1987

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Recommended Citation
Available at: http://open.mitchellhamline.edu/wmlr/vol13/iss4/9
PRODUCTS LIABILITY IN MINNESOTA: THE MANUFACTURER'S DUTY TO WARN OF FORESEEABLE MISUSE


INTRODUCTION

The Minnesota Supreme Court recently readdressed the issue of whether a manufacturer has a duty to warn users of risks arising from foreseeable misuse of its products.1 The court held a manufacturer has a duty not only to warn of risks from any foreseeable use of its products, but also of risks arising from foreseeable misuse of its products.2 This may include the user's failure to properly maintain safety devices provided by the manufacturer.3 The court's holding in Germainn v. F.L. Smithe Machine Co.4 was not a surprise but the court's analysis was, as it affirmed both the court of appeals5 and trial court, as well as the spirit of the supreme court's holdings in similar recent cases.6

The importance of the Germainn decision goes beyond its holding. Of greater significance is the supreme court's treatment of the issue and its analysis in arriving at its holding. Generally, duty to warn of product misuse issues raise mixed questions of law and fact pertaining to foreseeability and duty.7 Recent supreme court and court of

2. Id. at 925.
3. See id. But see Westerberg v. School Dist. No. 792, Todd County, 276 Minn. 1, 10, 148 N.W.2d 312, 317 (1967) ("[A] manufacturer is not required to anticipate or foresee that a user will alter [a product's] condition so as to make it dangerous, or that he will continue to use it after it becomes dangerous due to alteration in safety devices intended to protect the user from harm.")
4. 395 N.W.2d 922.
6. See, e.g., Bilotta v. Kelley Co., 346 N.W.2d 616, 622 (Minn. 1984) (holding failure to warn claims based on a negligence concept); Holm v. Sponco Mfg., Inc., 324 N.W.2d 207, 213 (Minn. 1982) (rejecting the latent-patent danger rule in favor of a reasonable care balancing test); Frey v. Montgomery Ward & Co., 258 N.W.2d 782, 787-88 (Minn. 1977) (holding the seller has a duty to warn of any dangers which might arise from a particular use the seller knows or should know is intended by the purchaser).
7. "The duty to warn rests on foreseeability." Westerberg, 276 Minn. at 9, 148 N.W.2d at 317. Compare Frey, 258 N.W.2d at 788 ("whether the risk for which there was no warning was a reasonably foreseeable one was properly a jury question.") with Germainn, 395 N.W.2d at 924 ("The question of whether a legal duty to warn exists is a question of law for the court—not one for jury resolution.") (citing PROSSER & KEE-
appeals cases in Minnesota indicated a willingness to submit issues of foreseeability to the jury. In Germann, however, the Minnesota Supreme Court viewed the issue as one of duty, a question of law, which in turn will increase the court's influence on decisions in this area. If this was the court's intent, the court has repositioned itself. It has moved from a court-passive, jury-oriented decision-making process to one in which the court will have much greater influence on policy considerations arising out of duty to warn of product misuse questions. This change is laden with policy ramifications which should be worrisome to manufacturers. Consequently, manufacturers are in a more uncertain position than they were before the decision.

This Comment is divided into two parts. The first part discusses the Germann holding. This includes a discussion of the legal considerations pertaining to the manufacturer's duty to warn in situations involving product misuse. The first part also outlines the recent history in Minnesota of the duty to warn for product misuse with particular attention focused on the Westerberg v. School District No. 792 of Todd County and Frey v. Montgomery Ward & Co. decisions.

The second part of the Comment compares the court of appeals' Germann opinion with that of the supreme court. The court of appeals, citing Frey, framed its analysis in a foreseeability context. This made the dispositive issue a jury question. The supreme

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8. See, e.g., Frey, 258 N.W.2d at 788; Germann, 381 N.W.2d at 508.
9. See Germann, 395 N.W.2d at 924.
10. See id.

There are two opposing policy considerations in the law of products liability: that a manufacturer is responsible for injuries from defective products and that a manufacturer is not the insurer of his products. Ideally, a balance should be maintained; however, the expanding responsibility of a manufacturer encroaches on the latter policy.

Id. See also Note, Products Liability in Texas: Foreseeability and Warnings, 58 Tex. L. Rev. 1323, 1334-35 (1980) (Three policies justify strict liability in design cases: (1) reduction of "accident and safety costs by imposing liability on the seller of unreasonably dangerous products, thereby deterring the marketing of such products in their unimproved forms"; (2) minimization of "the impact of accidents on society by spreading the economic costs of accidents . . . "; and (3) eliminating the hidden subsidy to manufacturers that consists of the risk absorbed by consumers). Id.

12. 276 Minn. 1, 148 N.W.2d 312 (1967).
13. 258 N.W.2d 782.
14. Id. at 788.
15. Id.
court opinion, on the other hand, made it very clear the issue was whether the manufacturer had a duty to warn; duty properly being a question of law for the courts. The second part concludes with the author's evaluation of the supreme court's treatment of the issue in Germann.

I. Duty to Warn Background

An historical review of the common law regarding a manufacturer's duty to warn of risks from foreseeable product misuse reveals a convergence of two theories, negligence and strict liability. Under common law negligence, liability turns on the breach of the duty "to warn of a danger inherent in the use of the chattel . . . ." A manufacturer with actual or constructive knowledge of dangers to product users has a duty to warn of those dangers. This duty to warn rests on foreseeability by the manufacturer of risk to the users. There was certainly no duty at common law to warn against unforeseeable use or misuse. Where the chattel was safe for the use for which it was intended, the courts often found no manufacturer duty or liability for user actions falling within the broad category of "improper use."

17. Id. at 924.
18. See infra notes 119-40 and accompanying text.
19. Westerberg, 276 Minn. at 7, 148 N.W.2d at 316 (citing Annotation, Manufacturer's or seller's duty to give warning regarding product as affecting his liability for product-caused injury, 76 A.L.R.2d 9, 16 (1961) (hereinafter Annotation, 76 A.L.R.2d 9)).
20. Westerberg, 276 Minn. at 8, 148 N.W.2d at 316 (citing Annotation, 76 A.L.R.2d 9, 16). See also Restatement (Second) of Torts § 388(a) (1965) (a supplier is liable for the physical harm caused by use of the chattel in a manner for which it was supplied by a person to whom it was supplied, if the supplier "knows or has reason to know that the chattel is or is likely to be dangerous for the use of which it is supplied . . . .").
21. See Westerberg, 276 Minn. at 7-11, 148 N.W.2d at 316-18.
22. See Prosser and Keeton, supra note 11, § 96, at 685. With respect to unforeseen use:
A manufacturer . . . is subject to liability for failing either to warn or adequately to warn about a risk or hazard inherent in the way a product is designed that is related to the intended uses as well as the reasonably foreseeable use that may be made of the products it sells. There can be no negligence in failing to warn about a risk in the absence of evidence that would justify a finding that a manufacturer . . . knew or in the exercise of ordinary care should have known about it.

Id. (footnote omitted) (emphasis added). With respect to misuse, see infra note 38 and accompanying text.
23. See, e.g., infra notes 40-43 and accompanying text.
Strict products liability, a common law alternative to negligence in duty to warn actions, was adopted in Minnesota in 1967.24 The Restatement (Second) of Torts, section 402A addresses strict liability.25 In a section 402A action, a plaintiff/user must establish the defendant/manufacturer's product was in an unreasonably dangerous defective condition when it left the manufacturer's control and the defect was the proximate cause of the injury.26 The user must also establish the injury did not result from abnormal use.27 If the manufacturer could reasonably foresee danger from a particular use, that manufacturer would have a duty to warn users of that danger.28

Causes of action for failure to warn most frequently arise under either strict liability or negligence theories.29 Despite different bases of liability under strict liability30 and negligence,31 the conceptual


25. Restatement (Second) of Torts § 402A (1965) provides in part:
   (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

   Id. at comment g.

26. The seller is not liable when he delivers the product in a safe condition, and subsequent mishandling or other causes make it harmful by the time it is consumed. The burden of proof that the product was in defective condition at the time that it left the hands of the particular seller is upon the injured plaintiff . . . .

   Id. at comment h. “A product is not in a defective condition when it is safe for normal handling and consumption. If the injury results from abnormal handling . . . . the seller is not liable.”

27. See id. “Where . . . [the seller] has reason to anticipate that danger may result from a particular use, . . . he may be required to give adequate warning of the danger . . . .”

28. A warning claim may be brought under strict liability, negligence, or breach of warranty theories. As commentators have pointed out, courts rarely decide a warning case under a breach of warranty theory. See, e.g., Bressler, The Warning Claim in an Arizona Products Liability Action: Limitations on the Duty to Warn, 25 Ariz. L. Rev. 395, 397 (1983). Therefore, this Comment will not discuss warning cases in terms of breach of warranty.

30. In strict liability, the focus is on the condition of the product. See Hauenstein v. Locitite Corp., 347 N.W.2d 272, 275 (Minn. 1984) (“[a] condition is unreasonably dangerous if it is dangerous when used by an ordinary user who uses it with the knowledge common to the community as to the product's characteristics and common usage.”)

31. In negligence, the focus is on the conduct of the manufacturer. The question is whether the manufacturer was negligent in failing to provide adequate warnings or instructions. See id.
issue for duty to warn is essentially the same under both theories. The determinative question in both strict liability or negligence is whether the particular product use which resulted in injury to the user was sufficiently foreseeable to be regarded as a danger absent a warning. If the misuse is within the scope of manufacturer foreseeability, the manufacturer has a duty to warn. If the misuse was not foreseeable, the manufacturer is generally not liable under either negligence or strict product liability theories.

A. Minnesota Law

Historically, under Minnesota law, "[w]here a chattel is safe for the use for which it is intended, ordinary care does not require the manufacturer to anticipate its improper use." The Westerberg court acknowledged "[t]he duty to warn rests on foreseeability." The crux of its opinion was the determination that "a manufacturer is not required to anticipate or foresee that a user will alter [the condition of

32. Bilotta, 346 N.W.2d at 622. See Hauenstein, 347 N.W.2d at 274:
Several jurisdictions have recognized that the standard for the duty to warn in strict liability cases is based upon concepts of negligence. If the failure to warn is not negligent, the product is not 'defective,' and there is no strict liability. See Annot., 53 A.L.R.3d 299, 246 (1971). This parallel was noted in the dissenting opinion in Holm v. Sponco Manufacturing, Inc., 234 N.W.2d 207 (Minn. 1982): 'As a practical matter, where the strict liability claim is based on ... failure to warn ... there is essentially no difference between strict liability and negligence.'

1 FRUMER & FRIEDMAN, PRODUCT LIABILITY § 8.03[1] (1986) [hereinafter Frumer]. Liability for product misuse or alteration in duty to warn cases may be said to turn on both foreseeability and causation, although foreseeability is ultimately determinative of both. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 99, at 659 n.72 (4th ed. 1971) [hereinafter W. Prosser].

33. Bilotta, 346 N.W.2d at 622; Germann, 381 N.W.2d at 508.

34. But cf. Parks v. Allis-Chalmers Corp., 289 N.W.2d 456 (Minn. 1980) (manufacturer liable for a dangerous product despite warnings). The Parks jury found that the defendant-manufacturer was 51% negligent and the plaintiff-user was 49% negligent when the user lost an arm in a harvester manufactured by the defendant. The plaintiff in Parks ignored conspicuous warnings and failed to follow the manufacturer's directions, yet the majority of the court determined the accident was foreseeable. Id.

35. See FRUMER, supra note 32, § 8.093.

36. See W. PROSSER, supra note 32 § 96(a) ("It is often said that there is no duty to guard against unforeseeable misuse .... [A] misuse may be so rare and unusual that a manufacturer must be regarded as not negligent as a matter of law in failing to warn against a damaging event produced in this manner.")

37. See Restatement (Second) of Torts § 402A, comment n.

38. Westerberg at 8, 148 N.W.2d at 316 (citing Hartmon v. National Heater Co., 240 Minn. 264, 272, 60 N.W.2d 804, 810 (1953); Despacht Oven Co. v. Rauenhorst, 229 Minn. 436, 447-48, 40 N.W.2d 73, 81 (1949); Greuwend v. Northern States Power Co., 226 Minn. 216, 221, 32 N.W.2d 320, 323 (1948)).

39. Westerberg at 9, 148 N.W.2d at 317 (citing FRUMER, supra note 32, § 8.03).
its product] so as to make it dangerous, or that he will continue to use it after it becomes dangerous due to alteration in safety devices intended to protect the user from harm" as a matter of law.40 User misuse was, by definition, outside the definition of manufacturer foreseeability.41

Twenty years ago, in Westerberg, however, it was accepted law that a manufacturer with knowledge of foreseeable dangers had a duty to warn product users.42 Duty to warn was a duty distinct from a manufacturer's duty to protect users from injuries arising from any misuse, foreseeable or not.43 There was, in actuality, no manufacturer liability for user misuse in Minnesota.44

Liberalizing pressures within the realm of product liability worked inexorably to expand the limits of manufacturer liability.45 Within ten years of Westerberg,46 the court had expanded and linked the duty to warn of dangers from foreseeable use to the duty to warn of certain dangers from misuse.47 The supreme court in Frey held the duty to warn consisted of two duties: "(1) The duty to give adequate in-

40. Id. But compare Germann, 395 N.W.2d at 925 (characterizing Westerberg as stating that a manufacturer did not have to warn of "every conceivable danger that might arise from misuse," but implied that there may be some dangers arising from misuse of which a manufacturer must warn), with Frey, 258 N.W.2d at 788 (where the supreme court characterized Westerberg stated that "the manufacturer's duty to warn must rest on foreseeability, with no duty to warn of an improper use that could not have been foreseen."). Both cases omitted all reference to the Westerberg statement that misuse is not foreseeable as a matter of law. See infra notes 95-97 and accompanying text.

41. Westerberg at 11, 148 N.W.2d at 318.

42. Id. at 8, 148 N.W.2d at 316. See Hill v. Wilmington Chemical Corp., 279 Minn. 336, 341-42, 156 N.W.2d 898, 892 (1968) (wherein the supreme court held that a manufacturer, who sells a product to an intermediary who in turn markets a finished product, had no opportunity or duty to warn the ultimate consumer/user but had a duty to warn the intermediary of dangerous propensities of the product unknown to the intermediary).

43. Westerberg at 7, 148 N.W.2d at 316.

44. Id. at 11, 148 N.W.2d at 318. The Westerberg court supported its holding by stating that the manufacturer is notable for injury because the product is "mishandled, or used in some unusual and unforeseeable way . . . ." Id. at 318-19 (citing W. Prosser, Torts, § 96 (3d ed. 1964)).


46. Ten years after Westerberg, the Minnesota Supreme Court made two important decisions. In September, 1977, the supreme court, in Frey, determined that under the theory of negligence a manufacturer would be liable for injury from product misuse if that misuse were foreseeable. See infra notes 74-75 and accompanying text. Only two months later, in November, 1977, the supreme court, in McCormack, adopted strict liability as a product liability theory. See supra notes 24-28 and accompanying text.

47. See infra notes 48-50 and accompanying text.
uctions for safe use; and (2) the duty to warn of dangers inherent in improper usage." Frey recognized a distinction between adequate instructions for effective use and adequate warnings for safe use. The court argued, however, the better reasoned cases held "directions for use, which merely tell how to use the product, and which do not say anything about the danger of foreseeable misuse, do not necessarily satisfy the duty to warn." As a practical matter, the two duties have become inextricably linked under the duty to warn.

The major significance of Frey lies in its expansion of manufacturer liability. In Westerberg, the supreme court limited liability by excluding product misuse from the scope of foreseeability as a matter of law. The Frey court ignored the Westerberg limitation. Instead, it allowed a more liberal procedure wherein the trier of fact determined whether the use or misuse was foreseeable. Accordingly, the issue for the supreme court in Frey and the court of appeals in Germann was not whether there were any limits on foreseeability as a matter of law, but merely whether the jury determined the use or

48. 258 N.W.2d at 787 (emphasis added).
49. See id.
50. Id. at 788 (quoting Frumer, supra note 32, § 8.05(1).
51. See infra notes 53-56 and accompanying text.
52. Westerberg at 10-11, 148 N.W.2d at 317-18.
53. See supra note 40 and infra note 98 and accompanying text.
54. Frey, 258 N.W.2d at 788.
55. See id., Germann, 381 N.W.2d at 503-04. There are limitations on a manufacturer's duty to warn other than foreseeability. For example, while a manufacturer has a duty to protect against latent dangers, a manufacturer generally has no duty to guard against obvious dangers or defects. "Generally, there is no duty to warn if the user knows or should know of potential danger." Minneapolis Soc'y of Fine Arts v. Parker-Klein Assoc. Architects, Inc., 354 N.W.2d 816, 821 (Minn. 1984) (citing Strong v. E.I. Dupont de Nemours Co., 667 F.2d 682, 686-87 (8th Cir. 1981); see also Westerberg at 8, 148 N.W.2d at 316 (there is no duty resting upon a manufacturer or seller to warn of a product-connected danger which is obvious, or of which the person who claims to be entitled to warning knows, should know, or should, in using the product, discover." (quoting 76 A.L.R.2d 9, 28 (1961)); Restatement (Second) of Torts § 388(b), comment k (1965):

One who supplies a chattel to their customer to use for any purpose is under a duty to exercise reasonable care to inform them of its dangerous characteristics . . . but only if he has no reason to expect that those for whose use the chattel is supplied will discover its condition and realize the danger involved.

Id.

This limitation on duty to warn actions arose by extension of the patent danger doctrine in design defect cases. Bressler, supra note 29, at 404-05 (The obvious danger doctrine was first developed for design defect cases in Campo v. Scofield, 301 N.Y. 468, 472, 95 N.E.2d 802, 804 (1950). The New York Court of Appeals ruled against the plaintiff holding that the defendant-manufacturer's duty was limited to latent defects and not to guarding against obvious defects. The Campo reasoning was later used in duty to warn cases. The obvious danger doctrine in design defect cases is now less certain. In recent years, courts have modified the obvious danger doctrine and al-
misuse to be foreseeable.\textsuperscript{56}

\section*{II. The \textsc{Germann} Decision}

The relevant facts of the case were not disputed by the parties.\textsuperscript{57} On July 21, 1982, Dan Germann severely injured his left leg just below the knee when it was caught in a hydraulic press manufactured by the F. L. Smithe Machine Company. Germann was operating the machine as an employee of Quality Park Products, a third-party defendant. The press (referred to as “PHP 33”) was used by Quality Park to cut paper stock into envelopes. Basically, PHP 33 consisted

\begin{quote}
\textit{Micallef v. Miehle Co.,} 39 N.Y.2d 376, 379, 348 N.E.2d 571, 578, 384 N.Y.S.2d 115, 117 (1976) (the New York court found for the plaintiff in holding that the duty of the manufacturer should not depend on the obviousness of the danger; the obviousness goes to what constitutes reasonable care).
\end{quote}

Despite these considerations, it is unclear whether the obvious danger doctrine has been completely overruled. \textit{See, e.g., Byrns v. Riddell, Inc.,} 113 Ariz. 264, 267, 550 P.2d 1065, 1068 (1976) (the Arizona Supreme Court abandoned the patent danger doctrine in design defect cases by holding that the obviousness of the danger is only one factor to consider in determining whether the defect is unreasonably dangerous); \textit{Micallef,} 39 N.Y.2d at 387, 384 N.Y.S.2d at 122, 348 N.E.2d at 578 (the obviousness of a danger will not prevent a plaintiff from establishing his case but will be considered as a factor in a negligence action); \textit{Olson v. A. W. Chesterton Co.,} 256 N.W.2d 530, 536 (N.D. 1977) (“\[T\]he manufacturer of the obviously defective product ought not escape because the product was obviously a bad one. The law, we think, ought to discourage misdesign rather than encouraging it in its obvious form.” \textit{Id.} (quoting \textit{Palmer v. Massey-Ferguson, Inc.,} 3 Wash. App. 508, 517, 476 P.2d 713, 718-19 (1970)). Some dangers, for example, a sharp knife, should be obvious enough to eliminate the need for a warning. Bressler, \textit{supra} note 29, at 406. \textit{See also Micallef,} 39 N.Y.2d at 387, 384 N.Y.S.2d at 122, 348 N.E.2d at 578 (The obviousness of a danger should be left as part of the defendant’s affirmative defense and should not limit the plaintiff from establishing a cause of action). Otherwise, a manufacturer would be obligated to warn of all dangers. Bressler, \textit{supra} note 29, at 406. The “truly obvious danger” suggests a limit on the duty to warn of obvious dangers to parameters of which the court will likely determine on a case-by-case basis. \textit{Id.}

A second limitation on a manufacturer’s duty to warn under a strict liability theory is the trend away from absolute liability. \textit{Id.} Absolute liability would occur without regard for fault or negligence. BLACK'S LAW DICTIONARY 9 (5th ed. 1979). Under a strict liability theory, a manufacturer may be presumed to have knowledge of dangers whether foreseeable or not. Bressler, \textit{supra} note 29, at 406. Accordingly, a manufacturer could be absolutely liable for all injuries resulting from use of its products. \textit{Id.} In the context of duty to warn, this is nonsensical. \textit{See, e.g., id.} A manufacturer cannot warn of a danger which is unknown or unforeseen. \textit{Id.} A manufacturer’s duty to warn under strict liability does not extend to absolute liability. \textit{Id.} Cf. \textit{Bilotta,} 346 N.W.2d at 622 (under strict liability knowledge of the condition of the product and the risks involved in that condition will be imputed to the manufacturer, whereas, in negligence, these elements must be proven). It is properly limited to foreseeability. \textit{Id.}

\textsuperscript{56} Frey, 258 N.W.2d at 788; Germann, 381 N.W.2d at 506.

of a stationary table and a movable table that moved toward and under the stationary table thereby creating a "pinch point."\(^{58}\)

PHP 33 had three separate safety devices intended to prevent the type of accident which occurred. First, an emergency stop button could stop all drives in the press. Second, a pressure sensitive "breaker bar" extended along the edge of the stationary table facing the moving table. When pressure was exerted on the bar, the tables popped apart thereby creating a safe clearance between the two tables. Third, a horizontal guard bar, bolted in two places to the stationary table, physically prevented the operator from moving his leg into a position between the two tables.\(^{59}\)

When the accident occurred, none of the three safety devices were functioning. Wires leading to the emergency stop button and the pressure sensitive breaker bar were disconnected.\(^{60}\) The guard bar was loosely connected by only one bolt and was hanging vertically instead of horizontally.\(^{61}\)

Germann had received only a few minutes of training on PHP 33 by a co-worker. His foreman had trained him extensively on a similar machine which did not have the safety devices that PHP 33 had. Significantly, Germann testified that, prior to the accident, he was unaware that PHP 33 was supposed to have a guard bar. Indeed, there were no warnings or decals on the machine referencing the guard bar.\(^{62}\) Furthermore, neither the service or operator's manuals mentioned the existence of a guard bar except in the parts list.\(^{63}\)

\(^{58}\). See at Germann, 395 N.W.2d at 923.

\(^{59}\). Tr. at 163, 164, 328-35.

\(^{60}\). Germann's leg hit the breaker bar but the expected safe clearance was not created. Tr. at 52. Fellow employees pushed the emergency stop button repeatedly but the tables continued to squeeze Germann's leg. The entire machine had to be unplugged to release Germann's leg. Tr. at 47-50.

\(^{61}\). Plaintiff's expert testified that because the machine had to be shipped to the purchaser in two separate boxes, the guard bar had to be attached after installation by the purchaser. Tr. at 299-300. This was presumably done because the maintenance foreman testified that he had done so. Tr. at 345-46. Further, the foreman testified that he removed the guard bar to perform repairs on the machine at least one or two times during the six and one-half years that the machine was in operation. Tr. at 351. Another employee testified that the bar had loosened over time until it hung loosely by just one bolt. Tr. at 233. Yet another testified that it had been hanging by one bolt for several months. Tr. at 145. There is conflicting testimony as to whether this condition was reported to Quality Park. Tr. at 348, 354, 235, 270.

\(^{62}\). The trial court stated that "[t]he uncontroverted evidence demonstrated that nowhere on the . . . machine, or in any of the literature accompanying the machine, was any reference made to the existence or function of the safety guard bar." Germann, 381 N.W.2d at 506.

\(^{63}\). Id. There were two manuals provided with the machine, the operator's manual and the service manual. Both discussed the emergency stop button. Only the service manual explained the pressure sensitive breaker bar. Id.
The *Germann* case was argued on a strict liability theory only. By special verdict, the jury found PHP 33 was not defective by reason of design. Significantly, however, they found the machine was defective because of Smithe's failure to warn of dangers or instruct as to safe use.

Smithe appealed. It argued *Westerberg* was "virtually indistinguishable" from this case. Since the court, in *Westerberg*, held that failure to normally maintain and repair a product is not, as a matter of law, foreseeable, Smithe argued it was not required to foresee the neutralization of the safety features on its product. Smithe also argued, in the alternative, the jury's conclusion that the neutralization of safety features was reasonably foreseeable found no support in the evidence.

**A. The Courts' Analysis**

The Minnesota Court of Appeals arrived at its holding in *Germann* by analyzing *Westerberg* in light of *Frey*. The court of appeals quoted the *Westerberg* rule as "[w]here a chattel is safe for the use for which it is intended, ordinary care does not require the manufacturer to anticipate its improper use." The court of appeals believed that, in *Frey*, the supreme court had subsequently limited this rule. The court of appeals quoted *Frey* as holding "the duty to warn consists of two duties: '(1) The duty to give adequate instructions for safe use; and (2) the duty to warn of dangers inherent in improper usage.'" The court of appeals emphasized *Frey* also stated "whether the risk for which there was no warning was a reasonably foreseeable one was properly a jury question." Based on *Frey*, the court of appeals, in *Germann*, concluded "the issue of foreseeability of the danger arising

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64. *Id.*
65. The jury awarded damages to *Germann* of $100,000 and assigned fault on a 50-50 basis to Smithe and Quality Products. *Germann*, 395 N.W.2d at 924 n.3.
66. Smithe appealed from the judgment and from the trial court's order denying its motion for a new trial or judgment notwithstanding the verdict. *See id.* at 924.
68. *See Germann*, 395 N.W.2d at 924; *see also infra* notes 98-101 and accompanying text (detailed discussion of the court's analysis in *Westerberg*).
69. *Germann*, 395 N.W.2d at 924-25. Smithe used a selective eye in overlooking *Frey* which interpreted *Westerberg* as treating misuse as a foreseeability or fact issue. *See infra* text accompanying notes 76-79.
70. *Brief for Appellant at 18-21, Germann*, 395 N.W.2d 922.
71. *See Germann*, 381 N.W.2d at 508; *infra* text accompanying notes 72-76.
72. *Germann*, 381 N.W.2d at 508 (citing *Westerberg*, 276 Minn. at 8, 148 N.W.2d at 316).
73. *See id.*
74. *Id.* (quoting *Frey*, 258 N.W.2d at 787) (emphasis in original).
75. *Frey*, 258 N.W.2d at 787; *see Germann*, 381 N.W.2d at 508.
from the failure to maintain the safety devices was properly a jury question." 76 It sustained the jury findings. 77

The Minnesota Supreme Court affirmed the court of appeals, but with a different approach. The supreme court viewed the primary issue as "whether Smithe had a legal duty to warn users of the dangers of using the PHP 33 when the safety bar was not properly attached." 78 The supreme court stated this was a matter for the court—not one for jury resolution. 79

To determine whether a duty existed, the supreme court went to the event causing the damage and looked back to the alleged negligent act. 80 "If the connection is too remote to impose liability as a matter of public policy," the court would hold there was no duty. 81 If the consequence was direct and was the type of event that should have been foreseeable, the court would hold, as a matter of law, a duty existed. 82

The supreme court distinguished the factual circumstances of Westerberg 83 from Germann as it examined the connection between the alleged negligent act and the event causing the injury. 84 Comparing the facts of the two cases, the supreme court noted, in Westerberg, the manufacturer had installed the safety device on the washer lid. 85 In Westerberg, then, it was "only remotely foreseeable that the safety feature would be altered or allowed to fall into disrepair in a manner so

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76. Germann, 381 N.W.2d at 508.
77. Id. at 509.
78. Germann, 395 N.W.2d at 924.
79. Id.
80. Id. Germann argued that Smithe should have warned operators that the safety bar should be properly attached for the safe operation of the machine. Id.
81. Id.
82. Id.
83. The supreme court limited its use of Westerberg to factual differentiation. See Germann, 395 N.W.2d at 925. Although the defendant-manufacturer, Smithe, read Westerberg to limit duty and thereby relieve a manufacturer from liability for misuse, the supreme court discounted that argument. See id. The court noted that its later cases demonstrated that where "a manufacturer should anticipate that an unwarned operator might use the machine in a particular manner so as to increase the risk of injury and the manufacturer has no reason to believe that users will comprehend that risk, a duty to warn may exist." Id. (citing Bilotta v. Kelley Co., 346 N.W.2d 616, 621 (Minn. 1984); Holm v. Sponco Mfg., Inc., 324 N.W.2d 207, 212 (Minn. 1982); Frey v. Montgomery Ward & Co., 258 N.W.2d 782, 786 (Minn. 1977); Clark v. Rental Equip., Co., 300 Minn. 420, 426, 220 N.W.2d 507, 511 (1974)).
84. Germann, 395 N.W.2d at 925. The court first noted, however, that, in certain respects, the two cases were indistinguishable. For example, both cases involved injury arising from a machine that was approximately six years old. Id. Both machines were heavily used. Id. And both accidents resulted from faulty maintenance of safety devices by a purchase-owner-employer. Id.
85. Id.
as to increase any risk of injury to a user.”

In *Germann*, however, the safety bar was designed to be attached by the purchaser. Furthermore, it was designed so the bar would have to be removed for servicing.

The supreme court concluded the risk of misuse from improper attachment or reattachment in *Germann* “was foreseeable; it was not remote; and the danger of injury to a user because of the misuse was likewise foreseeable.” The court held “Smithe had a legal duty to warn operators of the peril of running the press without a properly attached and operating safety bar.”

**III. ANALYSIS**

*Westerberg* is an important case in both the supreme court and court of appeals analyses of *Germann*. The supreme court distinguished *Germann* from *Westerberg* in terms of facts and holdings. The court of appeals relied heavily on *Frey*, a case which significantly modified *Westerberg*, in its analysis.

The general rule of *Westerberg* was that the “duty to warn rests on foreseeability.” The significance of *Westerberg*, however, was that duty was limited by improper use. The *Westerberg* court stated this limitation to duty on three separate occasions. First, the court said “[t]he manufacturer of a chattel can hardly be expected to warn of every conceivable danger that might arise from misuse of the chattel or failure to maintain it after it breaks down.” Second, the court stated “[w]here a chattel is safe for the use for which it is intended, ordinary care does not require the manufacturer to anticipate its improper use.” Finally, the *Westerberg* court made itself even clearer with respect to foreseeability as it related to duty by stating “a manufacturer is not required to anticipate or foresee that a user will alter [a product’s] condition so as to make it dangerous, or that he will continue to use it after it becomes dangerous due to alteration in safety devices intended to protect the user from harm.”

The *Frey* court substantially mischaracterized the spirit of *Westerberg* and found the manufacturer was liable. *Frey* highlighted foresee-
ability, downplayed duty, and omitted any mention of Westerberg having limited foreseeability by improper use.98 The Frey court mischaracterized Westerberg when it stated "[w]e held [in Westerberg] the manufacturer's duty to warn must rest on foreseeability, with no duty to warn of an improper use that could not have been foreseen."99 The determination in Westerberg was, in actuality, not based on whether an improper use could have been foreseen, but rather a manufacturer would have no duty because, as a matter of law, improper use cannot be foreseen.100

The court of appeals in Germann recognized Westerberg had been modified by Frey.101 Accepting improper use as a foreseeability question, both the Frey court and Germann court of appeals concluded "whether the risk for which there was no warning was a reasonably foreseeable one was properly a jury question."102 The court had abdicated to the jury the responsibility, or perhaps the burden,103 of making the determination in misuse cases.

The Frey court's mischaracterization of Westerberg as a vehicle to change the law,104 absent any policy discussion, begs comment. Had the supreme court in Frey decided to directly overrule the Westerberg limitation, some discussion of rationale or policy would have been necessitated or have been conspicuous by its absence.105 Frey offered no convincing rationale.106 Instead, the Frey court avoided this problem.107 It simply ignored the Westerberg limitation, apparently electing the less rigorous path of mischaracterizing its own case law. It was the Frey rationale, despite its weaknesses, the court of appeals

98. See infra notes 99 and 100 and accompanying text.
99. Frey, 258 N.W.2d at 788.
100. See Westerberg, 276 Minn. at 10-11, 148 N.W.2d at 317-18.
101. Germann, 381 N.W.2d at 508.
102. Frey, 258 N.W.2d at 788; Germann, 381 N.W.2d at 508.
103. FRUMER, supra note 32, § 8.03[1], at 163.
104. That there was a change was ignored by the supreme court in Frey. See generally Frey, 258 N.W.2d 782. The change was noted by the court of appeals in Germann which characterized Frey's change as a limitation on the Westerberg rule. Germann, 381 N.W.2d at 509. Since the Westerberg rule was itself a limitation on a general rule of duty to warn resting on foreseeability, Westerberg, at 10, 148 N.W.2d at 317, however, Frey is better characterized as an elimination of a limitation rather than a limitation of a limitation.
105. See also supra notes 40, 53, 99-101, 104 and accompanying text (instead, the Frey court used mischaracterization).
106. It is perhaps due to this absence of rationale or policy discussion that the court of appeals in Germann can only say it "believe[d]" Frey to be applicable to Germann. See Germann, 381 N.W.2d at 508. This uncertainty resulted despite the apparent black letter applicability of the Frey holding. See supra notes 99-100 and accompanying text.
107. The Frey court may have intentionally avoided what was a sticky area. Today, the overwhelming majority of jurisdictions treat misuse as a foreseeability-based question rather than a legal limitation (39 states plus the District of Columbia, treat
the issue as foreseeability, five (including New York) view misuse as a legal limitation to manufacturer liability, the positions of six jurisdictions are unclear).

reasonably anticipated. Plaintiff must show product unreasonably dangerous for normal use); Scott v. Terrebonne Lumber Co., 479 So.2d 410, 413 (La. App. 1985) (Normal use is not restricted to use for the purpose for which the product was intended but extends to all reasonably foreseeable uses). Maine: Stanley v. Schiavi Mobile Homes, Inc., 462 A.2d 1144, 1150 (Me. 1983) (foreseeable misuse by user may be a defense to a manufacturer, as the court noted that it was not intended to condone user’s contributory negligence). Maryland: Ellsworth v. Sherne Lingerie, Inc., 303 Md. 581, 591, 495 A.2d 348, 355 (1985) (in negligence, misuse of a product may bar recovery, but under strict liability, adequate warnings must be given for reasonably foreseeable uses of unreasonably dangerous products). Massachusetts: Mitchell v. Sky Climber, Inc., 396 Mass. 629, 632, 487 N.E.2d 1374, 1376 (1986) (manufacturer has no duty to set forth in customers’ manuals warnings of possible risk created solely by the act of another that would not be associated with foreseeable use or misuse of the manufacturer’s own product). Michigan: Trotter v. Hamill Mfg. Co., 143 Mich. App. 593, 602, 372 N.W.2d 622, 626 (1985) (manufacturers are still required to anticipate normal use of its products, which extends to reasonably foreseeable misuses.) Minnesota: Frey v. Montgomery Ward & Co., Inc., 258 N.W.2d 782, 788 (Minn. 1977) (a manufacturer’s duty to warn rests on the foreseeability of the use. There is no duty to warn of an improper use that cannot be foreseen). Mississippi: Early-Gary, Inc. v. Walters, 294 So. 2d 181, 186 (Miss. 1974) (manufacturer will be liable if user did not misuse the product, or that his unusual use of the product was one that the manufacturer was expected to foresee and guard against). Missouri: Jarrell v. Fort Worth Steel & Mfg. Co., 666 S.W.2d 828, 836 (Mo. Ct. App. 1984) (failure of vendor to properly inspect and repair is within the foreseeable risk of the manufacturer. Misuse does not become an intervening cause if the misuse was foreseeable). Montana: Rost v. C. F. & I. Steel Corp., 198 Mont. 485, 490, 616 P.2d 383, 386 (1980) (factors such as owner’s knowledge and ability to prevent danger, relative safety of the product, and the condition in which it is sold, or the lapse of time from the date of sale to the accident may shift responsibility of prevention of accidents from the manufacturer to the owner). Nebraska: Erickson v. Monarch Indus., Inc., 216 Neb. 875, 887, 347 N.W.2d 99, 109 (1984) (a manufacturer is not required to warn of all misuses of its products; failure to follow plain and unambiguous instructions is a misuse of its product). Nevada: Crown Controls Corp. v. Corella, 98 Nev. 35, 37, 659 P.2d 555, 557 (1982) (use of a product in a manner which the manufacturer should reasonably anticipate is not “misuse or abuse”). New Hampshire: Reid v. Spadone Mach. Co., 119 N.H. 457, 465, 404 A.2d 1094, 1099 (1979) (a manufacturer is under a general duty to design its product to be reasonably safe for uses which it can foresee. To avoid liability, a manufacturer may argue that the misuse was unforeseeable). New Jersey: Cepeda v. Cumberland Eng’g Co., 76 N.J. 152, 177-78, 386 A.2d 816, 828 (1978) (a manufacturer cannot escape liability on the grounds of misuse or abnormal use if the actual use proximate to the injury was objectively foreseeable; the foreseeability need only be “reasonable foreseeability” and not actual). New Mexico: First Nat’l Bank, Albuquerque v. Nor-am Agricultural Prod. Inc., 88 N.M. 74, 81-82, 537 P.2d 682, 694 (N.M. Ct. App. 1975) (manufacturer owes a duty to one who engages in foreseeable misuse of its product). New York: Nelson v. Garcia, 129 Misc. 2d 909, 494 N.Y.S.2d 276, 278 (1985) (after a product leaves the possession and control of the manufacturer and there is subsequent modification which substantially alters the product, the manufacturer cannot be liable however foreseeable such modifications may have been). North Carolina: Corprew v. Geigy Chem. Corp., 271 N.C. 485, 492, 157 S.E.2d 98, 103 (1967) (although a manufacturer is under a duty to foresee probable results of normal use of its product, he does not have to foresee and is not liable for use which is not normal or could not reasonably have been foreseen or anticipated or its use is in violation of an ordi-
hesitantly adopted for Germann.  

The supreme court affirmed the holding of the court of appeals in

Northern Dakota: Mauch v. Mfgs. Sales & Serv., Inc., 345 N.W.2d 338, 347-48 (N.D. 1984) (the seller's liability is reduced where the plaintiff misuses the product in a manner which the seller could not be expected to anticipate or provide in the manufacture or sale of the product). Ohio: White v. Dealers Transit, Inc., 4 Ohio App. 3d 40, 45, 446 N.E.2d 460, 466 (1980) (manufacturer does not have to warn of every risk of its product but must warn the user of dangerous propensities in the foreseeable use of its product). Oklahoma: Fields v. Volkswagen of America, Inc., 555 P.2d 48, 56-57 (Okla. 1976) (whether the use of a product has been abnormal turns on whether such use was reasonably foreseeable by the manufacturer). Oregon: Findlay v. Copeland Lumber Co., 265 Or. 300, 306, 509 P.2d 28, 31 (1975) (misuse sufficient to bar recovery must be use so unusual that the average consumer could not possibly expect the product to be designed and manufactured to withstand and the seller, therefore, need not anticipate and provide for it). Pennsylvania: Burch v. Sears, Roebuck & Co., 320 Pa. Super. 444, 451-52, 467 A.2d 615, 619 (1983) (abnormal use will negate liability only if it was not reasonably foreseeable by the seller). Rhode Island: Thomas v. Anway Corp., 488 A.2d 716, 722 (R.I. 1985) (a seller need only warn of those dangers which are reasonably foreseeable). South Carolina: Claytor v. General Motors Corp., 277 S.C. 259, 262-63, 286 S.E.2d 129, 131-32 (1982) (the test of whether a product is defective is whether the product is unreasonably dangerous to the user given the conditions and circumstances that foreseeably attend its use). South Dakota: Kappenman v. Action, Inc., 392 N.W.2d 410, 413 (S.D. 1986) (while misuse is a defense which will bar manufacturer's liability, a manufacturer will be liable for use of its product in a manner which the manufacturer could have reasonably anticipated). Tennessee: Ellithorpe v. Ford Motor Co., 503 S.W.2d 516, 520 (Tenn. 1973) (abnormal use of a product is generally a defense but will not bar recovery if such abnormal use is reasonably foreseeable by the manufacturer). Texas: Alm v. Aluminum Co. of America, 687 S.W.2d 374, 381-82 (Tex. Ct. App. 1985) (if misuse of a product by a user is foreseeable by the manufacturer, such misuse is no defense to an action based on failure to warn of risk created by misuse). Utah: Mulherin v. Ingersoll-Rand Co., 628 P.2d 1301, 1302-03 (Utah 1981) (defendants can use affirmative defenses of misuse of the product or unreasonable use of the product despite knowledge of defect and awareness of danger). Virginia: Featherall v. Firestone Tire & Rubber Co., 219 Va. 949, 962, 252 S.E.2d 358, 367-69 (1979) (there is no duty to warn when product is used in an unlikely, unexpected or unforeseeable manner; if the use was unforeseen, there was misuse which would prevent the manufacturer from being liable). Washington: Tiderman v. Fleetwood Homes of Washington, 102 Wash. 2d 334, 340, 684 P.2d 1302, 1305 (1984) (seller/manufacturer has a duty to warn of any condition which renders a product not reasonably safe for a foreseeable use); Boeke v. International Paint Co., Inc., 27 Wash. App. 611, 614, 620 P.2d 103, 105 (1980) ("misuse" as a defense may mean use for a purpose or manner not reasonably foreseen). West Virginia: Ilosky v. Michelin Tire Corp., 307 S.E.2d 603, 609-10 (W. Va. 1983) (for a duty to warn to exist, use of a product must be foreseeable to the manufacturer). Wisconsin: Schuh v. Fox River Tractor Co., 63 Wis. 2d 728, 743, 218 N.W.2d 279, 285-87 (1974) (misuse of a product was reasonably foreseeable by manufacturer which affixed a warning to its product. The warning did not bar recovery but was a fact to be considered). Wyoming: Ogle v. Caterpillar Tractor Co., 716 P.2d 334, 345 (Wyo. 1986) (seller may not be held liable if plaintiff's injuries were caused by unforeseeable alterations).

108. See Germann, 381 N.W.2d at 508 (the court of appeals, given Frey, could only write "[w]e believe [Westerberg] is no longer the law") (emphasis added).
Germann, but said absolutely nothing about the court of appeals’ analysis. Nor did the supreme court attempt to build on its earlier Frey opinion and analysis. Instead, the supreme court wrote an opinion which concealed as much as it revealed. The court’s treatment of the issue in Germann and its analysis of the facts will necessarily change the manner in which Minnesota courts treat future cases pertaining to duty to warn of product misuse. Both the court’s treatment of the issue and its analysis of the facts warrant comment.

The court of appeals and the supreme court saw the same issue, that is, whether the manufacturer had a duty to warn users of the dangers of operating the machine without safety devices. But each court treated the issue in a significantly different manner. The court of appeals, basing its treatment on earlier cases, concluded duty to warn rests on foreseeability. Foreseeability was a question for jury determination. The supreme court, apparently signaling a break with recent case law, cited only secondary authority to support its treatment of duty as a legal issue for court determination. Lest this signal be overlooked, the supreme court repeated it twice on the same page.

Why did the supreme court treat the issue in Germann as a legal question for court determination? The opinion offers no discussion. Nor does the opinion note its treatment of the issue conflicts with the court of appeals or its own treatment of the issue in earlier cases. One positive aspect of this analysis is the court has greatly downplayed Frey. Future decisions will not be tainted by legal mischaracterization—at least not the one upon which Frey is based.

109. Germann, 395 N.W.2d at 923.
110. See supra note 7 and infra notes 117-21 and 131-36 and accompanying text.
111. Id.
112. The court of appeals referred to “safety devices,” Germann, 381 N.W.2d at 506, while the supreme court consistently refers only to the warning bar. See Germann, 395 N.W.2d at 923-25; infra notes 131-36 and accompanying text.
113. See infra notes 114-17 and accompanying text.
114. Germann, 381 N.W.2d at 507-08 (particularly Westerberg and Frey).
115. Id. at 507 (citing Westerberg, 276 Minn. at 9, 148 N.W.2d at 317).
116. 381 N.W.2d at 508.
117. Germann, 395 N.W.2d at 924 (citing Keeton, Prosser and Keeton on the Law of Torts § 37 (1984); Restatement (Second) of Torts § 328B (1965)).
118. Id. (citing Green, Foreseeability in Negligence Law, 61 COLUM. L. REV. 1401, 1408 (1961)). The court went on to state that other issues “such as adequacy of the warning, breach of duty and causation remain for jury resolution.” Germann, 395 N.W.2d at 924 (citations omitted).
119. See generally Germann, 395 N.W.2d 922.
120. Id. (both Frey and the Germann court of appeals based on Frey characterized treatment of the issue as one of foreseeability for determination by a jury).
121. But cf. id. at 925 (Frey is cited as one of the cases that modified Westerberg).
122. See supra note 40.
Second, by treating the issue as a legal duty for court determination, the Minnesota Supreme Court has reacquired the burden in this politically and economically sensitive area. Policy considerations with respect to manufacturer liability for its products and misuse of its products cut both ways.123 Given the unsettled policy climate, the decision-making burden arguably ought not be passed off upon juries.124

123. Policy considerations militating in favor of placing an increased burden on the manufacturer include:


(2) Minimization of the impact of accidents on society by broadly spreading the risk of liability or economic cost of accidents to the manufacturer (who profits from the sale of the product). Lee, 290 Minn. at 327-28, 188 N.W.2d at 431; Restatement (Second) of Torts § 402A comment c (1965) (the burden of loss for injury caused by defective products should be borne by those who market them, and should be treated as a cost of production against which liability insurance may be obtained, and the public who enjoy the use of the product); Beshada, 90 N.J. at 205, 447 A.2d at 547.

(3) Simplification of fact-finding and avoidance of and protracted litigation. Lee, 290 Minn. at 327-28, 188 N.W.2d at 431; and


Just as there is pressure on manufacturers to produce safe products, there should be equal pressure on users not to alter safe products. Id. Under this reasoning, manufacturer liability would be limited to the product as it left the manufacturer's control. See Robinson, 49 N.Y.2d at 477-78, 403 N.E.2d at 443-46, 426 N.Y.S.2d at 721-23. Manufacturers would remain liable for injury arising from foreseeable use. See id. However, manufacturer liability could be limited with respect to any foreseeable alterations. Id. at 477, 403 N.E.2d at 444, 426 N.Y.S.2d at 721 (material alterations at the hands of a third party which work a substantial change in the condition in which the product was sold . . . are not within the ambit of a manufacturer's responsibility†). This portion of the burden would be shifted from the manufacturer to the user or the intermediary employer/purchaser who is, arguably, in a better position to know and protect the safety expectations of its employees. See Robinson, 49 N.Y.2d at 478, 403 N.E.2d at 444, 426 N.Y.S.2d at 721. Despite the arguable reasonableness of the manufacturer's position, the majority of courts are unpersuaded. See cases cited supra note 123. Evidently, the judges feel more comfortable allowing the common sense of the jury to determine foreseeability than they feel determining misuse as a legal question. See infra note 130 and accompanying text.

124. Frumer, supra note 32, § 8.03(1), at 163.
The net benefit to litigants is questionable. The Minnesota courts will, once again, determine whether a duty was owed in product misuse cases. This will afford the court an opportunity to greatly influence the disposition of each case. Given that duty still turns on foreseeability, however, such a determination might be better left to a jury unless the inferences are so clear there can be no dispute.

The supreme court's analysis is deceptive. First, the court omitted critical facts. It selectively excluded any consideration of the disconnected alternative safety features, the panic stop button and the breaker bar. The court focused only on the safety bar and concluded the risk it might not be properly reattached was foreseeable. However, the concurrent disconnection of a back-up safety device, the breaker bar, might be even less foreseeable. And the concurrent disconnection of yet a third safety device, the emergency stop button, might be so remote as to be unforeseeable. The court's analysis is silent on these points.

Second, the supreme court's analysis buried other facts. For example, when the court compared the facts of Westerberg to the facts of Germann, it noted three parallels, and then minimized their significance. The third parallel, "both accidents occurred as a result of faulty maintenance by the purchaser-owner-employer which caused designed safety mechanisms in each machine to fail" would seem to go to the heart of the issue. The court distinguished Westerberg on the basis of the foreseeability that the safety device could be altered.

125. See infra notes 126-30 and accompanying text.
126. Pre-Frey courts were also more likely to find duty as the dispositive matter. See, e.g., Westerberg, 276 Minn. at 9-12, 148 N.W.2d at 317-18.
127. See Germann, 395 N.W.2d at 924.
128. See, e.g., id. at 925.
129. Westerberg, 276 Minn. at 9, 148 N.W.2d at 317.
130. See Soler v. Castmaster, Div. of H.P.M. Corp., 98 N.J. 137, 154, 484 A.2d 1225, 1234 (1984) ("[D]etermination is for the fact-finder unless the inferences are so clear that a court can say as a matter of law that a reasonable manufacturer could not have foreseen the change." (quoting D'Antona v. Hampton Grinding Wheel Co., 225 Pa. Super. 120, 125, 310 A.2d 307, 310 (1973)); FRUMER, supra note 32, § 8.03(1), at 163 ("This being an area in which judges find it difficult to agree, the issue should ordinarily be left to the common sense of the jury.")
131. See supra note 60 and accompanying text; infra note 132-36 and accompanying text.
132. Germann, 395 N.W.2d at 925. The additional safety features are discussed by the court of appeals. Germann, 381 N.W.2d at 505.
133. Germann, 395 N.W.2d at 925.
134. Germann, 381 N.W.2d at 506.
135. Id.
136. See Germann, 395 N.W.2d at 925.
137. Id.
138. Germann, 395 N.W.2d at 925.
by the consumer.\textsuperscript{139}

Third, the supreme court's characterization of \textit{Westerberg} is different from, but no better than the \textit{Frey} court. The \textit{Germann} court simply observed the law has changed. In fact it cites \textit{Frey}, a case which mischaracterized \textit{Westerberg}, as one example of that change.\textsuperscript{140}

\textbf{Conclusion}

The effect on the duty to warn of foreseeable product misuse for one manufacturer remains unchanged by the "new" approach advocated by the Minnesota Supreme Court in \textit{Germann}. The general treatment of the law applicable to the manufacturer's duty to warn, however, has changed.

The supreme court indicated the emphasis on foreseeability advocated by \textit{Frey} and utilized by courts for the past ten years is not the proper analytical model for product misuse cases.\textsuperscript{141} Given the court's unfortunate lack of discussion of its own precedent during the past twenty years, manufacturers are left with more questions than answers. Is the \textit{Germann} court's focus on duty\textsuperscript{142} a better approach? Despite the acknowledgment that duty still turns on foreseeability, is Minnesota moving away from the approach adopted by a majority of jurisdictions?\textsuperscript{143} If this is Minnesota's direction, is this based more upon sound reasoning or analytical oversight? And, finally, if the supreme court, for whatever policy reason, selectively ignores the two improperly maintained back-up safety devices to make its case,\textsuperscript{144} might lower courts be influenced to ignore key facts in the same spirit to find manufacturer liability? Manufacturers can only wonder and worry.

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\textsuperscript{139.} Id.
\textsuperscript{140.} \textit{Germann}, 395 N.W.2d at 925.
\textsuperscript{141.} See supra note 7 and accompanying text.
\textsuperscript{142.} Id.
\textsuperscript{143.} See cases cited supra note 107.
\textsuperscript{144.} See supra notes 131-32 and accompanying text.