

NO. A07-0389

State of Minnesota
In Court of Appeals

Michael Duane Razink and Terri Razink,
Appellants,

vs.

Michael J. Krutzig, Kathy M. Krutzig, Daryl V. Krutzig,
and Charles Pfeffer, as individuals; S.B. 25, LLC, and
Ocello, LLC, Minnesota Limited Liability Companies;
and Pfeffer Company, Inc., a Minnesota Corp.,

Respondents.

APPELLANTS' APPEAL BRIEF AND APPENDIX

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LEGAL ISSUES

- I. Does Minn. Stat. § 604.20 et seq. bar any of Appellants' claims against any Respondents?

THE TRIAL COURT HELD:

Respondent Ocello granted access to Lot 2 by permitting snowmobilers to use the snowmobile trail. Minn. Stat. § 604A.25. Therefore Appellant is barred from asserting a claim as trespasser against Respondent Ocello.

As owners of the sign structure placed on Lot 2, Respondents S.B. 25 and Michael, Daryl and Kathy Krutzig are owners of "land" as defined under Minn. Stat. § 604A.21, subd. 3 and are therefore immunized from liability against Appellants' claims in accordance with the Minnesota Recreational Use Statute.

- II. In granting summary judgment to Respondents, did the Trial Court fail to view the facts in the light most favorable to Appellants, find facts which should have been reserved for a jury and err in its Conclusions of Law?

THE TRIAL COURT HELD:

As non-possessors of Lot 2, Respondents S.B. 25 and Michael, Daryl and Kathy Krutzig had a duty to avoid "creat[ing] or maintain[ing] upon the land a structure or other artificial condition which [they] should recognize as involving an unreasonable risk of physical harm to others upon or outside of the land. . . ." and are subject to liability for any physical harm thereby caused, regardless of Appellants' status as a trespasser. However, since there was no snow on the ground until shortly before the accident, Respondents could not have recognized that the sign posed an unreasonable risk of harm to snowmobilers.

Appellant failed to meet his own minimal duty to operate the snowmobile responsibly, riding at an excessive speed and while intoxicated.

The Wright County Zoning Code does not apply within Monticello limits, and since there was no violation of the City's sign setback provisions, Appellants cannot maintain a negligence per se claim.

STATEMENT OF FACTS

Respondent Ocello, LLC owned three plots in the City of Monticello, County of Wright, State of Minnesota, which have been identified in this litigation as Lots 1, 2, and 3 (A-241, 243; T. 16-17) At some time prior to February 9, 2003, Respondent Charles Pfeffer, a realtor, placed a 4'8' plywood "For Sale" sign on Lot 2. (A-245) Interested parties were to call Respondent Ocello, LLC. (A-118) The sign was supported by two thin, steel posts and placed parallel to Highway 25. (A-204, A-118) Respondent Pfeffer placed no reflective material on the sign or the supporting poles. (TA. 28)¹ The sign was placed edge-wise on a well-traveled snowmobile trail which also ran parallel to Highway 25.² (A-119; T. 4) The sign was in violation of Wright County Zoning Ordinance 724.1(10), which prohibits the placement of signs within public right-of-way or easements and which provides that no advertising sign or billboard may be placed within 200 feet from the centerline of any street or road. (A-188; TA. 31) The sign erected by Respondent Pfeffer for Ocello, LLC was 91 feet from the centerline of Highway 25 and was therefore in violation of the ordinance. (A-188)

At some time prior to February 9, 2003, Respondents Michael J. Krutzig and S. B. 25, LLC purchased Lot 1 from Ocello, LLC. (A-241; TA. 16) After the purchase and prior to February 9, 2003, Respondent Michael J. Krutzig replaced Respondent Ocello, LLC's for-sale sign with his own 4-foot by 8-foot plywood sign advertising the availability of retail and office space on his land and advising interested parties to call him. (A-236, A-255; TA. 14) The new

¹ "T" references the transcript from the December 12, 2004 Summary Judgment Hearing "TA" references the transcript from the November 18, 2005 Summary Judgment Hearing.

² Although this snowmobile trail is well-traveled, and its existence obvious, it is not groomed, maintained, or designated as a trail by any snowmobile club or governmental entity. The trail was created by the informal but frequent use of local snowmobilers riding their snowmobiles alongside the highway. Appellants submitted to the Trial Court color copies of five photographs as exhibits depicting the unmistakable existence of this trail. (A-194-198)

sign was approximately half an inch thick and was supported by the same steel posts and in the same location as the original sign. (A-255) Respondent Krutzig placed no reflective material on the sign or the supporting poles.

Michael Krutzig had permission from Respondent Pfeffer to replace Ocello's sign with his own. (A-235, A-246) Pfeffer did not call Ocello to ask its permission. (A-246, 250) There is no evidence in the record to suggest Ocello knew any of the Respondents Krutzig as anyone other than a purchaser of one of their plots of land.

On February 9, 2003, at approximately 7:42 p.m., Appellant Michael Duane Razink and Philip Michael Osman left Osman's home on Osman's snowmobiles to get gas for the snowmobiles. (A-207, A-213, A-119) They traveled northbound along the snowmobile trail on the east side of Highway 25. (A-214, A-217) Osman led and Appellant followed, generally staying at a safe distance behind. (A-219-221, A-224) Not knowing Respondents' sign was there, never suspecting someone would place a sign in the middle of such a trail, and unable to see the narrow, half-inch profile of the sign in the darkness ahead of him, Appellant crashed into the sign. (A-224, A-226) The impact caused serious fractures of Appellant's right arm, and the edge of the sign sliced deeply into Appellant's right arm, nearly severing it just above the bicep. (A-119)

STATEMENT OF THE CASE

This action was commenced by service of the Summons and Complaint on Respondents Michael J. Krutzig, Kathy M. Krutzig, Daryl V. Krutzig, S. B. 25, LLC, and Ocello, LLC on September 10, 2004. (A-1) Appellants brought negligence and negligence per se claims against Respondents. Respondents denied negligence and claimed immunity under Minn. Stat. § 604A.20, et seq.

In his Order dated January 4, 2005, Judge Mossey dismissed Respondent Ocello, LLC from this suit. (A-48) The Court's Conclusion of Law regarding this dismissal was that "Respondent Ocello granted access to Lot 2 by permitting snowmobilers to use the snowmobile trail. Minn. Stat. §604A.25 (2003), therefore bars Respondents from asserting a claim as a trespasser against Respondent Ocello."

Michael J. Krutzig, Kathy M. Krutzig, Daryl V. Krutzig, and their corporation, S.B.25 LLC were granted summary judgment by Judge Kathleen A. Mottl in an order dated February 16, 2006, finding, in part, that because they were "agents" of Ocello, they were also entitled to dismissal. (A-121)

Respondent Charles Pfeffer and Pfeffer Company, the final two remaining Respondents, were granted summary judgment by Judge Kathleen A. Mottl in an order dated December 15, 2006 on the same grounds. (A-167) Final judgment in this matter was entered on December 20, 2006. (A-164)

ARGUMENT

The Trial Court dismissed of their claims against Respondents even though statutory immunity pursuant to Minn. Stat. § 604A. 20-27 (2003) applies only to owners who give *express* written or oral permission for the recreational use of their land. In this case, no written or oral permission for Appellant to use Respondents' land was granted, and in addition, material facts regarding the trail and collision are in genuine dispute.

I. MINNESOTA'S RECREATIONAL LAND USE STATUTE (MINN. STAT. § 604.200, ET SEQ) IS INAPPLICABLE UNDER THE FACTS OF THIS CASE.

A. The immunity granted by Minn. Stat. § 604A.20, et seq. applies only to Ocello if it had given written or oral permission for the recreational use of their land

The statute provides:

An owner who gives *written or oral permission* for the use of the land for recreational purposes without charge does not *by that action . . . 3) assume responsibility for or incur liability for any injury to the person or property caused by an act or omission of the person.*

Minn. Stat. § 604A.23 (2003)(emphasis added). Two points about this section of the statute are clear. First, this section grants immunity from liability *only* for owners who give written or oral permission for the use of their land. In other words, the immunity applies between land owners and entrants, but it does not change the relationship between land owners and trespassers. Second, the effect of this section is merely to clarify that the mere act of giving permission does not be itself create any special or assumed duty on the part of the land owner. The statute does not say that a land owner is immune from liability for all acts or omissions which cause injury to entrants.

The statute further provides:

Except as provided in section 604A.25, an owner who gives *written or oral permission* for the use of the land for recreational purposes without charge: (1) owes no duty of care to render or maintain the

land safe for entry or use by other persons for recreational purpose; (2) owes no duty to warn these persons of any dangerous condition on the land, whether patent or latent; (3) owes no duty of care toward those persons except to refrain from willfully taking action to cause injury; and (4) owes no duty to curtail use of the land during its use for recreational purposes.

Minn. Stat. § 604A.22 (2003)(emphasis added).

Again, immunity depends exclusively on the owner having granted written or oral permission for the recreational user to come on the land. It is clear that the statute is intended to change the land owner's traditional common law duty to entrants, but by specifically requiring permission on the part of the land owner, this section of the statute does not change a land owner's duty to trespassers.

Finally, the statute expressly excludes liability to trespassers from its coverage. The statute provides:

Except as set forth in this section, nothing in sections 604A.20 to 604A.27 limits the liability that otherwise exists...for conduct which, at law, entitles a trespasser to maintain an action and obtain relief for the conduct complained of.

Minn. Stat. § 604A.25(1) (2003).

The exception set forth in that section is as follows:

Except for conduct set forth in section 604A.22, clause 3, a person may not maintain an action and obtain relief at law for conduct referred to in clause (1) in this section if the entry upon the land is incidental to or arises from access granted for the recreational trail use of *land dedicated, leased, or permitted by the owners for recreational trail use.*

Minn. Stat. § 604A.25 (2003) (emphasis added).

Pursuant to this language of the statute, even the claims of trespassers may be barred, but only where the land is dedicated, leased, or permitted by the owners for recreational trail use. The meaning of "leased" is clear enough. "Dedicated" means "made available by easement, license,

permit, or other authorization.” Minn. Stat. § 604A.21, subd. 2a (2003) “Permit” means “to consent to formally.” *Black’s Law Dictionary* 1160 (7th ed. 1999). The act of permission is an affirmative act, particularly within the context of this statute, which in two places requires “written or oral” permission. Where the land is not so dedicated, leased, or permitted for recreational trail use by the owners, the statutory immunity does not apply. And, even where the immunity does apply, a land owner still owes a duty to refrain from willfully taking action to cause injury. Minn. Stat. § 604A.22, subd. 3 (2003).

The Minnesota Court of Appeals held in *Watters v. Buckbee Mears Co.*, 354 N.W.2d 848 (Minn. Ct. App. 1984) that, “the Minnesota Supreme Court has found the Recreational Use Statute inapplicable when the land is not offered for public use,” *Watters*, 354 N.W. 2d at 851 (citing *Hughes v. Quarve & Anderson co.*, 338 N.W. 2d 422, 424 (Minn. 1983), and held that “[b]ecause they did not directly or indirectly invite or permit people to use the property for recreational purposes, the statute does not apply.” *Id.* (emphasis added)

In this case, there is no evidence to suggest that any of the Respondents ever gave consent, written, oral or otherwise, for Appellant to use their land for recreational purposes, nor was there any invitation or permission given, direct or indirect. As will be discussed below, this means Appellant was a trespasser and not an entrant, and the statutory immunities granted by §§ 604A.22 and 604A.23 are not applicable here.

The statutory immunity from trespasser claims granted by Minn. Stat. § 604A.25 (2003), is inapplicable as well, because there is no evidence to suggest that the land was ever dedicated, leased, or permitted by the owners for recreational use. Therefore, despite the immunities granted by the Recreational Land Use Immunity Statute, Respondents still owed Appellant the land owner’s common law duties of care to trespassers.

- B. Ocello owed a duty to warn Appellant of the artificial conditions it created or maintained since it knew or should have known snowmobilers were likely to intrude, the sign was likely to cause serious injury, and not be seen by snowmobilers.**

Watters, as previously discussed, holds that the Minnesota Recreational Use statute “preserves a trespasser’s common-law rights against landowners.” *Watters*, 354 N.W.2d at 851. *Watters* holds that if a land owner knows, or from facts within his knowledge should know, that trespassers constantly intrude upon a limited or definite area of the land, he has a duty to give reasonable warning to prevent injuries caused by an artificial condition that he created or maintains on the property, if the condition is known to him to be likely to cause serious injury and he has reason to believe that trespassers will not discover it. *See id.*; *Sirek v. State*, 496 N.W.2d 807, 809 (Minn. 1993).

Thus, a possessor of land who knows or should have known that trespassers constantly intrude upon a limited area on the land is subject to liability for bodily harm caused to a trespasser by an artificial condition on the land if:

1. The condition was created or maintained by the Respondent,
2. The Respondent knew that the condition would likely cause death or serious injury to trespassers,
3. The Respondent has reason to believe trespassers will not discover the condition, and
4. The Respondent failed to exercise reasonable care to warn trespassers of both the condition and the risk involved with regard to the condition.

See Restatement (Second) Torts, 2d, § 335 (1965); *Johnson v. Washington County*, 518 N.W.2d 594, 599 (Minn. 1994) (applying the Restatement). Under this standard a landowner does have an affirmative duty to give trespassers adequate warning, and he will be liable for failing to

exercise reasonable care to warn them about artificial dangers he created or maintained. *Sirek*, 496 N.W.2d at 809.

These elements of premises liability law underscore that the Respondents in this case do owe Appellant a duty of care despite the existence of Minnesota's Recreational Land Use Immunity Statute and despite Appellant's status as a trespasser.

C. Respondents Charles Pfeffer and Pfeffer Company, Inc., are also not entitled to immunity under Minn. Stat. §604A.20 et seq.

Charles Pfeffer and Pfeffer Company, Inc., are not "owners" as defined by Minn. Stat. §604A.20 et seq.

Only "owners" are entitled to the immunities granted by the recreational land use Statute. Minn. Stat. §604A.20 et seq., defines "owner" narrowly at subdivision 4:

"owner" means the possessor of a fee interest or a live estate, tenant, lessee, occupant, holder of a utility easement, or person in control of the land.

An "agent" of an owner is not entitled to the protections of the statute by its express definitions. Where a statute expressly defines terms, those terms limit the application of the statute to the persons or entities as defined and enumerated. Pfeffer, as an "agent" of "owner" is not entitled to the protection of the statute based on its expressed definitions at Minn. Stat. §604A.20 et seq.

Respondents Charles Pfeffer and Pfeffer Company, Inc., are not entitled to no greater immunity under Minn. Stat. §604A.20 et seq., than Ocello, L.L.C., is due. As discussed previously, Ocello, L.L.C., is not entitled to protection under Minn. Stat. §604A.20 et seq. due to it having not given written oral permission for snowmobilers to use the snowmobile trail across its property, specifically Lot 2. Respondents Pfeffer and Pfeffer Company, Inc., therefore, as real estate agents for Ocello, L.L.C., also failed to give any written written or oral permission for

the snowmobile use across Lot 2. Therefore, Respondents Pfeffer and Pfeffer Company, Inc. are equally barred from seeking immunity under Minn. Stat. §604A.20 et seq.

Although Charles Pfeffer and Pfeffer Company, Inc., are not entitled to immunity under Minn. Stat. §604A.20 et seq., *Charles Pfeffer and Pfeffer Company, Inc.*, are responsible to warn appellants of the artificial conditions they created in placing the posts of the subject sign. Charles Pfeffer knew or should have known that to place a sign in the middle of an obvious snowmobile path would likely cause serious injury to snowmobilers who would not see the very narrow half inch wide edge of the sign.

D. Respondents Michael, Daryl and Kathy Krutzig, and SB. 25 L.L.C., are not “Agents” of Ocello, L.L.C. and Appellants’ claims against them are not barred under Minn. Stat. § 604A.20, et seq.

Agency is the fiduciary relationship that results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other to so act. *Jurek v. Thompson*, 241 N.W.2d 788, 791 (Minn. 1976). It is the element of continuous subjection to the will of the principal which distinguishes the agent from other fiduciaries and the agency agreement from other agreements. *Id.*

Here, Respondents Daryl and Michael Krutzig took down Ocello’s sign, on Ocello’s lot, and put up their own sign advertising their own, adjacent land for sale. Before they did so, they obtained permission from Respondent Charles Pfeffer, Ocello’s realtor, who never asked anyone at Ocello for their permission. Respondents’ argument is, apparently, that Daryl Krutzig was an agent of Michael Krutzig, and since Michael Krutzig received permission from Ocello’s realtor to put up a sign, Daryl Krutzig is an agent of Ocello, LLC.³

³ See Defendant Krutzigs’ October 17, 2005 Memorandum of Law in Support of Motion for Summary Judgment at 7. Presumably, this argument includes the proposition that Michael Krutzig is also an agent of Ocello, LLC. (A-79)

However, there is no evidence Ocello even knew of, let alone consented to, the Krutzigs' placement of a sign on its property. There is certainly no evidence that Mr. Weinand or anyone at Ocello consented to an agency relationship between Ocello and the Krutzigs. Respondents were acting on their own behalf, not Ocello's. First, the Krutzigs took down Ocello's sign advertising Ocello's sale of the adjacent lots and advising interested parties to call Ocello. Then the Krutzigs put up their own sign advertising the sale of their lot and advising interested parties to call Michael Krutzig. The Krutzigs were sophisticated businessmen who saw "opportunities" for themselves in the purchase and sale of this property. They were acting on behalf of their own partnership, S.B.25 L.L.C., for the purpose of generating their own profit, and any benefit to Ocello was collateral at most. The Krutzigs are not employees, corporate officers, or property managers working for Ocello. Most importantly, there is no evidence to suggest that, when they removed Ocello's sign and put up their own, they were acting subject to Ocello's control. Respondent Pfeffer, the realtor, testified that he did not even call Ocello to advise them of the Krutzig's changing the signs.

II. RESPONDENTS MICHAEL, DARYL, AND KATHY KRUTZIG, AS WELL AS S.B. 25 L.L.C., OWED A DUTY OF CARE TO APPELLANT, AND QUESTIONS OF MATERIAL FACT EXIST AS TO WHETHER THEY VIOLATED THIS DUTY.

Respondents Michael, Daryl, and Kathy Krutzig, joined by S.B.25 L.L.C., have argued that they owed no duty to Appellant and, to the extent they did owe Appellant a duty of care, they satisfied their duties. Despite Respondents' assertions, they do owe a duty of care to Appellant. Because Respondents are not "landowners" of the land in question, they owed Appellant the same, garden-variety duty of care that any person owes to his fellow citizens. At a minimum, they owed Appellant the limited duty a landowner owes to a trespasser. In either case, genuine

questions of material fact remain as to whether their duty of due care was satisfied. Questions of whether the danger presented by this sign was "obvious," whether the placement of the sign was likely to cause death or serious injury, and whether the Respondents had reason to anticipate the harm are all questions of material fact for the jury. Moreover, Wright County zoning ordinances establish a fixed, statutory standard of care which Respondents failed to observe. Dismissal of any Respondents through summary judgment was therefore inappropriate.

- A. None of these Respondents were owners or possessors of the land on which the sign was located, and therefore, they have the common duty to exercise reasonable care and not the limited duty owed to trespassers.**

Careful reading of Minnesota's common law regarding the duty owed to trespassers shows that the limited duty owed to trespassers has been specifically limited to the protection of landowners, or "possessors of land:"

The general rule as to a *landowner's* duty to adult trespassers is that a *possessor of land* is not liable to trespassers for physical harm caused by his failure to exercise reasonable care to put the land in a condition reasonably safe for their reception, or to carry on his activities so as not to endanger them. However, the rule changes where there are artificial conditions highly dangerous to constant trespassers on a limited area. In that case, a *possessor of land* who knows, or from facts within his knowledge should know, that trespassers constantly intrude upon a limited area of the land, is subject to liability for bodily harm caused to them by an artificial condition on the land, if the condition is one which the *possessor* has created or maintains and is, to his knowledge, likely to cause death or serious bodily harm to such trespassers and is of such a nature that he has reason to believe that such trespassers will not discover it, and the possessor has failed to exercise reasonable care to warn such trespassers of the condition and the risk involved.

Hughes, 338 N.W.2d at 424 (emphases added). Recreational Land Use Statute is intended in part to "protect the landowner against common-law duties and liabilities." *Garberg v. Millerbernd*, 2003 WL 21265669 (unpublished opinion). (A-181) The Statute itself states "it is the policy of

this state...to encourage and promote the use of...privately owned lands..." Minn. Stat. § 604A.20 (2005).

While the law favors landowners, it does not limit the duty of care to be observed by others who are not owners of the land. The language used in the Recreational Land Use Statute, and by the Minnesota Supreme Court, is that "landowners," "possessors," and "occupants" of land have a limited duty. None of the above authorities suggest that if a Appellant is a trespasser, *all* persons creating or maintaining hazards on Lot 2 are relieved of their usual duty to exercise reasonable care.

In this case, it is undisputed that Appellant was a trespasser. However, it is also undisputed that the sign which caused Appellant's injury was located on Lot 2, which was at that time owned by Ocello, L.L.C. and was not owned by any of the Krutzigs or by S.B.25 L.L.C. Neither the Krutzigs nor S.B.25 L.L.C. were "possessors" or occupants of the lot on which the sign was placed. The Trial Court found as a matter of law that "Respondents Michael, Kathy, and Daryl Krutzig, and S.B.25 are not owners of Lot 2." (A-48) Therefore, the duty of care that applies to Respondents Michael, Kathy, and Daryl Krutzig, and S.B.25 is not the limited duty of landowners to trespassers, but the garden-variety duty to exercise reasonable care that any person must observe to protect the rights and safety of his fellow citizens. Genuine questions of material fact exist as to whether these Respondents violated their common-law duty of reasonable care when they placed their 8' x 4' x ½" sign, edge-on, in the middle of this well-traveled snowmobile trail, and by failing to place any lights or reflective materials or anything to warn persons approaching the sign at night. These questions must be resolved by a jury, and the Trial Court's dismissal of Respondents by summary judgment was inappropriate.

B. At the very least, Respondents owed Appellant the duty of care owed by landowners to trespassers.

Even if this Court were to find that Appellant's status as a trespasser controls the duty owed him by *anyone*, regardless of their status as a landowner, Respondents still owed Appellant at least the limited duty of care a landowner owes to trespassers. In general, a possessor of land is not liable to trespassers for physical harm caused by his failure to exercise reasonable care to put the land in a condition reasonably safe for their reception, or to carry on his activities so as not to endanger them. *Hughes v. Quarve & Anderson Co.*, 338 N.W.2d 422, 424 (Minn. 1983).

However, the rule changes where there are artificial conditions highly dangerous to constant trespassers on a limited area. *Id.* If a land owner knows, or from facts within his knowledge should know, that trespassers constantly intrude upon a limited or definite area of the land, he has a duty to give reasonable warning to prevent injuries caused by an artificial condition that he created or maintains on the property, if the condition is known to him to be likely to cause serious injury and he has reason to believe that trespassers will not discover it. *See id.*; *Sirek v. State*, 496 N.W.2d 807, 809 (Minn. 1993).

Thus, a possessor of land who knows or should have known that trespassers constantly intrude upon a limited area on the land is subject to liability for bodily harm caused to a trespasser by an artificial condition on the land if:

1. The condition was created or maintained by the Respondent,
2. The Respondent knew or should have known that the condition would likely cause death or serious injury to trespassers,
3. The Respondent has reason to believe trespassers will not discover the condition, and
4. The Respondent failed to exercise reasonable care to warn trespassers of both the condition and the risk involved with regard to the condition.

See Restatement (Second) Torts, § 335 (1965); *Johnson v. Washington County*, 518 N.W.2d 594, 599 (Minn. 1994) (applying the Restatement). The landowner has a continuing duty

to give trespassers adequate warning, and he will be liable for failing to exercise reasonable care to warn them about artificial dangers he created or maintained. *Sirek*, 496 N.W.2d at 809.

Again, the Trial Court has already held as a matter of law that Respondents Michael, Daryl, and Kathy Krutzig, and S.B.25 L.L.C. were not landowners in regard to the land in question. However, even if this limited standard is applied to these Respondents, genuine questions of material fact exist which must be resolved by a jury. It is undisputed that the sign was an artificial condition, and that it was maintained or created by Respondents. Genuine questions of material fact exist as to whether Respondents knew or should have known that placing a ½ inch thick sign edge-on in the middle of a snowmobile trail would likely cause death or serious injury to snowmobilers, and whether Respondents had reason to know snowmobilers might fail to see the sign until too late. A jury must also decide whether Respondents exercised reasonable care to warn snowmobilers of the danger presented by this sign, although it is also undisputed that Respondents failed to place lights, reflectors, any reflective material, or anything at all to warn snowmobilers in time to avoid this sign at night. As such, dismissal of Respondents by summary judgment was inappropriate.

C. Questions of Appellant's contributory negligence, whether the danger presented by this sign was "obvious," whether the sign was likely to cause serious bodily harm, and whether the Respondents had reason to anticipate the harm, are all questions of material fact for the jury.

Respondents in their respective summary judgment memoranda asserted various reasons why they should not be held liable for their negligent conduct. They assert that:

- 1) Appellant was intoxicated and/or not keeping a proper lookout;
- 2) Appellant was exceeding snowmobiling speed limits;
- 3) The sign was "obvious," and
- 4) The sign was not "likely to cause death or serious injury."

Each of these allegations, even if true, does no more than create a fact question for a jury to decide, and therefore summary judgment was inappropriate. Allegations regarding Appellant's speed, intoxication, and failure to keep a proper lookout create at most a question of comparative fault to be resolved by a jury. A jury must determine whether Appellant's speed was excessive, whether he kept a proper lookout, whether he was too intoxicated to properly operate his snowmobile, and whether any of these things contributed to his injury.

Arguments that the sign was "obvious" and not "likely to cause death or serious injury" likewise create fact questions for a jury to resolve. Respondents Daryl and Kathy Krutzig argue that "there is no evidence that trespassers regularly used the property in question." However, taking the evidence--including the pictures of this trail taken in both the winter and summer months--in the light most favorable to Appellants, there is at least a question of material fact regarding regular use. (A-194-198) In addition, the Trial Court erroneously found, since no express permission oral or written, that "Respondent Ocello granted access to Lot 2 by permitting snowmobilers to use the snowmobile trail." (A-48). A jury should decide whether there was regular use by snowmobilers, and whether the sign was likely to cause serious bodily harm given the position in which it was placed.

Respondents claim the sign was obvious, while Appellant claims he could not see the sign until it was too late to avoid it. The question of whether the sign was obvious to persons riding on the snowmobile trail is one of fact to be resolved by a jury. In addition, the Minnesota Supreme Court has held on this issue that even if a danger is "obvious," the possessor of land is still liable to a trespasser if the possessor "should anticipate the harm despite such knowledge or obviousness." *Peterson v. W.T. Rawleigh*, 144 N.W.2d 555, 558 (Minn. 1966). Even supposing the sign and its placement were obvious as a matter of law, a jury should be permitted to

consider Appellant's contention that Respondents should have anticipated the harm that befell him.

D. Respondents Pfeffer, Krutzig, Krutzig and S.B. 25's placement of the sign violated Wright County safety ordinances and constitutes negligence per se.

Minnesota recognizes establishes that violations of regulations or ordinances that are adopted pursuant to statutory authority can result in negligence per se. *Alderman's Inc. v. Shanks*, 536 N.W.2d 4, 10 (Minn. 1995).

Respondents have asserted in deposition and in previous pleadings that the Wright County zoning ordinance is inapplicable because the incident took place within the city limits of Monticello. The Trial Court adopted this position. However, it makes no sense to suggest that county ordinances do not apply simply because the acts in question occurred inside the limits of a city within that county. Respondent has cited no authority to support its claim that the Wright County ordinance does not apply for this reason. Unless the City of Monticello has adopted a compatible but more restrictive ordinance, the Wright County ordinance applies. Minn. Stat. § 394.33, entitled "County prevails over town unless town more restrictive," provides that:

after the adoption of official controls for a county or portion thereof by the board of county commissioners no town shall enact or enforce official controls inconsistent with or less restrictive than the standards prescribed in the official controls adopted by the board.

Minn. Stat. § 394.33, subd. 1 (2003). The term "inconsistent" means circumstances where a township implements standards that are different in nature from county standards. *Altenburg v. Bd. of Supervisors of Pleasant Mound Township*, 615 N.W.2d 874, 879 (Minn. Ct. App. 2000). Counties have been given priority over townships in matters of zoning except to the extent that the township's ordinance is compatible but more restrictive. *Id.* at 880. Respondents' sign was placed within the County of Wright and is therefore subject to the ordinances passed by the

County of Wright, regardless of the fact that the sign was also within the city limits of Monticello.

Wright County Zoning Ordinance 724.1(10), prohibits the placement of signs within public right-of-way or easements and requires that signs be placed 200 feet away from the centerline of any street or road. (A-188) Listed first among the purposes of this ordinance is the protection of the public health and safety. Appellants are members of the public and residents of Wright County, and the ordinance was enacted in part to protect their health and safety. The only conceivable public health and safety rationale for this ordinance is to protect members of the public, including Appellant, from being injured if their car were to stray from the road, or if they were operating an off-road vehicle alongside the road, as Appellant was when he was injured by Respondents' sign. Respondents placed their sign well within 200 feet of the centerline of Highway 25, and Appellant was severely injured as a result. The undisputed facts of this case establish Respondents' negligence per se. At the very least, there are genuine issues of material fact regarding Respondents' violation of this ordinance which must be resolved by a jury. Either way, summary judgment for Respondents is inappropriate.

CONCLUSION

Minnesota's Recreational Land Use immunity statute *only* absolves land owners who give written or oral permission for entrants to use their land for recreational purposes. Because no permission was given in this case and because Respondents owed Appellants a duty of care, even as a trespasser, the Recreational Land Use immunity statute does not bar Appellants' claims. In addition, the Wright County Zoning Ordinance is applicable and sustains Appellants' negligence per se claims.

Additionally, Respondents owed a duty of care to Appellants. Because all Respondents except for Ocello, L.L.C. were not "land owners" of land in question, those Respondents owed Appellants the same, garden-variety duty of care that any person owes to his fellow citizens. Failing that, they owed Appellants the limited duty a land owner owes to a trespasser. In either case, genuine issues of material fact remain as to whether Respondents' duty of care was satisfied. Questions of whether the danger presented by this sign was "obvious," whether placement of the sign was likely to cause death or serious injury, or the Respondents had reason to anticipate the harm are all questions of material fact for the jury. Further, Wright County Zoning Ordinances established a fixed, statutory standard of care which Respondents failed to observe.

For these reasons, the Trial Court's dismissal of all Respondents was inappropriate, and Appellants seek reversal of the Trial Court's rulings.

Dated: 10 May 2007

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CERTIFICATE OF BRIEF LENGTH

The undersigned counsel for Appellants certifies that this Brief complies with the requirements of Minn. R. Civ. App. P. 132.01, subd. 3, in that it is printed in proportionately spaced typeface utilizing Word and contains 5,833 words, excluding the Table of Contents and Table of Authorities.

Dated: 10 May 2007

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