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State of Minnesota  
In Court of Appeals

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IRONWOOD SPRINGS CHRISTIAN RANCH, INC.,

*Appellant,*

vs.

WALK TO EMMAUS a/k/a WALK FOR EMMAUS,

*Respondent.*

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**APPELLANT'S BRIEF, ADDENDUM 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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**STATEMENT OF THE LEGAL ISSUES**

- I. WAS THERE EVIDENCE TO IMPOSE UPON RESPONDENT EMMAUS THE LEGAL DUTY OF A “POSSESSOR” OF THE PLACE WHERE JACKIE LARKIN FELL?**

**TRIAL COURT RULED: “NO.”**

- II. WAS THERE EVIDENCE SHOWING APPELLANT IRONWOOD RELIED UPON EMMAUS’ UNDERTAKING TO KEEP THE PLACE WHERE JACKIE LARKIN FELL SAFE?**

**RULING: TRIAL COURT RULED: “NO.”**

## STATEMENT OF THE CASE

Appellant Ironwood Springs Christian Ranch (“Ironwood”) was a Minnesota non-profit corporation that owned and operated a ranch/campground outside Stewartville, Minnesota. Ironwood had facilities for retreats, and rented these facilities to groups like Respondent Walk to Emmaus (“Emmaus”).

On January 30, 2005, Jackie Larkin was working as a volunteer for Emmaus, slipped on ice outside a dining hall door and hit her head. She started an action against Ironwood and a jury awarded \$750,000.00 in damages and found Larkin 42% and Ironwood 58% at fault. Appellant appealed (*Minn. App. Case No. A08-645*); this court affirmed [Larkin v. Ironwood Springs, 2009 WL 234620 (*Minn. App.*)]. Ironwood paid the judgment and started an action against Emmaus for contribution in the District Court, Olmsted County, Third Judicial District, Minnesota, the Honorable Jody Williamson presiding. Emmaus filed a motion for summary judgment, the motion was granted and a timely appeal followed under Rule 104.01, Subd. 1, Minn.R.Civ.App.P.

## STATEMENT OF THE FACTS

Early Sunday evening, January 30, 2005, Jackie Larkin slipped, fell and was hurt as she was leaving the dining hall to cross a parking lot to her cabin. Larkin was a volunteer with Emmaus for its eighth Women's Winter Retreat at Ironwood. Emmaus rented the lodge, chapel, recreational hall and cabins for the retreat. A large parking lot separated the lodge/dining hall and the recreational hall/cabins so retreat participants had to cross the parking lot in order to get from the lodge/dining hall to the recreational hall/cabins. The lodge and dining hall were inside one building and open from the inside so participants could walk freely from the dining hall to the lodge from inside the building to reach the main door to the lodge. [A.81-83]

The retreat started on Thursday, January 27, 2005. Ironwood provided a clear path leading from the main door to the lodge across the parking lot to the recreation hall/cabins on the other side so participants could cross safely to and from the recreation hall/cabins.

“Well, I think the parking lot, I believe was okay....I don't think it was an issue in the parking lot....There wasn't a lot of ice outside the lodge.... [T]here were clear paths, clear access to the lodge, to everywhere else. There was a clear path to the dining hall; it's just that the ice was in front of [the door to the dining hall].” [A. 81-83]

On Friday morning, January 28<sup>th</sup>, there was ice outside the dining room door because of snow melting from the roof, and participants wanted to use the dining room door. James Rottinger was the Emmaus retreat team leader. Josh Christenson was Ironwood's host for the retreat. Ironwood wasn't doing it. Rottinger talked to

Christenson about it; the ice needed to be removed for the protection of Emmaus' people; he told Christenson that Emmaus would sand, salt and remove the ice and Christenson showed Rottinger where the ice chisel, sand and salt were stored. [A.83-87, 93-96]. Christenson testified Ironwood offered to do it but Rottinger said Emmaus would do it and Christenson showed Rottinger where the ice chisel, sand and salt were located so Emmaus could take care of the ice. [A.104-107]. Rottinger chopped, sanded and salted the ice outside the dining hall door four or five times through the weekend and knew none of Ironwood's staff was doing it and talked no further with them about it. [A.83-88, 93-96]. Christenson took no steps to tell his staff to remove the ice outside the dining hall door because Rottinger told him: "Were (sic) going to take care of it." [A. 93-96, 104-107].

On Sunday evening, January 30, 2005, Larkin slipped, fell outside the dining room door and was hurt. She started an action against Ironwood. A jury awarded \$705,000.00 to Larkin; found her 42% and Ironwood 58% at fault for the fall and judgment for \$408,900.00 plus costs was entered against Ironwood. Ironwood appealed to this court; this court affirmed [Larkin v. Ironwood Springs, 2009 WL 234620 (Minn. App.), A.202-207] and Ironwood paid the judgment and commenced an action for contribution against Emmaus. Emmaus filed a motion for summary judgment claiming there was no genuine issue of material fact, Emmaus had no legal duty to take care of the ice outside the dining hall door and was entitled to judgment of dismissal as a matter of law. Ironwood opposed the motion on the following grounds:

1. Emmaus assumed a duty to maintain the place where Larkin fell;

2. Emmaus took charge of the work and became a “possessor”;
3. Ironwood relied on Emmaus’ undertaking;
4. Emmaus failed to use reasonable care to keep the place safe for Larkin and as a direct result Larkin fell, was hurt and suffered damages; and,
5. There was a genuine issue of material fact on each element enumerated above.

[A.39-40].

The motion was scheduled for May 14, 2010. On May 21, 2010, Ironwood filed a motion for additional time for discovery to file an affidavit of Daniel Ostegard. [A.152-168].

The trial court denied Ironwood’s motion (“Even if the Court were to accept the Ostegard affidavit it would not alter the decision of this court....”) and granted Emmaus’ motion for summary judgment saying in part as follows:

“Although Ironwood’s contention that there may be more than one possessor of land is correct, the facts in the present case do not establish that Emmaus was a possessor of land, as defined in Restatement (Second) of Torts §328E. Emmaus did not, in the past or on the day of Ms. Larkin’s fall, take occupation of the ranch with the intent to control it. Additionally, Emmaus was not entitled to immediate occupation of the ranch, Ironwood at all times, had immediate control and occupation. Emmaus was an organization who paid money to us facilities on Ironwood’s property. At no time did Emmaus occupy Ironwood’s property in such a manner as to become a possessor or joint possessor of the ranch....”

“Furthermore, Emmaus did not assume a duty of care to Ms. Larkin. The record is undisputed that Mr. Rottinger salted and chipped away at the ice outside of the dining room entrance four or five time over the weekend. Whether Rottinger salted or scraped the ice does not change the facts. There is no evidence that others, including Larkin, relied on any assumption of duty by Rottinger or that Larkin, the other retreat attendees, or the Ironwood staff refrained from taking other and more direct actions to protect themselves. In fact, the record is void of any evidence that the retreat attendees had any knowledge that Rottinger engaged in removing or chipping ice.

“Ironwood alleges that Rottinger advised Josh Christenson, an Ironwood employee, that Rottinger would assume the responsibility of removing the snow and ice. However, Christenson left work on Friday evening and failed to inform any of the weekend employees of Rottinger’s statements regarding snow and ice removal. There is no evidence the weekend replacements, Luke Fannin or Dan Ostergard, knew of Rottinger’s alleged statement to Christenson or that Fannin and Ostergard relied on any alleged statements. Accordingly, because there is no evidence Ms. Larkin relied on an assumption of duty by Emmaus or that the Ironwood employees refrained from removing and chipping away at the ice based on Rottinger’s alleged statements, Ironwood’s contribution claim fails and Emmaus is entitled to summary judgment as a matter of law.” [A.189-195].

## ARGUMENT

### **I. WAS THERE EVIDENCE TO IMPOSE UPON RESPONDENT EMMAUS THE LEGAL DUTY OF A “POSSESSOR” OF THE PLACE WHERE JACKIE LARKIN FELL?**

The standard of review from an order granting a motion for summary judgment is as follows:

“A district court may grant summary judgment if the pleadings and other documents before the court ‘show that there is no genuine issue as to any material fact and that either party is entitled to judgment as a matter of law.’ Minn.R.Civ.P. 56.03 (1984). On appeal from summary judgment, it is the function of the appellate court to determine whether the trial court erred in its application of the law. *Betlach v. Wayzata Condominium*, 218 N.W.2d 328, 330 (Minn.1979). The rule in Minnesota is summary judgment is proper when the nonmoving party fails to provide the court with specific facts indicating that there is a genuine issue of fact. *Erickson v. General United Life Ins. Co.*, 256 N.W.2d 255, 258-59 (Minn.1977). In order to successfully opposed a motion for summary judgment, a party cannot rely upon mere general statements of fact but rather must demonstrate at the time the motion is made that specific facts are in existence which create a genuine issue of trial. *Id.* (citing *Borom v. City of St. Paul*, 289 Minn. 371, 184 N.W.2d 595 (1971); Minn.R.Civ.P. 56.05).” *Hunt v. IBM American Employees Federal Credit Union*, 384 N.W.2d 853, 855 (Minn. 1986).

On a motion for summary judgment, the court does not weigh the evidence. All reasonable inferences are drawn in the non-moving party’s favor. When the evidence

supports more than one conclusion, summary judgment is inappropriate. Illinois Farmers Ins. Co. v. Tapemark Co., 273 N.W.2d 630, 634 (Minn. 1978) and DLH, Inc. v. Russ, 566 N.W.2d 60, 70 (Minn. 1997).

This is an action for contribution. “The right of contribution arises upon payment by one of the joint obligors of more than his share of the obligation.” Coble v. Lacey, 101 N.W.2d 594, 597 (Minn. 1960). The cause of action rests upon a joint obligation and one or more joint obligors paying or performing more than their share of the obligation or burden. Merrimac Min. Co. v. Gross, 12 N.W.2d 506, 510 (Minn. 1943). A joint tortfeasor’s negligence does not preclude them from recovering contribution from another joint tortfeasor in an action for negligence. Fidelity & Cas. Co. of New York v. Christenson, 236 N.W. 618, 619 (Minn. 1931).

It is true that in the underlying appeal Ironwood tried to avoid a legal duty to Larkin arguing the premises was rented to Emmaus or Emmaus assumed the duty to keep the premises safe. See, Larkin v. Ironwood Springs, 2009 WL 234620 (Minn. App.). This court ruled Ironwood retained enough control over the premises involved in the fall to impose a legal duty under Peterson v. Balach, 199 N.W.2d 639 (Minn. 1972). The court did not rule Emmaus was not a possessor and had no legal duty to keep the premises where the fall took place safe.

There can be more than one “possessor.” A volunteer who undertakes to keep another’s premises safe for another is a “possessor” and is charged with the same duties as the land owner. Isler v. Burmanu, 232 N.W.2d 818, 821 (Minn. 1975):

“We recognized in Dishington v. A.W. Kuettel & Sons, Inc., 255 Minn. 325, 96 N.W.2d 684, 688 (1959), that one who carries on activities on land on behalf of a possessor has the same liabilities as the possessor, and ‘that one in control of the premises is under the same duty as the owner to keep the premises in safe condition.’”

Here, Emmaus undertook the task of removing, sanding and salting ice outside the dining room door for the safety of its participants; did the work and took possession of the place where Jackie Larkin fell. Because Emmaus undertook to do the work where she fell, Emmaus had a duty to keep the premises in a reasonably safe condition for people such as Jackie Larkin who are using the dining room door. Emmaus “occupies the position of a possessor.” Dinington v. A.W. Kuettle & Sons, Inc., *Id.* p .688.

It is true Emmaus had no legal duty to act until Emmaus undertook the task of removing, sanding and salting the ice outside the dining room door. But, when Emmaus undertook this task, it had a legal duty to use reasonable care even though it acted gratuitously.

“It is well established that one who voluntarily assumes a duty must exercise reasonable care or he will be responsible for damages resulting from his failure to do so. As stated in Glanzer v. Sheppard, 233 N.Y. 236, 239, 135 N.E. 275, 276, 23 A.L.R. 1425, 1427 (1922): ‘...It is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all....’” Isler v. Burmanu, *Id.* p. 822 (Minn. 1975) citing Thelen v. Spilman, 251 Minn. 89, 86 N.W.2d 700 (1957).

A party may assume the duty through conduct alone where no duty previously existed. Cracraft v. City of St. Louis Park, 279 N.W.2d 801, 806 (Minn. 1979) and Nickelson v. Mall of America Company, 593 N.W.2d 723, 726 (Minn. App. 1999). Emmaus’ joint liability doesn’t turn on whether or not Emmaus was expected to do the maintenance.

Emmaus' joint liability flows from work poorly done following an offer to clear the ice outside the dining room door even though gratuitously made.

**II. WAS THERE EVIDENCE SHOWING APPELLANT IRONWOOD RELIED UPON EMMAUS' UNDERTAKING TO KEEP THE PLACE WHERE JACKIE LARKIN FELL SAFE?**

Emmaus undertook to do the work realizing it was necessary for the safe protection of its participants; Ironwood through Christenson relied on Emmaus to do the work; Christenson didn't instruct his staff (Fannin and Ostegard) to do the work and Emmaus through Rottinger knew Emmaus was doing the work rather than the Ironwood staff.

"We believe that the applicable rule of law is stated in Restatement, Torts 2d, §324A:

'One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if

'(a) his failure to exercise reasonable care increases the risk of such harm, or

'(b) he has undertaken to perform a duty owned by the other to the third person, or

'(c) the harm is suffered because of reliance of the other or the third person upon the undertaking." Walsh v. Pagra Air Taxi, Inc., 282 N.W.2d 567,570-71 (Minn. 1979) (party undertook to furnish fire protection for city realizing it was necessary to protect third party's airplane against fire).

See also, Williams v. Harris, 518 N.W.2d 864, 868 (Minn.App. 1994):

"Liability for voluntarily assuming a duty arises only if this conduct 'leads other to rely on such assumption of duty and to refrain from taking other and more direct action to protect themselves...' Abresch v. Northwestern Bell Tel. Co., 246 Minn. 408, 416, 75 N.W.2d 206, 211-12 (1956)."

It appears to be unnecessary to show Larkin –the third-person who Emmaus sought to protect- knew Emmaus was furnishing her protection. It seems sufficient for Ironwood to simply show they relied upon Emmaus to do the work and Emmaus failed to use reasonable care in fulfilling its undertaking.

To summarize, Ironwood furnished a safe route or path across the parking lot leading from the main door to the lodge/dining hall. Rottinger wanted ice removed outside the dining hall door to protect Emmaus' people. Rottinger talked to Christensen about it, told Christenson that Emmaus would do the sanding, salting and removing of the ice and over the next two or three days undertook to do the work knowing Ironwood wasn't doing the work, Christenson didn't instructing his staff to do it and none of his staff did the work throughout the retreat. Christenson didn't instruct his staff to do it or take steps to protect Emmaus' people because none of them were doing it, Rottinger said he'd do it and did the work for the next two or three days.

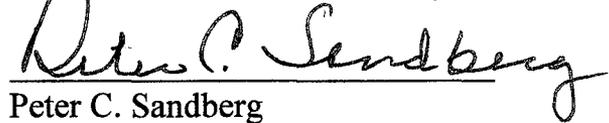
**CONCLUSION**

For the reasons above-stated, Appellant Ironwood Springs Christian Ranch asks this court to reverse the trial court and remand for a trial.

Dated: November 19, 2010.

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**CERTIFICATION OF BRIEF LENGTH**

STATE OF MINNESOTA

IN COURT OF APPEALS

CASE TITLE: Ironwood Springs Christian Ranch, Inc. v. Walk to Emmaus

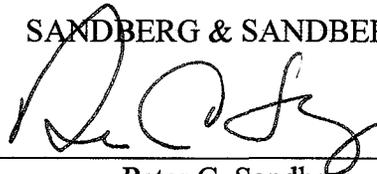
APPELLATE COURT CASE NUMBER: A10-1907

I hereby certify that this brief conforms to the requirements of Minn. R. Civ.App. P. 132.01, subs. 1 and 3, for a brief produced with a proportional font. The length of this brief is 3,221 words. This brief was prepared using Windows Vista Basic.

Dated: November 19, 2010.

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