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† JD Candidate, William Mitchell College of Law, 2016; BA English, University of Minnesota, 2009. I would like to thank Professor Mike Steenson for his advice, members of the William Mitchell Law Review for their guidance, and my friends, family, and dogs, Al and Gary, for their neverending understanding and support.
In the recent Doe 169 v. Brandon decision, the Minnesota Supreme Court held that a church licensing body did not owe a duty to protect a minor from the intentional, tortious conduct of a third party. The court found that the licensing body’s renewal of the third party’s ministerial credentials did not create a foreseeable risk that the third party would sexually molest the appellant; thus, the licensing body had no duty to protect the minor from the third party. Because the existence of duty is a threshold element, the injured party’s negligence claim necessarily failed.

As Doe 169 traversed the legal system, the 2011 Domagala v. Rolland decision proved crucial. In Domagala, the Minnesota Supreme Court clarified that, though true only in limited and narrow circumstances, it is possible for one actor to owe a duty of care to another actor absent a special relationship between the

1. Doe 169 v. Brandon (Doe 169 II), 845 N.W.2d 174, 179 (Minn. 2014).
2. Id.
3. Id. at 177, 179.
4. 805 N.W.2d 14 (Minn. 2011).
parties. In Doe 169, it was undisputed that no special relationship existed between the church licensing body and the injured party. The Domagala exception, therefore, became the linchpin upon which the Doe 169 decision would ultimately turn.

The exception outlined in Domagala may prove outcome determinative; however, application of this exception necessitates scrupulous judicial examination. The critical eye will note that the Domagala exception is rife with highly subjective threshold issues. Under Domagala, the element of duty only exists when the injury in question is both (1) foreseeable, and (2) a direct result of an actor’s own conduct. Each of these threshold issues—duty, foreseeability, and misfeasance—are notoriously difficult to apply.

The critical eye will also note that the Minnesota Supreme Court’s treatment of Doe 169 did not include the precise, painstaking examination integral to a correct application of the Domagala exception. In Doe 169, the court reiterated that the absence of a special relationship between the church licensing body and the injured party was not decisive. The court then found that the licensing body was not, as a matter of law, liable for the injury, as the licensing body’s actions did not meet the considerable requirements of the Domagala exception. While this decision falls in line with precedent—Minnesota has been notably reluctant to hold third parties liable for involvement in sexual

5. Id. at 26 (“[W]hen a person acts in some manner that creates a foreseeable risk of injury to another, the actor is charged with an affirmative duty to exercise reasonable care to prevent his conduct from harming others.”).
7. See infra Part V.E.
8. See infra Parts V.B, V.LC-D.
10. See John C.P. Goldberg & Benjamin C. Zipursky, The Moral of MacPherson, 146 U. Pa. L. Rev. 1733, 1770 (1998), for a discussion of the ways in which the element of duty “is a largely question-begging concept that can be safely used if one is not misled by it.” See also infra Part V.B-C for a discussion of the legal system’s wary approach to the misfeasance/nonfeasance distinction, and infra Part VI.C for common criticisms of the foreseeability element.
11. See infra Parts V.A, C.2; VI.A, E.
12. Doe 169 II, 845 N.W.2d 174, 178 (Minn. 2014) (“In Domagala, we explained that a duty of care to protect others can arise in two ‘instances.’” (quoting Domagala v. Rolland, 805 N.W.2d 14, 22–23 (Minn. 2011))).
13. Id. at 179 (“Applying our case law to the facts and circumstances of this particular case, we hold that the District Council did not create a foreseeable risk of injury to Doe, and thus the District Council did not owe Doe a duty of care.”).
abuse claims— the court’s rationale suggests a muddled understanding of the Domagala exception. The court attributes its Doe 169 decision to a purported, but largely unsupported, absence of foreseeability. This attribution is erroneous. Contrary to the court’s stated rationale, it is the passive nature of the defendant’s conduct—the absence of misfeasance—that proves dispositive.

Understanding the complexities of the duty element is crucial to understanding the blurred rationale behind the Doe 169 decision. To that end, this note begins with a brief historical overview, outlining the development and evolution of the scope of duty within the tort of negligence and examining this scope of duty within the state of Minnesota specifically. Next, this note presents the facts and procedural posture of the Doe 169 decision, followed by an examination of the legal issues—the misfeasance/nonfeasance distinction and the foreseeability element—that render the decision something of a conundrum. Finally, this note explores the questions left unanswered by the Doe 169 decision and the troubling policy implications of the court’s decision to reinstate a summary judgment.

14. See Jonathan J. Hegre, Minnesota “Nice”? Minnesota Mean: The Minnesota Supreme Court’s Refusal to Protect Sexually Abused Children in H.B. ex rel. Clarke v. Whittemore, 15 LAW & INEQ. 435, 458 (1997) (“By failing to appreciate the unique nature and social significance of child sexual abuse, the supreme court’s ruling severely limits victims’ collective ability to compel abuse reporting. Until such time as [the Minnesota Supreme Court’s] test for special relationships in cases of child sexual abuse reporting is properly modified, Minnesota children will continue to suffer unnecessarily from the primary and secondary effects of sexual abuse.”).

15. See infra Part V.E.

16. Doe 169 II, 845 N.W.2d at 179 (“[T]he [defendant] did not create a foreseeable risk of injury to a foreseeable plaintiff. Thus, as a matter of law, the [defendant] had no duty to [the plaintiff].” (emphasis added)).

17. Id. at 179 n.3 (“Because we decide the issue of duty on foreseeability, we need not decide whether what the District Council did or did not do after . . . constituted misfeasance or nonfeasance.”).

18. See id. at 179 for the “[s]everal undisputed facts” that support the court’s conclusion. See infra Part V.A for a discussion of those factors the court considers crucial.

19. See infra Part II.

20. See infra Part III.

21. See infra Part IV.

22. See infra Part V.B–C.

23. See infra Parts VI–VII.

24. See infra Parts VI.E, VII.

25. See infra Part VIII.
II. THE HISTORICAL DEVELOPMENT OF THE SCOPE OF DUTY

A. The Element of Duty

As one legal scholar notes, with perhaps a hint of derision, “Any first year law student can recite [the rule that] liability in tort requires that the defendant have a duty to the plaintiff and that the plaintiff’s harm result from a breach of that duty.” Specifically, to sustain a prima facie claim of negligence, a plaintiff must prove four elements: (1) existence of a duty of care, (2) breach of that duty, (3) resultant injury, and (4) proximate causation.

It is the distinction between misfeasance and nonfeasance that determines whether a duty attaches to an actor’s conduct. Misfeasance is “‘active misconduct working positive injury to others.’” Nonfeasance, meanwhile, is “‘passive inaction or a failure to take steps to protect [others] from harm.’” There exists a general obligation to avoid affirmative actions that pose a likely risk of harm, but “[i]naction by a defendant—such as a failure to warn—constitutes negligence only when the defendant has a duty to act for the protection of others.”

B. Duty and Negligence Emerge

Duty, the distinct obligation “to conform to the legal standard of reasonable conduct in light of the apparent risk,” made its

27. Bjerke v. Johnson, 742 N.W.2d 660, 664 (Minn. 2007).
28. Doe 169 II, 845 N.W.2d 174, 178 (Minn. 2014) (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 56 (5th ed. 1984)); see also ALLAN BEEVER, REDISCOVERING THE LAW OF NEGLIGENCE 211 (2007) (suggesting that defining the distinction as being that between “the causing of injury” and “the failure to benefit . . . or . . . the failure to prevent harm” is “more helpful”).
30. Domagala v. Rolland, 805 N.W.2d 14, 23 (Minn. 2011) (citing Ruberg v. Skelly Oil Co., 297 N.W.2d 746, 750 (Minn. 1980)); see also FRANCIS H. BOHLEN, STUDIES IN THE LAW OF TORTS 45 (1926) (“[W]hile everyone is bound to refrain from action probably injurious to others, no duty to take affirmative precautions for the protection of those voluntarily placing themselves in contact with him is cast upon anyone . . ..”).
debut at the end of the eighteenth century. The development of a defined duty standard occurred almost concurrently with the emergence of torts as a defined legal field. These legal evolutions transpired amidst the chaos of the Industrial Revolution. As law professor G. Edward White writes, “A standard explanation for the emergence of an independent identity for [t]orts . . . is the affinity of tort doctrines . . . to the problems produced by industrialization.” The inventions and innovations of the Industrial Revolution—namely, industrial worksites, mass-produced products, railroads, and motor vehicles—“had a marvelous, unprecedented capacity for smashing the human body.” Unsurprisingly, torts evolved as a cohesive legal mechanism designed to provide remedies for the “unprecedented spate of accidental deaths and injuries” that came as a grievous disadvantage to the rise of modern industry.

Limiting Use of Policy Considerations, 34 San Diego L. Rev. 1503, 1520–22 (1997) (citing William L. Prosser, Handbook on the Law of Torts 166 (2d ed. 1955)) (explaining that “duty” has been used by courts to mean: (1) negligence liability, (2) general standard of conduct, (3) negligent conduct, and (4) the first element of a prima facie negligence case, and further explaining that “[d]uty’ as the word has been used by courts in this century has had several meanings”).

32. See Jean Elting Rowe & Theodore Silver, The Jurisprudence of Action and Inaction in the Law of Tort: Solving the Puzzle of Nonfeasance and Misfeasance from the Fifteenth Through the Twentieth Centuries, 33 Duq. L. Rev. 807, 832–33 (1995) (“Somewhere in [the court’s] mind . . . there lurked the notion that defendant was under a duty not to have behaved as the plaintiff claimed he did. [However,] [a]s the eighteenth century gave way to the nineteenth, the word negligence assumed legal significance . . . . Toward the mid-nineteenth century, the word ‘duty’ sounded its first cries.”); cf. Lawrence M. Friedman, A History of American Law 350 (3d ed. 2005) (noting that torts was “built up out of old bricks from the common-law brickyard” and that many basic tort doctrines pre-dated the emergence of torts as a distinct legal field, certainly including the concept of duty and moral obligations).

33. See Rowe & Silver, supra note 32, at 827–28. (explaining that modern negligence, and, thus, the modern concept of duty, “was born in the early nineteenth century”).

34. G. Edward White, Tort Law in America: An Intellectual History 3 (1980) (“The process by which Torts emerged as a discrete branch of law was more complex . . . and less dictated by the demands of industrial enterprise than the standard account suggests. . . . [T]his new increase in cases . . . would not have been sufficient had it not come at a time when legal scholars were prepared to question and discard old bases of legal classification.”).

35. Friedman, supra note 32, at 350.

C. Duty’s Originally Limited Scope

Today, the “notion of reasonably foreseeable victims . . . is . . . a standard doctrinal test for determining to whom a duty of care is owed.”\(^{37}\) The concept that “any person who engages in a course of conduct . . . owes a duty to exercise due care against physically harming anyone whom he might reasonably foresee physically harming were he to perform that conduct carelessly” may seem “intuitive.”\(^{38}\) This idea, however, has not always been viewed as rational and instinctual.

In the early days of modern negligence law, scope of duty was narrowly defined.\(^{39}\) Originally, an actor was negligent only if he, she, or it failed to perform a specific duty.\(^{40}\) An obligation to perform a specific duty could be prescribed in three ways\(^{41}\): (1) common law, (2) contract,\(^{42}\) or (3) statute.\(^{43}\) In the absence of a preexisting duty, however, “[m]ere carelessness, resulting in harm to another person, [was] not actionable.”\(^{44}\)

1. Scope of Duty and Industrialization

This originally narrow scope of duty is commonly attributed to fears of economic ruin.\(^{45}\) “Industry . . . seemed to be the foundation

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37. Id. at 78.
38. Id. (emphasis omitted).
39. See id. (discussing the movement away from the “older, narrower duty rules”).
40. W. H. WHITE, supra note 34, at 15.
41. See, e.g., William B. Hale, Hale on Torts 454 (St. Paul, Minn., West Publishing Co. 1896).
42. See id. at 468 (“All persons contracting to do certain things owe a duty not to injure the person or property of another while in the performance of the contract.”).
43. See id. at 476 (“The statute or ordinance may create, not only a public duty, but a duty to private persons, a breach of which may be actionable negligence; and yet an individual may not be able to recover, because he is not of the class of persons for whose benefit the statute was designed.”).
44. Id. at 454.
45. See Friedman, supra note 32, at 350–51. But see Gary T. Schwartz, Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation, 90 Yale L.J. 1717, 1721 (1981) (arguing that this theory is “rudimentary” and illustrative of “rather little about the actual common-law objectives” behind the emergence of torts). Schwartz contends that the economic limiting theory is not supported by contemporary case law, and that, in fact, “nineteenth-century tort law tended to be generous in affirming the tort liabilities of emerging industry.” Gary T. Schwartz,
on which economic growth, national wealth, and the greater good of society rested; and thus industry had to be protected . . . ." It was feared that “a duty of care grounded in foreseeability was too expansive” and would impair manufacturers of mass-marketed products by exposing them to a seemingly endless pool of potential tort victims—customers and employees.

2. Winterbottom v. Wright: An Illustrative Case

The old English case of Winterbottom v. Wright proves illustrative of these early limitations. The mid-nineteenth century products liability action, which “found general acceptance . . . in the United States,” established the “privity of contract” rule. Pursuant to Winterbottom’s holding, “a contractor, manufacturer, or vendor [was] not liable for injury to third persons who [had] no contractual relations with [that contractor, manufacturer, or vendor.]”

In Winterbottom, the plaintiff-driver was injured while operating a mail coach. The driver sued the manufacturer, claiming that the mail coach was defective. The court held that even if the manufacturer had negligently constructed and maintained the coach, the manufacturer could not be held liable to the driver. The manufacturer had contracted only with the driver’s employer, and not with the driver himself. Perhaps in response to concern that expanding tort liability would impede manufacturers, and consequently the economy, the court declared that “[u]nless we

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46. FRIEDMAN, supra note 32, at 350–51.
47. GOLDBERG & ZIPURSKY, supra note 36, at 79.
48. See id.
50. Id.
51. See e.g., GOLDBERG & ZIPURSKY, supra note 36, at 79.
53. Id.
54. Id.
55. Id.
56. But see BEEVER, supra note 28, at 117–18 (2007), for a contrary view of Winterbottom’s holding. Beever argues that, despite the wide acceptance of the view that Winterbottom’s holding is attributable to fear of impeding industrialization, the holding actually was based on (1) “the belief that the law of tort has no room to operate when the claimant’s injury was caused by an event covered by contract,”
confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which [we] can see no limit, would ensue.”

3. From Wagons to Automobiles: Expansion of Duty

The scope of duty was broadened and further defined in an early twentieth-century opinion, when Justice Benjamin Cardozo, “wielding a mighty axe . . . buried the general [privity] rule.” In *MacPherson v. Buick Motor Co.*, Cardozo underscored that “a duty of care and vigilance” extends beyond those with whom one chooses to contract. Rather than “something one chooses to accept” by establishing a contractual relationship, a duty of care “is imposed by law for the protection of potential victims.” In *MacPherson*, the plaintiff purchased an automobile from Buick Motor Co. with a defective wheel that “crumbled.” Buick Motor Co. was a manufacturer of automobiles, but did not manufacture the defective wheel. Nevertheless, Cardozo, in a departure from the contemporary notion of accountability, found that the company should reimburse MacPherson. Cardozo wrote:

If [an actor] is negligent, where danger is to be foreseen, a liability will follow. . . . We have put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else. We have put the source of the obligation where it ought to be. We have put its source in the law.

With this landmark decision, Justice Cardozo paved the way for the current understanding of scope of duty. “The negligence principle . . . was not tied to status or vocation or contract, but was

and (2) “the fear of indeterminate liability.” *Id.* at 118.

58. Goldberg & Zipursky, supra note 10, at 1736 (quoting William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1100 (1960)).
60. Goldberg & Zipursky, supra note 36, at 80.
61. 217 N.Y. at 384–85.
62. *Id.*
63. *Id.* at 390–91.
64. *Id.* at 390.
a reflection of generalized civil obligations.\textsuperscript{65} Though \textit{MacPherson} centered on negligence tied to supplied goods,\textsuperscript{66} the opinion had the larger impact of “extract[ing] negligence from a relational context . . . and identif[y]ing it with a universal duty of care.”\textsuperscript{67}

III. SCOPE OF DUTY IN MINNESOTA

A. Limitations on Duty: Not Our Brother’s Keeper

Though the scope of duty has expanded significantly, this expansion has not continued boundlessly. As the Minnesota Supreme Court has noted, “The public has an interest that no man shall act so as to injure another, it has no concern that he shall benefit anyone.”\textsuperscript{68} In Minnesota, “we are not our brother’s keeper.”\textsuperscript{69} Ordinarily, “there is no duty to control the conduct of a third person to prevent physical harm to another,”\textsuperscript{70} nor is there a duty to protect another person from harm caused by a third person.\textsuperscript{71}

The question of the limitation of the scope of duty has been argued extensively. In general, Minnesota courts have found that “the prevention of crime is essentially a governmental function” and is not the responsibility of average citizens.\textsuperscript{72} Likewise, “a duty to protect against the devious, sociopathic, and unpredictable conduct of criminals does not lend itself easily to an ascertainable

\textsuperscript{65}{} WHITE, \textit{supra} note 34, at 125.
\textsuperscript{66}{} See id.
\textsuperscript{67}{} Id. at 127.
\textsuperscript{69}{} Lundgren v. Fultz, 354 N.W.2d 25, 27 (Minn. 1984).
\textsuperscript{70}{} Doe v. Brainerd Int’l Raceway, Inc., 533 N.W.2d 617, 621 (Minn. 1995) (citing Harper v. Herman, 499 N.W.2d 472, 474 (Minn. 1993) and \textit{Lundgren}, 354 N.W.2d at 27).
\textsuperscript{71}{} Domagala v. Rolland, 805 N.W.2d 14, 24 (Minn. 2011).
\textsuperscript{72}{} Erickson v. Curtis Inv. Co., 447 N.W.2d 165, 169 (Minn. 1989).
standard of care uncorrupted by hindsight nor to a determination of causation that avoids speculation.\textsuperscript{75}

To this end, a trailer park manager is not required to safeguard tenants' children from a sexually abusive neighbor.\textsuperscript{71} Friends are not obligated to keep a watchful eye on an intoxicated acquaintance’s physical condition.\textsuperscript{75} A boat owner does not have to warn an adult guest that the water is too shallow for safe diving.\textsuperscript{76}

\textbf{B. Exceptions to the General No Duty to Protect Rule}

There are, however, two exceptions to this general rule. A duty to protect from \textit{foreseeable} harm arises when (1) a special relationship exists between the parties, or (2) an actor’s own conduct creates the risk.\textsuperscript{77}

To determine whether an injury was foreseeable, the Minnesota Supreme Court has held that one must consider “whether the specific danger was objectively reasonable to expect, not simply whether it was within the realm of any conceivable possibility.”\textsuperscript{78} The risk of foreseeable injury must be “clear to the person of ordinary prudence.”\textsuperscript{79} If the connection between the danger and the defendant’s own conduct is “too remote, . . . there is no duty.”\textsuperscript{80}

1. \textit{The Special Relationship Exception}

An actor owes a duty of care if a “special relationship” exists between the parties and the risk of injury is “foreseeable.”\textsuperscript{81}

Ordinarily, there is no duty to control the conduct of a third person to prevent him from causing physical harm to another unless a special relationship exists, either

\begin{itemize}
\item \textsuperscript{73.} Id.
\item \textsuperscript{74.} Clark \textit{ex rel.} H.B. v. Whittemore, 552 N.W.2d 705, 706 (Minn. 1996).
\item \textsuperscript{75.} Gilbertson v. Leininger, 599 N.W.2d 127, 128 (Minn. 1999).
\item \textsuperscript{76.} Harper v. Herman, 499 N.W.2d 472, 473 (Minn. 1993).
\item \textsuperscript{77.} Domagala v. Rolland, 805 N.W.2d 14, 23 (Minn. 2011) (“A duty to act with reasonable care for the protection of others arises in two instances implicated in this case.”).
\item \textsuperscript{78.} Whiteford \textit{ex rel.} Whiteford v. Yamaha Motor Corp., U.S.A., 582 N.W.2d 916, 918 (Minn. 1998).
\item \textsuperscript{79.} Connolly v. Nicollet Hotel, 254 Minn. 373, 382, 95 N.W.2d 657, 664 (1959).
\item \textsuperscript{80.} Germann v. F.L. Smithe Mach. Co., 395 N.W.2d 922, 924 (Minn. 1986).
\item \textsuperscript{81.} Bjerke v. Johnson, 742 N.W.2d 660, 667 (Minn. 2007).
\end{itemize}
between the actor and the third person which imposes a duty to control, or between the actor and the other which gives the other the right to protection.\textsuperscript{82}

Three scenarios lead to the existence of a special relationship\textsuperscript{83}: relational status,\textsuperscript{84} assumption of custody,\textsuperscript{85} and assumption of responsibility.\textsuperscript{86}

2. \textit{The Domagala Exception}

Additionally, as \textit{Domagala} clarifies, a duty of care arises when “the defendant’s own conduct creates a foreseeable risk of injury to a foreseeable plaintiff.”\textsuperscript{87} In the 2011 decision, Rolland, an experienced skid load operator, agreed to help Domagala, who had no similar experience, with landscaping work.\textsuperscript{88} Rolland controlled the skid

\begin{itemize}
\item \textsuperscript{82} Delgado v. Lohmar, 289 N.W.2d 479, 483 (Minn. 1979) (citing Cracraft v. City of St. Louis Park, 279 N.W.2d 801 (Minn. 1979)).
\item \textsuperscript{83} \textit{See Bjerke}, 742 N.W.2d at 665 (“The first prerequisite to a finding of a duty to protect another from harm is the existence of a special relationship between the parties. A special relationship can be found to exist under any one of three distinct scenarios.”).
\item \textsuperscript{84} \textit{See Erickson v. Curtis Inv. Co.}, 447 N.W.2d 165, 168 (Minn. 1989). A special relationship may arise due to the status of the parties in relation to one another. \textit{Id.} For example, innkeepers owe a duty to guests, as do common carriers to passengers, and landowners to invitees. Harper v. Herman, 499 N.W.2d 472, 474 (1993). These relationships present “a situation where B has in some way entrusted his or her safety to A and A has accepted that entrustment.” \textit{Erickson}, 447 N.W.2d at 168.
\item \textsuperscript{85} \textit{See Bjerke}, 742 N.W.2d. at 665. An individual may assume, or may receive by grant of law, custody of another person who is “deprived of normal opportunities of self-protection.” \textit{Id.} (quoting \textit{Harper}, 499 N.W.2d at 474 (Minn. 1993)). In \textit{Bjerke}, for example, an adult “accepted entrustment” of a child and, therefore, also accepted a duty to protect that child from the tortious actions of a third party when that adult assumed a “large degree of control” over the child visiting the adult’s home. \textit{Id.}
\item \textsuperscript{86} Laska v. Anoka Cnty., 696 N.W.2d 133, 138 (Minn. Ct. App. 2005) (“A special relationship may also arise where one accepts responsibility to protect another, although there was no initial duty.” (quoting Lundman v. McKown, 530 N.W.2d 807, 820 (Minn. Ct. App. 1995)). For example, “the supreme court concluded a special relationship existed between a diabetic boy and two individuals—a Christian Science nurse and a Christian Science practitioner—whom his mother had hired, paid, and entrusted to provide care to him by praying during his illness.” \textit{Id.} (citing \textit{Lundman}, 530 N.W.2d at 821–25).
\item \textsuperscript{87} Domagala v. Rolland, 805 N.W.2d 14, 23 (Minn. 2011) (emphasis added).
\item \textsuperscript{88} \textit{Id.} at 19.
\end{itemize}
loader at all times. When rocks jammed the skid loader, Rolland would “flutter the hydraulics” to free the debris, though he knew that doing so was “very dangerous.” After “fluttering” the machine’s bucket attachment to loosen a trapped stone, the bucket detached and fell onto Domagala’s foot. As a result, Domagala had three toes amputated.

There was no special relationship between Rolland and Domagala; however, the Minnesota Supreme Court found that this fact was not ultimately decisive. The court emphasized that the duty imposed by the existence of a special relationship is “separate and distinct” from the duty that one must act with reasonable care. When an actor’s own conduct creates a risk of harm, a duty of reasonable care is owed, regardless of relational status. This distinction proved critical to the Doe 169 decision.

IV. FACTS AND PROCEDURAL POSTURE OF DOE 169

A. Facts

From 1991 to 1999, Paul Alan Brandon worked as a youth pastor at the Maple Grove Assemblies of God Church (Maple Grove). During this time, Greg Hickle worked at Maple Grove as a senior pastor and acted as Brandon’s supervisor. In his youth pastor position, Brandon had multiple job performance problems, including “boundary issues” with youth group participants. Hickle, acting in his supervisory role, “ordered Brandon to stop” behaviors such as hosting sleepovers for the youth group participants, which were viewed as cause for concern. Brandon

89. Id.
90. Id. at 19–20.
91. Id.
92. Id. at 20.
93. See id. at 30.
94. Id. at 23 (quoting Louis v. Louis, 636 N.W.2d 314, 320 (Minn. 2001)).
95. Id. at 23.
96. Doe 169 II, 845 N.W.2d 174, 176 (Minn. 2014).
97. Id.
was not, however, accused of acting in a sexually inappropriate manner with any minors. 100

Due to his job performance and boundary issues, Brandon resigned in 1999. 101 As a condition of his separation from Maple Grove, Brandon agreed to present a letter to prospective employers detailing Maple Grove’s concerns. 102 Despite his resignation, Brandon remained a credentialed member of the Assemblies of God Church. 103 The Minnesota District Council of the Assemblies of God (District Council) recommended the renewal of Brandon’s ministerial credentials. 104

As early as 1999, Brandon began volunteering as a youth leader at Emmanuel Christian Center of the Assemblies of God, Inc. (ECC). 105 Brandon did not present ECC with the letter that Maple Grove had composed. 106 Crucially, Brandon’s ECC volunteer youth leader position did not require ministerial credentials. 107 As such, “the District Council itself did not control or supervise” Brandon in his ECC position. 108

In 2004, Hickle left Maple Grove and began working for the District Council as secretary and treasurer. 109 As Brandon’s former supervisor, Hickle knew of, and, indeed, insisted that Brandon cease those boundary issues exhibited by Brandon during his time at Maple Grove. 110 Nevertheless, in his District Council position, “Hickle took no action relative to Brandon’s volunteer work at ECC.” 111

100. Id.
101. Id.
103. Doe 169 II, 845 N.W.2d at 176.
104. Id.
105. Id.
107. Doe 169 II, 845 N.W.2d at 176.
108. Id. at 177.
109. Id. at 176.
110. Id.
111. Id. at 177.
B. Procedural Posture

1. The District Court Decision

John Doe 169 (Doe 169), a former ECC youth group participant, accused Brandon of sexually molesting him while he was at Brandon’s house for a sleepover. Doe 169 brought a negligence claim against the District Council. Doe 169 alleged that the District Council acted negligently when the District Council recommended renewal of Brandon’s ministerial credentials. The district court granted summary judgment in favor of the District Council, finding that it owed no duty of care to Doe 169, as the District Council and Doe 169 did not have a special relationship. Subsequently, Doe 169 appealed the district court’s decision, arguing that the district court’s conclusion that the District Council owed him no duty of reasonable care was erroneous.

2. The Minnesota Court of Appeals Decision

The Minnesota Court of Appeals reversed the district court’s decision and remanded the case back to the lower court. The appellate court found that the district court’s decision was based on a misapplication of law—the absence of a special relationship between the District Council and Doe 169 was not wholly decisive. The District Council likely knew, through Hickle, of Brandon’s past inappropriate conduct with minors and had general knowledge of sexual abuse by ministers. Subsequently, the appellate court found that the foreseeability of Doe 169’s injury necessitated jury consideration. The District Council sought review of the appellate court’s decision; a request which was granted by the Minnesota Supreme Court.

112. Id. at 176.
113. Id.
114. Id.
115. Id.
117. Id. at *9.
118. Id. at *6.
119. Id. at *7–8.
120. Id.
121. Doe 169 II, 845 N.W.2d 174, 177 (Minn. 2014).
3. The Minnesota Supreme Court Decision

The Minnesota Supreme Court reversed the appellate court’s holding and reinstated the district court’s summary judgment.\textsuperscript{122} The supreme court held that, under \textit{Domagala}, the District Council’s recommendation of credential renewal did not create a duty of care to Doe 169, as there was no foreseeable risk of harm.\textsuperscript{125} The link between the District Council’s actions and Doe 169’s injury, the court held, was simply “too attenuated” for Doe 169’s injury to have been a foreseeable consequence.\textsuperscript{124}

V. ANALYSIS

A. The Court’s Four Decisive Factors

The Minnesota Supreme Court based its decision in \textit{Doe 169} on four critical factors: (1) the District Council did not employ, supervise, or control Brandon; (2) a separate volunteer application process controlled Brandon’s acceptance as a volunteer; (3) Brandon spent years volunteering for ECC before the District Council came to know of Brandon’s past; and (4) the ECC, not the District Council, controlled the determination of an applicant’s fitness.\textsuperscript{125} The court stated that these factors spoke to the unforeseeable nature of Doe 169’s injury. Actually, however, these factors centered on the control, or lack thereof, the District Council exercised over Brandon.

If the Minnesota Supreme Court intended these factors to illustrate that the District Council had little opportunity to know of Brandon’s questionable behavior, and, therefore, could not have realized the potential danger Brandon posed, then its intention fails. The Minnesota Court of Appeals advanced a convincing argument that, under the law of agency, Hickle’s knowledge of Brandon’s inappropriate behavior was likely imputed to the District Council.\textsuperscript{126} Interestingly, this contention was not addressed at all by the supreme court.

\begin{itemize}
  \item \textsuperscript{122} \textit{Id.} at 179.
  \item \textsuperscript{123} \textit{Id.}
  \item \textsuperscript{124} \textit{Id.}
  \item \textsuperscript{125} \textit{Id.}
  \item \textsuperscript{126} See \textit{Doe 169 I}, No. A12-1721, 2013 WL 2302023, at *16 (Minn. Ct. App. May 28, 2013) (arguing that Hickle likely acted as the District Council’s agent, as an agency relationship “results from the manifestation of consent by one person
The crux of the supreme court’s rationale was not foreseeability; it was the distinction between misfeasance and nonfeasance. The court stated that the issue of the District Council’s potential misfeasance was not reached. Yet, the court largely credited as the basis for its decision the fact that the District Council did not exert control over Brandon securing, or operating within, his volunteer position. The court did not examine the question of whether the District Council had reason to know of Brandon’s history. Previously, when the court has examined an actor’s level of “control” over a situation, its examination has culminated in a discussion of that actor’s level of misfeasance.

B. The Difficult Distinction Between Misfeasance and Nonfeasance

At first blush, the misfeasance/nonfeasance distinction appears straightforward. However, “in practice it is not always easy to say whether an alleged misconduct is active or passive.” Indeed, at times, attempts at distinction prove to be an exercise in “profound confusion.” Categorizing complex human actions and interactions “invites decision-making based on some fragile factual characterizations.” Consider, for example, a situation in which a gun stolen from an unalarmed shop is used as a murder weapon. Clearly, the individual who pulled the trigger committed an

127. Doe 169 II, 845 N.W.2d at 179 n.3.
128. See Lundgren v. Fultz, 354 N.W.2d 25, 28 (Minn. 1984) (arguing that a psychiatrist’s ability, and subsequent failure, to control his patient created a risk of harm); Olson v. Ische, 343 N.W.2d 284, 290 (Minn. 1984) (arguing that a passenger was not in control of an automobile and, thus, was not liable for a negligent accident caused by the driver).
129. BOHLEN, supra note 30, at 294.
130. See Rowe & Silver, supra note 32, at 808.
131. Adler, supra note 26, at 881.
affirmative action, but what about the shop owner? One court may well decide that the failure to stringently secure the shop was an inactionable, passive choice; another court may decide that a reasonable jury could find that the owner’s lapse in security measures constituted affirmative conduct that facilitated the theft and, in turn, the murder. The subjective quality inherent in this distinction, when applied to concrete fact patterns, has the potential to “wreak conceptual chaos.”

C. The Distinction in Minnesota

1. Judicial Reluctance

The Minnesota legal system has a long history of handling the misfeasance/nonfeasance distinction warily. Over one hundred years ago, in 1910, the Minnesota Supreme Court considered Brower v. Northern Pacific Railway Co. In Brower, a railroad engineer failed to correctly replace a gauge, and a worker was injured due to this oversight. Though the court ultimately decided that the engineer’s actions constituted misfeasance, the court acknowledged that “[t]he thinness and uncertainty of the distinction between misfeasance, malfeasance, and nonfeasance leaves an exceedingly unstable basis on which to rest an important

133. See Gallara v. Koskovich, 836 A.2d 840, 843 (N.J. Super. Ct. Law Div. 2003) (denying summary judgment to a gun store, as the court decided that a reasonable jury could conclude that the gun store’s actions amounted to affirmative, actionable negligence).
134. Rowe & Silver, supra note 22, at 808.
135. See Brower v. N. Pac. Ry. Co., 109 Minn. 385, 124 N.W. 10 (1910). For an early twentieth century discussion of the difficulty of the misfeasance/nonfeasance distinction in other courts as well, see Floyd R. Mechem, The Liability of an Agent to Third Persons in Tort, 20 YALE L.J. 239, 252 (1911) (“The attempted distinction between misfeasance and non-feasance has been very much criticized and often denied to exist. It is undoubtedly true that the Latin names employed may not be very appropriate or illuminating.”). But see BEEVER, supra note 28, at 205 (“[T]here is no distinction more deeply rooted in the common law and more fundamental than that between misfeasance and nonfeasance.” (quoting Francis H. Bohlen, The Moral Duty to Aid Others as a Basis of Tort Liability, 56 U. PA. L. REV. 217, 219 (1908))).
136. 109 Minn. 385, 124 N.W. 10 (1910).
137. Id. at 386, 124 N.W. at 11.
138. Id. at 388, 124 N.W. at 11.
principle of liability.” A century later, in Domagala, the Minnesota Supreme Court demonstrated that this unstable foundation remained a fount of concern, and noted “the confounding complexity of characterizing a defendant’s action or inaction as misfeasance or nonfeasance.”

2. Judicial Reliance

Nevertheless, the misfeasance/nonfeasance distinction has played a valid and critical role in negligence claims, at times serving as a case-determinative element. For example, the Minnesota Supreme Court’s decisions in Tholkes v. Decock and Giefer v. Dierckx showcase the manner in which the misfeasance/nonfeasance distinction can, rather than “wreak conceptual chaos,” prove to be of “crucial importance.” Tholkes and Giefer share broadly similar fact patterns. In both cases, motorists were injured as a result of defective roadwork. In Tholkes, a motorist sustained injuries after driving into an open culvert. Highway repairmen were working to repair the culvert and left the culvert exposed, unbarricaded, and “without guards, lights, or other warnings.” In Giefer, a motorist sustained injuries after driving into a bridge washout. There had been a torrential rainfall, and township officers only managed to barricade one side of the washout.

Despite these similarities, Tholkes and Giefer had divergent outcomes. The issue of liability in Tholkes was a question for the jury; the defendant in Giefer was excused from liability. These disparate determinations turned on the misfeasance/nonfeasance distinction. The defendant’s actions in Tholkes amounted to an
“affirmative act of misconduct.” Conversely, the Giefer defendants’ failure “to do something more” than barricade one side of the bridge washout was deemed nonfeasance and, thus, no liability would be imposed as a matter of law.

As evidenced by Domagala, the misfeasance/nonfeasance distinction maintains its relevancy. In fact, the Domagala court, though cognizant of criticisms and complications, urged that the distinction is, nonetheless, the conceptual foundation upon which the element of duty is built. Outside of a special relationship, a duty to protect emerges only when the defendant’s own conduct gives rise to the risk of harm. That is, the misfeasance/nonfeasance distinction is inextricably linked with a finding of an existent duty. The court noted that “[t]he distinction between the specific duty to warn and exercising reasonable care by giving a warning likely stems from the historical divergence of liability for misfeasance and nonfeasance.”

VI. THE FORESEEABILITY ISSUE

A. Foreseeability in Doe 169

Domagala played an integral role in the judicial treatment of Doe 169, and the misfeasance/nonfeasance distinction is integral to Domagala. It is interesting, then, that the Minnesota Supreme Court declined to consider this distinction in Doe 169. Instead, the court chose to frame its decision around the element of foreseeability, despite the fact that the element of foreseeability has earned its own fair share of criticism, and, arguably, provides a basis for decision that is less stable than the misfeasance/nonfeasance distinction.

151. Tholkes, 125 Minn. at 511–12, 147 N.W. at 649.
152. Giefer, 230 Minn. at 38, 40 N.W.2d at 427.
153. Domagala v. Rolland, 805 N.W.2d 14, 22 (Minn. 2011); see also Adler, supra note 26, at 870 (characterizing the distinction as “judicial hair-splitting”). But see Rowe & Silver, supra note 32, at 808 (“The law (if it has a will) never intended that nonfeasance and misfeasance should be distinguished, since in logic inaction is one form of action.”).
154. Domagala, 805 N.W.2d at 22.
155. See infra Part VI.E.
156. See supra Part V.C.2.
157. Doe 169 II, 845 N.W.2d 174, 179 n.3 (Minn. 2014) (“Because we decide the issue of duty on foreseeability, we need not decide whether what the District Council did or did not do after Hickle joined it constituted misfeasance or nonfeasance.”).
distinction. Furthermore, in relying upon the foreseeability element, the court ignored contradictory case law, including a problematic dual standard presented in Domagala.159

B. Palsgraf and the Importance of Foreseeability

Foreseeability is “often cited as the most important factor in duty,” and the use of foreseeability in deciding matters of negligence is “nearly ubiquitous.”160 Another Cardozo opinion, the infamous Palsgraf decision, exemplifies a situation in which the foreseeability element played a critical and clear role.161 In Palsgraf, the plaintiff was injured when a railway passenger’s fireworks, carried in an unmarked package, exploded after falling onto the tracks.162 The New York Court of Appeals held that the station guards, who jostled the passenger when it appeared he was in danger of toppling onto the tracks himself, were not liable for the plaintiff’s injuries.163 Writing for the court, Cardozo explained that the guards had no way of knowing that their actions held a “potency of peril.”164 The guards had no reason to suspect that the unmarked package contained fireworks.165 Nor could the guards have reasonably predicted that their interaction with the passenger would have any effect on the plaintiff, who stood “at the other end of the platform many feet away.”166 The guards were not liable for “inadvert[ently]” causing the plaintiffs injuries, as the plaintiff was not in the “orbit of the danger as disclosed to the eye of reasonable vigilance,” and, thus, was not within the guards’ “orbit of . . . duty.”167

Though Palsgraf was decided nearly a century ago, its lesson endures. A defendant should not be liable for an injury that occurs outside his, her, or its “range of reasonable apprehension.”168 The

158. See infra Parts VI.C–E, VII.
159. See infra Parts V.E, VII.
162. Id.
163. Id.
164. Id.
165. Id.
166. Id.
167. Id. at 100–01.
168. Id. at 101.
persistence of this lesson is exemplified by the abundance of negligence cases that have foreseeability, or lack thereof, as a dispositive factor.\textsuperscript{169} As the \textit{Doe} \textsuperscript{169} court’s analysis shows, however, application of this familiar factor is not necessarily an easy or straightforward exercise.\textsuperscript{170}

C. The Problematic Nature of Foreseeability in General Negligence Law

Difficulties arise when, as is typical, the foreseeability of an incident does not involve such clear-cut circumstances as are present in \textit{Palsgraf}. The element of foreseeability in general negligence law has been described as “abstract, vague, and imprecise.”\textsuperscript{171} That which is “foreseeable” is based on what a “reasonable person in [the] defendant’s position” would expect.\textsuperscript{172} This standard is, by definition, inherently subjective and open to interpretation, as “both the reasonable man and his foreseeability are transparent fictions . . . . They are argumentative words with no definite or literal meaning but are capable of absorbing any meaning given them.”\textsuperscript{173}

For this reason, legal scholar William Prosser argued that “[f]oreseeability of risk, in short, carries only an illusion of certainty in defining the consequences for which the defendant will be liable.”\textsuperscript{174} This illusion quickly begins to unravel upon comparisons of discordant court decisions. As Prosser noted, one court may hold

\begin{footnotesize}
\begin{enumerate}
\item[169.] See, e.g., \textit{Foss v. Kincade}, 766 N.W.2d 317, 318 (Minn. 2009) (“[The homeowner did not have a duty to secure an empty bookcase to the wall to prevent it from tipping over because it was not reasonably foreseeable that a three-year-old guest would injure himself by attempting to climb the bookcase.”); \textit{Whiteford ex rel. Whiteford v. Yamaha Motor Corp., U.S.A.}, 582 N.W.2d 916, 919 (Minn. 1998) (noting that the danger of a child colliding with a stationary snowmobile was too remote a possibility to impose a duty on the snowmobile manufacturer).
\item[170.] \textit{Doe 169 II}, 845 N.W.2d 174 (Minn. 2014).
\item[171.] D.E. Buckner, Annotation, \textit{Foreseeability as an Element of Negligence and Proximate Cause}, 100 A.L.R.2d 942 (1965).
\item[173.] Leon Green, \textit{Foreseeability in Negligence Law}, 61 Colum. L. Rev. 1401, 1413 (1961) (“To attempt to draw the line between the foreseeable and the unforeseeable in the world of everyday affairs raises even more difficulties than the determination of where space leaves off and outerspace begins.”).
\end{enumerate}
\end{footnotesize}
that “the foreseeability of the spread of fire ends at the first adjoining house,” while another court may deem foreseeable that “a mudhole left by a defendant in a highway would stall a car, that a rescuer attempting to tow it out would get his wooden leg stuck in the mud, and that a loop in the tow rope would lasso his good leg and break it.” Evidently, foreseeability is a fluid concept open to subjective reasoning and perspective. Hence, in *Doe 169*, while the Minnesota Court of Appeals proposed that the District Council’s foreseeability was at issue, the supreme court found otherwise.

D. Further Foreseeability Complications in Minnesota: The Domagala Variance

The foreseeability standards set forth by Minnesota case law share the inconsistent nature of broader foreseeability definitions. A sharper clarification of foreseeability is further impeded by recent developments in Minnesota’s negligence law. *Domagala* elucidated that a duty of care may exist outside of a special relationship. However, *Domagala* also had the effect of further complicating the element of foreseeability in Minnesota.

As Professor Mike Steenson noted, a close reading of *Domagala* reveals that the court presented two different foreseeability standards. On the one hand, the court stated that the test for foreseeability is the test outlined in *Whiteford*: “[W]hether it was objectively reasonable to expect the specific danger causing the plaintiff’s injury.” On the other hand, only a few lines later, the court stated that the test for foreseeability “is not whether the precise nature and manner of the plaintiff’s injury was foreseeable,

175. Id.
176. Id.
180. See supra Part III.B.2.
181. See Steenson, supra note 179.
182. Id. at 651.
183. Domagala v. Rolland, 805 N.W.2d 14, 27 (Minn. 2011) (citing Whiteford *ex rel.* Whiteford v. Yamaha Motor Corp., U.S.A., 582 N.W.2d 916, 918 (Minn. 1998)).
but whether ‘the possibility of an accident was clear to the person of ordinary prudence.’”

E. Domagala and Doe 169: The Domagala Variance Remains Unaddressed

Domagala factored heavily in the Minnesota Court of Appeals’ analysis of Doe 169’s negligence claim. Notably, in its discussion of the foreseeability of Doe 169’s injury, the court of appeals cited the more lenient test presented in Domagala. Under this analysis, the court found that the foreseeability of Doe 169’s injury was a proper question for a jury. The court further discussed the District Council’s knowledge, via Hickle, of Brandon’s “history of inappropriate relationships with young boys.” Although acknowledging that there were no precise incidents of sexual misconduct, the court noted that the generally known fact that sexual abuse by church authority figures “occurred and was a problem.” The court reasoned that this general knowledge, combined with Hickle’s insight, provided “sufficient evidence to create questions for the jury” as to whether Doe 169’s injury was reasonably foreseeable.

Despite the court of appeal’s considerable reliance on Domagala, the supreme court appeared to overlook the fact that, in Domagala, “the duty formulations vary.” The supreme court acknowledged the Domagala exception, but then adopted a foreseeability standard without expressly recognizing or addressing the duty formulation variance and the “precise nature and manner” caveat of Domagala. In so doing, the supreme court avoided the issue of Domagala’s incongruence.

184. [Note: cites source]
186. Id. at *7 (stating that the test utilized by the court of appeals did not require that the “precise nature and manner” of Doe 169’s injury be foreseeable).
187. Id. at *8 (“Viewing this evidence in a light most favorable to appellant, whether Brandon’s sexual abuse of appellant was a foreseeable harm is an issue for the jury.”).
188. Id. at *17.
189. Id. at *21.
190. Id. at *7–8.
191. Steenson, supra note 179, at 651.
Due to the supreme court’s failure to address and clarify the Domagala variance, it remains applicable law. This is a troubling prospect. As Professor Steenson noted, the two differing standards presented by the Domagala decision may very well be outcome determinative. As the highest court in the state, the supreme court’s decisions “contribute importantly to public policy nationwide,” public policy that is “directly relevant to the lives of most citizens.” Adherence to past rulings gives predictability and continuity to the law. Allowing Domagala to stand, unaddressed, does exactly the opposite and allows for “the dangerous possibility that judges will decide cases on a momentary whim or with an individualistic sense of right and wrong.”

Doe 169 incorporates the very essence of the problem that the dual standards of the Domagala variance presents. The less stringent foreseeability threshold is met if a reasonable person might have foreseen the possibility of an accident, even if not the exact accident that occurred; the steeper threshold is met if a reasonable person could have foreseen the exact injury that did occur. The former threshold leaves the door wide open for negligence litigation. The term “possible accident” is so vague as to invite almost any adverse event as the basis for a case. In addition, in cases involving serious injury, foreseeability could be found, even if only minor injury could have been foreseen. Minnesota negligence law could benefit from stricter, more clearly defined limits. The latter Domagala threshold provides exactly that.

the specific danger was objectively reasonable to expect . . . .” (citing Whiteford ex rel. Whiteford v. Yamaha Motor Corp., U.S.A., 582 N.W.2d 916, 918 (Minn. 1998)).

193. See id. at 179 (noting that, though the court “applies the framework of Domagala,” it does not address the two test formulations present in Domagala).
194. Steenson, supra note 179, at 653–54.
196. Id. at 87.
198. Id.
VII. FORESEEABILITY QUESTIONS LEFT UNANSWERED

Like this dual foreseeability standard, the foreseeability factors listed by the appellate court—Hickle’s knowledge of Brandon’s past inappropriate behavior; the existence of, to borrow a term from a previous Minnesota Court of Appeals case, “red flags”; and Hickle’s general knowledge that sexual abuse by religious authority figures was a commonly known hazard—were ignored by the supreme court. The Minnesota Supreme Court failed to address these factors entirely, which was a curious choice. For better or worse, state case law appears to support the court of appeal’s decision.

A. Knowledge of Inappropriate Behavior

First, the Minnesota Court of Appeals considered the fact that the District Council, through Hickle, had knowledge of “Brandon’s inappropriate boundaries and conduct with male youths while


201. *See Doe 169 I*, 2013 WL 2302023, at *8 (“Respondent knew that Brandon continued to host sleepovers with male youths even after Hickle directed him to stop [and] that two youths complained that they felt uncomfortable when Brandon insisted that they sleep in his bed with him . . . .”)

202. *Id.* (“Hickle acknowledged that by the late 1980’s ‘it was widely known’ that sexual abuse of children by ministers and youth workers occurred and was a problem. Hickle wrote an article about the prevention of sexual abuse of children in the ministry context that was published in a newsletter available to churches and ministers affiliated with respondent. Slagg testified that sex abuse is a well-known hazard of ministering to children.”).

203. *See supra* Part V.A for a discussion of those factors considered decisive by the Minnesota Supreme Court in reaching the *Doe 169* conclusion.

204. The policy implications of the Minnesota Court of Appeals’ decision were troubling to many. *See e.g.* Brief and Appendix of Amicus Curiae Minnesota Religious Council at 10, *Doe 169 II*, 845 N.W.2d 174 (No. A12-1721), 2015 WL 8481219, at *10 (“[A]ll that [was] necessary to impose a duty on a defendant to protect a third party from injury is the defendant’s ‘certification’ (or some similar act) regarding the tortfeasor and a general societal knowledge that people in the tortfeasor’s position may cause injury to others.”).
Brandon was employed” under Hickle’s supervision. Namely, Hickle was aware that “Brandon gave one youth leg and back rubs.” In the Minnesota Supreme Court’s 2007 Bjerke v. Johnson decision, the defendant directly witnessed inappropriate interactions between a minor and an adult. Ultimately, the supreme court decided that the issue of whether or not the defendant should have reasonably foreseen danger, and the events that unfolded, was a question for the jury. Unlike Doe 169 and the District Council, the Bjerke defendant and victim were in a special relationship. Nevertheless, the existence of a special relationship does not obviate the requirement that the injury in question be foreseeable. The supreme court found that the “inappropriate behavior” demonstrated by the adult male should have alerted the Bjerke defendant to the likelihood of imminent sexual abuse. The Minnesota Supreme Court failed to address what makes the inappropriate behavior in Bjerke different from the inappropriate behavior in Doe 169.

B. The Existence of Red Flags

Second, the Minnesota Court of Appeals has suggested that “red flags” may provide sufficient grounds to establish foreseeability. For example, in C.B. ex rel. L.B. v. Evangelical Lutheran Church in America, a retired minister sexually molested the child of a former parishioner. The court of appeals held that the particular “red flags” presented by the plaintiff—the child’s overnight visits at the abuser’s house, the abuser’s habit of buying the child expensive gifts, and the child’s hesitation to visit the abuser—were insufficient to render the sexual abuse foreseeable.
The court stated that as these behaviors were not “abnormal,” and they did not render the abuse “objectively foreseeable.” This seems to suggest, then, that the existence of abnormal behaviors, like those behaviors observed on the part of Brandon, can render abuse foreseeable. The supreme court, however, did not consider this issue in its foreseeability discussion.

C. The Existence of General Knowledge

Third, the Minnesota Court of Appeals found that the foreseeability of Doe 169’s injury was a question for the jury, as Hickle acknowledged that “it was widely known” that sexual abuse of children by ministers and youth workers occurred and was a problem. Knowledge that a specific hazard commonly poses a risk in a particular field has, in previous decisions, rendered the realization of that hazard a foreseeable event.

For example, in Fahrendorff ex rel. Fahrendorff v. North Homes, Inc., the Minnesota Supreme Court found that an employer, a group home, was responsible for the sexual abuse of a minor-resident by an employee. The supreme court deemed the foreseeability of the employee’s abuse a question for a jury, as “inappropriate sexual contact . . . in [group homes] . . . is a well known hazard.” Likewise, in Marston v. Minneapolis Clinic of Psychiatry and Neurology, Ltd., the supreme court found that a clinic

notice of the abuse.

214. Id.
216. See Doe 169 II, 845 N.W.2d at 179 for the Minnesota Supreme Court’s analysis of the foreseeability element. The court does not address Brandon’s inappropriate past actions.
218. Fahrendorff ex rel. Fahrendorff v. N. Homes, Inc., 597 N.W.2d 905, 911–12 (Minn. 1999) (“[Plaintiff] submitted the affidavit from . . . a purported expert in the group home industry, expressly stating that ‘inappropriate sexual contact or abuse of power in [group home] situations, although infrequent, is a well known hazard in this field.’ This sworn statement, although somewhat conclusory and lacking specific examples, is nearly identical to the testimony we relied on in Marston in holding that a question of material fact existed on the issue of foreseeability.” (citing Marston v. Minneapolis Clinic of Psychiatry & Neurology, Ltd., 329 N.W.2d 306, 311 (Minn. 1982))).
219. 597 N.W.2d 905, 911.
220. Id.
was responsible for an employee-physician’s forbidden sexual relationships with clients.221 Once again, as “sexual relations between a psychologist and a patient is a well-known hazard,”222 the Minnesota Supreme Court found that the foreseeability of the doctor’s sexual misconduct posed a question of material fact.223 The occurrence of sexual abuse within the church is also, unfortunately, an all too common occurrence.224 In light of widespread knowledge that such abuse occurs, as well as valid Minnesota case law supporting the idea that widespread knowledge may serve as a basis for foreseeability, the Minnesota Supreme Court should have addressed why this general knowledge did not render Doe 169’s injury reasonably foreseeable.

VIII. SUMMARY JUDGMENT IMPLICATIONS

A. The Drastic Nature of Summary Judgment

Despite the existence of unanswered questions and the underlying presence of seemingly contradictory case law, the Minnesota Supreme Court, rather than remand Doe 169 to the lower courts for further examination, reinstated the “drastic”225 and “extreme”226 legal remedy of summary judgment.227 Summary judgment results in the serious consequence of removing a case from the hands of a jury.228 The right to trial by jury, a right

221. 329 N.W.2d 306, 311.
222. Id.
223. Id.
227. Doe 169 II, 845 N.W.2d 174, 179 (Minn. 2014).
expressly guaranteed by the U.S. Constitution, is “venerate[d] . . . as an institution that links the state with both political and civil society and helps to make democratic society a reality.” Therefore, a summary judgment motion should be granted only when “there is no genuine issue as to any material fact” and a “party is entitled to a judgment as a matter of law.”

The Minnesota Supreme Court has warned that the “blunt instrument” of summary judgment “should be employed only where it is perfectly clear that no issue of fact is involved.” Minnesota has admonished that summary judgment should be wielded with caution and applied “only where it is clearly

Our Day in Court and Jury Trial Commitments?, 78 N.Y.U. L. REV. 982, 1077 (2003) (”Jury trial is both unique and central to the American legal system.”).

229. U.S. CONST. art. VII.

230. JOHN GASTILL ET AL., THE JURY AND DEMOCRACY: HOW JURY DELIBERATION PROMOTES CIVIC ENGAGEMENT AND POLITICAL PARTICIPATION 192 (2010); see Vikram David Amar, Jury Service as Political Participation Akin to Voting, 80 CORNELL L. REV. 203, 206 (1995) (“[T]he link between jury service and other rights of political participation such as voting is an important part of our overall constitutional structure . . . .” (citing Powers v. Ohio, 499 U.S. 400, 407 (1991))).

231. The drastic nature of summary judgment has made it a controversial legal remedy. Some scholars question whether summary judgment manages to achieve its goals of economic and judicial efficiency. See John Bronsteen, Against Summary Judgment, 75 GEO. WASH. L. REV. 522, 547 (2006) (“Summary judgment costs more than it saves, both in terms of money and fairness.”); D. Theodore Rave, Note, Questioning the Efficiency of Summary Judgment, 81 N.Y.U. L. REV. 875, 909 (2006) (concluding that, while not enough empirical data exists to reach a concrete conclusion, “serious questions” exist as to whether summary judgment is “a cost-saving device”). Some scholars critique summary judgment as a wholly unconstitutional legal remedy that should never be granted. See Suja A. Thomas, Why Summary Judgment Is Still Unconstitutional: A Reply to Professors Brunet and Nelson, 93 IOWA L. REV. 1667 (2008); Suja A. Thomas, Why Summary Judgment Is Unconstitutional, 93 VA. L. REV. 139 (2007). But see Edward Brunet, Six Summary Judgment Safeguards, 43 AKRON L. REV. 1165, 1167 (2010) (arguing that “the summary judgment process facilitates the identification of the issues in litigation,” and “focus[es] the parties' attention on the quality of the facts and law”). Furthermore, Brunet contends that “safeguards”—including “(1) the inherent and discretionary ability [of the trial court] to find one issue of disputed fact, (2) robust de novo review, and (3) the Rule 56(f) request for a time-out of pending discovery”—exist [to] prevent erroneous grants of summary judgment.” Id. at 1188.

232. MINN. R. CIV. P. 56.03.


234. Lundgren v. Eusterman, 370 N.W.2d 877, 882 (Minn. 1985) (noting that though each individual case presents a unique situation, “summary judgments are
Granting a summary judgment motion is only appropriate when “there is then no legally legitimate fact conflict for the jury to resolve or fact inference for the jury to draw.” Applying the summary judgment remedy in ambiguous situations, Minnesota’s courts have held, is “wholly erroneous.”

B. Summary Judgment in Negligence Actions

Summary judgment motions are rarely granted in negligence actions. Questions of negligence require close examination of circumstances and deliberation as to what is reasonable, ordinary, or prudent. As such, these questions are “uniquely suited for jury consideration,” and “are usually inappropriate for summary judgment.” Deciding that an individual acted unreasonably, that an injury was foreseeable, or that harm resulted directly from an actor’s own conduct are often matters of discretion. This is not to say that summary judgment is always inappropriate in a negligence claim; such a motion may be granted “in the clearest of cases,” to be granted with caution”); see also Couillard v. Charles T. Miller Hosp., Inc., 253 Minn. 418, 418, 92 N.W.2d 96, 97 (1958). 235. Katzner v. Kelleher, 535 N.W.2d 825, 828 (Minn. Ct. App. 1995). 236. Jeffrey W. Stempel, A Distorted Mirror: The Supreme Court’s Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process, 49 OHIO ST. L.J. 95, 164 (1988) (discussing summary judgment at the federal level). 237. See Illinois Farmers Ins. Co. v. Tapemark Co., 273 N.W.2d 630, 638 (Minn. 1978) (“[P]laintiff should be permitted to offer evidence tending to establish that young persons . . . were present on the day of the accident and that the parking lot was known to be a location for incidents of theft . . . and vandalism.”); Sauter v. Sauter, 244 Minn. 482, 485–86, 70 N.W.2d 351, 353 (1955) (holding that summary judgment is inappropriate where poor weather conditions create questions of material fact pertaining to a driver’s ability to avoid an automobile accident); Abo El Ela v. State, 468 N.W.2d 580, 582–83 (Minn. Ct. App. 1991) (holding that “standards of reasonableness and causation” pertaining to a state trooper’s purported negligence are appropriately decided by a jury). 238. 10A CHARLES ALLEN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2729 (3d ed. 1998). 239. Abo El Ela, 468 N.W.2d at 582–83. 240. See Pond Hollow Homeowners Ass’n v. The Ryland Grp., Inc., 779 N.W.2d 920, 923–24 (Minn. 2010) (upholding summary judgment against plaintiff when plaintiff failed to establish a professional standard of care); Fabio v. Bellomo, 504 N.W.2d 758, 763 (Minn. 1993) (upholding summary judgment in case of purported negligent aggravation of a preexisting medical condition); Kaczor v. Murrow, 354 N.W.2d 524, 526 (Minn. Ct. App. 1984) (affirming summary judgment for motorist who had no duty to warn other motorists of a dangerous driving situation).
in which “the material facts are undisputed and as a matter of law compel only one conclusion.” In such cases, summary judgment does not violate the seventh amendment right to a jury trial, as the lack of material evidence would leave a reasonable jury with “no acceptable task.”

C. Summary Judgment in Doe 169

With the Minnesota Supreme Court’s reasoning in Doe 169, summary judgment was an inappropriately strong judicial remedy. In Doe 169, the supreme court acknowledged that “[o]ur case law states, without explaining, that in close cases, foreseeability as it relates to duty is a jury question.” The court then declared that “[b]ecause [Doe 169] does not present a close question on foreseeability, we decide the question as a matter of law.” Case law suggests the contrary. Questions of material fact, at least as to the foreseeability of Doe 169’s injury, certainly existed. It is undisputed that Hickle, a member of the District Council, knew about Brandon’s history of inappropriate interactions with minors. In addition, the District Council certainly knew that sexual abuse of minors by church ministers was a reality and a true problem within the church. Hickle’s first-hand knowledge, along with the District Council’s general knowledge, created questions of fact as to foreseeability. Therefore, the case should have gone before a jury and not disposed of through summary judgment.

IX. CONCLUSION

Foreseeability and the misfeasance/nonfeasance distinction play complex and often misunderstood roles in Minnesota tort law. Both elements are critically important to questions of negligence; however, both elements also are potentially perplexing and garner significant criticism for the often unstable manner in which they

242. Sauter, 244 Minn. at 486, 70 N.W.2d at 354.
243. Stempel, supra note 236, at 164.
244. Doe 169 II, 845 N.W.2d 174, 178 n.2 (Minn. 2014).
245. Id.
247. Id. at *8.
are applied. Foreseeability lacks a clear and standard definition. What exactly makes an event, victim, or injury foreseeable is largely discretionary. Meanwhile, the misfeasance/nonfeasance distinction has been described as little more than “semantic play,” and applying this differentiation to real world scenarios at times proves “impossible.”

In an attempt to inject precision into the murky realms of foreseeability and misfeasance, states carve out standards through case law, statutes, and policy decisions. However, despite the gravity of foreseeability and the misfeasance/nonfeasance distinction, and the bewilderment with which they are often approached, Doe 169 presents no clarifications. The Minnesota Supreme Court’s blurred analysis is problematic, beyond simply serving as a showcase of the court’s disorientation with the Domagala exception. The court reinstated summary judgment for the defendant in Doe 169, signifying that no other conclusion could be reached. A decision based on foreseeability, however, calls to mind numerous Minnesota Supreme Court decisions in which similar facts were considered sufficient to render injury reasonably foreseeable to necessitate jury consideration. Furthermore, the court’s decision confounds, rather than clarifies, the precarious spot that the elements of foreseeability and misfeasance occupy in Minnesota case law. In fact, the court’s decision, though heavily reliant upon the Domagala opinion, overlooks the fact that Domagala itself presents a perplexing dual foreseeability standard.

In its Doe 169 ruling, the Minnesota Supreme Court had the opportunity to specify that foreseeability exists only when specific injury could be reasonably predicted. In so doing, it could have—and should have—eliminated much of the subjective ambiguity present in negligence litigation and created a set standard by which Minnesota courts could abide.

248. See generally William H. Hardie, Jr., Foreseeability: A Murky Crystal Ball for Predicting Liability, 23 CUMB. L. REV. 349, 397-98 (1993) (“[N]o one can state a clear and unequivocal definition of ‘foreseeability.’”).
249. Adler, supra note 26, at 877.
250. See Cardi, supra note 160, at 1878. (“[W]here duty is not controlled by statute or specific common-law rule . . . duty almost universally is articulated as a multi-factorial policy decision.”).
251. See Doe 169 II, 845 N.W.2d at 178.
252. Id. at 179.
253. See supra Part VII.
254. See supra Part VI.E.