NO. A07-0389

State of Minnesota

In Court of Appeals

Michael Duane Razink and Terri Razink,

Appellants,

v.

Michael J. Krutzig, Kathy M. Krutzig,
Daryl V. Krutzig, S.B. 25, LLC, a Minnesota corporation,
Ocello, LLC, a Minnesota corporation,
Charlie Pfeffer, Pfeffer Company, Inc.,

Respondents.

BRIEF OF RESPONDENT OCELLO

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LEGAL ISSUES PRESENTED

I. Whether Respondent Ocello is entitled to immunity from trespasser liability under the Recreational Land Use Statute where a "known and well-traveled snowmobile trail"across Ocello's property demonstrates permission was given to use the land for recreational trail use.

The Trial Court held that Respondent Ocello granted access to its property by permitting snowmobilers to use the "known and well-traveled snowmobile trail." Thus, Appellants are barred under Minn. Stat. § 604A.25 from asserting a trespasser claim against Respondent Ocello.

II. Whether Respondents had a duty to warn Appellant about the sign it erected when the sign itself was not inherently dangerous.

The Trial Court found there was no duty to warn as Respondents could not have recognized that the sign posed an unreasonable risk of harm.

III. Whether Appellants' negligence claim is barred because the sign he struck was an open and obvious condition, and Appellant failed to meet his own duty by driving a snowmobile at an excessive speed at night while intoxicated.

The Trial Court held that Appellant had a duty to operate his snowmobile responsibly, but failed to do so when he drove at an excessive speed at night and while intoxicated.

IV. Whether Appellants can maintain a negligence per se claim against Respondents when the county zoning ordinance does not apply within the city limits.

The Trial Court held that the Wright County Zoning Code does not apply within Monticello city limits where the accident occurred. Therefore, Respondents did not violate the code and Appellants cannot maintain a negligence per se claim.

STATEMENT OF THE CASE

Appellants Michael and Terri Razink commenced this action in September 2004 against Respondents Michael, Kathy and Daryl Krutzig; S.B. 25, LLC ("S.B. 25"); and Ocello, LLC ("Ocello") alleging negligence and negligence per se in connection with the placement of a sign on property owned by Ocello.

In November 2004, Respondent S.B. 25 brought a Rule 12 motion to dismiss for failure to state a claim upon which relief may be granted. Respondents Krutzigs and Ocello joined in the motion. Respondents argued that Minnesota's Recreational Land Use Statute, Minn. Stat. §§ 604A.20-27, barred Appellants' claims. Judge Dale Mossey concluded that Ocello, the owner of the property, granted access to its property by allowing use of the snowmobile trail traversing the land, and thus Minn. Stat. §604A.20 et seq. barred Appellants from asserting a claim as a trespasser against Ocello. The Court determined that the Recreational Land Use Statute applied only to "owners" of a parcel and therefore denied the Motion to Dismiss as to the Krutzigs and S.B. 25.

Appellants later amended their Complaint, adding Charles Pfeffer and Pfeffer Company as Defendants.

The Krutzigs and S.B. 25 later moved for Summary Judgment in October 2005. Judge Kathleen Mottl concluded that the Krutzigs and S.B. 25 are owners of land as defined in the Recreational Land Use Statute, and therefore are immunized, like Ocello, from liability against Appellants' claims. Further, Judge Mottl ruled that Respondents had no duty to warn

Appellant about the sign at issue because they could not recognize that the sign posed an unreasonable risk of harm. Finally, Judge Mottl found that Appellant failed to meet his own minimal duty to operate his snowmobile responsibly; riding at an excessive speed at night and while intoxicated.

Respondents Charles Pfeffer and Pfeffer Company were granted summary judgment in December 2006 on similar grounds. Appellants then brought this appeal.

STATEMENT OF FACTS

The following Statement of Facts is based solely on the allegations set forth in the Complaint as Ocello was dismissed from this action on a Rule 12 Motion to Dismiss for failure to state a claim upon which relief can be granted.[1] Such facts were accepted as true and accurate for purposes of the Rule 12 motion.

On February 9, 2003, Appellant Michael Razink drove a snowmobile on a known and well-traveled snowmobile trail where he crashed into a sign, resulting in a serious fracture and lacerations to his right arm. (A-1 at ¶ VIII, XIII, and XV) The sign was located on a plot of land [Lot 2] owned by Respondent Ocello in Monticello, Minnesota. (Id. at ¶ VIII) Ocello owned Lots 1, 2, and 3, and placed the sign on Lot 2 advertising the plots for sale. (Id. at ¶ VII and VIII)

Before the accident, Respondents Michael Krutzig and S.B. 25 purchased Lot 1 from Ocello. (Id. at ¶ IX) After the purchase of Lot 1 and prior to the accident, Mr. Krutzig replaced Ocello's sign with his own sign advertising the availability of retail and office space. (Id. at ¶ XI) The new sign was supported by the same steel posts and in the same location as the Ocello sign. (Id.) This was the sign that Michael Razink struck.

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[1] For purposes of addressing Appellants' claims of negligence and negligence per se, Ocello adopts and incorporates by reference the Statement of Facts submitted by Respondents.

ARGUMENT

I. STANDARD OF REVIEW

In reviewing cases involving dismissal for failure to state a claim upon which relief can be granted pursuant to Rule 12.02(e), the question before the appellate court is whether the complaint sets forth a legally sufficient claim for relief. *Barton v. Moore*, 558 N.W.2d 746, 749 (Minn. 1997). The standard of review is therefore de novo. *See Frost-Benco Elec. Ass'n v. Minn. Pub. Utils. Comm'n*, 358 N.W.2d 639, 642 (Minn. 1984). The reviewing court must consider only the facts alleged in the complaint, accepting those facts as true and must construe all reasonable inferences in favor of the nonmoving party. *Marquette Nat'l Bank v. Norris*, 270 N.W.2d 290, 292 (Minn. 1978).

II. RULE 12 MOTION FOR JUDGMENT ON THE PLEADINGS

A motion for judgment on the pleadings should be granted only if the pleadings create no fact issues. If a fact issue is raised by the pleadings, the motion must be denied. In ruling on the motion, the court must give all benefit of doubt to the non-moving party. *Stephenson v. Plastics Corp. of America*, 276 Minn. 400, 150 N.W.2d 668 (1967). If a pleading states a valid claim, but also admits facts that defeat that claim, judgment on the pleadings is proper. *Wallner v. Schmitz*, 239 Minn. 93, 57 N.W.2d 821 (1953).

III. DISMISSAL OF APPELLANTS' COMPLAINT AGAINST OCELLO WAS PROPER UNDER THE IMMUNITY PROVIDED BY MINNESOTA'S RECREATIONAL LAND USE STATUTE.

The state of Minnesota encourages and promotes private landowners to grant access to their property for recreational purposes. Minn. Stat. § 604A.20 (2004). In furtherance of this objective, the legislature enacted Minn. Stat. § 604A.20 through § 604A.27, limiting the landowner's exposure to legal liability for claims arising out of the public's recreational use of their property.

A. Appellants are barred from bringing a claim as trespasser against Respondent Ocello under section 604A.25 of the recreational land use statute.

Based upon the allegations in Appellants' Complaint, Michael Razink was not an invitee when he traveled across Ocello's property on a snowmobile on the date of the accident. Rather, he was a trespasser. Respondents' Rule 12 motion to dismiss focused on the application of Minn. Stat. § 604A.25, the statutory provision relating to claims by trespassers. This statute provides, in relevant part:

> Except for conduct set forth in section 604A.22, clause (3) [willfully taking action to cause injury], a person may not maintain an action and obtain relief at law for conduct referred to by clause (1) in this section [trespasser action] **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 (emphasis added). A review of the allegations in Appellants' Complaint reveals that they fall within the coverage of Minn. Stat. § 604A.25. Appellants admit that the accident occurred on private land owned by Ocello. Further, they allege that

Razink was traveling on a snowmobile on a *"known and well-traveled snowmobile trail"* when the accident occurred. (A-1 at ¶VIII, XIII, and XV) Importantly, they do not allege that Ocello willfully intended to cause injury. Finally, the allegations do not dispute that Mr. Razink entered the land for the recreational purpose of snowmobiling. Thus, Appellants' Complaint acknowledges that Razink was a recreational user of Ocello's known and well-traveled snowmobile trail. Based solely on Appellants' Complaint, their action against Ocello is barred by Minn. Stat. § 604A.25.

B. The Trial Court properly found that the language in Minn. Stat. § 604A.25 should be interpreted broadly.

Appellants argue that Minn. Stat. § 604A.25 does not apply to their claims against Ocello because the immunity granted by the Recreational Land Use Statute applies only to owners who give *written or oral permission* for the recreational use of their land. While Ocello did not give Mr. Razink formal permission to snowmobile on the property, Appellants' interpretation of "permitted" in Minn. Stat. § 604A.25 is too narrow and runs contrary to the objective of the statute - to provide incentive for allowing the use of one's land as a recreational trail.

Appellants' strict reading of the statute discourages landowners from allowing recreational use of their land. Absent a designated trail, there is no practical way for most landowners to give permission to snowmobilers to use their property. As the Complaint implicitly acknowledges, a large amount of snowmobiling occurs on trails that are not dedicated, marked, or groomed by any official entity. Yet, the objective of the law is to

encourage landowners to open their property for recreational use such as snowmobiling. Under Appellants' interpretation, there is no way for landowners to avail themselves of the protection of the statute because there is no practical way to provide permission to a large number of snowmobilers.

The purpose of the Recreational Land Use Statute is better served by a more expansive interpretation of "permitted". Further, the Legislature's broad language in Minn. Stat. § 604A.25 proves its intention to protect landowners from trespasser claims.

The Legislature's choice of the word "permitted" in Minn. Stat. § 604A.25 is significant because it is broader than the references to permission in other sections of the land use statute. If the Legislature had intended, as Appellants argue, to restrict the protection from trespasser claims only to those landowners who give "written or oral permission", that is the language that the Legislature would have chosen. Instead, the Legislature chose broader language in Minn. Stat. § 604A.25. In ruling on Respondents' Rule 12 motion to dismiss, Judge Mossey found that when interpreting Minn. Stat. § 604A.25, "[t]he rules of construction forbid adding words or meaning to a statute that were intentionally or inadvertently left out." *Genin v. 1996 Mercury Marquis*, 622 N.W.2d 114, 116 (Minn. 2001) (A-50). Because this statute does not specifically require affirmative "written" or "oral" permission, such meaning cannot be added to it.

Judge Mossey held that Minn. Stat. § 604A.25 provides immunity against trespasser claims to landowners who permit recreational trail use on their land, either affirmatively or

passively. (A-50) Appellants' Complaint states that this accident occurred on a *"known and well-traveled snowmobile trail"* on property owned by Ocello, thereby acknowledging that Ocello acquiesced to snowmobilers using the land. Ocello did nothing to prevent access to its property, but rather permitted access for recreational trail use.

Appellants' allege that Ocello permitted snowmobile traffic on its property. Accordingly, Ocello is protected under Minn. Stat. § 604A.25, and Appellants cannot maintain an action against Ocello. Dismissal of Appellants' claims against Ocello under Minn. Stat. § 604A.25 was proper and should be upheld.

IV. RESPONDENTS HAD NO DUTY TO WARN ABOUT THE SIGN THEY ERECTED WHEN THEY COULD NOT RECOGNIZE THAT THE SIGN POSED AN UNREASONABLE RISK OF HARM

Following the Rule 12 dismissal of Appellants' claims against Ocello, Respondents Michael, Kathy, and Daryl Krutzig and S.B. 25 successfully moved for summary judgment on Appellants' duty to warn claim. In granting summary judgment, Judge Mottl found that Respondents would not have recognized that the sign at issue could pose an unreasonable risk of harm to snowmobilers as it is not inherently dangerous. Likewise, Ocello could not recognize that the sign could pose an unreasonable risk of harm to snowmobilers.

In their brief, Appellants set forth the elements of the Restatement (Second) Torts, § 335, regarding a landowner's duty to give trespassers adequate warning about artificial dangers he created or maintained. These elements are as follows:

1. The condition [sign] 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.

Restatement (Second) Torts, 2d, § 335 (1965). Each of the Restatement's four requirements must be met for Ocello to be liable. As Judge Mottl indicated in her persuasive Memorandum, the key inquiry here is whether Respondents should have recognized the sign as posing an unreasonable risk of harm to others. (A-132)

Ocello does not dispute that it erected the sign on its property. However, just as with Respondents Krutzig and S.B. 25, it was impossible for Ocello to have realized such a level of risk. Ocello could not have known that a road-side sign would likely cause death or serious injury to trespassers as the sign itself is not an inherently dangerous object. The hazards satisfying this prong of the Restatement tend to be those which have inherently dangerous propensities such as high voltage lines, excavations, and open bodies of water. *See Johnson v. State of Minnesota*, 478 N.W.2d 769, 773 (Minn. App. 1991) *review denied* (Minn. Feb. 27, 1992). In addition, the condition must be likely to cause death or serious bodily harm. *Id.* Certainly, a plywood sign does not have inherently dangerous propensities.

Further, Ocello had no reason to believe that a trespasser would fail to discover the sign. To the contrary, Ocello erected the sign with the intent to draw attention to it for advertising purposes. It was placed in plain view in an open, flat area. There was nothing

on the property surrounding the sign that would obstruct its view. Nobody else had been injured because of the sign and Ocello had received no prior complaints regarding the sign.

There is simply no evidence that Ocello should have recognized that the sign could pose an unreasonable risk of physical harm to others. Respondents Krutzigs and S.B. 25 were properly granted summary judgment on similar grounds. In the event this Court determines that Ocello is not immune from liability under the Recreational Land Use Statute, then summary judgment should likewise extend to Ocello on these grounds alone.

V. RESPONDENTS HAD NO DUTY TO PROTECT APPELLANT FROM THE OPEN AND OBVIOUS CONDITION OF THE SIGN.

Appellants have presented no evidence that the sign in question was concealed or contained any hidden dangers. It was constructed with a 4x8 piece of plywood, 3/4" thick, and attached to posts. As stated earlier, the sign was placed in an open and flat area and was not obstructed from view. Further, nobody else had been injured due to the sign.

It is well settled that a landowner owes no duty of care where the alleged defect in the property is open and obvious. *Baber v. Dill*, 531 N.W.2d 493, 495-96 (Minn. 1995). Further, there is no duty to protect another from known hazards apparent upon ordinary observation. *Flynn v. Arcade Investment Co.*, 253 Minn. 107, 91 N.W. 2d 113 (1958). Therefore, Judge Mottl properly concluded Respondents did not owe Appellant any duty of care as a matter of law.

The pivotal question is not whether Appellant actually saw the sign, but whether he *could* have seen it. *Munoz v. Applebaum's Food Mkt., Inc.*, 293 Minn. 433, 434, 196 N.W.2d

921,922 (1972). Minnesota Courts have expressly held that when a brief inspection would have revealed the condition, it is not concealed. *Johnson*, 478 N.W.2d 769 at 773. As a trespasser, Appellant had a duty to be aware of his surroundings and could have inspected the snowmobile trail before traveling on it. Instead, as Judge Mottl pointed out, Appellant failed to meet his own minimal duty to operate a snowmobile responsibly as he was driving at an excessive speed at night and while intoxicated. (A-120) Razink's injuries are the direct result of *his* failure to exercise due care for his own safety. Had he been snowmobiling responsibly, this accident would have never happened. Respondents owed no duty for open and obvious conditions which should have been apparent to Appellant. While Judge Mossey did not address this issue in dismissing Ocello, the reasoning of Judge Mottl in granting summary judgment should apply to Ocello. Summary judgment for all Respondents must be upheld.

VI. RESPONDENTS WERE ENTITLED TO SUMMARY JUDGMENT WHERE THERE WAS NO VIOLATION OF A SIGN SETBACK ORDINANCE CONSTITUTING NEGLIGENCE PER SE.

No negligence per se claim may be made for violation of a Wright County Zoning Ordinance within the City of Monticello. Appellants allege Respondents are per se negligent based on a violation of Wright County Zoning Ordinance 724.1 which prohibits the placement of signs within public easements or right-of-way and requires signs to be placed a minimum of 200 feet from the centerline of any roadway. However, as Respondents point out, county ordinances are not controlling within the limits of a city. As reflected in Judge

Mottl's order granting summary judgment, Appellants' contentions of per se negligence, based on a violation of the Wright County Zoning Ordinance724.1 are irrelevant and have no merit.

Further, even if the Wright County Zoning Ordinance was applicable, Appellants have failed to establish that Appellant was within the class of persons the ordinance sought to protect. It is not a safety ordinance, but rather a zoning ordinance. Minnesota courts have held that "a violation of a statute does not constitute negligence per se, unless the victim of harm was intended to be protected by the statute and unless the harm suffered is the kind intended to be prevented by the statute." See *Anderson v. Anoka Hennepin Independent School Dist. 11*, 678 N.W.2d 651 (Minn. 2004). Appellants' negligence per se claim was properly dismissed as Appellants have not and cannot establish these essential elements.

CONCLUSION

Respondent Ocello respectfully submits that the trial court's Rule 12 dismissal of Appellants' claims under the Recreational Land Use Statute should be affirmed. In the alternative, summary judgment should be upheld for Ocello and this appeal be dismissed.

ERSTAD & RIEMER, P.A.

Dated: 6/11/07

By: _____

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Respondents.

I, Lawrence J. Skoglund, attorney for Respondent Ocello, LLC, do hereby certify as follows:

1. That the brief of Respondent Ocello complies with the type-volume limitation, pursuant to Minn. R. Civ. App. P. 132.01, subd. 3(a), in that the number of words in the brief is 3,100.

2. That the name and version of the word processing software used in preparing the brief is Corel WordPerfect, Version 9.0, Times New Roman, 13 pitch.

Lawrence J. Skoglund (#101904)

Subscribed and sworn to before me this
12th day of [illegible], 2007

Notary

SUSAN M. ROFF
Notary Public
Minnesota
My Commission Expires January 31, 2010