IN THE SUPREME COURT OF IOWA

CASE NO. 19-1349

JENNIFER MORRIS, Individually and as the Administrator for the ESTATE OF DAULTON HOLLY, and JASON ALLAN HOLLY,

Plaintiffs-Appellants,

v.

PRETTY WOMAN, INC., d/b/a THE BEACH GIRLS, J.P. PARKING, Inc., and JAME E. PETRY,

Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT
FOR POLK COUNTY

HON. DAVID PORTER, DISTRICT COURT JUDGE

APPELLEE'S FINAL BRIEF

GREFE & SIDNEY, P.L.C.
Adam Zenor AT0009698
Sean M. Corpstein AT0012659
500 E. Court Ave., Ste. 200
Des Moines, IA 50309
Phone: (515) 245-4300
Fax: (515) 245-4452
azenor@grefesidney.com
scorpstein@grefesidney.com
ATTORNEYS FOR DEFENDANTS J.P. PARKING INC. D/B/A THE BEACH GIRLS, JAMES E. PETRY, AND PRETY WOMEN, INC.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

STATEMENT OF THE ISSUES

I. WHETHER THE DISTRICT COURT PROPERLY GRANTED J.P. PARKING D/B/A THE BEACH GIRLS, JAMES E. PETRY, AND PRETTY WOMEN, INC.S' MOTION FOR SUMMARY JUDGMENT

ROUTING STATEMENT

This case involves application of existing principles of law and should be routed to the Iowa Court of Appeals. Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

This is a case where Plaintiff-Appellants sued Defendant-Appellees for premises liability where no injury occurred on the premises, no instrumentality from the premises caused injury and injury was caused by a third-party criminal act occurring a half mile away from the premises. Plaintiff-Appellants theory of liability is that Defendant-Appellees were required to protect Daulton Holly, the decedent, from himself after he voluntarily left the premises, walked a half-mile down a public roadway, and laid down prior to being hit by a vehicle driven by an intoxicated Ronald Hauser.

On March 29, 2019, J.P. Parking d/b/a The Beach Girls, James Petry, and Pretty Women, Inc. filed a Motion for Summary Judgment.

On July 15, 2019, the District Court granted summary judgment as to all counts for Defendants J.P. Parking, Inc. d/b/a The Beach Girls, James Petry, and Pretty Women, Inc.

STATEMENT OF THE FACTS

On August 22, 2015, at approximately 11:37 pm, Daulton Holly and his friend, Jordan Wills, arrived by taxi at J.P. Parking, d/b/a The Beach Girls located at 6220 Raccoon River Drive, West Des Moines, Iowa 50266.[1] *See* Surveillance Video (App. 1104); *see also* Kraemer Depo at 7:4-8:3 (App. 470-71); *see also* Petition (App. 7-15); *see also* Defendants' Statement of Undisputed Facts in Support of Motion for Summary Judgment ("SUMF") ¶ 5 (App. 1099). J.P. Parking d/b/a The Beach Girls operates an adult entertainment establishment that permits patrons to bring their own alcohol. The Beach Girls does not serve alcohol.

At approximately 1:15 am on August 23, 2015, J.P. Parking employee Jeremiah Kraemer witnessed D. Holly attempt to enter the entertainers' dressing room. *See* Surveillance Video (App. 1104); *see also* Kraemer Depo at 7:4-8:3, 10:24-11:9, 12:9-13:25 (App. 470-71, 473-74, 475-76); *see also* SUMF ¶ 7 (App. 1109). This behavior was inappropriate and as a result, D. Holly was asked to leave the premises. *Id.* Kraemer

[1] This property was previously owned by Pretty Women, Inc. between September 1993 and August 7, 2006. Pretty Women, Inc. is now a defunct corporation. Plaintiffs have not argued that dismissal against Pretty Women, Inc. was in error and the District Court's ruling as to the same should not be disturbed.

escorted D. Holly to the entrance and outside of the front door. *Id*. Kraemer radioed to other security personnel to direct Wills, D. Holly's friend, to the front of the establishment. *Id*. Outside of the entrance, Kraemer offered to call D. Holly a cab. *See* Kraemer Depo at 19:14-21 (App. 482); *see also* SUMF ¶ 10 (App. 1100). D. Holly expressly declined the cab offer. *Id*. Wills refused to leave with Holly and the two visited after visiting with Kraemer outside of the establishment. *See* Kraemer Depo 16:10-13 (App. 479); *see also* Video Surveillance (1104); *see also* SUMF ¶ 11 (App. 1100).

Ultimately, D. Holly left the premises under his own power. *See* Video Surveillance (App. 1104); *see also* Kraemer Depo 9:7-9, 13:9-20, 16:14-22, 17:7-13, 18:4-13 (App. 472, 476, 479, 480, 490); *see also* SUMF ¶ 12 (App. 1100). At approximately 1:22 am, D. Holly walked off the premises and did not trip, fall, or otherwise lose his balance as he voluntarily left the premises. *Id*. As D. Holly walked off the premises, D. Holly displayed his middle finger to Wills. *See* Kraemer Depo 16:14-22 (App. 479); *see also* SUMF ¶ 13 (App. 1100). No injury occurred while D. Holly was on the premises. *See* Petition (App. 7-14).

Also on the evening of August 22, and early morning hours of August 23, 2015, separate from the events at JP Parking, Ronald Hauser drank alcoholic beverages at Legends Fieldhouse Bar and Grill, LLC. *See* Hauser Depo 30:1-4, 35:4-8, 41:13-15, 42:7-10, 43:17-21 (App. 946, 951, 957, 958, 959). After drinking at Legends, Mr. Hauser drove on Raccoon River Drive in West Des Moines, Iowa, during the early morning hours of August 23, 2015. Hauser Depo 48:13-49:10, 50:5-16, 52:1-53:13, 67:7-10, 84:13-86:15 (App. 964, 966, 968, 1000-1002). While on Raccoon River Drive, a public highway, Hauser's vehicle struck and killed D. Holly without stopping or swerving. Hauser Depo 125:12-25 (App. 1041). D. Holly's body was discovered at approximately 2:18 am. *See* Weatherall Depo 16:5-7, 30:2-8 (App. 1108, 1109); Countryman Depo 4:5-22 (App. 1111).

Toxicology reports indicated both alcohol and marijuana were present in Holly's system at the time of death. *See* Post-Mortem Toxicology Report (App. 1115-1118). Ronald Hauser pled guilty to OWI and Hit and Run—Serious Injury. Hauser Depo 86:3-17 (1002).

James Petry perfected corporate requirements prior to the filing of suit and cannot be held personally liable. Plaintiffs did not resist this

fact at the District Court. Pretty Women, Inc. was a defunct corporation at the time of the incident and therefore has no liability. Plaintiffs did not resist this fact at the District Court. *See* Certificate of Dissolution (App. 1119-1120).

ARGUMENT

I. THE COURT REVIEWS SUMMARY JUDGMENT RULINGS FOR CORRECTION OF ERRORS AT LAW.

Scope and Standard of Review

(The Defendant-Appellees agree the Plaintiff-Appellants preserved error only as to J.P. Parking d/b/a The Beach Girls as to Count II (premises liability) and Count III (loss of consortium) on appeal.)

Defendant-Appellants' argued in their Motion for Summary Judgment that (1) no liability existed as to J.P. Parking d/b/a The Beach Girls (or James Petry/Pretty Women, Inc.) based on the facts of the case and application of Iowa law, (2) no personal liability existed as to James Petry as he was an owner who perfected corporate requirements, and (3) no liability existed as to Pretty Women, Inc. as the corporation was defunct and no longer in operation at the time of the allegations in Plaintiffs' Petition. *See* Defendants' Memorandum of Authorities in Support of Motion for Summary Judgment *generally* (App. 494-505).

Plaintiffs did not resist the motion as to James Petry or Pretty Women, Inc. *See* Plaintiffs' Resistance to Defendants' Motion for Summary Judgment – filed 4-16-19 (App. 506-529). Plaintiffs' made no mention of personal liability as to James Petry or how Pretty Women, Inc., a defunct corporation, could be held liable for the allegations within the Petition. *Id*. The District Court's grant of summary judgment as to J.P. Parking d/b/a The Beach Girls, James Petry, and Pretty Women, Inc. dismissed all claims against these parties. *See* District Court Order on Defendants' Motion for Summary Judgment – filed 7-15-19 (App. 1086-1094). Plaintiff-Appellants' notice of appeal purports to challenge "all adverse rulings and orders inhering therein" of the District Court's July 15, 2019 Order.

However, within Plaintiff-Appellants' Proof Brief, filed October 14, 2019, Plaintiff-Appellants fail to argue or cite any authority providing for personal liability of James Petry or liability for the defunct corporation, Pretty Women, Inc. *See State v. Adney*, 639 N.W.2d 246, 250 (Iowa Ct. App. 2001) ("When a party, in an appellate brief, fails to state, argue, or cite to authority in support of an issue, the issue may be deemed waived.")

(citing Iowa R. App. P. 14(a)(3); *Pierce v. Staley*, 587 N.W.2d 484, 486 (Iowa 1998)).

Here, any arguments concerning liability as to James Petry or liability for the defunct Pretty, Women, Inc. are waived.

The Court reviews "summary judgment rulings for correction of errors at law." *Deeds v. City of Marion*, 914 N.W.2d 330, 339 (Iowa 2018). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Hills Bank & Tr. Co. v. Converse*, 772 N.W.2d 764, 771 (Iowa 2009).

II. DAULTON HOLLY DIED 30 MINUTES AFTER DECLINING A CAB, VOLUNTARILY WALKING OFF JP PARKING'S PREMISES, WALKING HALF A MILE AWAY, LAYING IN THE MIDDLE OF A ROADWAY, AND BEING IMPACTED BY A VEHICLE DRIVEN BY MR. RONALD HAUSER, AN INTOXICATED INDIVIDUAL.

Plaintiff-Appellants fail to acknowledge critical facts in their Statement of Facts section, totaling over 10 pages in length and at the District Court level, Plaintiff-Appellants failed to dispute any material facts pled by Defendant-Appellees.

A. The facts are straightforward and undisputed.

The following facts are material, undisputed, dispositive in the case at hand, and are completely omitted from Plaintiffs-Appellants' Proof Brief.

- D. Holly was asked to leave the premises for violating the rules of conduct. *See* Surveillance Video (App. 1104); *see also* Kraemer Depo 7:4-8:3, 10:24-11:9, 12:9-13:25 (App. 470-71, 473-74, 475-76).
- J.P. Parking employees offered to call D. Holly a cab who declined—twice. *See* Kraemer Depo 19:14-21 (App. 482).
- D. Holly raised his middle finger towards his friend, Wills, and walked off when J.P. Parking employees suggested Wills take Holly home. *See* Kraemer Depo 16:14-22 (App. 479).
- D. Holly was uninjured when he exited J.P. Parking's premises. *See* Kraemer Depo 9:7-9:13:9-20, 16:14-22, 17:7-13, 18:4-13 (App. 472, 479, 480, 481); *see also* Petition (App. 7-14).
- D. Holly travelled about a half mile down the road. *See* Weatherall Depo 16:5-7, 30:2-8 (App. 1108, 1109); Countryman Depo 4:5-22 (App. 1112).

- D. Holly then laid down in the middle of the roadway. *See* SUMF 19, 20 (App. 1101).
- Hauser, who was intoxicated, drove his vehicle over D. Holly. *See* Hauser Depo 86:3-17 (App. 1002).
- Hauser entered pleas of guilty to OWI and leaving the scene of an accident causing serious injury. *Id*.

B. Plaintiffs' Statement of Facts Section, which is over 10 pages long, fails to acknowledge the above simple facts.

Plaintiffs failed to respond to or dispute these facts. *Compare* Defendant's Statement of Undisputed Facts *with* Plaintiffs' Resistance to Defendants' Motion for Summary Judgment. The facts, as laid out in Defendant-Appellees' Statement of Undisputed Facts ("SUMF") are undisputed by operation of Iowa law.

The special relationship that existed between Defendant-Appellees, namely that of business and invitee, ended when D. Holly left the premises. No further extension of this relationship under these facts is found in the law.

C. Plaintiffs filed no pleading disputing any facts at the District Court, nor offered any admissible evidence otherwise.

Plaintiff-Appellants failed to resist the factual allegations at the District Court and failed to offer any evidence to the contrary as required. *See* Iowa R. Civ. P. 1.981(3). The District Court properly granted summary judgment as there were no material facts in dispute. *See Hills Bank & Tr.*, 772 N.W.2d at 771.

Plaintiffs ignored their obligations under Iowa R. Civ. P. 1.981(5) to provide the District Court with competent evidence. Plaintiff-Appellants provided inadmissible police reports in an attempt to create a fact dispute. *See Herold v. Shagnasty's, Inc.*, No. 03-0894, 2004 WL 2002433, at *5 (Iowa Ct. App. Sept. 9, 2004) (holding police reports to be inadmissible). The District Court properly considered only competent evidence in ruling on Defendant's Motion for Summary Judgment. *See* Order, at 7 ("Plaintiff has failed to set forth specific material facts, *as supported by competent evidence*….").

Even if these reports were admissible, they do not create a fact dispute. The injury occurred off of the premises and no condition or conditions of the premises caused Defendant-Appellees' injuries.

III. WHATEVER DUTY J.P. PARKING OWED TO D. HOLLY — WHEN HE WAS LAWFULLY ON ITS PREMISES OR AFTER HE WAS ASKED TO LEAVE — WAS SATISFIED AFTER HOLLY EXITED ITS PREMISES UNINJURED.

Defendant-Appellees have never argued that no duty was owed to D. Holly while D. Holly was a patron of the premises. Instead, Defendant-Appellees argument submits that the relationship between business and patron ended when D. Holly voluntarily left the premises.

Plaintiff-Appellants purposefully misstate and mischaracterize both Defendant-Appellees' argument and the District Court's Order in arguing that Defendant-Appellees previously claimed that "they owed no duty to Daulton Holly on the night of his death." *See* Plaintiffs-Appellants Final Brief, at 25. Defendant-Appellees have not asked for a special carve out for entertainment businesses. Instead, Defendant-Appellees have always maintained that the special-relationship between business and patron, and duty existing therefrom, was extinguished when D. Holly voluntarily left the premises.

Defendant-Appellees submitted that Iowa law did not extend this relationship and duty into perpetuity. *See* Defendants' Memorandum of Authorities in Support of its Motion for Summary Judgment, at 2 (Defendants "had no duty…after [Holly] voluntarily left Defendant's

premises") (App. 495); *id.* at 7 (Defendant's duty to Holly did not continue "*after* he left the premises" (emphasis added) (App. 500); Transcript of Proceedings Motion for Summary Judgment, at 5 ("[T]here is no duty that defendants owed Daulton Holly *at the time of his injuries*." (emphasis added) (App. 1070); *id.* at 6 (noting the duty was extinguished when "Daulton Holly voluntarily left the premises") (App. 1071); *id.* at 7 (noting there was no duty "after [Holly] ceased to be a patron") (App. 1072); Order on Defendant's Motion for Summary Judgment, at 4 ("[T]he duty owed to [Holly] was terminated.") (App. 1089); *id.* at 5 ("[W]hen Holly voluntarily left the premises, that duty ceased.") (App. 1090).

Defendant-Appellees have always maintained and argued that (1) a landowner/possessor owes a duty to lawful visitors; (2) a landowner/possessor owes a duty to a trespassers (if known)—albeit a lesser duty; (3) whether the duty Defendant-Appellees owed was the general duty of the lesser one, it was satisfied on these facts; (4) Plaintiff-Appellants seem unwilling to acknowledge that the *land* itself gives rise to the special relationship; and (5) the law necessarily ties duty owed to the land itself.

A. A landowner/possessor owes a duty to a lawful visitor.

As a preliminary issue, Plaintiff-Appellants were required to prove that Defendant-Appellees owed D. Holly a duty to be successful as to their negligence claim. *See Pitts v. Farm Bureau Life Ins. Co.*, 818 N.W.2d 91, 98 (Iowa 2012) ("[a]n actionable claim of negligence requires the existence of a duty to conform to a standard of conduct to protect others) (quoting *Thompson v. Kaczinski*, 774 N.W.2d 829, 834 (Iowa 2009)).

Landowners or property possessors owe lawful visitors a duty of reasonable care with respect to:

> (a) conduct by the land possessor that creates risks to entrants *on the land*;
>
> (b) artificial conditions on the land that pose risks to entrants *on the land*;
>
> (c) natural conditions on the land that pose risks to entrants *on the land*; and
>
> (d) other risks to entrants *on the land* when any of the affirmative duties provided in Chapter 7 is applicable.

Ludman v. Davenport Assumption High Sch., 895 N.W.2d 902, 910 (Iowa 2017) (quoting Restatement (Third) of Torts § 51, at 242 (Am. Law. Inst. 2012)) (emphases added).

To the extent the Court finds Holly to be a lawful visitor of Defendant-Appellant J.P. Parking, the duty owed to him is limited to those duties a business holding their land open to the public owes the patron *on the land*. D. Holly's injuries did not occur on the land.

B. A landowner/possessor owes a duty to a trespasser—albeit a lesser duty.

A landowner/possessor owes a lesser duty to trespassers, (1) to not to cause malicious injury; and (2) to use reasonable care to avoid injury once the landowner is aware of the trespasser. *See Alexander v. Med. Assocs. Clinic*, 646 N.W.2d 74, 75 (Iowa 2002). When a lawful visitor exceeds the scope of the invitation, or is no longer permitted to remain on the premises, the visitor becomes a trespasser. *See Morgan v. Perlowski*, 508 N.W.2d 724, 727 (Iowa 1993). No duty was breached. D. Holly was not injured on the premises.

C. Whether the duty owed was the general duty or the lesser one, it was satisfied on these facts.

Plaintiff-Appellants contend that because D. Holly was intoxicated when he voluntarily left the premises, that Defendant-Appellees relationship and duty owed to D. Holly should be increased and extended until Defendant-Appellees "transfer[ed] [ ] [D. Holly] to another, to someone else who's taking responsibility for them." *See* MSJ Hearing

Transcript 10:18-20 (App. 1075). This custodial argument fails and will be addressed in more detail below.

Plaintiff-Appellants have not alleged that D. Holly was injured on the premises. Plaintiff-Appellants do not claim that an instrumentality originating from the premises injured D. Holly. Plaintiff-Appellants do not even claim that a third-party criminal act caused D. Holly's injury on the premises. Instead, Plaintiff-Appellants' claim has always been that D. Holly walked away from the premises and was injured on a public highway a half-mile away and approximately an hour after leaving the premises.

D. Plaintiffs seem unwilling to acknowledge that the *land* itself is what gives rise to the "special relationship" here.

Plaintiff-Appellants' theory of liability is simple: Because D. Holly was on Defendant-Appellees premises last, they should be responsible for D. Holly even after D. Holly has voluntarily left the premises. The harm Plaintiff-Appellants ask Defendant-Appellees to protect D. Holly from was not a condition of the premises, but instead, from D. Holly himself *after* Holly had voluntarily left the premises.

The duty owed by a business holding their premises open to the public are owed to those "on the premises." *See* Restatement (Third) of Torts: Phys. & Emot. Harm § 40 (2012) ("a business or other possessor of land that holds its premises open to the public with those who are lawfully *on the premises*") (emphasis added). This duty is limited to "the scope of the relationship." *Id.* Once a patron has left the premises, the relationship and any duty owed is extinguished. *See* Restatement (Third) of Torts: Phys. & Emot. Harm § 40 cmt. f (2012) ("this Section imposes no affirmative duty on a common carrier to a person who left the vehicle and is no longer a passenger. Similarly, an innkeeper is ordinarily under no duty to a guest who is injured or endangered while off the premises.").

A special relationship, such as that between a business owner and a lawful visitor, can be severed by the latter's departure from the premises. *Brenneman v. Stuelke*, 654 N.W.2d 507, 509–10 (Iowa 2002) (surveying Iowa cases that hold "[o]nce a person leaves the land or remains without consent, the individual loses the status of 'licensee,' and the affirmative duty of the land possessor to control the individual's conduct would cease"). Iowa courts have long recognized that any special relationship between a lawful visitor will not operate in perpetuity, and

will eventually terminate. *Davis v. Kwik-Shop, Inc.*, 504 N.W.2d 877, 879 (Iowa 1993). The adoption of the Restatement Third of Torts has not changed this analysis.

E. Because the land is what gives rise to the "special relationship," the law necessarily ties duty owed to the land itself.

Under Iowa law, the only duty owed to D. Holly arises from the following – "a business or other possessor of land that holds its premises open to the public with those who are *lawfully on the premises*." *See Hoyt v. Gutterz Bowl & Lounge L.L.C.*, 829 N.W.2d 772, 776 (Iowa 2013) (quoting Restatement (Third) Torts: Liab. for Physical & Emotional Harm § 40(b)(3)).

The Restatement (Third) specifies that the duty owed applies to "risks that arise within the scope of the relationship." *See id.* § 40(a). This affirmative duty is tied to the existence and scope of the special relationship. In this case, the relationship flows from the D. Holly's presence on the business land.

Plaintiff-Appellants contend that Restatement (Third) § 40 imposes a duty on Defendant-Appellees to protect D. Holly from third-party actions occurring on a public road away from and off of the premises,

about an hour after D. Holly voluntarily walked off JP Parking's premises.

Plaintiffs-Appellants' reliance on Section 40 is misplaced and incomplete. Business owners owe a duty to lawful visitors based on the special relationship between a business and a patron under § 40, but only insofar as it relates to "risks that arise within the scope of the relationship." *Id.* § 40(a). Here, the scope of the relationship between this business and patrons is simple: patrons are invited to the premises for entertainment. That is the entirety of the relationship. This business is not a common-carrier tasked with driving persons on the public roadway. This business is not a care facility taking custodial control of patrons. This business is not a security detail tasked with the protection of patrons into perpetuity.

If D. Holly had been on the premises lawfully when he was injured by a third party this may be a different case. The injury occurred on a public highway. As the Restatement (Third) makes clear, "the relationships in this Section are bounded by geography and time," noting no special relationship exists when a passenger of a common carrier

disembarks and is no longer a passenger or when an innkeeper's guest "is injured or endangered while off the premises." *Id.* § 40 cmt. f.

IV. WHILE PLAINTIFF-APPELANTS SUED A NUMBER OF DEFENDANTS, THEIR CLAIMS AGAINST DEFENDANT APPELLANTS HAVE NO SUPPORT IN IOWA LAW.

Plaintiff-Appellants' claim is unsupported by Iowa law because (1) premises liability claims require injury *on* the land or *by* an instrumentality from the land; (2) neither alternative exists here; (3) D. Holly was injured by Hauser's third party criminal act away from the premises; and (4) Hauser's drunken presence on the public highway did not related to Defendant-Appellees' actions or premises.

A. Premises liability claims are cognizable where a person is injured *on* the land or *by* an instrumentality from the land.

Premises liability actions, are founded on dangers present on the land itself. *See Hoyt*, 829 N.W.2d at 776 (recognizing landowner/possessor duty to protect "persons *lawfully on their land* who become ill of endangered by risks created by third parties"); *see also Thompson v. Kaczinski*, 774 N.W.2d 829, 831–32 (Iowa 2009) (imposing duty on landowner for landowner's trampoline blowing into adjacent public street causing injury).

B. Neither alternative exists here: Mr. Holly was not injured on the land or by an instrumentality from the land.

D. Holly died on a public highway in West Des Moines a half mile away from the J.P. Parking premises. D. Holly's injuries were not sustained by any instrumentality originating or deriving from the premises.

C. Rather, D. Holly was injured by Hauser's third-party criminal act occurring off of the premises.

D. Holly was injured on a public highway off J.P. Parking premises by a vehicle, driven by an intoxicated Hauser, nearly an hour after D. Holly left the premises. Any duty Defendant-Appellees owed relative to third party criminal acts existed only on the premises and was terminated when D. Holly left the premises. D. Holly's injuries were attenuated in both geography and time from the special relationship with Defendant-Appellees.

D. Hauser's drunken presence on the public highway was not foreseeable, although this finding is unnecessary for resolution of this case.

Thompson holds that foreseeability is critically important in cases with an intervening or superseding cause. *Thompson*, 774 N.W.2d at 838.

The District Court considered 'foreseeability' only to the extent that D. Holly's injuries were geographically and temporally attenuated from his contact with the Defendant-Appellees' premises. *See* Order, at 5 (App. 1090); *see also* Restatement (Third) § 40 cmt. f (specifying that the existence of the special relationship is to be tied to geography and time). The District Court's 'consideration' of foreseeability was not in error because (1) the Iowa Supreme Court precedent advises its consideration; and (2) it was not critical to the District Court's ultimate ruling. Even if this Court determines the District Court was not required to assess foreseeability, this Court may affirm on other grounds than those considered by the District Court, as long as the alternative grounds were properly raised below. *Pitts v. Farm Bureau Life Ins. Co.*, 818 N.W.2d 91, 97 (Iowa 2012). Here, Defendant-Appellees raised the argument that the special relationship between the parties expired and that no duty was owed beyond the premises. Affirming on this basis is proper.

E. Indeed, Plaintiff-Appellants maintain their tort claim against Hauser and their dram claim against Legends, where Hauser was drinking prior to driving his car over Mr. Holly.

While there are viable claims Plaintiff-Appellants maintain against other tortfeasors, Iowa law forecloses on Defendant-Appellees J.P. Parking, James Petry, and Pretty Women's liability.[2]

Hauser was the intoxicated driver travelling on the public highway and from Legends when he hit D. Holly. Hauser was not a patron at J.P. Parking prior to the incident. Hauser was not driving away from J.P. Parking's premises at the time of the accident. D. Holly's special relationship with J.P. Parking terminated and all duties were discharged nearly an hour before D. Holly was killed. The District Court did not err by recognizing that J.P. Parking is not to be held liable under these undisputed facts on the record before it.

V. THEREFORE, THE DISTRICT COURT'S DECISION GRANTING SUMMARY JUDGMENT IS SOUND AND SHOULD BE AFFIRMED.

The District Court's entry of summary judgment was sound and should be affirmed.

---

[2] As indicated above, Plaintiff-Appellants failed to argue as to personal liability of James Petry or the liability of the defunct Pretty Women.

A. The District Court considered the applicable Iowa cases: *Thompson*: Injury by an instrumentality from the land; *Hoyt*: injury on the land; *Regan*: injury by an instrumentality from the land.

Plaintiffs cite three Iowa cases for its charge that Defendant-Appellees owed D. Holly a duty ad infinitum. The District Court properly considered each.

The District Court properly treated the relevant questions of law through the *Thompson* framework. *See* Order, at 4–5 (App. 1089-1090). The District Court appreciated the factual differences between *Thompson* and the case at bar.

Contrary to Plaintiffs' contention that Defendant never mentioned *Hoyt*, Defendant, and later the Court, found it inapplicable to the case at hand because of three facts discussed in Defendant's reply brief: (1) Holly's injuries occurred off of JP Parking premises; (2) no condition emanating from JP Parking premises caused any injury to Holly; and (3) the injury was caused by a supervening illegal act by Ronald Hauser on a public highway about half a mile from JP Parking's premises. *See* Defendants' Reply Brief to Plaintiffs' Resistance to Defendants' Motion for Summary Judgment, at 2; Order at 4-6 ("The facts in *Hoyt*, however, are not analogous to the facts of this case in a number of critical ways."

"Given these factual dissimilarities, Plaintiff's reliance on *Hoyt* is misplaced.") (App. 1089-1091).

The District Court analyzed *Regan* closely. *See* Order, at 7 (App. 1092). In *Regan*, two patrons of a bar were asked to leave after fighting, a patron asked the bar tender to call police, the bartender chose not to call authorities, and once outside, a fight resumed. *Regan v. Dunbar*, 514 N.W.2d 751, 752-53 (Iowa Ct. App. 1994). This is not the case at hand.

B. The District Court distinguished those cases from this one.

In *Thompson*, the Supreme Court found the plaintiff's liability claim cognizable because the trampoline was an instrumentality coming from the defendant's land. D. Holly was not injured by an instrumentality coming from Defendant-Appellees' premises.

In *Hoyt*, there was injury on the premise. *Hoyt*, 829 N.W.2d at 773. D. Holly was not injured on the premises.

In *Regan*, a case decided before the adoption of the Restatement Third of Torts, the fight causing injuries began on the premises. *Regan*, 514 N.W.2d at 752. *Regan v. Denbar* is not applicable under the Restatement Third of Torts and is in no way analogous to the case at hand. No injuries occurred on the land and no fight had "already

occurred" inside the establishment as was the case in *Regan*. *See Knebel v. Ka-Boos Bar & Grill*, 680 N.W.2d 379 (Iowa Ct. App. 2004) (distinguishing *Regan*: "There, an altercation first occurred inside a bar.").

None of the cases cited by Plaintiff-Appellants provide support for the argument that a special relationship extends into perpetuity.

C. The District Court further recognized the danger in allowing limitless tort liability.

Plaintiff-Appellants ask this Court to fashion a novel rule wherein "[a] special relationship ends when there is a transfer of this person to another, to someone else who's taking responsibility for them." *See* Transcript of Proceedings, at 10 (App. 1075).

Iowa case law and the Restatement (Third) stipulate that no further duty is owed after the special relationship is extinguished. *See, e.g.*, *Davis*, 504 N.W.2d at 879; Restatement (Third) § 40(a), cmt. f. Such a special relationship terminates when the underlying predicate contact has ceased. *Id.*

This Court should decline Plaintiff-Appellants' request as the law is well-settled in this area.

D. The District Court also recognized that the law does not obligate a defendant to protect another from the risk he poses to himself.

Plaintiff-Appellants argue that D. Holly should have been protected from himself. *See* Transcript of Proceedings, at 10 ("[A]t that point he can't help himself.…") (App. 1075). Iowa law recognizes no such duty to protect. *Rippel v. J.H.M. of Waterloo, Inc.*, 328 N.W.2d 499, 501 (Iowa 1983) ("Plaintiff's own intoxication does not excuse him from recognizing the nature and extent of the danger to which he subjected himself."). Iowa courts have often held that adults are free to make their own decision as to whether to consume alcohol, and an adult's decision on that matter does not create a duty to protect. *See Garofalo v. Lambda Chi Alpha Fraternity*, 616 N.W.2d 647, 654 (Iowa 2000).

Further, Iowa "law generally imposes no duty upon an individual to protect another person from the self-inflicted harm in the absence of a 'special relationship,' usually custodial in nature." *Jain v. State*, 617 N.W.2d 293, 297 (Iowa 2000); *Husker News Co. v. S. Ottumwa Sav. Bank*, 482 N.W.2d 404, 407–08 (Iowa 1992). Defendant-Appellees had no duty to rescue D. Holly from himself when he voluntarily wandered onto the public highway to lay down.

To the extent Plaintiffs argue the opposite—that Defendant-Appellees voluntarily accepted the duty to rescue Mr. Holly—the facts of the present case preclude such a finding. *First*, this argument was not made to the District Court and therefore cannot properly be introduced on appeal. *Donovan v. State*, 445 N.W.2d 763, 767 (Iowa 1989).

Second, the facts do not support such an argument. D. Holly refused multiple offers for rides home. J.P. Parking employee Kraemer offered to call him a cab and had another security staff retrieve Mr. Holly's friend, Wills, to ask him to take D. Holly home. D. Holly refused both. Then, on departing, D. Holly raised his middle finger up at Wills and voluntarily walked off the premises. J.P. Parking employees are not required to force an individual to take a cab. Nor does Iowa law command such a result. *See State v. Heston*, No. 09-0255, 2010 WL 624841, at *2 (Iowa Ct. App. 2010) (finding no duty to call emergency services after a motorist hit a bicyclist but did not think there was any reportable injury).

Third, J.P. Parking exercised its important right as property owner to exclude others. *See Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979). At that point, the special relationship was extinguished, and duties discharged. J.P. Parking employees did not voluntarily accept the

risk, as D. Holly's relationship ended and he became a trespasser. Any argument based on Kraemer's statement that he will "try to get customers home safely," is refuted by the facts of this case and Kraemer's knowledge that he "can't detain people for no good reason, so if they want to leave, they can leave." Kraemer Depo 18:18-23, 13:1-3 (App. 481, 476).

Fourth, this argument is counter to Plaintiff-Appellants' arguments that J.P. Parking could have protected D. Holly by acting. Plaintiff-Appellants cannot have it both ways—either J.P. Parking voluntarily attempted to help D. Holly by offering a cab and calling his friend, which he quickly and independently rejected, or J.P. Parking did not act. *See Lindemulder v. Davis Cty. Cmty. Sch. Dist.*, No. 15-0067, 2016 WL 1679835, at *8 (Iowa Ct. App. 2016) ("To be liable under assumed duty, one must render services, not fail to render services."). Plaintiff-Appellants argument here is that Defendant-Appellees failed to stop D. Holly from leaving the premises.

Defendant-Appellants had no ability to control D. Holly's actions. The relationship between the parties, that of a business and patron, did not require Defendant-Appellants to hold D. Holly against his will. *See Estate of Gottschalk by Gottschalk v. Pomeroy Dev., Inc.*, 893 N.W.2d 579,

591 (Iowa 2017) (discussing custodial relationships recognized by the Restatement (Third) and adopted by Iowa law). No custodial relationship existed here.

D. Holly drank his own alcohol, behaved inappropriately, declined an offer to have a cab called, declined to leave with his friend, and voluntarily walked off the premises under his own power to ultimately lay down in the roadway a half mile from the premises. Defendant-Appellants are not responsible for D. Holly's actions. The District Court appropriately recognized the undisputed facts in this case preclude a special relationship extending in perpetuity.

CONCLUSION

For the above stated reasons, this Court should affirm the District Court's dismissal as to all counts against Defendant-Appellants J.P. Parking d/b/a The Beach Girls, James E. Petry, and Pretty, Women, Inc.

REQUEST FOR NON-ORAL SUBMISSION

The Appellees believe this case can be decided on the briefs without the assistance of oral argument. However, if oral argument is granted, the Appellees request the opportunity to be heard.

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on December 16, 2019, I electronically filed the foregoing Appellee's Final Proof Brief with the Clerk of the Supreme Court by using the Iowa Electronic Document Management System (EDMS), which will send notice of electronic filing to the following:

Tiffany R. Wunderlin
Dicello, Levitt & Gutzler
P.O. Box 437
Platteville, WI 53818
twunderline@dicellolevitt.com
ATTORNEY FOR PLAINTIFF

R. Craig Oppel
Allbee & Barclay, P.C.
115 E. 2nd St.
Muscatine, IA 52761-0092
coppel@allbeelaw.com
ATTORNEY FOR PLAINTIFF

Adam P. Bates
Peddicord Wharton, LLP
6800 Lake Drive, Suite 125
P.O. Box 65630
West Des Moines, IA 50266
adam@peddicord.law
ATTORNEY FOR RONALD P. HAUSER

Henry J. Bevel, III
Swisher & Cohort, P.L.C.
528 W 4th Street
P.O. Box 1200
Waterloo, IA 50704
bevel@s-c-law.com
ATTORNEY FOR LEGENDS FIELDHOUSE BAR & GRILL, LLC

Per Rules 6.106(1) and 6.701, this constitutes service for purposes of the Iowa Court Rules.

/s/ Adam Zenor
Adam Zenor
Sean M. Corpstein
ATTORNEYS FOR DEFENDANT-APPELLEES

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirement and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because:

[x] This brief has been prepared in proportionally spaced typeface using Century Schoolbook 14 point and contains 5,576 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

December 16, 2019
Date

/s/ Adam Zenor
Adam Zenor
Sean M. Corpstein
ATTORNEYS FOR DEFENDANTS-APPELLEES