

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' REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....i

ARGUMENT 1

I. DISMISSAL OF APPELLANT'S COMPLAINT WAS IMPROPER BECAUSE THERE EXISTS A FACTUAL DISPUTE THAT THE SIGN POSED A FORESEEABLE RISK OF HARM TO OTHERS.....1

A. The sign created an artificial condition whose visibility is disputed..... 1

B. The sign and the location of its placement created an inherently dangerous condition..... 2

II. WHETHER THE SIGN WAS OPEN AND OBVIOUS IS AN ISSUE FOR THE JURY 4

CONCLUSION..... 6

CERTIFICATE AS TO BRIEF LENGTH..... 7

TABLE OF AUTHORITIES

Page No.

Case Law

Johnson v. State of Minnesota, 478 N.W.2d 769, 773 (Minn. App. 1991)	2, 3
Knapp v. City of Decatur, 513 N.E.2d 34, 538 (Ill. App. CT. 1987)	2
Lishinski v. City of Duluth, 634 N.W.2d 456, 460 (Minn. App. 2002).....	3
Nolan v. Soo Line R.R., 474 N.W.2d 4, 7 (Minn. App. 1991)	4
Steinke v. city of Andover, 525 N.W.2d 173 (Minn. 1994)	1
Watson v. McGraw-Hill, Inc., 507 S.W.2d 366 (Mo. 1974)	2

Secondary Authorities:

Restatement (Second) of Torts § 355 (1965)	2
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ARGUMENT

I. DISMISSAL OF APPELLANT'S COMPLAINT WAS IMPROPER BECAUSE THERE EXISTS A FACTUAL DISPUTE THAT THE SIGN POSED A FORESEEABLE RISK OF HARM TO OTHERS.

A. The sign created an artificial condition whose visibility is disputed.

Respondents erroneously argue that the sign was visible to Appellant as a matter of law. Respondents cite to *Steinke v. City of Andover*, 525 N.W.2d 173 (Minn. 1994), claiming that whether appellant saw the sign is not the issue but whether the sign was visible. (Krutzig Brief, p.11). In that case the Court applied the *Munoz* standard in deciding that the issue was not whether the snowmobiler saw the ditch but if the snowmobiler *could* have seen the ditch. *Steinke*, 525 N.W.2d at 177. The Court held that the accident was a result of the failure of *Steinke* to observe the normal conditions of rural land. *Id.* *Steinke* crossed the ditch at other points in the past and knew that there were ditches in the area. *Id.* *Steinke* "presented no credible evidence the ditch was concealed or contained hidden dangers." *Id.* The Court reasoned that the ditch was a common earthen ditch, of a type found throughout Minnesota, and was in a flat area not obstructed from view. *Id.*

Contrary to Respondents argument, the *Steinke* case is not on point. The sign in question is not a natural, common element found throughout central Minnesota fields, as was the ditch in *Steinke*. A plywood sign posted in the path of a snowmobile is not a normal condition of rural land. Respondents claim that Mr. Razink had a duty to be aware of his surroundings and a brief inspection

would have revealed the condition. This allegation by Respondents is a disputed question of fact. Whether a condition is considered hidden turns on its *visibility*. Whether Mr. Razink should have the sign under the visibility conditions of that night is a factual dispute for the jury to decide.

B. The sign and the location of its placement created an inherently dangerous condition.

Respondents claim that there is no evidence that the sign was inherently dangerous and cite to cases that do not control in this jurisdiction and pertain to piles of snow and sand respectively. (Krutzig Brief, p. 14, *citing to Watson v. McGraw-Hill, Inc.* 507 S.W.2d 366, 368 (Mo. 1974); *Knapp v. City of Decatur*, 513 N.E.2d 534, 538 (Ill. App. Ct. 1987)). Respondents claim that a plywood sign does not have dangerous propensities and that the condition must satisfy a minimal threshold and be likely to cause death or serious bodily harm. (Ocello Brief, p. 10). *See also* Restatement (Second) of Torts § 335 (1965). In this instance the Respondents fail to look at the totality of the circumstances of where and how the sign was erected. The Court in *Johnson v. State of Minnesota*, concluded that the Restatement requires that the *condition* be likely to cause serious bodily harm. 478 N.W.2d 769, 773 (Minn. App. 1991) (emphasis added). Respondents concede that the intent of the sign was to draw attention from the *road* for advertising purposes and this emphasizes that the sign was edge-on and could not be seen when someone approached it from the side. This artificial condition created a concealed danger in that the sign became effectively “invisible” to oncoming snowmobilers and whether the sign was in fact visible is for a jury to decide.

Respondents also erroneously claim that a brief inspection would have revealed the condition. (Ocello Brief, p.10). Respondents fail to take into consideration that Mr. Razink had traveled “pretty much the same” path two to three times in the past, fulfilling the duty to know and inspect the trail. (Pfeffer Brief, p. 7.) Mr. Razink, traveling on this land, could not see the edge-on sign during the particular conditions of the evening. In *Lishinski v. City of Duluth*, the Minnesota Court of Appeals held that a trial court did not err in denying summary judgment when an in-line skater died as a result of a change in park path conditions that occurred at the bottom of a hill, behind a stage. 634 N.W.2d 456, 460 (Minn.App. 2002). Two experts testified that a skater would not know about the danger until it was too late and the Court reasoned that it was for “the jury to decide whether the condition behind the stage was hidden or whether brief inspection would have revealed the condition.” *Id.*

Judge Crippen in the dissent in *Johnson* stated that “there is a fact issue on discoverability of a hazard where evidence shows a sidewalk joint that is indistinguishable from the surrounding walkway and located on a heavily used public walkway.” *Id.* at 774. In addition, Judge Crippen called on the Court to not “disregard danger as a matter of law by comparing a condition with one which has inherently dangerous propensities, such as a high voltage wire.” *Id.* The artificially created condition was the edge-on placement of the plywood board on a well traveled snowmobile trail and the totality of the circumstances of where the sign was located; not the board in and of itself. The placement of the sign created a high likelihood that serious injury would occur when it was placed edge-on on a

frequently traveled snowmobile trail. Whether the sign was "hidden" is a factual issue for a jury to decide.

II. WHETHER THE SIGN WAS OPEN AND OBVIOUS IS AN ISSUE FOR THE JURY.

Respondents claim they had no knowledge that snowmobiles frequently crossed the area where the sign was placed and the trial court in arguing that "nor should they have recognized the fact." (Krutzig Brief, p. 14). This proposition is a question of fact, not a question of law, and is better left for a jury to decide on the reliability of the Respondents' knowledge. In *Noland v. Soo Line R.R.*, the Minnesota Court of Appeals reversed a grant of summary judgment and concluded that there were material facts that were in dispute that warranted a trial. 474 N.W.2d 4, 7 (Minn.App. 1991). A snowmobiler drove off the side of a railroad trestle and was injured. *Id.* at 5. The snowmobiler had never traveled that particular path before and the trestle was covered with snow and was difficult to see because of darkness and blowing snow. *Id.* The Court held that because "these conditions may have obscured the trestle enough to make it difficult for even an attentive snowmobiler to discover," there was thus "a fact question about whether the trestle was so concealed respondent had reason to believe trespassers would not discover it." *Id.* at 7.

Like *Noland*, there is a fact question as to whether the placement of the sign created a dangerous condition and whether that condition caused the sign to be hidden or concealed. Whether Appellant failed to meet his own duty to operate a snowmobile responsibly is a question of fact for a jury to decide.

The possibility that there was little snow does not mean there were no tracks or remnants of snowmobile use or there was knowledge of snowmobile use in the past. In fact, the photographic evidence clearly shows a well worn snowmobile path during summer. (A-194) Respondents also claim that there is no duty of care when a defect is open and obvious. True, however, this was a 4x8 piece of plywood, 1/2" to 3/4" thick attached to thin metal posts and it is for a jury to decide whether, taking in the totality of all the variables that night, that the sign was open and obvious. Is a 1/2" knife edge open and obvious at night as a matter of law in Minnesota? No law supports such a sweeping finding. It is a fact question for the jury.

CONCLUSION

This Court should overrule the trial court and remand this case to a jury because the issue of whether the posted sign was likely to cause serious bodily harm as well as whether the sign was visible are fact questions for the jury to decide.

Dated: 25 June 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 1,817 words, excluding the Table of Contents and Table of Authorities.

Dated: 25 Jun 2007

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