666, 668 (Minn. 2001), a landlord was accused of breaching such a duty when intruders gained access to a tenant's apartment through an unsecured exterior door and murdered the tenant. The court acknowledged the possibility that the landlord could be held liable for undertaking a duty under section 323 of the Second Restatement of Torts by installing a security system in the building but the court held that the facts did not support this theory. *Funchess*, 632 N.W.2d at 674–75.

(7) a custodian with those in its custody, if: a) the custodian is required by law to take custody or voluntarily takes custody of the other; and b) the custodian has a superior ability to protect the other.

Section 40(b)(7) replaces section 314A(4) of the Second Restatement, which has been frequently cited by the supreme court as one of the special relationships recognized in Minnesota law. *See, e.g.*, *H.B. v. Whittemore*, 552 N.W.2d 705, 708 (Minn. 1996); *Donaldson v. Young Women's Christian Ass'n of Duluth*, 539 N.W.2d 789, 792 (Minn. 1995); *Harper v. Herman*, 499 N.W.2d 472, 474 (Minn. 1993). The court, in *Bjerke v. Johnson*, 742 N.W.2d 660, 665–67 (Minn. 2007), applied section 314A in holding that a custodial relationship was established between plaintiff, a minor at the time, and the horse farm owner she stayed with when she was sexually abused by another adult resident at the farm.

A duty may also be based on the defendant's relationship with the person causing harm. Section 41 of the Third Restatement covers cases where the actor is in a special relationship with the person who causes harm to the injured person. The "[s]pecial relationships giving rise to the duty . . . include: (1) a parent with dependent children, (2) a custodian with those in its custody, (3) an employer with employees when the employment facilitates the employee's causing harm to third parties, and (4) a mental-health professional with patients." RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 41 (AM. LAW INST. 2010).

(1) parent with dependent children

Section 316 of the Restatement (Second) of Torts, provides that parents are under a duty to use reasonable care to control their minor children to prevent them from causing harm to others, intentionally or negligently, in cases where (a) the parents know or have reason to know they have the ability to control their children, and (b) know or should know of the need and opportunity to control them. RESTATEMENT (SECOND) OF TORTS § 316 (AM. LAW INST. 1965). Section 41 of the Restatement (Third) of Torts, which supersedes section 316, provides that "[a]n actor in a special relationship with another owes a duty of reasonable care to third parties with regard to risks posed by the other that arise within the scope of the relationship," and identifies one of those special relationships as "a parent with dependent children." RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 41 (AM. LAW INST. 2010).

The Minnesota Court of Appeals has recognized the special relationship between parent and child as a relationship that will impose a duty on parents to prevent

certain injuries caused by their children. *See, e.g.*, *Jaramillo v. Weaver*, No. A06-2343, 2007 WL 4303775, at *5 (Minn. Ct. App. Dec. 11, 2007) (holding facts insufficient to establish special relationship between parents and adult child); *Sarau v. Oliver*, No. C1-00-223, 2000 WL 1052143, at *2 (Minn. Ct. App. Aug. 1, 2000) (refusing to apply section 316 to parent of twenty-year-old son); *Kohn v. Ross*, No. C0-97-198, 1997 WL 423579, at *4 (Minn. Ct. App. July 29, 1997) (recognizing parent-child special relationship but concluding that injury to plaintiff at party hosted by fifteen-year-old son was unforeseeable); *Hansen v. C.H.*, No. C2-91-1808, 1992 WL 67513, at *2 (Minn. Ct. App. Apr. 7, 1992) (applying section 316 but holding that parents did not have sufficient knowledge of their children's dangerous propensities); *Silberstein v. Cordie*, 474 N.W.2d 850, 855-56 (Minn. Ct. App. 1991) (applying section 316 to parents who failed to prevent injury caused by mentally ill twenty-seven-year-old son).

(2) A custodian with those in its custody

This is a long-standing but limited special relationship. The Third Restatement notes that "[t]he classic custodian under this Section is a jailer of a dangerous criminal," and that "[o]ther well-established custodial relationships include hospitals for the mentally ill and for those with contagious diseases." RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 41 cmt. f (AM. LAW INST. 2010). Minnesota courts have considered this theory, including under section 319 of the Second Restatement of Torts, which was replaced by section 41. *See Johnson v. State*, 553 N.W.2d 40, 49-50 (Minn. 1996) (acknowledging section 319, but finding the halfway house owed no duty to plaintiffs for parolee at halfway house who committed rape and murder of a third person); *Rum River Lumber Co. v. State*, 282 N.W.2d 882, 886 (Minn. 1979) (holding there was a duty imposed on Anoka State Hospital for property damage caused by escaped patient); *Sylvester v. Nw. Hosp. of Minneapolis*, 236 Minn. 384, 387-88, 53 N.W.2d 17, 19-20 (1952) (holding there is a duty imposed on the hospital to other patients when it accepts patients with mental disorders); *Stuedeman v. Nose*, 713 N.W.2d 79, 84 (Minn. Ct. App. 2009) (holding the group foster home had a duty with respect to one of its violent residents).

(3) Employer-employee

The Minnesota Supreme Court has analyzed negligent supervision claims both under Restatement (Second) of Agency § 213 (Am. Law Inst. 1958) and Restatement (Second) of Torts § 317 (Am. Law Inst. 1965). *See Semrad v. Edina Realty, Inc.*, 493 N.W.2d 528, 533-34 (Minn. 1992).

The court adopted the tort of negligent hiring in *Ponticas v. K.M.S. Investments*, 331 N.W.2d 907, 910-11 (Minn. 1983), relying on Restatement (Second) of Agency § 213. Liability is based on the employer's negligence "in placing a person with known propensities, or propensities which should have been discovered by reasonable investigation, in an employment position in which, because of the circumstances of the employment, it should have been foreseeable that the hired individual posed a threat of injury to others." *Ponticas*, 331 N.W.2d at 911.

Negligent retention was first recognized in *Dean v. St. Paul Union Depot Co.*, 41 Minn. 360, 362-63, 43 N.W. 54, 54 (1889). An employer's liability for retaining an employee with a propensity to cause harm to others is based on the employer's "personal fault in exposing others to unreasonable risk of injury in violation of the [employer's] duty to exercise due care for their protection." *Porter v. Grennan Bakeries*, 219 Minn. 14, 22, 16 N.W.2d 906, 910 (1944). In general, "[a]n employer has the duty

B. Special Relationships and Fenrich

In *Fenrich v. Blake School*, the school urged the court to adopt a categorical rule that “a school never owes a duty of care to non-student third parties for injuries resulting from student conduct.”⁴⁸ The court declined.⁴⁹ While recognizing the importance of schools in a civilized society, which as a matter of policy might suggest a more restrictive liability rule, the lack of precedent for the no-duty proposition argued by the school prompted the court to conclude that there is no justification for exempting schools from basic tort law principles.⁵⁰

‘to refrain from retaining employees with known dangerous proclivities.’” *J.M. v. Minn. Dist. Council of Assemblies of God*, 658 N.W.2d 589, 597 (Minn. Ct. App. 2003) (quoting *Yunker v. Honeywell, Inc.*, 496 N.W.2d 419, 423 (Minn. Ct. App. 1993), *rev. denied* (Minn. Apr. 20, 1993)); *see also* *Olson v. First Church of Nazarene*, 661 N.W.2d 254, 264 (Minn. Ct. App. 2003) (quoting *Yunker*, 496 N.W.2d at 423).

Minnesota, however, does not recognize the claim of negligent training. *See, e.g.*, *Soto v. Shealey*, 331 F. Supp. 3d 879, 884 n.1 (D. Minn. 2018) (citation omitted); *Peterson v. Bankers Life and Cas. Co.*, 734 N.W.2d 275, 277 (Minn. Ct. App. 2007) (citation omitted); *M.L. v. Magnuson*, 531 N.W.2d 849, 856 (Minn. Ct. App. 1995) (citation omitted).

(4) Mental health professionals with their patients

Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334 (Cal. 1976), is the seminal case in which the California Supreme Court imposed a duty on a psychotherapist to warn a third person of death threats made toward the third person by the psychotherapist’s patient. *Id.* at 340. Minnesota courts have considered the role of a mental health professional to act for the protection of third persons in a handful of cases. For example, in *Lundgren v. Fultz*, the court recognized that a special relationship between a psychiatrist and patient could be the basis for a limited duty giving rise to the psychiatrist’s alleged negligence in aiding the patient to get access to a gun, which the patient used to kill a third person. 354 N.W.2d 25, 27–28 (Minn. 1984). The court in *Lundgren* emphasized that any duty to warn potential victims would be limited to cases where the patient has made “specific threats against identifiable persons.” *Id.* at 29 (citing *Cairl v. State*, 323 N.W.2d 20, 25–26 (Minn. 1982)).

Section 148.975 of the 2018 Minnesota Statutes imposes a duty on the limited category of “licensee[s],” defined in subdivision 1(d) to include “practicum psychology students, predoctoral psychology interns, and individuals who have earned a doctoral degree in psychology and are in the process of completing their postdoctoral supervised psychological employment in order to qualify for licensure,” to make “reasonable efforts” to warn potential victims of specific threats to that victim. Subdivision 2 requires “a specific, serious threat of physical violence against a specific, clearly identified or identifiable potential victim.” MINN. STAT. § 148.975, subdiv. 2 (2018).

47. *Fenrich v. Blake Sch.*, 920 N.W.2d 195, 201–02 (Minn. 2018).

48. *Id.* at 202.

49. *Id.*

50. *Id.*

The school's argument was based on *Gylten v. Swalboski*,⁵¹ an Eighth Circuit case applying Minnesota law. In that case, a student football player on a cooperative football team sponsored by two separate school districts caused an accident while driving from his school, Climax, to the other school, Fisher, which was where practice was to be held that day.⁵² Pursuant to the cooperative agreement, each school was responsible for the transportation of its students to the other school for practices.⁵³ The schools used buses for transportation, but because of a mix-up as to which school was supposed to be hosting the practice on the day of the accident, Timothy Swalboski, Jr., a junior, drove himself and another teammate to practice at the other school, with the knowledge of his coach.⁵⁴ The plaintiffs argued that the school districts "negligently breached their duty of supervision and control of the students while in transport to football practice."⁵⁵

The defendant school districts moved for summary judgment, arguing that they did not owe a duty to non-students who might be injured by the negligence of a student who was driving to an activity sponsored by the schools.⁵⁶ The Eighth Circuit concluded that there was no special relationship between the school and the plaintiffs, and that the school could not, under the facts, anticipate that they would be injured.⁵⁷ There was no indication that the school had knowledge that there would be a risk of injury to the third parties under these circumstances, prompting the court to "believe that the Minnesota Supreme Court would likely reach the conclusion of not extending a school district's liability to non-student third parties who lack any connection to the school."⁵⁸

The Minnesota Supreme Court, in *Fenrich v. Blake School*, read *Gylten* as considering only the issue of whether there was a special relationship between the school and the general public that would impose a duty on the school.⁵⁹ According to the supreme court, the

51. 246 F.3d 1139 (8th Cir. 2001).

52. *Id.* at 1141.

53. *Id.* at 1140.

54. *Id.* at 1140-41.

55. *Id.* at 1141.

56. *Id.*

57. *Id.* at 1142, 1144.

58. *Id.* at 1144.

59. 920 N.W.2d 195, 202 (Minn. 2018) (citing *Gylten*, 246 F.3d at 1143).

Eighth Circuit did not consider the “own conduct” exception and it did not create a categorical exclusion for schools from tort liability.⁶⁰

The plaintiff in *Fenrich* argued that there was a special relationship between the Fenrichs and school under *in loco-parentis* and common-carrier theories.⁶¹ The supreme court rejected both arguments.⁶²

1. *In Loco Parentis*

As the Third Restatement notes, the relationship between a school and student is based on the school’s status as a possessor of land that has opened its premises to a substantial portion of the public population, as a custodian of its students, and because it acts partially in the place of the students’ parents.⁶³ The duties are overlapping.

The supreme court, in *Fenrich*, rejected the argument that there is a special relationship based on an *in loco-parentis* theory.⁶⁴ The court explained that it has “never held that a school generally stands *in loco parentis* with its students” and declined to do so in *Fenrich*.⁶⁵ However, Minnesota cases may not make it quite that clear. There are acknowledgements of the *in loco-parentis* theory in the school setting, and, in some cases, whispers of the concept without the use of the term.⁶⁶

60. *Id.*

61. *Id.*

62. *Id.*

63. RESTATEMENT (THIRD) OF TORTS § 40 CMT. L (AM. LAW INST. 2010).

64. 920 N.W.2d at 202–03.

65. *Id.* (citing *Hollingsworth v. State*, No. A14-1874, 2015 WL 4877725, at *4 (Minn. Ct. App. Aug. 17, 2015)) (“Hollingsworth concedes that schools generally do not owe a duty of care *in loco parentis* to protect students.”). The court, citing *London Guarantee & Acc. Co. v. Smith*, 242 Minn. 211, 64 N.W.2d 781, 784 (1954), noted that “[i]n *loco parentis* . . . ‘refers to a person who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation without going through the formalities necessary to legal adoption.’” *Fenrich*, 920 N.W.2d at 202.

66. Another unpublished court-of-appeals opinion, *Vistad v. Board of Regents of the University of Minnesota*, acknowledges the concept. No. A04-2161, 2005 WL 1514633, at *2 n.1 (Minn. Ct. App. June 28, 2005) (“Because a school district ordinarily is *in loco parentis* with its minor students, its duty is greater than that of a university to its adult students.”). The Minnesota Supreme Court has acknowledged the rule, although it did not use the term “*in loco parentis*.” See, e.g., *Verhel v. Indep. Sch. Dist.* No. 709, 359 N.W.2d 579, 593 (Minn. 1984) (Simonett, J., dissenting in part) (citations omitted) (“Ordinarily, a school district’s duty to supervise is based on the fact that parents have relinquished custody of their children to the school for school activities

*Sheehan v. St. Peter's Catholic School*⁶⁷ is a key case in the development of a school's obligation to protect its students.⁶⁸ In *Sheehan*, an eighth grader lost the sight in her right eye as a result of a three-to-four-minute pebble-throwing incident during recess.⁶⁹ At the teacher's direction, she was sitting with a group of twenty girls on the side of an athletic field being used by eighth-grade boys who threw pebbles at the girls. The trial court instructed the jury that:

It is the duty of a school to use ordinary care and to protect its students from injury resulting from the conduct of other students under circumstances where such conduct would reasonably have been foreseen and could have been prevented by the use of ordinary care. There is no requirement of constant supervision of all the movements of pupils at all times.⁷⁰

The jury found for the plaintiff and awarded her \$50,000 in damages.⁷¹ The supreme court affirmed.⁷²

After surveying decisions from several other jurisdictions,⁷³ the court distilled the following standard:

and, consequently, the school is charged with the duty of protecting the children while in its charge.”).

67. 291 Minn. 1, 188 N.W.2d 868 (1971).

68. See *S.W. v. Spring Lake Park Sch. Dist. No. 16*, 592 N.W.2d 870, 874 (Minn. 1999) (calling *Sheehan v. St. Peter's Catholic School*, 291 Minn. 1, 188 N.W.2d 868 (1971), “the seminal school duty case”).

69. *Sheehan*, 291 Minn. at 3, 188 N.W.2d at 870.

70. *Id.*

71. *Id.* at 869.

72. *Id.* at 871.

73. The defendant, in *Sheehan*, relied on *Woodsmall v. Mount Diablo Unified School District*, 10 Cal. Rptr. 447 (Cal. Ct. App. 1961); *Wilber v. City of Binghamton*, 66 N.Y.S.2d 250 (N.Y. App. Div. 1946), *aff'd*, 73 N.E.2d 263 (N.Y. 1947); *Ohman v. Board of Education*, 90 N.E.2d 474 (N.Y. 1949); and *Nestor v. City of New York*, 211 N.Y.S.2d 975 (N.Y. Sup. Ct. 1961). 291 Minn. at 3, 188 N.W.2d at 870. The Minnesota Supreme Court distinguished those cases because “the injuries were inflicted suddenly and without warning and in such a manner the courts felt supervision would not have prevented them.” *Id.* The court also contrasted *Christofides v. Hellenic Eastern Orthodox Christian Church*, 227 N.Y.S.2d 946 (N.Y. Mun. Ct. 1962), where liability was imposed when student was stabbed by another student in a classroom that was unsupervised for twenty-five minutes, with *Nash v. Rapides Parish School Board*, 188 So.2d 508 (La. Ct. App. 1966), where no liability attached when teacher could not have anticipated or prevented one child striking another in the eye. *Sheehan*, 291 Minn. at 5, 188 N.W.2d at 871. However, the court stated that it subscribed to the position taken by the California Court of Appeals in *Ziegler v. Santa Cruz City High School District*, 335 P.2d 709 (Cal. Ct. App. 1959), “which held that in order to recover damages a

We are of the opinion that the better reasoned cases permit recovery if there is evidence from which a jury could find that supervision would probably have prevented the accident. We need not decide whether there may be recovery for lack of supervision where a child is injured by sudden, unanticipated action of a fellow student. This is not such a case. Here, the pebble throwing continued for 3 or 4 minutes before plaintiff was injured. Under such circumstances, a jury could properly find that had the teacher been present she would have put a stop to this dangerous activity before plaintiff was struck.⁷⁴

The court also held that a plaintiff is only required to prove that “a general danger was foreseeable and that supervision would have prevented the accident” that occurred.⁷⁵ Proof that the particular accident was foreseeable is unnecessary.⁷⁶

The takeaway from the court’s decisions is that a special relationship exists between a school and its students that justifies imposing liability on the school for inadequate supervision that results in injury to another student. That duty does not extend to third persons.

2. *Common Carrier*

The common carrier theory in *Fenrich* was based on the argument that T.M.’s car was, in effect, a “school bus,” which made it a common carrier.⁷⁷ However, the statutory definition of “school bus” excludes motor vehicles of the type T.M. was driving;⁷⁸ the court quickly disposed of the claim on statutory grounds.⁷⁹

student need only prove that a general danger was foreseeable and that supervision would have prevented the accident” and that “[i]t was not necessary to prove that the particular accident which occurred was foreseeable.” *Sheehan*, 291 Minn. at 4–5, 188 N.W.2d at 871.

74. *Id.* at 871.

75. *Id.*

76. *Id.*

77. 920 N.W.2d at 203 (Minn. 2018).

78. *Id.* (citing MINN. STAT. § 169.011, subdiv. 71(a) (2016)) (explaining that “school bus” excluded “a vehicle . . . qualifying as a type III vehicle under paragraph (h),” and thus excluded passenger cars of the type T.M. was driving).

79. *Id.*

III. DUTY AND FORESEEABLE RISKS

There may also be a duty where “the defendant’s own conduct creates a foreseeable risk of injury to a foreseeable plaintiff.”⁸⁰ The supreme court agreed with the district court and the court of appeals in concluding that “the school went beyond passive inaction by assuming supervision and control over its athletic team’s trip to Sioux Falls.”⁸¹ The first step in the supreme court’s determination of whether the school owed a duty to the Fenrichs was finding that the school assumed supervision and control over the trip.⁸² The second step turned on the foreseeability of risk.⁸³

A. Assumption of Supervision and Control and the Misfeasance/Nonfeasance Issue

The issue of supervision and control in the case was linked to the issue of whether the school’s action constituted misfeasance sufficient to impose a duty to use reasonable care on the school. To better understand the court’s approach to the problem in *Fenrich*, it is helpful to first take a broader look at the misfeasance/nonfeasance issue.

In tort law, there is ordinarily no duty to act unless the defendant has created a risk of injury.⁸⁴ Recent Minnesota decisions hold that there is a duty if the defendant creates a foreseeable risk of injury to a foreseeable plaintiff.⁸⁵ There is no duty if the defendant does not create a risk of injury,⁸⁶ unless the plaintiff can establish one of the

80. *Id.* at 202 (quoting *Domagala v. Rolland*, 805 N.W.2d 14, 23 (Minn. 2011)). The “foreseeable risk of injury to a foreseeable plaintiff” appeared for the first time in the *Domagala* case. 805 N.W.2d at 23. Under *Domagala*, duty turns on the creation of a foreseeable risk of injury. *See id.*

81. *Id.* at 203.

82. *See id.* at 203–05.

83. *See id.* at 205–07.

84. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 7(a) (AM. LAW INST. 2010) (“An actor ordinarily has a duty to exercise reasonable care when the actor’s conduct creates a risk of physical harm.”). There are, however, limitations on duty. Section 7 also states that “[i]n 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).

85. *See, e.g., Doe 169 v. Brandon*, 845 N.W.2d 174, 178 (Minn. 2014); *Domagala*, 805 N.W.2d at 23.

86. Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 37 (Am. Law Inst. 2010).

exceptions to the general rule that there is no duty in nonfeasance cases.

The line between misfeasance and nonfeasance may seem clear. If the defendant doesn't act (nonfeasance) there is no duty. If the defendant does act and creates a (foreseeable) risk of injury (misfeasance), there is a duty to act. The line isn't so bright in application, however, and focusing just on whether there is misfeasance or nonfeasance can be misleading. The issue is not whether

reasonable care entails the commission or omission of a specific act. . . . For example, a failure to employ an automobile's brakes or a failure to warn about a latent danger in one's product is not a case of nonfeasance governed by the rules in this Chapter, because in these cases the entirety of the actor's conduct (driving an automobile or selling a product) created a risk of harm. This is so even though the specific conduct alleged to be a breach of the duty of reasonable care was itself an omission.⁸⁷

The supreme court's decision in *Harper v. Herman*⁸⁸ is a good example of the impact of a narrow focus on only the failure to act. The plaintiff in the case was injured when he dove off a boat owned by Herman into shallow water off a lake island.⁸⁹ Harper was unaware that the water was shallow, but Herman, an experienced boater, knew that it was.⁹⁰ Harper was one of four guests on the boat.⁹¹ He was invited by another guest, but not by Herman.⁹² The district court held that Herman owed no duty to warn Harper that the water was shallow.⁹³ The court of appeals reversed, holding that Herman "voluntarily assumed a duty to exercise reasonable care when he allowed [Harper] to embark on his boat," and that he "owed a duty of care to warn [Harper] not to dive from the boat because he knew the water was dangerously shallow."⁹⁴

The Minnesota Supreme Court reversed.⁹⁵ The court framed the issue as "whether a boat owner who is a social host owes a duty of care to warn a guest on the boat that the water is too shallow for

87. *Id.* § 37 cmt. c.

88. 499 N.W.2d 472 (Minn. 1993).

89. *Id.* at 474.

90. *Id.* at 473.

91. *Id.*

92. *Id.*

93. *Id.* at 474.

94. *Harper v. Herman*, 487 N.W.2d 908, 910 (Minn. Ct. App. 1992).

95. *Herman*, 499 N.W.2d at 475.

diving.”⁹⁶ Harper argued that Herman owed him a duty to warn that the water was shallow because of Harper’s inexperience as a swimmer and diver and Herman’s as a veteran boater.⁹⁷ Harper argued that under those circumstances, Herman should have known that Harper needed his protection.⁹⁸

The supreme court began with the assumption that this was a nonfeasance case and that the only way to impose a duty on Herman was to establish a special relationship between Herman and Harper.⁹⁹ The court held that there was no recognized special relationship and that Herman, therefore, did not owe a duty to warn Harper.¹⁰⁰ Herman’s knowledge of the dangerous condition alone was insufficient to establish liability.¹⁰¹

The court’s focus on the failure-to-warn issue immediately foreclosed any analysis of the surrounding circumstances.¹⁰² Herman did not warn Harper of the danger of diving at the spot where he had moored the boat.¹⁰³ Had he been one of the other passengers, it seems clear that he would not have owed a duty, but he was an experienced boater and he moored the boat in an area where the water was shallow.¹⁰⁴ Viewing the facts in their entirety, it is arguable that Herman created a risk of injury when he put the boat in that position and knew that Harper would be swimming there. In that view, he facilitated the injury rather than simply failing to prevent it.¹⁰⁵

Focusing on the facts in their entirety provides a clearer way of viewing the issue. The supreme court did that in *Fenrich*, using *Verhel*

96. *Id.* at 474.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 475.

102. *See id.*

103. *Id.* at 474.

104. *Id.*

105. This is a recurring problem. The take-home asbestos cases are good examples of how the issue should be resolved. In those cases, a worker brings home clothing embedded with asbestos fibers. Another member of the household contracts asbestosis or mesothelioma because of exposure to the asbestos. The issue is whether the company employing the worker has a duty to warn family members of the danger. Failure to do so is nonfeasance, or so the argument goes, but the company has affirmatively created a risk of injury in exposing the family members to the asbestos. *See Flint v. Langer Transp. Corp.*, 762 F.Supp.2d 735 (D. N.J. 2011); *Satterfield v. Breeding Insulation Co.*, 266 S.W.3d 347 (Tenn. 2008).

*v. Independent School Dist. No. 709*¹⁰⁶ as its template for the analysis of the supervision issue.¹⁰⁷ The plaintiff in *Verhel*, a Denfeld High School cheerleader, was injured in a motor vehicle accident while riding in a van with several other cheerleaders that was driven by one of the cheerleaders.¹⁰⁸ At the time of the accident, one week before school started, the cheerleaders were putting up banners in the early morning hours on homes of the school's football players in anticipation of the first game of the season.¹⁰⁹ Verhel sued another cheerleader who was driving a van in which Verhel and several other cheerleaders were passengers.¹¹⁰

The key issue in the case was whether the school district had assumed supervision and control over cheerleading at the high school, which would then require it to provide regulations and supervision for members of the cheerleading squad while they were engaged in cheerleading activities.¹¹¹ Following a jury verdict for the plaintiff, the court held on appeal that the facts were sufficient to justify the verdict.¹¹²

The court in *Fenrich* saw the facts in *Verhel* as "strikingly similar" to the *Fenrich* facts, concluding that "viewed in a light most favorable

106. 359 N.W.2d 579 (Minn. 1984).

107. *Fenrich*, 920 N.W.2d at 203. The court in *Verhel* in turn used *Raleigh v. Independent School District No. 625*, 275 N.W.2d 572 (Minn. 1978), as its template. *Verhel*, 359 N.W.2d at 589-90. The minor plaintiff in *Raleigh*, a student at Central High School in St. Paul, was slashed by another student after an off-campus showing of the film "KING, A Filmed Record, Montgomery to Memphis," during Black History Month and at a time of racial tension at the school. *Raleigh*, 275 N.W.2d at 573. A jury found the school district liable for negligently supervising and organizing the students. In affirming, the supreme court concluded that "although the school district might not be liable for sudden, unanticipated misconduct of fellow students, it is liable for sudden, foreseeable misconduct which probably could have been prevented by the exercise of ordinary care." *Id.* at 576. The court thought that the facts of the case made it "extremely close," but that the evidence showing the school district's awareness of the racial tension at the school and the lack of supervision and organization of the students, the court decided that it could not hold as a matter of law that the jury was not justified in finding a breach of duty and in finding causation. *Id.* Had there been reasonable supervision, the sudden injuries might have been prevented by either interrupting it or deterring it from happening at all. *Id.*

108. *Verhel*, 359 N.W.2d at 583.

109. *Id.*

110. *Id.*

111. *Id.* at 586-87.

112. *Id.* at 588-90.

to Fenrich, a reasonable fact-finder could find that they constitute misfeasance.”¹¹³

In analyzing the issue of whether there was misfeasance by the school, the court focused on a list of specific facts in the case that suggested affirmative action by the school:

The head coach strongly encouraged the entire team to participate in the Nike meet and 14 team members registered. The assistant coach paid the bulk registration fee. The coaches were active in preparation for the meet, including the assistant coach attending one of the practices and recruiting a volunteer coach to run them.

The assistant coach also took active responsibility for coordinating transportation to, and lodging at, the Nike meet. As he put it, “we all drove down as a team.” He expressly approved the plan to have T.M.—and not T.M.’s father or another adult—drive team members and the volunteer coach more than 200 miles to Sioux Falls. The assistant coach decided that the volunteer coach, a teenager, would ride with T.M. But he did not give the volunteer coach any safety instructions—such as to sit in the front seat, to pay attention (rather than be distracted by electronic devices), and to make sure that T.M. drove responsibly. Nor did the assistant coach give any instructions to T.M., except, during a break, to “keep it safe and keep rolling.”¹¹⁴

The *Fenrich* court borrowed *Verhel*’s conclusion that this sort of driving “behavior, or misbehavior, by unsupervised students is to be expected and is precisely the harm to be guarded against by the exercise of the school district’s supervision,” and rejected the dissent’s argument that the school’s duty should be limited only to its own students.¹¹⁵ The court concluded that, on those facts, “a reasonable factfinder could conclude that the school’s own conduct was misfeasant.”¹¹⁶

IV. DUTY AND FORESEEABILITY

Misfeasance—creating a risk of injury—provides part of the basis for the duty determination under Minnesota law, but the risk of

113. *Fenrich*, 920 N.W.2d at 204.

114. *Id.* at 199–200.

115. *Id.* at 205.

116. *Id.* at 204.

injury has to be foreseeable. The foreseeability issue, including whether the judge or jury decides it, is critical to that determination.

A. The Recent Cases

Montemayor v. Sebright Products, Inc.,¹¹⁷ and *Senogles v. Carlson*,¹¹⁸ are key recent cases addressing that issue, and they are foundational for the court's consideration of the issue in *Fenrich*. In each case, one involving the foreseeability issue in a products liability case and the other a case involving a landowner's duty, the supreme court concluded that, viewing the evidence and inferences to be drawn from it in favor of the non-moving parties, summary judgment based on the conclusion that the injuries were not foreseeable as a matter of law was inappropriate.¹¹⁹

It seems clear that the court is not establishing a new *rule* for summary judgment cases involving the foreseeability issue,¹²⁰ but

117. 898 N.W.2d 623 (Minn. 2017).

118. 902 N.W.2d 38 (Minn. 2017). For an analysis of *Montemayor* and *Senogles* and the foreseeability issue, see Mike Steenson, *Duty, Foreseeability, and Montemayor v. Sebright Products Inc.*, 39 MITCHELL HAMLIN L. J. PUB. POL'Y & PRAC. 31, 44-47 (2018). In *Warren v. Dinter*, No. A17-0555, 2019 WL 1646469 (Minn. Apr. 17, 2019), a medical negligence case the supreme court held, in a case of first impression, that the alleged decision of a hospitalist to deny admission of a patient to a hospital could constitute professional negligence, even absent a physician-patient relationship between the hospitalist and the person for whom a nurse-practitioner in a different clinic was seeking admission. The court noted that it has "never held that such a relationship is necessary to maintain a malpractice action under Minnesota law," and that "[t]o the contrary: when there is no express physician-patient relationship, we have turned to the traditional inquiry of whether a tort duty has been created by foreseeability of harm." *Id.* at *4. The court bracketed its analysis with two cases decided eighty-five years apart, *Skillings v. Allen*, 143 Minn. 323, 173 N.W. 663 (1919) (parents of daughter with scarlet fever were told that she was not contagious and that they could visit her in the hospital), and *Molloy v. Meier*, 679 N.W.2d 711, 717 (Minn. 2004) (physicians' failure to disclose that a key test to determine genetic disorder was not performed on daughter with genetic disorder). Those cases, said the court, "teach us that a duty arises between a physician and an identified third party when the physician provides medical advice and it is foreseeable that the third party will rely on that advice." 2019 WL 1646469, at *5.

119. *Senogles*, 902 N.W.2d at 48; *Montemayor*, 898 N.W.2d at 633.

120. The Minnesota cases are sprinkled with the "close cases" rubric. See, e.g., *Bjerke v. Johnson*, 742 N.W.2d 660, 667-68 (Minn. 2007); *Lundgren v. Fultz*, 354 N.W.2d 25, 28 (Minn. 1984). But even without the term "close cases," a careful sifting of the facts is nothing new. See *Ill. Farmers Ins. Co. v. Tapemark Co.*, 273 N.W.2d 630, 637-38 (Minn. 1978). At times, the Minnesota Supreme Court has expressed concern about leaving the foreseeability issue to juries. See, e.g., *Cooney v. Hooks*, 535 N.W.2d

rather an *approach* that more clearly gives the benefit of the doubt to the injured plaintiff in cases that are on the fence. The court's approach in *Montemayor* and *Senogles* was reinforced in a recent decision, *Henson v. Uptown Drink, LLC*.¹²¹

Henson arose out of the death of an off-duty bar employee who slipped and hit his head on the sidewalk while aiding the bar manager in escorting an intoxicated and disruptive patron from the bar.¹²² The plaintiff asserted innkeeper's liability and Civil Damages Act claims against the bar.¹²³ The innkeeper's liability claim required proof that the injury was foreseeable,¹²⁴ which the district court held involved a close question of fact.¹²⁵ The supreme court affirmed that holding.¹²⁶ The evidence was clear that the disruptive patrons had been in dustups with other patrons and bar employees before the altercation that led to Henson's death.¹²⁷ The court concluded that the "evidence is enough to create a disputed issue of material fact or disputed reasonable inferences from undisputed facts."¹²⁸

609, 612 (Minn. 1995); *Alholm v. Wilt*, 394 N.W.2d 488, 491 n. 5 (Minn. 1986). That ship seems to have sailed, however.

121. 922 N.W.2d 185 (Minn. 2019).

122. *Id.* at 188-89.

123. *Id.* at 190.

124. *Id.*

125. *Id.* at 192. The court of appeals affirmed the district court's finding but reversed the court's conclusion that the plaintiff assumed the risk because the issue of whether the defendant enlarged the risk to the plaintiff presented a fact question for the fact-finder. *Henson v. Uptown Drink, LLC*, 906 N.W.2d 533, 540 (Minn. Ct. App. 2017). The supreme court reversed that determination, holding that primary assumption of risk did not apply in innkeeper liability cases. *Henson*, 922 N.W.2d at 191. Coupled with its same-day decision in the skiing accident case of *Soderberg v. Anderson*, 922 N.W.2d 200 (Minn. 2019), the court narrowly confined the doctrine of primary assumption of risk to cases involving inherently dangerous sporting activities. *See id.* at 206.

126. *Henson*, 922 N.W.2d at 192. The court explained that the innkeeper liability theory requires proof of four elements: "(1) notice of the offending party's 'vicious or dangerous propensities' by 'some act or threat,' (2) adequate opportunity for the innkeeper to protect the injured patron, (3) failure on the part of the innkeeper to take reasonable steps to do so, and (4) foreseeable injury. *Id.* at 190 (quoting *Boone v. Martinez*, 567 N.W.2d 508, 510 (Minn. 1997)).

127. *Id.* at 192-93.

128. *Id.* at 193.

B. Foreseeability in *Fenrich*

The Minnesota Court of Appeals in *Fenrich* drew the line in concluding that the school did not owe a duty to the plaintiffs because the accident was not foreseeable as a matter of law.¹²⁹ The Minnesota Supreme Court drew the line in a different place and reversed.¹³⁰

The court launched its discussion of the foreseeability issue with a nod to the familiar standards the court has used in other cases. The court looked to *Foss v. Kincade* for the proposition that in “determining whether a danger is foreseeable, [the court] ‘look[s] at whether the specific danger was objectively reasonable to expect, not simply whether it was within the realm of any conceivable possibility.’”¹³¹ The key question is whether foreseeability is a question for the court or for the jury.¹³² The court has consistently taken the position that, while duty is a question of law for the court, foreseeability is a question for the trier of fact in close cases.¹³³

Because summary judgment was granted for the defendant on the foreseeability issue, the court viewed the evidence and reasonable inferences to be drawn from the evidence in the plaintiff’s favor.¹³⁴

The court listed the key facts, on both sides of the issue:

- T.M.’s parents said that they were comfortable in having T.M., a licensed driver, drive to the meet.
- There was no evidence that T.M. had any history of improper driving.
- T.M. was following the vehicle driven by the assistant coach.
- There was no indication that T.M. was tired.¹³⁵

The facts also indicated that:

- T.M. was only sixteen and had been licensed for six months, and was not legally entitled to drive multiple passengers under the age of 20.

129. *Fenrich v. Blake Sch.*, 901 N.W.2d 223, 234 (Minn. Ct. App. 2017).

130. *Fenrich v. Blake Sch.*, 920 N.W.2d 195, 207 (Minn. 2018).

131. *Id.* at 205 (quoting *Foss v. Kincade*, 766 N.W.2d 317, 322 (Minn. 2009)). However, there are other formulations.

132. *Foss*, 766 N.W.2d at 322–23.

133. See *Senogles v. Carlson*, 902 N.W.2d 38, 44 (Minn. 2017); *Montemayor v. Sebright Prods., Inc.*, 898 N.W.2d 623, 629 (Minn. 2017); *Domagala v. Rolland*, 805 N.W.2d 14, 27 (Minn. 2011); *Bjerke v. Johnson*, 742 N.W.2d 660, 667–68 (Minn. 2007).

134. *Fenrich*, 920 N.W.2d at 205.

135. *Id.*

- The assistant coach did not provide him with any directions in preparation for the drive, other than to “keep it safe and keep rolling.”
- The assistant coach told the volunteer coach to ride with T.M., but did not give him any specific directions to monitor T.M.’s driving, nor was the volunteer coach told to sit in the front seat where he could have better monitored T.M.’s driving.
- Absent adult supervision, the record indicated that T.M. was distracted by an electronic device while driving, and that may have been the cause of the accident.¹³⁶

The court summed up: “A reasonable factfinder could conclude that, under these circumstances, it was foreseeable that a teenage driver on a long trip, in a car with three other teenagers, could get distracted and collide with another driver.”¹³⁷ The court saw it as a “close call,”¹³⁸ but that the issue had to be resolved at trial.

V. THE TRIAL

The last paragraph of the *Fenrich* opinion provides guideposts for trial of the case:

As we did in two recent cases involving the issue of duty of care in the context of summary judgment, we decide today that foreseeability is at least a close call, meaning that summary judgment on the element of duty was not appropriate and the case should have been tried. Nothing in our decision prevents the district court from deciding by trial whether the facts show misfeasance or nonfeasance. And nothing in our decision prevents the school from arguing at trial the specific elements of negligence: that the school had no duty because its conduct did not create a foreseeable risk of injury to Fenrich; that the school did not breach a duty; and that the school’s conduct was not the direct and proximate cause of the injuries.¹³⁹

First, “foreseeability is at least a close call,” making it *an issue for trial*.¹⁴⁰ Second, nothing in the supreme court’s decision prevents the

136. *Id.* at 206.

137. *Id.* at 206 (citing *Bjerke*, 742 N.W.2d at 667).

138. *Id.* at 205 (citing *Senogles*, 902 N.W.2d at 48; *Montemayor*, 898 N.W.2d at 633).

139. *Id.* at 206–07 (citations omitted).

140. *Id.* at 207.

district court from deciding “*by trial* whether the facts show misfeasance or nonfeasance.”¹⁴¹ Third, there is nothing in the court’s opinion that “prevents the school from *arguing at trial* the specific elements of negligence.”¹⁴² That includes the arguments that the school did not owe a duty to the Fenrichs because there was no foreseeable risk of injury; that the school did not breach its duty; and “that the school’s conduct was not the direct and proximate cause of the injuries.”¹⁴³ The issues are either *for* trial, to be resolved *at* trial, or *by* trial. Summary judgment is inappropriate, but that only means there are fact issues to be resolved at trial. The plaintiff may or may not prevail, but the plaintiff made enough of a showing to get the case to trial.¹⁴⁴ But *who* decides the issues, judge or jury? And what are the guidelines if the issues are for jury resolution?

A. Foreseeability

The issue of duty is a question of law for the court.¹⁴⁵ A court may decide that there is no duty for reasons of principle or policy,¹⁴⁶ or

141. *Id.* (emphasis added).

142. *Id.* (emphasis added).

143. *Id.* There are four elements to a negligence claim in Minnesota: duty, breach of duty, proximate cause, and damages. *See, e.g.,* Bjerke v. Johnson, 742 N.W.2d 660, 664 (Minn. 2007); Gradjelick v. Hance, 646 N.W.2d 225, 230 (Minn. 2002); Funchess v. Cecil Newman Corp., 632 N.W.2d 666, 672 (Minn. 2001); Lubbers v. Anderson, 539 N.W.2d 398, 401 (Minn. 1995).

144. On motions for summary judgment, courts weigh the evidence, determine witness credibility, resolve factual disputes, or decide the merits of the case. *Foley v. WCCO Television, Inc.*, 449 N.W.2d 497, 506 (Minn. Ct. App. 1989). As the supreme court noted in *Lundgren v. Fultz*, the issue of whether the shooting was foreseeable presented a close question that should be resolved by a jury. 354 N.W.2d 25, 28 (Minn. 1984). *Lundgren* involved the alleged negligence of a University of Minnesota psychiatrist for recommending to University police that they return handguns to one of his patients, who then used one of the guns in a random shooting. *Id.* at 26–27. The court noted that “[i]t may be that plaintiff will be unable to prove a case, either to the trial court or the jury, but enough of a showing has been made to escape a summary judgment motion.” *Id.* at 29.

145. *See* Domagala v. Rolland, 805 N.W.2d 14, 22 (Minn. 2011).

146. Policy issues relating to duty permeate the Minnesota cases. *See e.g.,* *Funchess*, 632 N.W.2d at 673 (discussing landlord’s duty to tenant); *K.A.C. v. Benson*, 527 N.W.2d 553, 561 (Minn. 1995) (discussing negligent exposure to AIDS); *M.H. v. Caritas Fam. Serv.*, 488 N.W.2d 282, 287–88 (Minn.1992) (discussing negligent misrepresentation by an adoption agency); *Lundgren*, 354 N.W.2d at 27 (discussing psychiatrist’s duty to control conduct of a patient); *Stadler v. Cross*, 295 N.W.2d 552, 554–55 (Minn. 1980) (discussing negligent infliction of emotional distress). *Stadler* is a good example of a case where the emotional harm was inflicted upon the parents who were

that an injury or accident is not foreseeable as a matter of law.¹⁴⁷ However, even if policy hurdles are cleared, there may be factual disputes that have to be resolved before liability can be imposed.¹⁴⁸ Foreseeability is one of those issues.

Foreseeability becomes a jury issue in close cases. This can be handled in one of three ways. First, there could be a specific jury instruction and correlative special verdict question on the issue that would precede a jury's consideration of the breach issue. Second, the foreseeability issue could be a specific factor for the jury to decide in considering the breach issue. Third, the jury could be instructed on the general negligence issue and asked to simply consider whether the defendant used reasonable care, without specific mention of foreseeability.

If the first approach is followed, a finding that an injury or accident was unforeseeable might be conclusive on the duty issue, but a finding that the injury or accident is foreseeable would not be conclusive on the breach issue. The jury would still have to determine whether the defendant used reasonable care under the circumstances.¹⁴⁹

near their child when the child was hit by a truck. 295 N.W.2d at 553. The issue in the case was whether the supreme court should adopt bystander recovery theory in a negligent infliction of emotional distress case. *Id.* While the emotional harm to the bystander parents, who were nearby when their five-year-old child was hit by a pickup truck, may have been foreseeable, the supreme court held that recovery should be limited to the zone-of-danger rule, which had been the rule in Minnesota since *Purcell v. St. Paul City Ry. Co.*, 48 Minn. 134, 50 N.W. 1034 (1892). *Stadler*, 295 N.W.2d at 553.

147. See *Foss v. Kincade*, 766 N.W.2d 317, 323 (Minn. 2009) (holding it is unforeseeable that a child would attempt to climb a bookcase in a neighbor's home).

148. See, e.g., *Huber v. Niagara Mach. and Tool Works*, 430 N.W.2d 465, 467 (Minn. 1988) (citations omitted) (holding a manufacturer's duty to warn is a question of law for resolution by the court, but if there is a specific factual dispute concerning the manufacturer's awareness of a risk, the issue should be resolved by the jury); RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 40 cmt. e (AM. LAW INST. 2010) ("If disputed historical facts bear on whether the relationship exists, as with a dispute over whether a plaintiff was a paying guest in a hotel or was a trespasser, the jury should resolve the factual dispute with appropriate alternative instructions."). As another example, there may be a fact question as to whether an entrant on land is a trespasser. The entrant's status will be determinative of the duty issue. *Id.* § 50 cmt. e, Reporters' Note.

149. See 4 MNPRAC CIVJIG 25.10 (6th ed. 2014). CIVJIG 25.10 is the standard jury instruction on negligence. See *id.* "Negligence" is defined as "the failure to use reasonable care." *Id.* The instruction goes on to provide that there is negligence "when a

The second approach would require a modification of the standard jury instruction to include the standard factors relating to breach. The Third Restatement of Torts 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.¹⁵⁰

Including those factors in a jury instruction would be consistent with existing Minnesota case law. For example, in *Erickson v. Curtis Investment Co.*, the supreme court concluded in a parking-ramp-assault case that the negligence issue was for the jury, but the court also held that the jury instruction in the case should include the foreseeability issue:

We hold that the duty should be defined and explained to the jury along the following lines: The operator or owner of a parking ramp facility has a duty to use reasonable care to deter criminal activity on its premises which may cause personal harm to customers. The care to be provided is that care which a reasonably prudent operator or owner would provide under like circumstances. Among the circumstances to be considered are the location and construction of the ramp, the practical feasibility and cost of various security measures, and the risk of personal harm to customers which the owner or operator knows, or in the exercise of due care should know, presents a reasonable likelihood of happening. In this connection, the owner or operator is not an insurer or guarantor of the safety of its premises and cannot be expected to prevent all criminal activity. The fact that a criminal assault occurs on the premises, standing alone, is not evidence that the duty to deter criminal acts has been breached.¹⁵¹

person . . . [d]oes something a reasonable person would not do; or . . . [f]ails to do something a reasonable person would do." *Id.*

150. Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 3 (Am. Law Inst. 2010).

151. 447 N.W.2d 165, 169–70 (Minn. 1989). There are other examples. In *Bilotta v. Kelley Co.*, Justice Simonett suggested that a jury might be instructed on design defect as follows:

A product is unsafely designed if, by reason of its design, the product is in a defective condition unreasonably dangerous to the user. The manufacturer has a duty to use

Justice Simonett's proposed instruction in *Bilotta v. Kelley Co.* specifically includes the foreseeability issue.¹⁵² Short of that, however, the general jury instruction encompasses foreseeability, just as it encompasses the other factors involved in determining breach of duty.¹⁵³

The third alternative is to simply use the standard instruction on negligence without any specific mention of foreseeability. The court's concern in its "close cases" is to be sure the issue is resolved at trial.¹⁵⁴ Foreseeability will be the subject of proof and argument. Surviving a motion for summary judgment on the issue does not mean that foreseeability will not be the subject of proof and argument at trial. A defendant may move for judgment as a matter of law if the plaintiff's proof is deficient, and if the plaintiff survives that motion, the defendant may argue that the injury is so unanticipated that the defendant should not be considered negligent for failure to guard against it.

A second question is whether there has to be a specific jury instruction on the misfeasance/nonfeasance issue. Here, the key issue is whether the defendant acted affirmatively in creating a risk of injury. In *Fenrich*, the facts at the summary judgment stage were sufficient to justify resolving the misfeasance/nonfeasance issue at

due care to design a product that does not create an unreasonable risk of harm to anyone who is likely to be exposed to the danger when the product is put to its intended use or to any unintended yet reasonably foreseeable use. 346 N.W.2d 616, 626 n.2 (Minn. 1984) (Simonett, J., concurring specially).

In *Peterson v. Balach*, 294 Minn. 161, 174, 199 N.W.2d 639, 648 n.7 (1972), the court suggested that a jury might be instructed on various factors to determine the liability of landowners in cases involving injuries to entrants on land: "Among the factors to be considered might be the circumstances under which the entrant enters the land (licensee or invitee); foreseeability or possibility of harm; duty to inspect, repair, or warn; reasonableness of inspection or repair; and opportunity and ease of repair or correction."

152. 346 N.W.2d at 626 n.2.

153. The Third Restatement of Torts 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.

Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 3 (Am. Law Inst. 2010).

154. See, e.g., *Bjerke v. Johnson*, 742 N.W.2d 660, 667-68 (Minn. 2007); *Lundgren v. Fultz*, 354 N.W.2d 25, 28 (Minn. 1984).

trial.¹⁵⁵ Given the necessity of considering the totality of the circumstances in resolving the issue,¹⁵⁶ the most logical assumption is that the issue of whether there is misfeasance or nonfeasance has to be tested by a motion for judgment as a matter of law.

The factual causation issue is for the trier of fact pursuant to the standard instructions defining direct cause,¹⁵⁷ but the proximate

155. Fenrich v. Blake Sch., 920 N.W.2d 195, 207 (Minn. 2018).

156. *Satterfield v. Breeding Insulation Company*, 266 S.W.3d 347 (Tenn. 2008), is a good example of why it is necessary to consider the totality of the circumstances in determining whether the case involves misfeasance or nonfeasance. The case involved a suit by the estate of a daughter who alleged that she had contracted mesothelioma from repeated exposure to her father's asbestos-contaminated work clothes over an extended period of time. *Id.* at 351–52. The defendant-employer argued that it had no duty to her to prevent her exposure. *Id.* at 352. The court summarized the essential issue:

The underlying dispute in this case is fundamentally one of characterization and classification. Has Alcoa engaged in an affirmative act that created an unreasonable and foreseeable risk of harm to Ms. Satterfield? If Alcoa did create such a risk of harm, are there countervailing legal principles or policy considerations that warrant determining that Alcoa nevertheless owed no duty Ms. Satterfield? Or, alternatively, does this case involve an omission by Alcoa in failing to control the actions of Mr. Satterfield, its employee?

Id. at 355.

The Tennessee Supreme Court relied on Prosser and Keeton's distinction between misfeasance and nonfeasance:

In the determination of the existence of a duty, there runs through much of the law a distinction between action and inaction. . . . [T]here arose very early a difference, still deeply rooted in the law of negligence, between "misfeasance" and "nonfeasance"—that is to say, between active misconduct working positive injury to others and passive inaction or a failure to take steps to protect them from harm. The reason for the distinction may be said to lie in the fact that by 'misfeasance' the defendant has created a new risk of harm to the plaintiff, while by 'nonfeasance' he has at least made his situation no worse, and has merely failed to benefit him by interfering in his affairs.

Id. at 356 (quoting W. Page Keeton, Prosser and Keeton on the Law of Torts § 56, at 373 (5th ed.1984)).

The court used the classic example of a driver who sees a pedestrian in a crosswalk but fails to brake in time to avoid injuring her. *Id.* at 357. While the failure to apply the brakes is an omission, the driver drove the car negligently. *See id.* It's misfeasance rather than nonfeasance. *Id.* (citing John C.P. Goldberg & Benjamin C. Zipursky, *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 VAND. L. REV. 657, 691 (2001)). The court concluded that "Alcoa engaged in misfeasance that set in motion a risk of harm to Ms. Satterfield." *Id.* at 364.

157. The pattern instructions define "direct cause" as "a cause that had a substantial part in bringing about the (collision) (accident) (event) (harm) (injury)." 4 MNPRAC CIVJIG 27.10 (6th ed. 2014).

cause issue does present problems if it is a fact issue for the trier of fact. The proximate cause issue presents some problems, given the lack of consistency in the proximate-cause standards the supreme court has used in its decisions. For example, in 1896, Justice Mitchell framed it this way in *Christianson*:

What a man may reasonably anticipate is important, and may be decisive, in determining whether an act is negligent, but is not at all decisive in determining whether that act is the proximate cause of an injury which ensues. If a person had no reasonable ground to anticipate that a particular act would or might result in any injury to anybody, then, of course, the act would not be negligent at all; but, if the act itself is negligent, then the person guilty of it is equally liable for all its natural and proximate consequences, whether he could have foreseen them or not. Otherwise expressed, the law is that if the act is one which the party ought, in the exercise of ordinary care, to have anticipated was liable to result in injury to others, then he is liable for any injury proximately resulting from it, although he could not have anticipated the particular injury which did happen. Consequences which follow in unbroken sequence, without an intervening efficient cause, from the original negligent act, are natural and proximate; and for such consequences the original wrongdoer is responsible, even though he could not have foreseen the particular results which did follow.¹⁵⁸

But, in *Lubbers v. Anderson*, a 1995 case, the Minnesota Supreme Court framed the proximate cause test as requiring foresight:

We have said that in order for a party's negligence to be the proximate cause of an injury "the act [must be] one which the party ought, in the exercise of ordinary care, to have anticipated was likely to result in injury to others, . . . though he could not have anticipated the particular injury which did happen."¹⁵⁹

In *George v. Estate of Baker*, the supreme court recently stated that proximate cause means that the negligent act must have been "a

158. *Christianson v. Chicago, St. P., M. & O. Ry. Co.*, 67 Minn. 94, 97, 69 N.W. 640, 641 (1896). The supreme court has reaffirmed the standard several times. *See, e.g.*, *Kronzer v. First Nat. Bank of Minneapolis*, 305 Minn. 415, 426, 235 N.W.2d 187, 194 (1975); *Orwick v. Belshan*, 304 Minn. 338, 349, 231 N.W.2d 90, 97 (1975); *Hillgoss v. Cross Cos.*, 304 Minn. 546, 547, 228 N.W.2d 585, 586 (1975); *Dellwo v. Pearson*, 259 Minn. 452, 454-56, 107 N.W.2d 859, 861-62 (1961).

159. *Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn. 1995).

substantial factor in the harm's occurrence."¹⁶⁰ That is the standard used in the pattern jury instructions on proximate cause, although the pattern instruction uses the term "direct cause."¹⁶¹ The court in *George* rejected the "but for" standard as the proximate cause standard "because '[i]n a philosophical sense, the causes of an accident go back to the birth of the parties and the discovery of America.'"¹⁶² The court said, however, that while the defendant's negligent conduct must have been a "substantial factor" in the injury, it also had to, at a minimum, have been a "but-for" cause of the plaintiff's injury.¹⁶³ But-for causation becomes a necessary but not sufficient condition for causation.¹⁶⁴ The relationship of the "substantial factor" standard to determinations concerning the scope of a defendant's responsibility for the consequences of negligent conduct is not clear.

That leaves the law with three embedded standards. Sometimes, the courts, concerned about the proximate cause issue, will conclude that an obvious but-for cause of an injury is not a cause, but an "occasion" for the injury.¹⁶⁵ The real difficulty is that Minnesota law lacks a mechanism for resolving issues concerning scope of liability. Perhaps the simplest view is to focus on the negligent acts that made the defendant's acts tortious, and then asking whether the injury that occurred is similar enough for the defendant to be responsible for it. That is the position taken in the Third Restatement of Torts.¹⁶⁶

160. 724 N.W.2d 1, 10 (Minn. 2006). The Minnesota Supreme Court reaffirmed this as the test for proximate cause in case involving Civil Damages Act claims. See *Osborne v. Twin Town Bowl, Inc.*, 749 N.W.2d 367, 372 (Minn. 2008).

161. 4 MNPRAC CIVJIG 27.10 (6th ed. 2014).

162. *George*, 724 N.W.2d at 10–11 (citation omitted).

163. *Id.*

164. *Id.*

165. See *Kryzer v. Champlin Amer. Legion No. 600*, 494 N.W.2d 35, 37 (Minn. 1992) (intoxication of patron who was injured while being ejected from the legion club was not the cause of her injury, but only the "occasion").

166. The Third Restatement's provision governing the scope of liability provides, simply, that "[a]n actor's liability is limited to those harms that result from the risks that made the actor's conduct tortious." RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 29 (AM. LAW INST. 2010). The Restatement rejects the term "proximate cause" because of the confusion it causes. *Id.* § 29 cmt. b. The concept is straightforward. First determine what risks led to the conclusion that the defendant acted negligently. Second, determine whether the injury sustained by the plaintiff falls within the scope of the negligently created risks. The Reporters' Notes to comment (b) of section 29 offered the four alternative instructions:

(1) You must decide whether the harm to the plaintiff is within the scope of the defendant's liability. To do that, you must first

VI. CONCLUSION

Fenrich v. Blake School highlights recurring issues in Minnesota tort law, including the special relationship issue, the misfeasance/nonfeasance problem, and the issue of when foreseeability becomes a question for the trier of fact and not the judge. It also invites inquiry into the appropriate method of resolving those issues at trial, along with the other basic issues in a negligence case.

The essential question in *Fenrich* concerned a school's responsibility for the actions of one of its students in causing an accident while

consider why you found the defendant negligent [or some other basis for tort liability]. You should consider all of the dangers that the defendant should have taken reasonable steps [or other tort obligation] to avoid. The defendant is liable for the plaintiff's harm if you find that the plaintiff's harm arose from the same general type of danger that was one of those that the defendant should have taken reasonable steps [or other tort obligation] to avoid. If the plaintiff's harm, however, did not arise from the same general dangers that the defendant failed to take reasonable steps [or other tort obligation] to avoid, then you must find that the defendant is not liable for the plaintiff's harm.

- (2) You must decide whether the harm to the plaintiff is within the scope of the defendant's liability. The plaintiff's harm is within the scope of defendant's liability if that harm arose from the same general type of danger that was among the dangers that the defendant should have taken reasonable steps [or other tort obligation] to avoid. If you find that the plaintiff's harm arose from such a danger, you shall find the defendant liable for that harm. If you find the plaintiff's harm arose from some other danger, then you shall find for the defendant.
- (3) To decide if the defendant is liable for the plaintiff's harm, think about the dangers you considered when you found the defendant negligent [or otherwise subject to tort liability]. Then consider the plaintiff's harm. You must find the defendant liable for the plaintiff's harm if it arose from one of the dangers that made the defendant negligent [or otherwise subject to tort liability]. You must find the defendant not liable for harm that arose from different dangers.
- (4) You must decide whether the plaintiff's harm was of the same general type of harm that the defendant should have acted to avoid. If you find that it is, you shall find for the plaintiff. If you find that it is not the same general type, you must find for the defendant.

Id. § 29 cmt. b, Reporters' Note. The fourth alternative is the simplest. *See id.* The scope of liability concept is captured in the first sentence. *See id.* The second would not be used when the case is submitted on a special verdict. *See id.*

on a trip with other students and an assistant and volunteer coach to an out-of-season cross country meet in another state.¹⁶⁷ The school's liability turned on whether there was a special relationship between the school and the student that would impose a duty on the school to use reasonable care for the protection of a third person, and, if not, whether the school created an affirmative risk of injury because of its involvement in coordinating arrangements to send the students to the meet, and, if it did, whether it was foreseeable to the school that an accident involving a student driver would occur.¹⁶⁸

The micro view is that summary judgment was inappropriate and that the key issues had to be resolved at trial.¹⁶⁹ But decisions reverberate. *Fenrich* stands for broader propositions. One is that the court rejected any categorical rule that schools could not be liable for injuries caused by students to third parties.¹⁷⁰ Although that may appear to create the possibility for a potentially unlimited expansion of liability,¹⁷¹ the court's fact-specific analysis of the case and disinclination to find a special relationship between the school and student that would impose a duty on the school for the protection of third persons belies that concern.

In cases involving close calls on the foreseeability issue, the supreme court continues to require resolution of the issue by the trier of fact where there are conflicted inferences that can be drawn from the facts. The court's continued cautions on that issue are certainly consistent with past decisions, but the impact is that the court's footprint in its recent decisions is clear in requiring careful consideration of summary judgment motions involving the foreseeability issue.

167. *Fenrich v. Blake Sch.*, 920 N.W.2d 195, 198 (Minn. 2018).

168. *Id.* at 201-02.

169. *Id.* at 205.

170. *Id.* at 202.

171. *Id.* at 207 (Anderson, J., dissenting).

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