

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.

**RESPONDENTS KATHY AND DARYL KRUTZIG'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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STATEMENT OF LEGAL ISSUES

- I. Whether Respondents are entitled to summary judgment on the grounds that they were immunized from liability against Appellants' claims in accordance with the Minnesota Recreational Use Statute.**

The trial court held: The trial court correctly concluded that Respondents Kathy and Daryl Krutzig are owners of "land" as defined under Minn. Stat. § 604A.21, Subd. 3, and are therefore entitled to immunity against liability for personal injuries based on the Minnesota Recreational Use Statute, and granted summary judgment in Respondents' favor.

- II. Whether Respondents are entitled to summary judgment on the grounds that there is no factual dispute that the sign erected by Respondents did not pose an unreasonable risk of physical harm to others.**

The trial court held: The trial court correctly concluded that Respondents could not have recognized that the sign posed an unreasonable risk of harm to snowmobilers.

- III. Whether Respondents are entitled to summary judgment on the grounds that the sign Appellant ran into while snowmobiling was an open and obvious condition.**

The trial court held: The trial court correctly concluded that Appellant failed to meet his own minimal duty to operate his snowmobile responsibly, as he was riding at an excessive speed and while intoxicated.

STATEMENT OF THE FACTS

Appellants have alleged, by way of their Amended Complaint, that on February 9, 2003, Appellant Michael Duane Razink ("Plaintiff") operated his snowmobile on a "known, well-traveled snowmobile trail" on the east side of Highway 25. *See* Amended Complaint (A-53-59)¹. While traveling northbound along this route, Appellant Michael Razink crashed his snowmobile into a sign located on property within the City of Monticello, Minnesota, injuring himself. (*Id.*). Appellants have alleged in this action claims for negligence and negligence per se on the part of Respondents Kathy and Daryl

¹ References to "A-" are references to Appellants' Appendix.

Krutzig, but Appellants do not allege Respondents Krutzig willfully took action to cause Appellant's injuries.

At the time of this accident, the property in question, referred to as Lot 2, was owned by Ocello, LLC. (A-241). Prior to the accident, Lot 1 of the parcel of property involved had been transferred via quit claim deed from Ocello to Michael and Daryl Krutzig. (A-242-243). Charles Pfeffer, a commercial real estate agent, was involved in the transfer of Lot 1. (A-243). Mr. Pfeffer testified Lots 2 and 3 of the same parcel of property were covered by the initial option as well. (A-244). However, ownership of Lot 1 did not transfer to the Krutzigs until December 2002. (A-248). At that point, Ocello was still the owner in fee for Lots 2 and 3. (*Id.*).

With regard to the sign at issue, Mr. Pfeffer testified he had originally placed a "For Sale" sign on the property, for which he had permission from Ocello, the owner of the property, via the listing agreement. (A-245). In particular, Mr. Pfeffer testified he would have contacted Shawn Weinand with Ocello to request permission to place his sign on the property. (A-249). Mr. Pfeffer testified he had a "gentlemen's" relationship with Mr. Weinand such that Mr. Weinand preferred Mr. Pfeffer to place signs on the property. (*Id.*). Given this relationship, there was no need for Mr. Pfeffer to contact Mr. Weinand when he needed to move one of the signs he had placed. (A-249-250).

Mr. Pfeffer, in turn, granted permission to Michael Krutzig to use his sign posts for the posting of a sign advertising the availability of space coming to the site. (A-246). Mr. Pfeffer testified there was no need for him to contact the property owner, Ocello, as this would have been part of his gentlemen's agreement with Mr. Weinand. (A-250). He believes his conversation with Michael Krutzig occurred in October of 2002. (A-246).

Mr. Pfeffer returned to the property to retrieve his own sign, which had been removed from the posts and laid on the ground, within a couple of weeks. (A-247). Mr. Pfeffer believes when he went to pick up his sign, a replacement sign was in its place. (*Id.*).

Michael Krutzig confirmed this series of events in his own deposition testimony. He recalled contacting Charlie Pfeffer and asking Mr. Pfeffer if it was alright to replace Mr. Pfeffer's piece of plywood on Lot 2 with his own piece of plywood, marketing the property as retail/commercial. (A-253). Mr. Krutzig testified he was aware that Charlie Pfeffer was the liason with Ocello, given his position as the realtor. (A-256). He understood that Charlie Pfeffer would be able to give him permission, on behalf of Ocello, to erect the sign on their property. (*Id.*). Daryl had no involvement in the conversation with Charles Pfeffer. (*Id.*).

Mr. Krutzig testified after being given permission by Mr. Pfeffer, he and his brother, Daryl, removed Mr. Pfeffer's sign and put up their own sign. (A-254). Mr. Krutzig believes this occurred in December of 2002. (A-254). They saw no evidence of any snowmobiling activity or ATVing in the area when they were out putting up the signs. (A-238). Mr. Krutzig also testified no one, including Mr. Pfeffer or Ocello, had told them there might be either snowmobiling or ATVing activity going on on Lot 2. (A-239).

Mr. Krutzig described the sign he and Daryl placed onto Mr. Pfeffer's posts as a 4 by 8 sheet of plywood and ¾ inch thick. (A-255). He had no difficulty whatsoever seeing the sign when he drove up to it, parallel to the sign. (A-257). Mr. Pfeffer also testified that the sign put up by the Krutzigs was clearly visible from the roadway. (A-251-252).

Appellant Razink admitted at the time of his deposition that he had been drinking beer prior to going snowmobiling the day of this accident. (A-209). In addition, he testified that at the time of the impact he was traveling at speeds up to 40 m.p.h. (A-220).

All of the various Respondents have been dismissed from this case by way of summary judgment. Respondents Daryl and Kathy Krutzig contend that they were properly dismissed from this lawsuit on the basis that they are entitled to immunity provided by the Minnesota Recreational Use Statute (MRUS) against Appellants' claims.

LEGAL ARGUMENT

I. STANDARD OF REVIEW

On appeal from summary judgment, the appellate court asks two questions: (1) whether there are any genuine issues of material fact and (2) whether the lower courts erred in their application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990).

II. SUMMARY JUDGMENT STANDARD

In Minnesota, summary judgment procedure is well established. If there is no genuine issue as to any material fact and the moving party is legally entitled to judgment, Rule 56 provides the mechanism for the court to grant a judgment without trial. Minn.R.Civ.P. 56.03. A material issue of fact is one which, depending on its resolution, will affect the outcome of a case. *Zappa v. Fahey*, 310 Minn. 555, 556, 245 N.W.2d 258, 258-60 (1976). The burden is on the party opposing the summary judgment motion to prove that a material issue of fact exists. *Hunt v. IBM Mid America Employees Federal Credit Union*, 384 N.W.2d 853, 855 (Minn. 1986). Moreover,

[W]hen motion for summary judgment is made and supported as provided by R. 56, an adverse party may not rest on the mere averments or denial of the adverse

party's pleading, but must present specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Minn.R.Civ.P. 56.05; *Grondahl v. Bulluck*, 318 N.W.2d 240, 242 (Minn. 1982).

“Summary judgment is not to be avoided simply because there is some metaphysical doubt as to a factual issue.” *Bob Useldinger & Sons, Inc. v. Hangsleben*, 505 N.W.2d 323, 328 (Minn. 1993). Summary judgment must be granted, however, when the material facts are not disputed, as, “The existence of a factual dispute is not sufficient to preclude entry of summary judgment, however, where the evidence presented by the non-moving party is insufficient to permit in its favor on the disputed issue.” (Citations omitted).

In *Thiele v. Stich*, 425 N.W.2d 580 (Minn. 1988), the Minnesota Supreme Court held that “when the moving party makes out a prima facie case, the burden of producing facts that raise a genuine issue shifts to the opposing party.” *Id.* at 583 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2584, 2556-57 (1986)(Brennan, J., dissenting but not on this point)). The *Thiele* court rejected the argument that one moving for summary judgment bears the threshold burden of positively establishing the complete absence of any questions of material fact. *Thiele*, 425 N.W.2d at 583.

When the moving party has met its threshold burden, a non-moving party cannot successfully resist a motion for summary judgment by “simply show[ing] that there is some metaphysical doubt as to the material facts.” *Carlisle v. City of Minneapolis*, 437 N.W.2d 712, 715 (Minn.Ct.App. 1989); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 1355-56, 89 L.Ed.2d 538 (1986). Rather, the burden on one resisting summary judgment is to “provide the court with specific facts

indicating that there is a genuine issue of fact.” *Hunt v. IBM Mid Am. Employees Fed. Credit Union*, 384 N.W.2d 853, 855 (Minn. 1986).

Appellants attempt to assert that “questions of material fact” remain, thus precluding summary judgment in this matter. However, a careful review of the record before the court will indicate that there are no disputed material facts. If anything, the parties are interpreting the facts in different manners. This does not preclude a finding of summary judgment, which requires the court to apply the law to the facts in the record. That is exactly what the trial court did in this case, and its decision should be affirmed.

III. THE UNDISPUTED EVIDENCE COMPELS A FINDING THAT RESPONDENTS KATHY AND DARYL KRUTZIG ARE OWNERS OF LAND AS DEFINED BY MINN. STAT. § 604A.21, SUBD. 3, AND ARE THEREFORE IMMUNIZED FROM LIABILITY AGAINST APPELLANTS’ CLAIMS IN ACCORDANCE WITH THE MINNESOTA RECREATIONAL USE STATUTE.

A. The Minnesota Recreational Use Statute is Applicable to the Facts of this Case.

Even on the Complaint’s face, this case falls squarely within the protection afforded by § 604A.25, which bars claims arising from the use of a snowmobile trail. In fact, Appellants admit in their Amended Complaint that Razink was operating his snowmobile on a “*known, well-traveled snowmobile trail*” when the incident in question occurred. (Amended Complaint ¶ VIII) (emphasis added). Thus, it is readily apparent that Appellant’s use of the land in question was a “recreational trail use” under the statute. *See Watters v. Buckbee Mears Co.*, 354 N.W.2d 848, 851 (Minn.Ct.App. 1984)(interpreting predecessor recreational use statute); Minn. Stat. § 604A.21, Subd. 6 (recreational trail use is defined as “use on or about a trail including, but not limited to, ... snowmobile riding ...”).

Two separate judges have issued orders in this matter concluding that the Minnesota Recreational Use Statute is applicable to the facts of this case. (A-48-51), *Razink v. Krutzig, et al.*, Wright Co. Dist. Ct., C8-04-3515 (Jan. 4, 2005 Order of Hon. Dale E. Mossey), and (A-117-138), *Razink v. Krutzig, et al.*, Wright Co. Dist. Ct, C8-04-3515 (Feb. 16, 2006 Order of Hon. Kathleen A. Mottl). In discussing the specific interpretation of the statute, the trial court noted, “This statute does not specifically require affirmative ‘written’ or ‘oral’ permission. (A-50); *See* Minn. Stat. § 604A.25. Therefore, the statute covers owners who permit recreational trail use on their land, either affirmatively or passively.” *Id.*

Because Appellants have failed to allege that Respondents Kathy and Daryl Krutzig willfully took action to cause Appellant injury, the Amended Complaint is grounded solely in negligence, and is therefore barred by the MRUS. Simply stated, the MRUS provides a complete defense to claims arising under a negligence theory. Accordingly, the trial court correctly concluded that the MRUS bars Appellants’ claims in this matter, and the court’s decision should be upheld.

B. The Trial Court Correctly Concluded that Respondents Daryl and Kathy Krutzig are Owners of “Land” as Defined by Minn. Stat. § 604A.21, Subd. 3, and are Therefore Entitled to the Immunity Provided by the Minnesota Recreational Use Statute.

Respondents had initially sought summary judgment based on the argument that in erecting the sign in question, Daryl Krutzig was acting as an agent for the owner of the land, Ocello, thus qualifying him for immunity under the Recreational Use Statute. While the trial court rejected this argument, it did correctly conclude that Respondents were entitled to immunity by virtue of their sign ownership, finding that this qualified

them as being “land” owners under the definition of the statute. This finding on the part of the trial court should be upheld.

The Minnesota Recreational Use Statute limits the liability exposure of owners who open up their land for public recreational use by granting the owner immunity against liability claims by public users. *See* Minn. Stat. §§ 604A.22, 604A.25. Subdivision 3 of the MRUS defines “land” as including “buildings, structures, and other improvements to land, and machinery or equipment when attached to land.” Minn. Stat. § 604A.21. As noted by the trial court, the “Merriam-Webster Dictionary broadly defines a structure as anything that is constructed or, alternately, something composed of multiple parts held together in a particular way.” (A-126). The trial court correctly concluded that the sign in question is unquestionably a structure, finding that it required “some amount of assembly in anchoring the posts into the ground and fastening the signboard thereto.” (*Id.*). The trial court’s conclusion is also supported by case law. In *Clear Channel Outdoor Advertising, Inc. v. City of St. Paul*, 675 N.W.2d 343 (Minn. App. 2004), as cited by the trial court, this court interpreted the term “sign structure,” as defined in St. Paul city ordinances, to include both the printed advertising material and the supportive superstructure. *Id.* at 346-47.

The trial court then went on to examine the issue of whether Respondents are “owners” protected by the statute, even though Kathy and Daryl Krutzig did not own the land on which the sign is built. In doing so, the court pointed out the case of *Peterson v. Midwest Security Insurance Company*, 636 N.W.2d 727 (Wis. 2001). There, a deer hunter who was injured when he fell from a tree stand built by a nephew of the landowners. In deciding the hunter’s claim against the nephew’s liability insurer, the

Wisconsin Supreme Court held that the tree stand was a structure, and thus deemed “property” under their recreational use statute, which similarly defined that term as “real property and buildings, structures and improvements thereon, and the waters of the state.” Wis. Stat. § 895.52(1)(f)(1998); *See Peterson*, 636 N.W.2d at 574. Given the intended broad interpretation and reach of recreational use statutes, the court held that a person who owns a ‘building, structure, or improvement’ on real property is an owner of ‘property’ as defined in Wis. Stat. § 895.52(1)(f), even where that person does not own the underlying real property. *Id.* at 578-79.

The trial court went on to state “The same conclusion is warranted in this instance.” (A-127). It found the reasoning of the Wisconsin Supreme Court sound, noting that the pertinent language in Wisconsin’s statute is virtually identical to that contained in the MRUS. Thus, the trial court held, “It is only logical that the term ‘land’ should be accorded the same treatment, and section 604A.21 does not explicitly require that the structures or improvements and the land upon which they are situated be owned by the same party for immunity to attach.” (A-128). Thus, the trial court correctly concluded that Respondents are entitled to immunity against negligence suits under the Minnesota Recreational Use Statute, and it appropriately awarded summary judgment to Respondents on that basis. The trial court’s decision in this regard should be upheld.

IV. THERE IS NO FACTUAL DISPUTE THAT THE SIGN RESPONDENTS ERECTED DID NOT POSE AN UNREASONABLE RISK OF PHYSICAL HARM TO OTHERS.

A. Appellant did not obtain permission from the landowner before operating his snowmobile on the day of this accident.

Minnesota requires a snowmobiler to obtain permission from the owner of land before snowmobiling on the property. Specifically,

Minnesota Snowmobile Safety Law, Rules and Regulations, 2001-02

Inside the seven-county metro area you may ride:

- On your land
- On land that is posted with signs stating “snowmobiles allowed”
- On land other than your own, with the written or spoken permission of the landowner, occupant, or lessee

Inside the seven-county metro area, you may NOT ride:

- On land that you do not own, unless given written or oral permission to ride on that land by the owner, occupant or lessee, or unless signs are posted stating “snowmobiling is allowed.”

(R-1-)².

Minnesota’s snowmobile rules and regulations impose an affirmative duty on a snowmobiler that does not exist under common law. Under Minnesota’s snowmobile rules and regulations, a snowmobiler must ask the landowner for permission. Under the common law, in contrast, a trespasser has no duty to ask for permission. Because the snowmobiler owes a duty that a trespasser does not, the snowmobiler cannot argue he is entitled to relief available to a trespasser under common law.

Under the common law, a trespasser theoretically can argue that the landowner is liable because he failed to warn against a hidden and artificial danger. See CIVJIG 85.13 and its authorities. If a court allows a snowmobiler who has not obtained permission to make that common law argument, then the court has eliminated a statutorily imposed duty and rendered it a nullity. As the court is aware, rules and regulations must be

² References to “R-” are references to Respondents Kathy and Daryl Krutzig’s Appendix.

interpreted so as to avoid rendering them a nullity. *Cf. Church of Scientology of Minnesota v Minnesota State Medical Ass'n Foundation*, 264 N.W.2d 152, 155 (Minn. 1978).

Further, a landowner is entitled to assume that trespassers know that no preparations have been made for their arrival. The trespasser is assumed to "be on the alert to observe the conditions which exist upon the land." *Sirek v. Dept. of Natural Resources*, 496 N.W.2d 801, 810 (Minn. 1993). Here, Appellant made no inspection of the property he was riding on to determine if it was suitable for snowmobiling.

Even if we are to assume that Appellant was a known trespasser, that fact does not relieve him of his obligation to be aware of his surroundings. *Lishinski v. City of Duluth*, 634 N.W.2d 456, 459 (Minn.App. 2002). *See also, Johnson v. State*, 478 N.W.2d 769, 773 (Minn.App. 1991), holding that if a brief inspection would have revealed the condition, the condition is not considered hidden. Whether a condition is considered hidden turns on its *visibility*, not whether the claimant saw it.

Steinke v. City of Andover, 525 N.W.2d 173 (Minn. 1994) is directly on point. In *Steinke*, the plaintiff was operating a snowmobile and was injured when it struck a drainage ditch measuring 16 feet across and three to six feet deep. *Id.* at 174. At the time of the accident, Steinke was not on a designated trail and admitted he was trespassing. *Id.* In arguing against summary judgment, Steinke claimed that the ditch presented a hidden and artificial condition which posed a hazard. *Id.* In rejecting that argument, the court stated that the record showed the ditch was in an open and flat area and was not obstructed from view. *Id.* at 177. The court also found that though this was Steinke's first time on this route, he was traveling at 45 m.p.h., and that he was a trespasser, he was

obliged to be aware of his surroundings. *Id.* The court determined that Steinke's accident was a result of his failure to observe the normal conditions of rural land. *Id.* In reversing this court's decision and reinstating the trial court's grant of summary judgment, the Minnesota Supreme Court held that the ditch was not a hidden, artificial condition. *Id.*

Like Steinke, Razink was not on a designated snowmobile trail. Appellant admitted he had never before been on the path he was traveling on this night of this accident. Similarly, Appellant did not do anything to inspect the land before taking off on his snowmobile at night. Appellant's injuries are the direct result of his failure to exercise due care for his own safety. Because Appellant Razink failed to obtain permission from the landowner, Appellants cannot maintain their lawsuit and the trial court properly dismissed their Complaint by way of summary judgment.

B. The Sign Erected by Respondents did not Pose an Unreasonable Risk of Physical Harm to Others.

The trial court determined that Respondents did not owe Appellant a duty by virtue of being a landowner, but did confer the status of "licensees of the possessor" upon them, their duty being governed by the Restatement (Second) of Torts § 386 (1965). This section states:

Any person, except the possessor of land or a member of his household or one acting on his behalf, who creates or maintains upon the land a structure or other artificial condition which he should recognize as involving an unreasonable risk of physical harm to others upon or outside the land, is subject to liability for physical harm thereby caused to them, irrespective of whether they are lawfully upon the land, by the consent of the possessor or otherwise, or are trespassers as between themselves and the possessor.

The question then becomes whether the sign erected by Respondents was such that Respondents should have recognized as involving an "unreasonable risk of physical harm

to others upon or outside the land.” The trial court correctly determined that “there is no factual dispute that it was impossible for the Krutzigs to have realized such a level of risk.” (A-132). The trial court cited to two cases involving the type of liability described in section 386. The first of these cases is *Carlson v. Rand*, 146 N.W.2d 190 (Minn. 1966). In *Carlson*, the plaintiff tripped over an area rug in his mother’s home and sued his sister, who did not own or possess the home, but had placed the rug there. *Id.* at 191-92. Plaintiff asserted that his sister owed “a duty not to maintain a condition involving an unreasonable risk of physical harm to others,” based upon section 386. *Id.* at 193. The Supreme Court concluded that plaintiff failed to present evidence that his sister created a condition she should have recognized as unreasonably dangerous, particularly since she could not anticipate that plaintiff would not watch where he was going, and therefore section 386 did not apply. *Id.* at 195.

The trial court also cited to *Bundy v. Holmquist*, 669 N.W.2d 627 (Minn. App. 2003). There, a prospective real estate purchaser stepped into a hole on the property and broke her ankle. *Id.* at 629. The Defendants were three sisters who had inherited rural land from their mother and sold the entire tract to a developer, who eventually entered into a purchase agreement to sell a portion to Debra Bundy and her husband. *Id.* Plaintiffs visited the property three weeks prior to closing their purchase, at which time the sisters and their relatives were moving their mother’s possessions out of the house and removing flower bulbs from the yard, with the developer’s consent. *Id.* While moving their possessions into the dwelling, Mrs. Bundy injured her ankle stepping into a hole, which she alleges was caused by the sisters’ digging and concealed by tall grass. *Id.* In the resultant personal injury suit, the district court granted summary judgment for

the sisters on the basis that they were not owners or acting on behalf of the developers. *Id.* at 630. This court reversed and remanded, finding that there was a question of fact as to whether the hole dug by the sisters was visible, as there was conflicting testimony as to this issue. *Id.* at 633.

On the contrary, in the present case, there has been no testimony that the sign in question was not visible. As noted below, all of the testimony has been to the contrary. While Appellant has indicated that he did not *see* the sign prior to hitting it, the test of a plaintiff's right to recover is whether the danger is in fact "visible." *Olson v. City of St. James*, 380 N.W.2d 555, 559 (Minn.Ct.App. 1986). As noted by the trial court, the key inquiry is whether Respondents should have recognized the sign as posing "an *unreasonable risk* of physical harm to others" at the time of placement. First, there is no evidence that the sign at issue was inherently dangerous. *See Watson v. McGraw-Hill, Inc.*, 507 S.W.2d 366, 368 (Mo.1974) (pile of snow about a foot high and two or three feet wide is not inherently dangerous); *Knapp v. City of Decatur*, 513 N.E.2d 534, 538 (Ill.App.Ct.1987) (pile of sand is not inherently dangerous). This distinguishes the sign in this case from cases involving inherently dangerous objects, sign as a utility line or open excavation pits, the most frequently occurring artificial conditions in section 386 cases. Secondly, the evidence clearly demonstrates that none of the Respondents in this case had knowledge that snowmobiles frequently crossed the area of Lot 2 where the sign was placed. As noted by the trial court, "Nor should they have recognized such a fact." (A-133). The deposition testimony of both Charlie Pfeffer and Michael Krutzig indicates that there was no snow on the ground, and consequently no sign of snowmobile use, when the signboard was replaced in late fall of 2002. The trial court correctly noted that

these statements are corroborated by weather reports, which showed that Monticello received less than three inches (3") of snow from October to the end of the year. (*Id.*). The court also cited to a newspaper article from late December, also discussing the lack of snow, with an accompanying photograph displaying bare ground in the city. (*Id.*). Further, Respondents visited the property infrequently, and never noticed snowmobile tracks. It was the culmination of all of this evidence that led the trial court to correctly conclude that Respondents Krutzig could not have known the sign posed an unreasonable danger to snowmobilers when it was erected. Consequently, the trial court's ruling granting summary judgment in favor of Respondents Kathy and Daryl Krutzig should be upheld.

V. RESPONDENTS WERE ENTITLED TO SUMMARY JUDGMENT ON THE GROUNDS THAT THE SIGN APPELLANT RAN INTO WHILE SNOWMOBILING WAS AN OPEN AND OBVIOUS CONDITION.

While Appellant claims not to have seen the sign his snowmobile struck, the facts on the record indicate that this sign was open and obvious. Therefore, the trial court correctly concluded that Appellant failed to meet his own minimal duty to operate his snowmobile responsibly.

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). 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). The fact that the condition is obvious is usually sufficient to apprise adults of the full extent of the risk involved. *Carlson v. Rand*, 275 Minn. 272, 146 N.W.2d 190, 194 (1966).

The test of a plaintiff's right to recover is whether the danger is in fact "visible." *Olson v. City of St. James*, 380 N.W.2d 555, 559 (Minn.Ct.App. 1986); *Munoz v. Applebaum's Food Market, Inc.*, 293 Minn. 433, 196 N.W.2d 921 (1972). In *Olson*, the court reaffirmed the holding in *Friday* that when the danger is "apparent", recovery is precluded. *Id.*; *Friday v. City of Moorhead*, 84 Minn. 273, 275, 87 N.W. 780 (1901). In *Bisher v. Homart Development Co.*, the court found that a landowner did not breach a duty of care when plaintiff tripped over a planter in a shopping mall because the planter was "obvious" and in "plain view." 328 N.W.2d 731, 733-34 (Minn. 1983). Similarly, in *Lawrence v. Hollerich*, the court found that a landowner did not breach a duty of care where a guest fell down a steep hillside because the hill was obviously treacherous. 394 N.W.2d 853, 856 (Minn.Ct.App. 1986), *rev. denied* (Minn. Dec. 17, 1986). Finally, in *Peterson v. W.T. Rawleigh*, 274 Minn. 495, 144 N.W.2d 555 (1966), the court accepted the *Restatement, Torts (2d)*, § 343A, for the proposition that:

A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

144 N.W.2d at 558.

The *Peterson* court noted that there are situations which are so obviously dangerous that the possessor has no duty to warn an invitee. *Id.* at 497, 144 N.W.2d at 558. This approach is supported by the unremarkable proposition that "no one needs notice of what he knows or reasonably may be expected to know." *Sowles v. Urschel Laboratories, Inc.*, 595 F.2d 1361, 1365 (8th Cir.1979).

While Respondents Krutzig accept Appellant's testimony that he did not see the sign prior to colliding with it, the undisputed evidence indicates that this sign was in fact

visible. The sign in question was a 4 by 8 piece of plywood, 3/4 inch thick, placed onto posts. (A-255). Michael Krutzig has testified he had no difficulty whatsoever seeing the sign when he drove up to it, parallel to the sign. (A-257). Charlie Pfeffer also testified that the sign put up by the Krutzigs was clearly visible from the roadway. (A-251-252).

The sign in question is the type of known or obvious danger to which the Restatement refers, and for which possessors of land may not be held liable to those who enter their land. Thus, Respondents Daryl and Kathy Krutzig cannot be held accountable for Appellant's own negligence in not watching where he was operating his snowmobile on the day of this accident. As noted by the trial court:

...Plaintiff proceeded to assume the risk of snowmobiling at a high rate of speed with his friend Osman on the evening of February 9, 2003, after the two had been drinking. Michael Razink's blood alcohol level was 0.15% when tested at the hospital, well in excess of the legal limit. Plaintiff estimated his speed to be 35 to 40 miles per hour at the time of the accident, which is over twice the posted speed limit (15 m.p.h.) for snowmobiles within Monticello city limits. A defendant's duty is defined on the assumption that a claimant was acting reasonably, and that simply was not the case here.

(A-134).

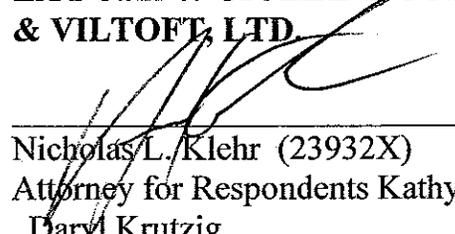
The trial court correctly granted summary judgment to Respondents on the basis that the Appellant failed to meet his own minimal duty by observing a sign that was clearly open and obvious.

CONCLUSION

Pursuant to all of the above arguments, Respondents Kathy and Daryl Krutzig respectfully submit that the trial court's decision to grant summary judgment in their favor should be affirmed.

Dated: June 4, 2007

**LA BORE & GIULIANI, COSGRIFF
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