NO. A07-0389

State of Minnesota

In Court of Appeals

Michael Razink and Terry 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 Corporation,

Respondents.

RESPONDENTS CHARLES PFEFFER AND PFEFFER COMPANY, INC.'S BRIEF AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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LEGAL ISSUES

1. Was dismissal of Respondents Charles Pfeffer and Pfeffer Company, Inc. proper on the grounds that they are immunized from liability by the Recreational Use Immunity Statute as the real estate agents for Respondent Ocello, LLC?
   - Trial court's ruling: Yes – motion for summary judgment granted.
   - Most apposite authority:
     Kastner v. Star Trails Ass'n, 658 N.W.2d 890 (Minn. Ct. App. 2003)

2. Was dismissal of Respondents Charles Pfeffer and Pfeffer Company, Inc. proper on the grounds that they had no duty to warn a trespasser of a visible condition not likely to cause death or serious bodily harm when they were unaware of any constant intrusion by trespassers?
   - Trial court's ruling: Yes – motion for summary judgment granted.
   - Most apposite authority:
     Steinke v. City of Andover, 525 N.W.2d 173 (Minn. 1994)
     Johnson v. State of Minnesota, 478 N.W.2d 769 (Minn. Ct. App. 1991)
     Watters v. Buckbee Mears Co., 354 N.W.2d 848 (Minn. Ct. App. 1984)
     RESTATEMENT (SECOND) OF TORTS § 335 (1965)

3. Was dismissal of the negligence *per se* claim proper on the grounds that Wright County Ordinance 724.1(10) is inapplicable to signage posted within the City of Monticello?
   - Trial court's ruling: Yes – motion for summary judgment granted.
   - Most apposite authority:
     MINN. STAT. § 394.32, Subd. 3
     Haverhill Township v. County of Olmstead, 674 N.W.2d 781 (Minn. Ct. App. 2004)

INTRODUCTION

This appeal arises out of an accident ("the Accident") that occurred on the night of February 9, 2003 on a parcel of unimproved property along the east side of Highway 25 in Monticello, Minnesota ("the Property") owned by Respondent Ocello, LLC ("Ocello"). Specifically, Appellant Michael Razink ("Razink"), an intoxicated trespasser, was injured when the snowmobile he was operating on the Property struck one of two steel posts holding a 4'x8' sign.

A sign and the posts had been originally placed by Respondent Charles Pfeffer ("Pfeffer"), Ocello's real estate agent, several years earlier. The sign posted by Pfeffer had advertised the availability of the Property for sale. A few months before the Accident, part of the Property was sold to Respondent Michael J. Krutzig ("Krutzig"), who, with Pfeffer's permission, replaced Pfeffer's sign with a sign advertising the availability of the Property for development ("the Sign").

Razink and his wife, Appellant Terri Razink (hereinafter collectively referred to as "the Razinks"), sued, alleging negligence and negligence *per se*. After the trial court dismissed their claims, the Razinks appealed. The trial court's dismissal of Pfeffer should be affirmed, because Pfeffer, as Ocello's agent, is immune from liability under the Recreational Use Immunity Statute ("the Statute"). In the alternative, Pfeffer is not liable, because it did not have a duty to warn trespasser Razink of the Sign. Further, Wright County Ordinance 724.1(10) ("the Ordinance"), upon which the Razinks' negligence *per se* claim is based, is not applicable.

STATEMENT OF THE CASE

On or about October 11, 2004, the Razinks served the Complaint that initiated the above-captioned matter, naming Respondents Krutzig, Ocello, Kathy M. Krutzig, Daryl V. Krutzig, and S.B. 25, LLC as defendants and alleging claims for negligence and negligence *per se*. (A-2-7) The Razinks allege that Respondents were negligent "in placing their signs directly in the path of an (sic) well-known and well-traveled snowmobile trail." (A-56) The Razinks' negligence *per se* claim is founded upon the Ordinance, which – according to the Razinks - prohibits the placement of signs within 200 feet of the centerline of any street or road in Wright County. (*Id.*)

On January 4, 2005, the Honorable Dale E. Mossey ("Judge Mossey") dismissed Ocello, concluding that the Statute immunized Ocello from liability for the Razinks' claims. (A-48-51)

On or about April 20, 2005, the Razinks served an Amended Complaint that named Pfeffer and Pfeffer Company, Inc. (hereinafter collectively referred to as "Pfeffer") as additional defendants. (A-53)

On February 16, 2006, the Honorable Kathleen Mottl ("Judge Mottl") granted summary judgment to Krutzig, Kathy M. Krutzig, Daryl V. Krutzig, and S.B. 25, LLC. Specifically, Judge Mottl found that, as owners of the Sign, these parties were owners of "land" and that, therefore, the Statute also immunized them from liability for the Razinks' claims. (A-117, 120) In the alternative, Judge Mottl ruled that these parties were entitled to summary judgment, because there

was no evidence that they could have recognized that the Sign posed an unreasonable risk of harm to snowmobilers and because Razink failed to meet his own minimal duty to operate the snowmobile responsibly. (A-120) Finally, Judge Mottl held that the Ordinance did not apply, because the Sign was located within the City of Monticello. (*Id.*)

On December 20, 2006, Judge Mottl granted summary judgment to Pfeffer. (A-164, 167) Specifically, Judge Mottl determined that, because Judge Mossey found that the Statute immunized Ocello from liability for the Razinks' claims, the Statute also immunized Pfeffer, as Ocello's agent, from liability. (A-177)

On or about February 20, 2007, the Razinks filed and served the notice that commenced this appeal. (A-178)

STATEMENT OF FACTS

I. Facts disputed

Pfeffer agrees that the Statement of Facts set forth in the Razinks' brief is generally accurate, except that Pfeffer disputes four of the "facts" contained therein.

The sign instructed interested persons to contact Pfeffer. According to the Razinks, the sign posted by Pfeffer directed interested parties to call **Ocello**. In support of this assertion, the Razinks improperly cite to Judge Mottl's February 16, 2006 Order, which – although a part of the Razinks' Appendix - is not evidence. In any event, Judge Mottl's finding is erroneous, as it is undisputed

that the sign posted by Pfeffer directed interested parties to contact **Pfeffer.** (Pfeffer Appendix ("PA").2, 10)

The Razinks' characterization of the posts as "thin" is argument not supported by the record. The Razinks aver that the Sign was supported by two "thin," steel posts. In support of this contention, the Razinks again improperly cite to Judge Mottl's February 16, 2006 Order, which is not evidence. In any event, Judge Mottl's Order stated only that the Sign was supported by "two steel posts." (A-118) The Razinks' added characterization of the posts as "thin" is argumentative, subjective, and inappropriate for inclusion in the Razinks' Statement of Facts.

There is no evidence that the Sign was ninety-one feet from the centerline of Highway 25. The Razinks assert that the Sign was ninety-one feet from the centerline of Highway 25 and, therefore, violated the Ordinance. In support of this contention, the Razinks cite only to the Ordinance itself. However, the Ordinance does not reference or otherwise evidence the distance between the Sign and the centerline of Highway 25. (A-186-193) In fact, the Razinks have failed to cite any evidence supporting their claim that the Sign was ninety-one feet from the centerline of Highway 25. In any event, the distance between the Sign and the centerline of Highway 25 is immaterial, for the reasons discussed in the Argument section below.

The placement of the Sign did not violate the Ordinance. The Razinks maintain that the placement of the Sign violated the Ordinance. As an initial

matter, for the reasons discussed in the Argument selection below, the Ordinance is inapplicable. In any event, to the extent the Razinks claim that the Sign violated the Ordinance, this is argument, not a fact.

II. Facts omitted

Further, Pfeffer agrees that the Statement of Facts set forth in the Razinks' brief is generally complete, except that it does not include the following, undisputed material facts.

Pfeffer was Ocello's real estate agent. The Razinks correctly identify Pfeffer as "a realtor." However, the Razinks fail to mention that Pfeffer was **Ocello's** real estate agent with respect to the Property. (PA.5-6)

Pfeffer did not need to ask Ocello for its permission to allow Krutzig to post his sign. The Razinks note that Pfeffer did not call Ocello to ask for its permission to allow Krutzig to replace the sign posted by Pfeffer. However, the Razinks fail to point out that it was not necessary for Pfeffer to contact Ocello for this purpose, because – as part of the agreement between Pfeffer and Ocello – Pfeffer had the authority to permit Krutzig to replace the sign. (PA.11-12) In fact, Ocello preferred that Pfeffer handle signage of the Property. (PA.11)

Pfeffer had no knowledge of snowmobile use. When Pfeffer posted the Sign, there was not any snow on the ground. (A-245) Further, there was no snow on the ground when Pfeffer retrieved the Sign from the property. (PA.8-9) In any event, Pfeffer has never been aware of trespassing snowmobilers traveling on the portion of the property where the Sign was located. (PA. 3-4, 7-8)

The sign was visible from the roadway. Although Razink claims he was not able to see the Sign prior to the Accident, Pfeffer testified that the Sign was visible from Highway 25. (PA.13-14)

Krutzig had no difficulty seeing the sign. Although Razink claims he was not able to see the Sign prior to the Accident, Krutzig testified that he had no difficulty noticing the Sign when driving parallel to it. (PA.16)

Razink was an experienced snowmobiler and knew that he needed to be particularly careful when traveling next to roadways. Although Razink claims he was not able to see the Sign prior to the Accident, he has been driving snowmobiles for more than thirty years. (A-227) Razink knew from experience that a snowmobiler has to be more careful in a ditch adjacent to a road than on a designated trail, because of obstacles and changes in topography. (*Id.*) Specifically, Razink knew that signs were potential obstacles for snowmobilers traveling in a ditch along a roadway. (A-227-28)

Razink had traveled the route before. Although Razink claims he was not able to see the Sign prior to the Accident, he had snowmobiled along "pretty much" the same route "two or three times" prior to the night of the Accident. (A-212)

The snowmobile's headlight was on. Although Razink claims he was not able to see the Sign prior to the Accident, the snowmobile he was driving at the time of the Accident was equipped with a headlight and the headlight was on

at the time of the Accident. (A-222) Razink denied that he was otherwise having any problems seeing prior to the Accident. (*Id.*)

It was dark at the time of the Accident. In spite of the fact that Razink was an experienced snowmobiler and knew that he needed to be particularly careful when traveling next to roadways, it was dark at the time of the Accident. (A-213)

Razink had consumed five to seven beers prior to the Accident. In spite of the fact that Razink was an experienced snowmobiler who knew that he needed to be particularly careful when traveling next to roadways and it was dark, Razink consumed "five to seven beers" in the hours immediately prior to the Accident. (PA.20, 31)

Razink was traveling thirty-five to forty miles per hour at the time of the Accident. In spite of the fact that Razink was an experienced snowmobiler who knew that he needed to be particularly careful when traveling next to roadways, it was dark, and Razink had consumed "five to seven beers," he was traveling in between thirty-five and forty miles per hour at the time of the Accident. (A-220)

ARGUMENT

I. The Statute immunizes Pfeffer, as Ocello's agent, from liability for the Razinks' claims

Judge Mossey dismissed Ocello on the grounds that the Statute immunized it from liability for the Razinks' claims. If this Court finds that dismissal

of Ocello on this basis was proper, then Pfeffer, as Ocello's real estate agent, is also entitled to dismissal pursuant to the Statute.

One need not have an actual ownership interest in the subject property to be entitled to the protections of the Statute. Indeed, under the Statute, "'owner' means the possessor of a fee interest or a life estate, tenant, lessee, occupant, holder of a utility easement, or person in control of the land. MINN. STAT. § 604A.21, Subd. 4.

Kastner v. Star Trails Ass'n, 658 N.W.2d 890 (Minn. Ct. App. 2003), which also involved a snowmobile accident, is an example of a case in which Minnesota's appellate courts have extended the protection of the recreational use statute to a non-owner. *Kastner* involved Andrew Kastner ("Kastner") and Eric Nelson ("Nelson"), who were paralyzed after they lost control of their snowmobiles at approximately the same place on the Star Trail in Washington County ("the County"). *Id.* at 892. Star Trail runs through land owned by Artie Schaefer ("Schaefer"). *Id.* Shaefer signed a permit allowing the land to be used as a snowmobile trail and giving the County the right to enter upon the land for purposes incidental to the trail. *Id.* The County, pursuant to a trail-assistance program, then contracted with Star Trails Association ("the Association"), a non-profit organization composed of various snowmobile clubs, to maintain the trail, including the erection, repair, and storage of signage. *Id.* After the accidents, Kastner and Nelson sued the Association. *Id.* The Association moved for summary judgment, arguing that it was protected from liability by the Statute. *Id.*

After the district court denied the motion on the grounds that the Association did not own the land in question, the Association appealed. *Id.*

The Minnesota Court of Appeals noted that the Statute's definition of "owner" includes "occupant" and "person in control of the land." *Id.* at 895. Accordingly, the Court characterized the issue as whether the Association was an "occupant" or "person in control." *Id.* The Court found that "occupant" falls within the broad definition of owner as "one who has possessory rights in, or control over, certain property or premises." *Id.* (citations omitted). The Court also determined that "the legislature's use of the phrase 'one who is in control of land,' instead of an accepted legal term, suggests a relationship with the land beyond the standard legal relationships surrounding ownership." *Id.* The Court further observed that the definition of "control" (the direct or indirect power to direct the management and policies of a person or entity, whether through ownership of voting securities, by contract, or otherwise) also supports a broad interpretation. *Id.* Accordingly, the Court concluded that the Association was an "owner" entitled to the protection of the Statute "if it had the power to direct the management of the trail." *Id.* at 896. The Court held that the Association was an "owner" and reversed the district court, explaining:

> The district court's opinion . . . did not recognize that the county's permit with Schaefer gave the county the express right to enter the land to manage and perform maintenance and that the trail-assistance program effectively placed the association in the county's shoes. . . [T]he association . . . was the entity in control of the trail. The association had the right to enter and control the trail; no greater formality in the legal

> relationship between the association and the county or the owner is required . . ..

Id.

The relationship between Ocello and Pfeffer is completely analogous to the relationship between the Association, the County, and Schaefer in *Kastner*. Although Pfeffer did not have an ownership interest in the Property, Pfeffer contracted with Ocello, its owner, to market the Property. As part of the agreement between Pfeffer and Ocello, Pfeffer was permitted to enter and sign the Property. In fact, Ocello preferred that Pfeffer handle signage of the Property. When Krutzig wanted permission to replace the sign posted by Pfeffer with his own, he contacted Pfeffer, who had the authority to grant Krutzig's request. Like the Association in *Kastner*, Pfeffer stood in Ocello's shoes for the purpose of controlling the signage on the Property.

Pursuant to the foregoing, Pfeffer is entitled to immunity under the Statute for the same reasons that the Association was entitled to immunity in *Kastner*. Accordingly, if this Court finds that dismissal of Ocello on the basis of the Statute was proper, then Pfeffer, as Ocello's real estate agent, is also entitled to dismissal pursuant to the Statute.

II. Pfeffer had no duty to warn Razink of the Sign

Even assuming *arguendo* the Statute did not immunize Pfeffer from liability for the Razinks' claims, dismissal of Pfeffer was nevertheless proper, because Pfeffer did not have a duty to warn Razink of the Sign. It is undisputed that the

Property was owned by Ocello and that Pfeffer was acting as Ocello's agent when he posted the original sign and subsequently permitted Krutzig to replace that sign. It is also undisputed that Razink was a trespasser. Pfeffer owed no duty to warn Razink of the Sign, because Pfeffer was not aware of any constant intrusion by trespassers, the Sign was not likely to cause death or serious bodily harm, and the Sign was not of such a nature that Pfeffer had reason to believe that trespassers would not discover it.

Any legal analysis of an action brought against a landowner alleging negligence must begin with an inquiry into whether the landowner owed the entrant a duty. *Baber v. Dill,* 531 N.W.2d 493, 495 (Minn.1995). Generally, the existence of a legal duty is an issue for the court to determine as a matter of law. *Larson v. Larson,* 373 N.W.2d 287, 289 (Minn.1985).

Minnesota, along with most other states, continues to distinguish between duties owed to trespassers and duties owed to other entrants on land. *Watters v. Buckbee Mears Co.*, 354 N.W.2d 848, 850 (Minn. Ct. App. 1984). A land possessor's duty to trespassers is set forth in § 335 of the RESTATEMENT (SECOND) OF TORTS (1965), which was adopted by the Minnesota Supreme Court in *Hanson v. Bailey*, 249 Minn. 495, 499-500, 83 N.W.2d 252, 257 (1957). *Id.* Section 335 provides:

> 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:
> (a) the condition:

(i) is one which the possessor has created or maintains and
(ii) is, to his knowledge, **likely to cause death or serious bodily harm** to such trespassers and
(iii) **is of such a nature that** he has reason to believe that such **trespassers will not discover it**, and

(b) the possessor has failed to exercise reasonable care to warn such trespassers of the condition and the risk involved.

Id. (citing to RESTATEMENT (SECOND) OF TORTS § 335 (1965)) (emphasis added). Each of the Restatement's requirements must be met for the land possessor to be held liable. *Cobb v. State of Minnesota*, 441 N.W.2d 839, 841 (Minn. Ct. App. 1989).

In other words, a landowner is liable for failure to warn of an artificial condition which he has created or maintained only if: (1) the artificial condition is likely to cause death or serious bodily harm; (2) the landowner has actual knowledge of that danger; and (3) the danger is concealed or hidden from the trespasser. *Lundstrom v. City of Apple Valley*, 587 N.W.2d 517, 520 (Minn. Ct. App. 1998).

The general trespasser standard holds a landowner liable only for failing to exercise reasonable care to warn trespassers about hidden, artificial dangers created or maintained by the landowner; a landowner has no duty to eliminate these conditions from the land in order to accommodate trespassers, but only to give them adequate warning. *Fear v. Independent School District 911*, 634 N.W.2d 204, 213 (Minn. Ct. App. 2001).

A. There is no evidence that Pfeffer knew or should have known that trespassers constantly intruded on the Property

To impose a duty on a possessor of land to warn trespassers of an artificial condition on the land, there must be evidence that the possessor of the land knew that trespassers constantly intruded upon a limited area of the land. Because there is no evidence that Pfeffer was aware that trespassers constantly intruded upon the Property, Pfeffer did not owe any duty to Razink and, therefore, the district court's dismissal of Pfeffer was proper.

Steinke v. City of Andover, 525 N.W.2d 173 (Minn. 1994), which also involved a snowmobile accident, exemplifies the way in which Minnesota's appellate courts have analyzed whether a possessor of land knew or should have known of the constant intrusion by trespassers. *Steinke* involved Roger Steinke ("Steinke"), who was driving a snowmobile along a cleared pipeline easement abutting a park in the City of Andover ("Andover") at a speed in excess of forty-five miles per hour when he crashed into a drainage ditch that intersected the easement. *Id.* at 174. The easement was not a designated trail and Steinke admitted that he was trespassing. *Id.* The drainage ditch was approximately three to six feet deep and sixteen feet across. *Id.* There were no warning signs or barriers. *Id.* Steinke sued Andover, alleging that it failed to warn Steinke of the ditch, which Steinke characterized as a hidden, artificial condition. *Id.* After the district granted summary judgment to Andover based upon municipal immunity,

Steinke appealed and the Minnesota Court of Appeals reversed. *Id.* at 175. The Minnesota Supreme Court subsequently granted review. *Id.* at 174.

The Supreme Court observed that Andover was immune from liability under the Municipal Tort Liability Act unless its conduct would entitle a trespasser to damages as against a private person. *Id.* at 176. The Court further noted that the standard for determining whether a trespasser is entitled to damages requires evidence that the possessor of land knew or should have known that trespassers constantly intrude upon a limited area of the land. *Id.* (citing to RESTATEMENT (SECOND) OF TORTS § 335 (1965)). The Court held that there was no evidence supporting a conclusion that Andover knew snowmobilers constantly intruded upon the property. *Id.* at 177. Specifically, the Court noted:

> First, the park was a summer nature park, not maintained by Andover in the winter. Second, a sign at the park entrance clearly indicated that motorized vehicles were not allowed in the park. Finally, Andover did not receive any accident reports or complaints involving snowmobilers at the accident site or in the park.

Id. Accordingly, the Court reinstated the district court's grant of summary judgment in favor of Andover. *Id.* at 178.

There is no more of a basis for finding that Pfeffer knew that trespassers were intruding upon the Property than there was for finding that Andover was aware of the intrusion of trespassers on the pipeline easement. When Pfeffer posted the original sign, there was not any snow on the ground. Further, there was no snow on the ground when Pfeffer retrieved his sign from the Property. Moreover, Pfeffer explicitly testified that he has never been aware of trespassing

snowmobilers traveling on the Property. Finally, there is no evidence that Pfeffer received any complaints or reports of accidents involving snowmobilers at any time prior to the Accident.

To impose a duty on Pfeffer to warn trespassers like Razink of the Sign, there must be evidence that Pfeffer knew that trespassers constantly intruded upon the Property. Because there is no such evidence in this case, Pfeffer did not owe any duty to Razink as a matter of law and, therefore, the district court's dismissal of Pfeffer was proper.

B. The Sign was not a condition likely to cause death or serious bodily harm

To impose a duty on a possessor of land to warn trespassers of an artificial condition on the land, the condition must be likely to cause death or serious bodily harm. Because the Sign was not such a condition, Pfeffer did not owe any duty to Razink and, therefore, the district court's dismissal of Pfeffer was proper.

Johnson v. State of Minnesota, 478 N.W.2d 769 (Minn. Ct. App. 1991) is an example of the manner which Minnesota's appellate courts have analyzed whether a condition was likely cause death or serious bodily harm. *Johnson* involved Lois Johnson ("Johnson"), who stopped at a travel information center operated by the State of Minnesota ("the State") and located at a rest area on Interstate 94. *Id.* at 770. Johnson entered the office, picked up two maps, and left by the same door. *Id.* On her way out, she tripped over a sidewalk joint that had raised approximately one inch as a result of heaving. *Id.* at 771. State

employees knew of the raised joint, but did not post any warnings or patch the joint. *Id.* Johnson sued the State, alleging negligence. *Id.* at 770. The district court granted summary judgment to the State on the grounds of governmental immunity and Johnson appealed. *Id.*

The Court of Appeals observed that the State was immune from liability under the governmental immunity statute unless its conduct would entitle a trespasser to damages as against a private person. *Id.* at 772. The Court further noted that the standard for determining whether a trespasser is entitled to damages requires evidence that the possessor of land had knowledge that the condition complained of was likely to cause death or serious bodily harm. *Id.* at 772-73 (citing to RESTATEMENT (SECOND) OF TORTS § 335 (1965)). The Court held that the raised sidewalk joint was "not in a condition *likely* to cause death or serious bodily harm." *Id.* at 773. The Court explained:

> Conditions found to satisfy (the likely to cause death or serious bodily harm requirement) generally have inherently dangerous propensities, such as a high voltage electrical wire. **The Restatement requires the condition to be likely to cause serious bodily harm, not that serious bodily harm "might" actually result.** The injury suffered does not define the requirement. **Otherwise, any artificial condition "could be" likely to cause death or serious bodily harm under the right circumstances.** The remote possibility that death or serious bodily harm could result any time a person falls does not make a raised sidewalk joint rise to the level of an inherently dangerous condition.

Id. (emphasis added). Consequently, the Court ruled that the trial court properly found as a matter of law that the sidewalk was not likely to cause death of serious bodily harm. *Id.*

For the same reasons articulated by the Court of Appeals in *Johnson*, there is no basis upon which to find that the Sign was likely to cause death or serious bodily harm. The Sign was a 4'x8' piece of plywood mounted on two plain, steel posts, not a high electrical voltage wire or other such condition with inherently dangerous propensities. Whether Razink actually suffered serious bodily harm as a result of colliding with the Sign is immaterial, because "the injury does not define the requirement." *Id.* Rather, a condition must be **likely** to cause death or serious bodily harm. The Sign was no more likely to cause death or severe bodily harm than the raised sidewalk joint at issue in *Johnson.* Indeed, there is no evidence that the Sign has ever injured anyone other than Razink.

To impose a duty on Pfeffer to warn trespassers like Razink of an artificial condition on the Property, the condition must be **likely** to cause death or serious bodily harm. Because the Sign was not such a condition, Pfeffer did not owe any duty to Razink as a matter of law and, therefore, the district court's dismissal of Pfeffer was proper.

C. The Sign was not a hidden or concealed condition

To impose a duty on a possessor of land to warn trespassers of an artificial condition on the land, the condition must be of such a nature that the possessor of the land would have reason to believe that a trespasser would not discover it. Because the Sign was not such a condition, Pfeffer did not owe any duty to Razink and, therefore, the district court's dismissal of Pfeffer was proper.

Watters v. Buckbee Mears, 354 N.W.2d 848 (Minn. Ct. App. 1984) exemplifies the way in which Minnesota's appellate courts have analyzed whether a condition was hidden or concealed for the purpose of trespasser liability. *Watters* involved James and David Watters, two brothers who were passengers in a vehicle driven by Tony Vecchiollo in the early morning hours. *Id.* at 849. Each of them had consumed between three and five beers. *Id.* The brothers suggested four-wheeling on adjacent property on which Tousley Development Corporation ("Tousley") mined gravel. *Id.* The site contained excavation holes and large dirt hills. *Id.* Although Tousley knew that the land was frequently used for off-road driving, the property was not fenced and there were no signs prohibiting trespassing or warning of dangerous conditions. *Id.* Each of the brothers had four-wheeled at the site before and admitted that they were trespassers. *Id.* at 849-50.

The group decided to drive up a thirty-foot hill. *Id.* at 849. When they reached the top, the vehicle went over a vertical drop of four to five feet and rolled over twice as it went down the remaining twenty to twenty-five feet of the hill. *Id.* The brothers sued Tousley, alleging negligence. *Id.* After the district court granted summary judgment to Tousley on the grounds that there was no duty to warn, because Tousley had no reason to expect that trespassers would not discover the condition, the brothers appealed. *Id.* at 849-50.

The Court of Appeals noted that the standard for determining whether a trespasser is entitled to damages requires evidence that the condition

complained of was of such a nature that the land possessor had reason to believe that trespassers would not discover it. *Id.* at 850 (citing to RESTATEMENT (SECOND) OF TORTS § 335 (1965)). The Court agreed with the district court's determination that the condition in question was not concealed, explaining "an inspection, however brief, would have revealed the ledge on the other side." *Id.* at 851. The Court further found:

> (The brothers) had undeniably been four-wheeling on the property in the past. Both admitted to being familiar with the general terrain and to knowing their activity was potentially dangerous. . . . (They) should have known that off-road night driving on this terrain was inherently dangerous.

Id. Accordingly, the Court held that there was no genuine issue of material fact to preclude summary judgment for Tousley and affirmed the district court. *Id.* at 851-52.

The conditions complained of in *Steinke* and *Johnson* did not satisfy the "hidden or concealed" requirement either. With respect to the ditch involved in *Steinke*, the Supreme Court concluded that it:

> [W]as a common earthen drainage ditch, of a type found throughout rural Minnesota. It was in an open and flat area and was not obstructed from view. Steinke had crossed the ditch at other points in the past and knew there were ditches in the area. He admits that even though it was his first time on the easement trail, he was traveling at a speed in excess of forty-five miles per hour.

Steinke v. City of Andover, 525 N.W.2d 173, 177 (Minn. 1994). In response to Steinke's claim that he did not see the ditch until it was too late, the Court stated:

> The issue is not whether Steinke actually saw the ditch, but whether he *could* have seen the ditch. (citations omitted) Steinke, as a trespasser, had a duty to be aware of his surroundings. A landowner is entitled to assume

> that trespassers will realize that no preparation has been made for their reception and will, therefore be on the alert to observe the conditions which exist upon the land. (citations omitted) Steinke's accident was a result of his failure to observe the normal conditions of rural land.

Id.

Similarly, the Court of Appeals held that the raised sidewalk joint involved in Johnson was not a concealed danger. *Johnson v. State of Minnesota*, 478 N.W.2d 769, 773 (Minn. Ct. App. 1991). The Court specifically noted that "the test is not whether the injured party saw the danger, but whether it was in fact visible" and that "when a brief inspection would have revealed the condition, it is not concealed." *Id.* (citations omitted). The Court observed that, although the State did not call attention to the raised joint by a posted warning, it was not concealed and that Johnson failed to offer any facts to the contrary. *Id.*

The Sign was no more a hidden or concealed condition than the ledge in *Watters*, the ditch in *Steinke* or the raised sidewalk joint in *Johnson*. Rather, the Sign was a 4'x8' piece of plywood that was visible from Highway 25. Krutzig testified that he had no difficulty noticing the Sign when driving parallel to it. Moreover, Philip Michael Osman, another trespasser who was snowmobiling slightly ahead of Razink on the night of the Accident, apparently had no problem avoiding the Sign.

Indeed, the facts of this matter are on all fours with those involved in *Watters.* Razink has snowmobiled for more than thirty years and knew from experience that a snowmobiler has to be more careful in a ditch adjacent to a

road than on a designated trail, because of obstacles and changes in topography. Razink was specifically aware that signs were potential obstacles for snowmobilers traveling in a ditch along a roadway. Furthermore, Razink had snowmobiled along "pretty much" the same route "two or three times" prior to the night of the Accident. In spite of the foregoing, Razink was an admitted trespasser who chose to snowmobile on the Property at night, at a speed between thirty-five and forty miles per hour, and after having consumed "five to seven" beers in the hours immediately prior to the Accident. This case is materially indistinguishable from *Watters* and mandates the same result: dismissal on the grounds that there was no duty to warn trespasser Razink of the Sign.

The fact that the Sign was ½" thick is immaterial, as this is approximately the same size as the raised sidewalk joint in *Johnson* that was found to not be a concealed danger. Similarly, the fact that Razink encountered the Sign at night has no bearing upon whether the Sign was hidden or concealed. Indeed, the ledge in *Watters* was found to not be hidden or concealed notwithstanding that the accident in that case also took place at night.

Whether a dangerous condition is hidden, triggering a landowner's duty to warn, depends on the visibility of the condition, not on whether the injured party actually saw the danger. *Lundstrom v. City of Apple Valley*, 587 N.W.2d 517, 520 (Minn. Ct. App. 1998) If a brief inspection would have revealed the condition, it is not concealed, and the landowner has no duty to warn trespassers of its

existence. *Id.* Trespassers are required to be alert to conditions existing on the land. *Id.* The Sign was visible and would have been revealed had Razink conducted a brief inspection and otherwise been alert for conditions existing on the Property. Accordingly, the Sign was not a hidden and concealed condition triggering a duty to warn.

To impose a duty on Pfeffer to warn trespassers like Razink of an artificial condition on the Property, the condition must be of such a nature that the possessor of land would have reason to believe that a trespasser would not discover it. Because the Sign was not such a condition, Pfeffer did not owe any duty to Razink as a matter of law and, therefore, the district court's dismissal of Pfeffer was proper.

III. The Razinks' negligence per se claim fails as a matter of law, because the Ordinance is inapplicable

Even assuming *arguendo* the Statute did not immunize Pfeffer from liability for the Razinks' claims and Pfeffer had a common law duty to warn Razink of the Sign, dismissal of the Razinks' negligence *per se* claim was nevertheless proper, because the Ordinance is inapplicable to the Sign.

Negligence *per se* is a form of ordinary negligence that results from violation of a statute. *Anderson v. State Dept. of Natural Resources*, 693 N.W.2d 181, 189 (Minn. 2005). Summary judgment is proper if there is a complete lack of proof on any of the essential elements of a negligence *per se* claim. *Id.* at 190.

The Razinks' negligence *per se* claim is based upon the Ordinance, which sets forth certain regulations relative to signage in Wright County. The Ordinance reads, in relevant part:

> No advertising sign or billboard, except agricultural crop demonstration information signs, shall be permitted within two hundred (200) feet from the centerline of any street or road.

(A-186) The Razinks maintain that the Sign failed to comply with the Ordinance, because it was purportedly located only ninety-one feet from the centerline of Highway 25.

As an initial matter, the only "evidence" cited by the Razinks in support of their contention that the Sign was located ninety-one feet from the centerline of Highway 25 is the Ordinance itself. However, the Ordinance does not reference or otherwise evidence the distance between the Sign and the centerline of Highway 25. In fact, the Razinks have failed to cite any evidence actually substantiating their claim that the Sign was ninety-one feet from the centerline of Highway 25.

In any event, The Razinks' negligence *per se* claim fails as a matter of law, because the Ordinance is inapplicable to the Sign, which was located within the City of Monticello. Minnesota law expressly permits a municipality to take over planning functions, including adoption and enforcement of official controls, with respect to areas within its corporate limits for which a county has adopted official controls. MINN. STAT. § 394.32, Subd. 3. Specifically, a municipality may adopt

and amend a comprehensive municipal plan and implement such plan by ordinance and other official actions. MINN. STAT. § 462.353, Subd. 1.

The City of Monticello has adopted a comprehensive municipal plan and a zoning ordinance to implement this plan. (PA.42-45) The zoning ordinance explicitly provides that it was "enacted pursuant to the authority granted by . . . Minnesota Statutes, Sections 462.351 to 462.363." (PA.45) Accordingly, the City of Monticello has taken over planning functions, including adoption and enforcement of official controls, with respect to the areas within its corporate limits, as it is permitted to do under Minnesota law.

The Razinks contend that a city is prohibited from adopting an official control that is inconsistent with or less restrictive than an official control promulgated by a county. In support of this position, the Razinks rely upon Minn. STAT. § 394.33, which provides, in pertinent part:

> The governing body of any town including any town with the powers of a statutory city pursuant to law may continue to exercise the authority to plan and zone as provided by law, but 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 (emphasis added). Consequently, according to the Razinks, the Sign is, at a minimum, subject to the requirements of the Ordinance.

However, the Razinks' argument completely ignores the distinction between a "municipality" and a "town," which are separately defined in Minnesota Statutes Section 394. Specifically, "municipality" is defined as "a city however

organized." MINN. STAT. § 394.22, Subd. 4. "Town" is defined as "any town, including those with the powers of a statutory city pursuant to law." *Id.* at Subd. 11. MINN. STAT. § 394.33, Subd. 1 prohibits only a "town" from adopting official controls less restrictive than those promulgated by a county. *See also Haverhill Township v. County of Olmstead*, 674 N.W.2d 781, 787 (Minn. Ct. App. 2004) (holding that towns do not have the authority of a municipality to enact and enforce official controls inconsistent with or less restrictive than those of the county). Because the City of Monticello is a "municipality," it is not subject to this limitation.

The Razinks' negligence *per se* claim is based upon the Ordinance, which, for the reasons set forth above, is not applicable to the Sign. As a result, the Razinks' negligence *per se* claim fails as a matter of law.

CONCLUSION

The Statute immunizes Pfeffer, as an agent of Ocello, from liability for the Razinks' claims. In any event, Pfeffer did not have any duty to warn Razink of the Sign, because Pfeffer was not aware of the constant intrusion of trespassers on the Property, the Sign was not a condition likely to cause death or serious bodily harm, and the Sign was neither hidden nor concealed. Finally, the Razinks' negligence *per se* claim fails, because it is based upon an Ordinance that is inapplicable to the Sign. For all of the foregoing reasons, this Court should affirm the district court's dismissal of Pfeffer.

Respectfully submitted,

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CERTIFICATE OF BRIEF LENGTH

The undersigned counsel for Respondents Charles Pfeffer and Pfeffer Company, Inc. certify that this Brief complies with the requirements of Minn. R. Civ. App.P. 132.01 in that it is printed in proportionately spaced typeface utilizing Microsoft Word 2002 and contains 6.788 words, excluding the Table of Contents and Table of Authorities.

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