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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A11-1612**

Jeffrey William Roos, as trustee for the heirs  
and next of kin of Matthew Gene Roos, decedent,  
Appellant,

vs.

Oscar Kawlewski,  
Respondent.

**Filed June 18, 2012  
Affirmed  
Cleary, Judge**

Otter Tail County District Court  
File No. 56-CV-11-497

Michael A. Bryant, Nicole L. Bettendorf, Bradshaw & Bryant, PLLC, Waite Park,  
Minnesota (for appellant)

Frank J. Rajkowski, Rajkowski Hansmeier LTD., St. Cloud, Minnesota (for respondent)

Considered and decided by Cleary, Presiding Judge; Stauber, Judge; and  
Rodenberg, Judge.

**UNPUBLISHED OPINION**

**CLEARY**, Judge

Decedent Matthew Roos died from injuries sustained in an all-terrain vehicle  
(ATV) accident. Appellant Jeffrey Roos, as trustee for the heirs and next of kin of  
decedent, commenced this wrongful-death lawsuit against respondent Oscar Kawlewski,

the owner of the real property where the accident occurred, maintaining that the accident was caused by a fence post in the ground within the right-of-way. The district court granted respondent's motion for summary judgment and dismissed appellant's claim, holding that the fence post is not within the right-of-way and that decedent was a trespasser on respondent's property to whom respondent did not owe a duty. We affirm.

### **FACTS**

In the early morning of January 26, 2007, decedent and his friend Jason Vanderpool were driving their ATVs on the surface of Long Lake Road, a gravel road located in Otter Tail County. Decedent was traveling behind Vanderpool. At some point, decedent drove off the road and into the ditch beside the road. Vanderpool then noticed headlights bouncing erratically, looked back, and saw that decedent's ATV had flipped and that decedent had been thrown from the ATV. Decedent died from injuries sustained in the accident.

Vanderpool testified during his deposition that he and his friends never drove in the ditch area of Long Lake Road, which is quite steep, and that one could not really drive an ATV in the ditch because it contained trees, brush, ice, and swampy terrain. Vanderpool testified that he has never seen any maintenance of the ditch. He also testified that there is a metal fence post erected in the ditch in the location where the accident occurred.

Rush Lake Township maintains the surface of Long Lake Road in the area of the accident. Around 1967, the township moved the road toward the fence post and raised its surface. In 2003, the township covered the road with clay and gravel, which further

raised its surface. Today, the surface of Long Lake Road is approximately 20 feet, 6 inches wide and the ditch has an approximately five-foot embankment dropping steeply from the surface of the road. The fence post is approximately 11 feet, 8 inches from the edge of the road's surface. Twice annually, the township mows a strip seven feet wide on the side of the road so drivers on the road do not have an obstructed view. The township has never maintained any other part of the ditch, including the area where the fence post is located.

Respondent has owned the real property where the accident occurred for more than 50 years. Respondent testified during his deposition that the fence post was in the ditch when he was school-aged, that he thinks it was put there before he was born, and that he has never moved it. Respondent also testified that he knows that ATVs and snowmobiles are operated on the surface of Long Lake Road in the area of the accident, but that he has never seen ATVs or snowmobiles anywhere on his property and has not had any issues with them crossing onto his property. He testified that one cannot drive an ATV in the ditch where the accident occurred.

Appellant filed a complaint alleging that respondent had placed the fence post in the ground, that the post is located within the right-of-way, that decedent's ATV struck the post, and that, as a direct result of respondent's carelessness, negligence, and unlawful conduct, decedent sustained injuries that caused his death. Respondent moved for summary judgment, arguing that there is no right-of-way on his property where the fence post is located and that respondent owed no duty to decedent, who had been a trespasser on respondent's property.

In opposing summary judgment, appellant argued that whether the fence post is within the right-of-way and whether decedent was a licensee or trespasser on respondent's property are factual issues for a jury to decide. Appellant provided a report by Daniel Lofgren, a professional accident reconstructionist. Lofgren inspected the accident scene, reviewed the local sheriff's department accident report and photographs of the accident scene and decedent's ATV, and concluded that decedent's ATV struck the fence post protruding from the bottom of the ditch, causing the ATV to flip. Lofgren's report states:

This township road has a 66-foot right-of-way road. I understand this means the road right-of-way extends 33 feet either side of the existing center line. On this gravel road, this means the road right-of-way extends 33 feet from the imaginary center line or about 22 to 23 feet from the east gravel edge.

Minnesota Statute 160.2715 indicates it is unlawful to have a fence within the road right-of-way. The fence and fence posts in the area of this accident were well within the road right-of-way and as such were unlawful. If the fence post had not been located in the right-of-way, in my opinion, [decedent] would not have flipped his ATV.

It was proper for [decedent] to operate his ATV in the ditch.

The district court granted respondent's motion for summary judgment, determining that there was no genuine issue of material fact as to whether the fence post is located within the right-of-way, and that Lofgren's assertion that the road has a 66-foot right-of-way was "without legal citation or factual foundation, has virtually no evidentiary value, and does not constitute 'substantial evidence' that creates more than 'a

metaphysical doubt' as to the width of the road.” The district court also determined that there was no genuine issue of material fact as to whether respondent gave the public consent to enter the ditch or knew that the public was trespassing in the ditch, and that decedent had therefore been a trespasser on respondent’s property to whom respondent did not owe a duty. This appeal followed.

## D E C I S I O N

A summary judgment decision is reviewed de novo. *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010). The role of an appellate court when reviewing a district court’s grant of summary judgment “is to determine whether there are any genuine issues of material fact and whether the [district] court erred in its application of the law.” *Wartnick v. Moss & Barnett*, 490 N.W.2d 108, 112 (Minn. 1992). The appellate court may not weigh the evidence or make factual determinations, but must consider the evidence in the light most favorable to the nonmoving party. *McIntosh Cnty. Bank v. Dorsey & Whitney, LLP*, 745 N.W.2d 538, 545 (Minn. 2008).

A motion for summary judgment shall be granted when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law.” Minn. R. Civ. P. 56.03. The party moving for summary judgment has the burden to show that summary judgment is appropriate. *Valspar Refinish, Inc. v. Gaylord’s, Inc.*, 764 N.W.2d 359, 364 (Minn. 2009). However, a party opposing summary judgment “may not rest upon the mere

averments or denials of the adverse party's pleading but must present specific facts showing that there is a genuine issue for trial." Minn. R. Civ. P. 56.05.

[T]here is no genuine issue of material fact for trial when the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions.

*DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). "Speculation, general assertions, and promises to produce evidence at trial are not sufficient to create a genuine issue of material fact for trial." *Nicollet Restoration, Inc. v. City of St. Paul*, 533 N.W.2d 845, 848 (Minn. 1995). "A nonmoving party cannot defeat a summary judgment motion with unverified and conclusory allegations or by postulating evidence that might be developed at trial." *Gradjelick v. Hance*, 646 N.W.2d 225, 230 (Minn. 2002).

**I. The district court did not err by holding as a matter of law that the fence post is not within the right-of-way.**

Appellant argues that whether the fence post is within the right-of-way of Long Lake Road is a question of fact for a jury to resolve, and that the district court erred by making a determination on this issue and discrediting Lofgren's conclusions at the summary-judgment stage. Respondent argues that the width of the road's right-of-way is a legal determination, which the district court properly made based on undisputed facts.

"The boundary of a public highway acquired by public use is a question of fact to be determined by the appropriate finder of fact." *Barfnecht v. Town Bd. of Hollywood Twp., Carver Cnty.*, 304 Minn. 505, 509, 232 N.W.2d 420, 423 (1975). However, the construction and interpretation of a statute is a question of law which an appellate court

reviews de novo. *Am. Tower, L.P. v. City of Grant*, 636 N.W.2d 309, 312 (Minn. 2001).

When a district court grants summary judgment based on its application of statutory language to the undisputed facts of a case, its conclusion is one of law which is reviewed de novo. *Lefto v. Hoggsbreath Enters., Inc.*, 581 N.W.2d 855, 856 (Minn. 1998).

Pursuant to Minn. Stat. § 160.2715(a)(3) (2006), it is unlawful to “erect a fence on the right-of-way” of a town road. “*Except as otherwise provided*, all roads hereafter established, except cartways, shall be at least four rods<sup>1</sup> wide.” Minn. Stat. § 160.04 (2006) (emphasis added).

When any road or portion of a road has been used and kept in repair and worked for at least six years continuously as a public highway by a road authority, it shall be deemed dedicated to the public to the width of the actual use and be and remain, until lawfully vacated, a public highway whether it has ever been established as a public highway or not.

Minn. Stat. § 160.05, subd. 1 (2006).

In *Barfnecht*, property owners whose land abutted a gravel road sued to prevent a township from rebuilding and improving the road, arguing that the road, as initially established and used for a number of years, was two rods wide, and that the township was unlawfully taking their property to widen the road. 304 Minn. 505, 506–07, 232 N.W.2d 420, 422. The township argued that the road was statutorily dedicated to a width of four rods, regardless of the width of actual use, and that, since the area of the road improvement fell within four rods, the land being used for the improvement was already part of the public highway and there was no taking of property. The Minnesota Supreme

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<sup>1</sup> A “rod” is equal to 5.5 yards or 16.5 feet, so four rods is equal to 66 feet. *The American Heritage Dictionary of the English Language* 1562 (3d ed. 1992).

Court determined that the statute dedicating roads to a width of four rods “does not authorize a township to widen a road acquired by adverse public use beyond that width actually acquired by such adverse use. Privately owned land cannot become public road by adverse use beyond the portion so used merely by a statutory pronouncement to that effect.” *Id.* at 508, 232 N.W.2d at 423. The court also stated that, “The width of the prescriptive easement, however, is not limited to that portion of the road actually traveled; it may include the shoulders and ditches that are needed and have actually been used to support and maintain the traveled portion.” *Id.* at 509, 232 N.W.2d at 423. Because land the width of only two rods had actually been used for the road in question, the court concluded that any additional land needed for the road-improvement project would need to be acquired by the township through eminent domain. *Id.* at 509, 232 N.W.2d at 424.

Applying the relevant statutes and caselaw, we conclude that the right-of-way for Long Lake Road is only as wide as the area actually used, which is not necessarily 66 feet, as appellant asserts. As stated in *Barfnecht*, the amount of land acquired by actual use is a question of fact to be determined by a jury. However, appellant did not present any evidence showing that there is a genuine issue for trial as to whether the land at the location of the fence post is actually used for road purposes. To the contrary, Vanderpool testified that the ditch was filled with trees, brush, ice, and swamp, and was not conducive to driving in. In addition to maintaining the surface of the road, Rush Lake Township does regularly mow a seven-foot-wide strip on the side of Long Lake Road, but the area where the fence post is located is not maintained. And while, according to

*Barfnecht*, the area acquired by public use may include shoulders and ditches used to support and maintain the traveled portion of the road, appellant presented no evidence that the land at the location of the fence post, 11 feet, 8 inches from the edge of the road's surface, supports or maintains the surface of Long Lake Road.

Appellant points to Lofgren's report, which states that Long Lake Road has a 66-foot right-of-way extending 33 feet from either side of the imaginary center line of the road. The report provides no foundation for this conclusion. The conclusion requires application of statutory language and caselaw to the facts of the case, and is a legal determination for a court to make. Lofgren's unsupported assertion that Long Lake Road has a 66-foot right-of-way, encompassing the land at the location of the fence post, is insufficient to defeat summary judgment on this issue. The district court did not err by determining that the fence post is not within the right-of-way.

**II. The district court did not err by holding that decedent was a trespasser on respondent's property to whom respondent did not owe a duty.**

Appellant argues that decedent was an entrant to whom respondent owed a duty to warn or use reasonable care. Respondent argues that the district court properly determined that decedent was a trespasser and that respondent did not owe decedent a duty.

The existence of a duty for a negligence claim is a question of law which an appellate court reviews de novo. *Wong v. Am. Family Mut. Ins. Co.*, 576 N.W.2d 742, 745 (Minn. 1998). Whether the entrant or trespasser standard of care applies to a

particular situation is a question of law. *Reider v. City of Spring Lake Park*, 480 N.W.2d 662, 666–67 (Minn. App. 1992), *review denied* (Minn. Apr. 13, 1992).

Decedent’s legal status while on respondent’s property determines the standard of care respondent owed decedent. *Id.* at 666. A landowner has a duty to use reasonable care for the safety of all entrants upon the premises, which includes “an ongoing duty to inspect and maintain property to ensure entrants on the landowner’s land are not exposed to unreasonable risks of harm.” *Olmanson v. LeSueur Cnty.*, 693 N.W.2d 876, 880–81 (Minn. 2005). “If dangerous conditions are discoverable through reasonable efforts, the landowner must either repair the conditions or provide invited entrants with adequate warnings.” *Id.* at 881.

“A trespasser is one who enters or remains on the land without the express or implied consent of the possessor of land.” *Reider*, 480 N.W.2d at 666 (quotation omitted). “Generally, a landowner does not owe a duty to a trespasser.” *Doe v. Brainerd Int’l Raceway, Inc.*, 533 N.W.2d 617, 621 (Minn. 1995). However:

A possessor of land who knows, or from facts within his knowledge should know, that trespassers constantly intrude upon a limited area of the land, is subject to liability for bodily harm caused to them by an artificial condition on the land, if

(a) the condition

(i) is one which the possessor has created or maintains and

(ii) is, to his knowledge, likely to cause death or seriously [sic] bodily harm to such trespassers and

(iii) is of such a nature that he has reason to believe that such trespassers will not discover it, and

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

Restatement (Second) of Torts § 335 (1965).

It is undisputed that respondent knew about the existence of the fence post in the ditch. However, appellant has presented no evidence that respondent either expressly or impliedly consented to decedent, or the public in general, entering his property in the area where the accident occurred. Nor has appellant presented evidence that anyone constantly intruded on respondent's property, such that respondent should have known that they did so. Respondent testified that, while ATVs and snowmobiles are operated on the surface of Long Lake Road in the area of the accident, he has never seen ATVs or snowmobiles anywhere on his property and has not had any issues with them crossing his property. Vanderpool testified that he and his friends never drove in the ditch. The area in question is not maintained, and both Vanderpool and respondent testified that one cannot drive an ATV in the ditch.

Appellant argues that respondent's knowledge that ATVs driving down Long Lake Road could tip off the road into the ditch created a duty to warn or use reasonable care for the safety of anyone who could be on respondent's property. Respondent testified, "And you see if you run the wheels off of the road, it's going to tip, and you are not going to stay on the four-wheeler." Respondent was not describing intentional entry onto his property, but potentially careless, reckless, or accidental conduct that does not give rise to a duty to a trespasser. The district court did not err by holding that decedent was a trespasser on respondent's property, to whom respondent did not owe a duty.

**Affirmed.**