

Case No. A07-0389

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*State of Minnesota*  
***In Court of Appeals***

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*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.*

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**RESPONDENT MICHAEL KRUTZIG'S BRIEF**

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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. ARE THE RESPONDENTS KRUTZIG IMMUNE FROM LIABILITY UNDER THE MINNESOTA RECREATIONAL USE STATUE.**

The trial court held that since the Krutzigs were the owners of at least part of the sign structure, they were entitled to immunity under the statute.

Authorities: Minn. Stat. § 604A.21, Subd. 3 (West 2007).

Clear Channel Outdoor Advertising, Inc. v. City of St. Paul, 675 N.W.2d 343 (Minn.App.2004).

Peterson v. Midwest Security Ins. Co., 636 N.W.2d 727 (Wis.2001).

**II. ARE THE RESPONDENTS KRUTZIG ENTITLED TO SUMMARY JUDGMENT ON THE GROUNDS THAT THERE ARE NO GENUINE ISSUES OF MATERIAL FACT TO SUGGEST THAT THE SIGN STRUCTURE POSED AN UNREASONABLE RISK OF PHYSICAL HARM TO OTHERS.**

The trial court held that they were in that there was no evidence that the Krutzigs knew or should have known that the replacement of the placard on the sign posed an unreasonable risk of physical harm to others.

Authority: Restatement (Second) of Torts, Section 386 (1965).

Carlson v. Rand, 146 N.W.2d 190 (Minn.1966).

**III. ARE THE RESPONDENTS KRUTZIG ENTITLED TO SUMMARY JUDGMENT ON THE GROUNDS THAT THE SIGN STRUCTURE WAS AN OPEN AND OBVIOUS CONDITION.**

The trial court held that the sign structure was an open and obvious condition which should have been seen by anybody operating a snowmobile using reasonable care.

Authority: Steinke v. City of Andover, 525 N.W.2d 173 (Minn.1994).

**IV. ARE WRIGHT COUNTY SETBACK REQUIREMENTS APPLICABLE TO THE PLACEMENT OF A SIGN STRUCTURE WITHIN THE CITY LIMITS OF A MUNICIPALITY.**

The trial court held that they were not.

Authority: Minn. Stat. § 394.32, Subd. 3 (West 2007).

Haverhill Township v. County of Olstead, 674 N.W.2d 781  
(Minn.App.2004).

### **STATEMENT OF THE CASE**

This matter is on appeal from the judgment of the District Court, Tenth Judicial District, Wright County granting Respondents Krutzig's motions for summary judgment and dismissing the Appellants' claims in their entirety. The Appellants originally brought a complaint asserting claims for personal injury. The complaint against the Krutzigs was based on a theory of negligence. In the complaint, it was alleged that the Respondents Krutzig erected a sign on land owned by Ocello, LLC, and that such placement was negligent as it was located on what was alleged to be a well-known snowmobile trail.

Prior to that, the Appellants' claims as against the Respondent Ocello had been dismissed on the grounds that the allegations in the complaint were such that the owner of the land could have no liability based on the provisions of the Minnesota Recreational Use Statute. Later, the Respondent Pfeffer's motion for summary judgment was also granted, and this appeal followed.

### **STATEMENT OF THE FACTS**

Defendant Ocello, LLC owned three adjacent lots within the City of Monticello, which have been identified in this lawsuit as Lots 1, 2, and 3. (*See Appellants' Appendix, A-117*). In December 2002, Respondents, Michael and Daryl Krutzig (hereinafter "Respondents") purchased Lot 1 from Ocello and retained an option to purchase Lots 2 and 3, granting them access to Lots 2 and 3. (*See Appellants' Appendix, A-242-343*) In 1999 or 2000 prior to the transfer of ownership of Lot 1 to Respondents, Charles Pfeffer, a commercial real estate agent employed by Ocello, erected a "For Sale" sign on Lot 2 with the consent of Ocello via the listing agreement. (*See Appellants' Appendix, A-245*). The sign, made up of a 4 by 8 foot sheet of plywood, which was 3/4 of an inch thick, was located on the east side of Highway 25 facing the road. (*See Appellants' Appendix, A-118; A-255*). Michael Krutzig testified that he had no

difficulty seeing the sign when he drove up to, and was parallel to the sign. (*See Appellants' Appendix, A-257*). The sign was also clearly visible from Highway 25. (*See Appellants' Appendix, A-251-252*).

After the transfer of ownership of Lot 1, Respondents Krutzig contacted Charles Pfeffer and were granted permission to replace the "For Sale" placard with his own advertisement of the availability of retail and office space to be constructed on his property. (*See Appellants' Appendix, A-246*) The new placard was owned by S.B. 25, LLC, had been placed there by the owners of S.B. 25, Michael and Daryl Krutzig, and was supported by the same posts in the identical location as that erected by Charles Pfeffer. (*See Appellants' Appendix, A-118*) The sign was placed in exactly the same composition, configuration, size and condition as what had been placed there in 1999 by the owner's real estate agent, Charles Pfeffer. (*Id.*) The only thing that changed was the message on the sign.

At the time the Respondents replaced the "For Sale" placard with their own, there was no evidence of snowmobiling activity in the area. (*See Appellants' Appendix, A-238*) In fact, there was no snow on the ground into January, 2003. (*See Respondent's Appendix, A-2*) The national weather records for December, 2002, through February, 2003, show that there was no significant snowfall throughout January and that the first useable snow for snowmobile purposes did not fall in the area until February 3<sup>rd</sup>. (*See Respondent Appendix, A-3 – A-6*) Prior to the purchase of the property in December, Krutzig had never been on the property in the winter when there was snow and had never seen evidence of snowmobile activity in the area of the sign structure. (*See Appellants' Appendix, A-25; and Respondent's Appendix, A-7*) Mr. Pfeffer also had no knowledge of snowmobile activity in the area, and, thus, did not communicate any concerns of such to Respondents. (*See Appellants' Appendix, A-238-239*)

On February 9, 2003, the Appellant Michael Razink was operating his snowmobile on what he later alleged to be “a well-traveled snowmobile trail” along Highway 25 and entered onto the land owned by Ocello. (*See Appellants’ Appendix, A-53-59*) While operating his snowmobile at night, the ski of Appellant’s snowmobile struck the signpost, causing him to be thrown into the post and the placard on the post. As a result, the Appellant suffered serious injuries to his arm. (*id.*) The Appellant admitted to drinking prior to the accident. According to North Memorial records, the Appellant’s blood alcohol concentration was .15, which was above the legal limit. (*See Respondent’s Appendix, A-8 – A-10; and Appellants’ Appendix, A-79; A-209*) At the time of the collision, the Appellant estimates that he was traveling between 35 and 40 miles per hour. (*See Appellants’ Appendix, A-220*) The accident occurred within the confines of the City of Monticello, Minnesota, which has adopted regulations for snowmobile use within its city limits. (*See Respondent’s Appendix, A-11*) In addition to the general prohibition against driving a snowmobile while under the influence, driving a snowmobile within the city limits at a speed greater than 15 miles per hour is prohibited. (*See Respondent’s Appendix, A-11*)

The Appellant is an experienced snowmobile driver and is familiar with the general area where the accident occurred. (*See Respondent’s Appendix, A-12 – A-13*) He testified that he had no indication that he was on a designated or groomed trail, but rather was traveling in an area where he observed other snowmobile tracks. (*See Respondent’s Appendix, A-14*) He also acknowledges, from his own personal experience, that he was fully aware that when driving in an area adjacent to a public road, a snowmobiler has to be especially careful due to the risk of signs or other obstacles commonly being located in those areas. (*See Respondent’s Appendix, A-12 – A-13*)

The trial court granted summary judgment in favor of the Respondents on the basis that 1) Respondents, Michael J. Krutzig, Kathy M. Krutzig, Daryl V. Krutzig, and S.B. 25, LLC are immune from liability under the Minnesota Recreational Land Use Statute by virtue of owning the sign on Ocello's land; 2) it was not foreseeable on the part of the Respondents, at the time of placement, that the sign might create an unreasonable risk of physical harm to others by being in or near an informal snowmobile trail; 3) that Appellant failed to meet his own minimal duty of care to operate his snowmobile in a reasonable fashion; and 4) the Wright County Zoning Code does not apply within the Monticello city limits and, thus, Appellant's negligence per se claim cannot be maintained. The trial court concluded that there exist no material issues of fact and, thus, the Respondents were entitled to summary judgment.

Appellants filed a notice of appeal alleging that the entry of summary judgment was erroneous on the basis that the trial court incorrectly found the Respondents were owners of "land" as defined by the Minnesota Recreational Land Use Statute and failed to view the evidence in the light most favorable to the Appellants in resolving issues of facts which should have been reserved for the jury.

#### **STANDARD OF REVIEW**

In reviewing entry of an order granting summary judgment, the appellate court must determine 1) whether any genuine issues of material fact exist; and 2) whether the district court erred in its application of the law. Rediske v. Johnson, 415 N.W.2d 692, 693 (Minn.1987). The court's function on a summary judgment motion is to determine whether or not a genuine issue of material fact exists. A material issue of fact is one which, depending on its resolution, will affect the outcome of a case. Zappa v. Fahey, 245 N.W.2d 258 (Minn.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). “[T]he judge’s function is not... to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.” Anderson v. Liberty Lobby, Inc., 106 S.Ct. 2505, 2511 (1986). Summary judgment is not appropriate when reasonable persons might draw different conclusions from evidence presented. DLH, Inc. v. Russ, 566 N.W.2d 60, 71 (Minn.1997) citing First National Bank of Arizona v. Cities Service Co., 88 S.Ct. 1575, 1592 (1968).

The court’s function on a motion for summary judgment is not to decide issues of fact, but solely to determine whether genuine factual issues exist. DLH, Inc. v. Russ, 566 N.W.2d 60, 69 (Minn.1997)(The court must determine whether a “genuine issue of material fact exists for trial and whether it has been established by “substantial evidence”). “Substantial evidence” refers to the legal sufficiency of the evidence presented or submitted and not quantum of the evidence. Id. at 70. Summary judgment may be granted against a nonmoving party whose evidence is “merely colorable” or is “not significantly probative”. Bob Useldinger & Sons, Inc. v. Hangseleben, 505 N.W.2d 323, 328 (Minn.1993) citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50 (1986). A fact is material if it will help establish a claim or defense, and if the outcome of the case might be affected depending upon how that factual issue is resolved. Zappa v. Fahey, 245 N.W.2d 258, 259-260 (Minn.1976).

In determining whether to grant summary judgment, the nonmoving party has the benefit of viewing the evidence which is most favorable and is entitled to have all doubts and factual inferences resolved against the moving party. Lindner v. Lund, 352 N.W.2d 68, 70 (Minn.1984). Any doubt as to the existence of a material fact must be resolved in favor of finding a fact issue exists. Rathbun v. W.T. Grant Co., 219 N.W.2d 641, 646 (Minn.1974). Summary judgment is

proper only where there is no issue to be tried, but is wholly erroneous where there is a genuine issue to try. Id.

However, when a motion for summary judgment is made and supported, the non-moving party may not rest upon the mere averments of his pleadings, or denials of the adverse party's pleadings, but must present specific facts showing that there is a genuine issue of fact for trial. Celotex Corp. v. Catrett, 477 U.W. 317, 324 (1986). If the non-moving party does not so respond, summary judgment, if appropriate, should be entered against the non-moving party. Bebo v. Delander, 632 N.W.2d 732, 737 (Minn.App.2001); Minn.R.Civ.P. 56.05 (2003).

In applying the applicable standard for granting summary judgment to the evidence presented in this lawsuit, it is evident that the trial court properly granted Respondents' motions for summary judgment.

## ARGUMENT

### **I. RESPONDENTS ARE IMMUNE FROM LIABILITY AGAINST APPELLANTS' CLAIMS, AS A MATTER OF LAW, UNDER THE MINNESOTA RECREATIONAL LAND USE STATUTE.**

#### **A. The Minnesota Recreational Land Use Statute governs the scope and nature of Respondents' liability, if any, against Appellants' claims for negligence.**

The Minnesota Recreational Land Use Statute (the "Statute") adopts the policy of this state to encourage and promote access to, and use of, privately owned land by the public for beneficial recreational purposes. Minn. Stat. § 604A.20 (2000). The definition of "recreational purpose" includes "...snowmobiling... upon a road or upon or across land in any manner, including recreational trail use...". Minn. Stat. § 604A.21, Subd. 5 (2000). In furtherance of this policy, landowners are immunized from liability for conduct which otherwise, at law, entitled a trespasser to maintain an action if "the entry upon the land is incidental to or arises from access

granted for the recreational trail use of land dedicated, leased, or permitted by the owners for recreational trail use”. Minn. Stat. § 604A.25, Subd. 2 (2000). In those cases, the landowner’s limited duty of care is to refrain from willfully taking action to cause injury. Minn. Stat. § 604A.22, Subd. 3. Liability for ordinary negligence claims are barred by the statute.

In interpreting the statute and applying it to the facts of this case, the trial court properly concluded that the Appellants’ claim against the Respondents Krutzig was barred by the recreational use statute. The Appellant Razink was injured while operating a snowmobile on private property. The Appellants in their complaint essentially alleged implied permission on the part of the landowner for snowmobile recreational trail use.<sup>1</sup> The Appellant Razink alleged that he was operating a snowmobile on a “known, well-traveled snowmobile trail”. Both district court judges properly held that the language of the statute did not require express written or oral permission to be given but applied equally to situations such as this where permission was implied by virtue of unobjected use. The only issue then in regard to the Respondents Krutzig is whether their ownership of the sign gave them the same immunity that the owner of the real estate had.

While the recreational use statute does apply only to owners of land who permit, either affirmatively or passively, recreational use of their land, Minn. Stat. § 640A.21, subd. 3, provides a definition of land for purposes of applying the statute. That subdivision states as follows:

Land means any of the following which is privately owned or leased or in which a municipal power agency has rights, land, easements, rights of way, roads, water, water courses, private ways and buildings, structures and other improvements to land and machinery or equipment when attached to land.

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<sup>1</sup> Minn.Stat. § 604A.21, Subd. 6, defines “Recreational trail use”, in pertinent part, as the use on or about a trail, including but not limited to... snowmobile riding. ”

The trial court in this matter relied on the statute's broad definition of land in applying the statute's immunity provision to the Krutzigs. As in the case of Kastner v. Star Trail Ass'n, 658 N.W.2d 890 at 895, the trial court, absent a statutory definition, relied on a well established dictionary definition in concluding that a sign constituted a structure. Webster's dictionary broadly defines the term structure as anything that is constructed or, alternately something composed of multiple parts held together in a particular way.

Although simple in design, the sign owned by Respondents and situated on Lot 2 unquestionably meets the definition of a "structure". It consists of multiple parts, the two sign posts anchored into the ground, and the advertisement placard. The structure cannot exist without either the posts or the placard, or without them being joined together. The evidence shows the multiple parts of the structure and the joining thereof. The Respondents were able to remove the placard from the structure without having to remove the sign posts from the ground.

In support of its conclusion that the sign constitutes a "structure" within the meaning of the Statute, the trial court relied on the holding in Clear Channel Outdoor Advertising, Inc., v. City of St. Paul, 675 N.W.2d 343, 346-47 (Minn.App.2004). There, the Court of Appeals held that the term "sign structure", as contained in the city ordinance, included both the printed advertising material and the supportive superstructure--much like the sign structure owned by the Respondents in the instant case. The fact that the Respondents did not own the underlying real property on which the sign was located is not dispositive of their ownership of the sign structure attached to land. Peterson v. Midwest Security Ins. Co., 636 N.W.2d 727, 732 (Wis. 2001).

Based on the evidence, statutes, and case precedent, the trial court properly concluded that the Respondents are owners of "land" and, as such, are immune, as a matter of law, against Appellants' negligence claims under the Minnesota Recreational Land Use Statute.

**II. THE APPELLANTS' ARGUMENT THAT, AT A MINIMUM, THE RESPONDENTS OWED THE APPELLANT THE DUTY OF CARE OWED BY LANDOWNERS TO TRESPASSERS, AT COMMON LAW, ALSO FAILS AS A MATTER OF LAW.**

A. The Respondents owed no duty of care to the Appellant as a trespasser.

There is no dispute that the Appellant was a trespasser as he did not obtain permission from Ocello to use its land for any purpose, nor did he believe the land was a designated snowmobile trail open to the public. That aside, the Appellant's argument that the Respondents owed him a minimum duty of care as a trespasser fails, as a matter of law.

A possessor of property has *no duty* to use reasonable care to put the land in a condition reasonably safe for trespassers or even to use reasonable care to carry on activities so as not to endanger them. See Sirek v. State, DNR, 496 N.W.2d 807, 809 (Minn.1993). As a trespasser, the Appellant is deemed to take the premises as they exist. See Roadman v. CE Johnson Motor Sales, 297 N.W. 166 (1941). An exception to the general rule is the limited duty of care for injury caused by an artificial condition on the premises "likely to cause death or serious bodily harm" where a possessor of land knows, or has reason to know, that trespassers regularly use certain portions of the premises..." unless the trespasser is already aware of, or from facts, that trespasser knew, or should have been aware, of the condition and the risks involved, 4 Minnesota Practice, JIG 326 (1986); Hanson v. Bailey, 83 N.W.2d 252, 257 (Minn.1957); Civil JIG 4, 85.13. See also Watters v. Buckbee Mears Co., 354 N.W. 2d 848, (Minn.1984).

It is clear from the evidence and deposition testimony that the circumstances giving rise to the Appellant's claims against Respondents do not, as a matter of law, fall within the narrow scope of the exception to the general rule that landowners have no duty of care to trespassers.

(1) The condition was not created or maintained by the Respondents.

Prior to the accident, Ocello, LLC was the owner of Lots 1, 2 and 3. In 1999 or 2000, Charles Pfeffer, the commercial real estate agent employed by Ocello, LLC erected a "For Sale" sign on Lot 2 with Ocello's consent via the listing agreement. Charles Pfeffer picked out the location for the sign, situated the metal posts, and affixed a 4 x 8 foot plywood placard onto the posts. The location and configuration of the sign was completely within the exclusive discretion and control of the owner, through its agent, Charles Pfeffer.

The Respondents subsequently purchased Lot 1 from Ocello, LLC the sale of which was finalized in December, 2002. In December, 2002, the Respondents were given permission from Charles Pfeffer to replace the "For Sale" placard with an identical size placard advertising the availability of commercial units for the project the Respondents were developing. The only permission granted to Respondents was to replace one placard with another. They had no permission, nor authority, to move the sign to a different location or to change its configuration.

Any hazardous condition created by the location and configuration of the sign structure was created and maintained by the owner, Ocello, LLC and not by the Respondents. The Respondents did nothing to increase the risk, such as it was, by simply replacing one placard with another of the same size. The metal posts remained in the exact same location. The risk, if any, stayed exactly the same as it had been in winters past. While ultimately the Appellant may have come in contact with the placard, the cause of the accident, by his own admission, was his failure to see the sign structure in time. The ski of Appellant's snowmobile struck the metal post, causing him to be thrown into the post and the placard on the post. The Respondents did not create the condition and since they assumed no active role in maintaining its condition or

location, and since their act did nothing to increase the risk to trespassers, there simply is no factual basis for a finding of liability on their part.

- (2) The sign structure is not, as a matter of law, an artificial condition “likely to cause death or serious bodily harm”.

A property owner is liable only upon evidence showing a foreseeable risk of injury under the circumstances. Watson v. McGraw-Hill, Inc., 507 S.W.2d 366, 368 (Mo. 1974). The Appellants have offered no evidence to show the Respondents knew, or should have known, that that the sign structure could likely cause “death or serious bodily harm”. A landowner owes no duty of care when the condition is open and obvious. Baber v. Dill, 531 N.W.2d 493, 495-96 (Minn.1995).

The Respondents did not know, nor did they have knowledge of facts, to indicate that a “For Sale” sign could be dangerous or create a foreseeable risk of bodily injury. The sign is 4 by 8 foot in size and completely visible to the traveling public. Like all advertising signs and billboards situated along roadways, the realtor placed the sign in a way such that it would be visible to the traveling public on Highway 25. The whole purpose of erecting advertisement signs would be defeated if they were even remotely concealed or otherwise hidden from open view. The Respondent testified that he had no difficulty seeing the sign when he drove up to and was parallel to it. A sign advertising commercial space for lease along a roadway is a common and every day condition, especially in a business area of a growing city like Monticello. There is nothing about the nature of the sign itself which creates knowledge of any risk of bodily injury or death. The placement and use of signs are not dangerous in and of themselves. It is only if a person is aware of circumstances which could make the location of the sign a hazard that a duty to trespassers attaches. Here, the sign was placed along the road, like countless other advertising

signs and billboards. It is undisputed that the Respondents had no prior knowledge of snowmobile use in the area at the time they replaced the placards.

The Court of Appeals has held that if a brief inspection of the property would have revealed the condition, the condition is not considered hidden. Johnson v. State, 478 N.W.2d 769, 773 (Minn.App.1991); See also Flynn v. Arcade Investment Co., 91 N.W.2d 113, 114 (Minn.1958)(There is no duty to protect others from known hazards which are apparent upon ordinary observations). Clearly, a sign having the dimensions and visibility as the one in which the Appellant collided, would have been revealed upon a brief inspection of the property, both during the day and at night. The evidence shows that the sign was in plain view from a distance to the highway.

The record is entirely void of any evidence to show that the Respondents knew, or had any knowledge of any facts which should have led them to believe, that the sign structure was likely to cause death or serious bodily harm.

- (3) It is undisputed that Respondents did not know, nor had reason to know, that snowmobilers regularly used the land upon which the sign structure was attached.

Respondent, Michael Krutzig testified clearly, and without contradiction, that he had no knowledge of any snowmobile use in the area. The sign had been existence in the same location for a period of at least two years prior to the Respondents purchasing the adjacent lot. When the Respondents requested permission to exchange the placard on the sign, there was no snow on the ground. The evidence shows that between December of 2002 (when Respondents' acquired ownership of Lot 1), and the end of January of 2003, there was very little snow, certainly not enough that it would be useable for snowmobile purposes. The weather records produced show that the first measurable snowfall sufficient for snowmobile use did not occur until February 3, 2003, or less than one week prior to the accident. Charles Pfeffer testified that even though he

had that sign in place for several years, he had no evidence of snowmobile use. The Respondents did not occupy the property. It was vacant land. They were under no obligation to check it daily or nightly. There is simply nothing in this record to suggest that in the exercise of reasonable care, they should have realized such use in the area of the sign at night.

The Appellant introduced pictures of the pertinent area which were taken after the accident to show repeated snowmobile use in the area. These pictures bear little, if any, relevance. If the first measurable snowfall was not until less than one week before the accident, the pictures taken after the accident provide no basis upon which to support an inference, much less a finding, that the Respondents knew or should have known of the snowmobile use on the land prior to the accident. The issue is not whether there was regular use, but rather whether the owner *knew, or from the facts within his knowledge should have known*, that trespassers constantly intruded upon a limited or definite area of land. Sirek v. State, DNR, 496 N.W.2d 807, 809 (Minn.1993). By reviewing the weather records, it is obvious that evidence of snowmobile tracks would not have even been possible until a few days before the accident. The Respondent, Michael Krutzig, himself, had very limited knowledge concerning the history of the land prior to their purchase. While he previously had a store in downtown Monticello, it was not in the area where the sign was located. While he did have an opportunity to inspect the land before he and his brother purchased it, those inspections were in months when there was no snow on the ground.

It is undisputed from the evidence that the Respondents knew, or had any knowledge of any facts which should have led them to believe prior to the accident, that snowmobilers used the land upon which the sign structure was affixed.

4. The Appellant was already aware of, or from the facts known to him should have been aware of, the condition of and risks involved with regard to the condition of the land.

A trespasser is presumed to “be on the alert to observe the conditions which exist upon the land” and has an obligation to be aware of his surroundings. Sirek v. State, DNR, 496 N.W.2d 807, 810 (Minn.1993); Lishinski v. City of Duluth, 634 N.W.2d 456, 459 (Minn.App.2002). The Appellant testified that he is an experienced snowmobile driver and, based on his personal experience, was fully aware of the need to proceed with extra caution while snowmobiling in an area adjacent to a public road due to signs, dips and bumps, and other obstacles which are commonly erected along the roadway. He had no indication that he was traveling on a designated or groomed trail, but rather was traveling in an area where he observed other snowmobile tracks. The Appellant further testified that he was familiar with the area near the accident site as he routinely passed by it while traveling on Highway 25 on his way to work. The sign post that he collided with was not markedly different than a myriad of other signs in and around the area.

Based on the Appellant’s own admissions, experience, appreciation for, and knowledge of, the risks of signs and obstacles situated along roads, and his personal knowledge of the area, the Appellant was already aware of, or from the facts known to him should have been aware, of the condition of the land and the risks involved.

**III. THESE SAME FACTS PRECLUDE LIABILITY ON THE PART OF THE RESPONDENTS KRUTZIG AS LICENSEES OF A POSSESSOR OF LAND.**

The trial court in this matter analyzed the question of the Krutzigs’ liability under the provisions of the Restatement (Second) of Torts 386 (1965). This section provides as follows:

*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 of 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. (Emphasis added)*

As noted by the court, the commentary to that restatement rule indicates that the rule relates to the liability of licensees not acting in the possessor's behalf, but for their own purposes which arguably is the case with the Krutzigs. However, as with any claim of negligence the restatement rule provides that the risk to be perceived defines the duty to be obeyed. Thus the restatement rule requires, as a precondition to liability, that the licensee of the possessor has to have created or maintained an artificial condition which he should recognize as involving an unreasonable risk of physical harm to others upon the land. As previously stated, there is simply no factual basis on which a jury could conclude that the Respondents Krutzig should have recognized that replacing the placard on the sign post would create an unreasonable risk of physical harm to others upon the land. Because of that the trial court found no basis for liability on the basis of Restatement § 386.

In support of its findings, the trial court relied upon two Minnesota appellate court decisions interpreting and applying § 386. In Carlson v. Rand, 146 N.W.2d 190 (Minn. 1966), the Minnesota Supreme Court held that an area rug placed by an invitee in a home she did not possess or own was not liable since the placement of a rug did not create a condition that the defendant should have recognized as unreasonably dangerous. This was particularly true since the defendant did not have to anticipate that the plaintiff would not watch where he was going and be endangered by an open and obvious condition.

The trial court also distinguished the Court of Appeals' decision in the case of Bundy v. Holmquist, 669 N.W.2d 627 (Minn.App. 2003). As the trial court pointed out in that case, there were facts on which a jury could find that the holes dug in the garden could have created a risk of harm to others. In this case on this record there was no basis to conclude that the Respondents Krutzig had any reason to believe that the placard on the sign created any risk of physical harm to others, or that it was not visible.

In applying the section and case law interpreting liability of non-owners and non-possessors, the court must determine whether the sign structure posed an "unreasonable risk of physical harm to others" at the time of placement. In viewing all of the evidence in light most favorable to the Appellants, the trial court concluded that "there is no factual dispute that it was impossible for the Krutzigs [Respondents] to have realized such a level of risk". The court correctly held that a 4 by 8 foot sign structure located in an area where similar signs are commonly erected, and the Respondents' lack of knowledge of snowmobile activity, immunized the Respondents' from liability under Section 386. Based upon the all of the evidence presented, the court reached the "inescapable conclusion that the Krutzigs and S.B. 25 could not have known, as a matter of law, that the signed posed an unreasonable danger to snowmobilers".

**IV. THE APPELLANT RAZINK'S ADMITTED NEGLIGENCE IN DRIVING DRUNK AT EXCESSIVE SPEEDS WAS NOT SOMETHING THAT WAS FORESEEABLE TO THE RESPONDENTS KRUTZIG.**

As set forth above, no one has a duty to warn a trespasser of an open and obviously dangerous condition. See Watters v. Buckbee Mears Co., 354 N.W.2d 848 (Minn.1984). The facts in this case are similar to the facts presented in Watters. There, the plaintiffs argued that they were not aware of the specific defect that led to their injuries. However, the plaintiffs did admit in the Watters case to being familiar with the general terrain and knowing their activity

was potentially dangerous. The court held that it was not enough that the Plaintiffs indicated they had not seen the specific danger because an inspection of the area, however brief, would have revealed the dangerous condition that led to their injuries. Similarly, the Appellant admitted he had never before been on the path he was traveling on the night of the accident. Had he inspected the property, either during the day or at night, the sign structure would have easily been discovered. The sign structure was not hidden or in any way obstructed from view. The placard was 4 by 8 foot and 3/4 of an inch thick. Respondent testified he had no difficulty seeing the sign when he drove up to, and was parallel to the sign. The sign was clearly visible from Highway 25.

The Appellant also has the responsibility for observing his surroundings and taking proper measures in operating his snowmobile. See Steinke v. City of Andover, 525 N.W.2d 173 (Minn.1994)(The Supreme Court held that a drainage ditch is not a hidden, artificial condition and, affirmed the entry of summary judgment, upon finding the Plaintiff failed to observe the normal conditions of rural land and, despite traveling the trail for the first time, proceeded in excess of 45 miles per hour). The Appellant, much like the Plaintiff in Steinke, knew of the general dangers of obstacles and signs in the areas adjacent to public roadways. This perceived risk should have been even greater in light of the road's location in a developing commercial area in the City of Monticello. Despite this awareness, the Appellant proceeded to assume the risk of snowmobiling at an unlawful speed limit and while legally intoxicated. As the trial court correctly pointed out, a defendant's duty is defined on the assumption that a claimant was acting reasonably. That simply was not the case here. The Respondents Krutzig had the right to assume even if they knew about snowmobile use on the property, which they did not, that snowmobilers would obey the law. Civil JIG 4, 25.12 gives to all persons the right to assume

another's good conduct until the contrary appears. Thus even if the pictures of the area taken well after the accident could create a fact question of knowledge, they would do nothing to suggest that the Krutzigs should have known that snowmobile use would be done in a manner so contrary to the law.

When the Appellant's obvious negligence in regard to his operation of the snowmobile is compared with the decision of Respondents to simply replace one placard on sign posts previously placed on property years before without any clue on his part of snowmobile use in the area, there simply is no basis, factually or legally, for liability on their part.

**IV. THE RESPONDENTS WERE NOT NEGLIGENT PER SE IN VIOLATION OF THE MINIMUM ROADWAY SIGN SETBACK REQUIREMENTS ESTABLISHED BY THE WRIGHT COUNTY ZONING ORDINANCE.**

The Appellant raises the issue of whether or not his claim for negligence per se under the Wright County Ordinance can be maintained. There is no authority cited which would indicate that ordinance was applicable to businesses within the City limits of Monticello. The cases and statutes cited by the Appellants refer to the relationship between county zoning ordinances and township ordinances. Towns are a completely different legal creature than statutory cities when it comes to zoning. It would be quite a surprise to all of the business owners in Monticello to learn that all of their business signs, whether on Main Street or elsewhere, had to be 200 feet back from a road right of way. Literally that would preclude any business advertising within the city. Statutorily, cities control their own zoning. Here there is no question that the property was within the city limits. There simply is no legal authority for the Wright County Ordinance to be applicable under those circumstances. As the trial court held, Monticello has enacted its own comprehensive plan and zoning code and, as a statutory municipality, these controls prevail over any Wright County provisions within the city limits. Based upon the Monticello Zoning

Ordinance, the Respondents only need to place their sign a minimum of 15 feet from the roadway. There is no evidence that this provision had been violated. As such, the Appellants' claims for negligence per se fails as a matter of law.

That aside, a "violation of a statute does not constitute negligence per se, unless the victim of harm was intended to be protected by the statute and unless the harm suffered is the kind intended to be prevented by the statute." See Anderson v. Anoka Hennepin School Dist. 11, 678 N.W.2d 651. Even if it was, the ordinance is clearly a zoning ordinance, and there is no indication that it was enacted to protect snowmobilers at night. It is not a safety ordinance for a particular class. It is a zoning ordinance. Section 701 of the Wright County ordinance reads as follows:

701 Purpose: The performance standards established in this section are designed to encourage a high standard of development by providing assurance that neighboring land uses will be compatible. The performance standards are designed to prevent and eliminate those conditions that cause blight. All future development in all districts shall be required to meet those standards. The standards shall also apply to existing development where so stated.

Since the purpose of this section has nothing to do with safety, it is simply not available to the Plaintiffs to assist them in a negligence per se claim.

Based on the foregoing, the Wright County Zoning Code does not apply within Monticello City limits and, since there was no violation of the City's sign setback requirements, the Appellant cannot maintain a negligence per se claim as a matter of law.

### **CONCLUSION**

The immunity provided by the recreational use statute applies to circumstances involving passive permission as alleged in the Appellants' complaint. It also applies to the owners of structures on the land of another such as the Krutzigs, who were owners of at least part of the

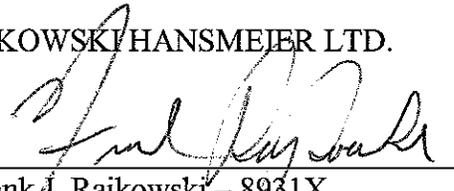
sign which does constitute a structure under normal dictionary definitions. More importantly, the Krutzigs had no facts which would put them on notice that the location of the sign on which they placed their placard created any risk of harm to others. They certainly had no reason to believe that the area was being used by snowmobilers, much less snowmobilers driving at an excessive rate of speed while drunk. Based on these facts, the trial court's grant of summary judgment to the Krutzigs was mandated.

Dated this 12th day of June, 2007.

Respectfully submitted,

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