

WRITING SAMPLE #1

STATEMENT OF THE CASE

Kaleb Stebens filed a Petition at Law on September 13, 2010, asserting claims against Farmhouse fraternity and various individual fraternity members because of a fall he had from a third-story window at the fraternity house. (Petition at Law, App. pp. 1-12). Various claims were ultimately dismissed by Stebens, but as to Penney, the only allegations were recited in Count IV of the Petition. (Petition at Law, Count IV, App. pp. 7-8). Stebens alleged that the negligence of Penney in supplying alcohol to Stebens, who was under legal age, was the proximate [sic] cause of Stebens' injuries and damages. (Petition at Law, Count IV, and Order 10-12-10, App. pp. 7-8, 15-16).

Penney answered on November 16, 2010. (Penney Answer, App. pp. 17-21). Penney affirmatively asserted, in the alternative, that: 1) Stebens was guilty of fault that caused his injury, 2) an intervening/superseding cause was involved and 3) this injury was a result of an accident, not a negligent act. (Answer, Affirmative Defenses, App. pp. 19-20). After depositions were completed, Penney filed a Motion for Summary Judgment, Statement of Material Facts as to Which There is No Genuine Issue and a Memorandum of Authorities. (Summary Judgment filings, App. pp. 97-115).

allegations, could not be used against him to avoid a summary judgment ruling. (Motion to Reconsider, ¶ 5, App. p. 555). Such Motion to Reconsider clarified the law and the application to the facts as established under oath by Stebens. (Motion to Reconsider, ¶¶ 1-4, App. pp. 553-555).

Based on the additional analysis of law, the Trial Court ruled that summary judgment as to Kyle Penney was warranted. (Ruling on Motion to Reconsider, 12-21-11, App. pp. 560-562). The Trial Court opined that the only sworn evidence presented was that sleepwalking was the cause of the fall and that Stebens was required to go outside of the pleadings to create a genuine issue for trial and that he had not. (Ruling, p. 1-2, App. pp. 560-561).

Stebens filed a Notice of Appeal on February 12, 2012, after the final party to the lawsuit was dismissed by Court Order, dated January 31, 2012.

STATEMENT OF THE FACTS

On September 7, 2008, Kaleb Stebens was a freshman at Iowa State University and a pledge at the Farmhouse fraternity. (Ruling on Summary Judgment, p. 1, App. p. 537). Stebens approached Kyle Penney, an older Farmhouse member, about purchasing alcohol for Stebens, who was then 18 years old. (Ruling on Summary Judgment, p. 2, App. p. 538). Stebens knew the consumption of alcohol at his age was illegal. (Ruling on Summary

Stebens has been unwavering with the story that Penney had nothing to do with his fall from the window and his consumption of alcohol had nothing to do with his fall from the window. (Stebens' deposition, pp. 121: 18-23, 128: 8-25, 130: 21 to 131: 2 , 143: 9 to 144: 3, 202: 11-17, 218: 13-16; App. pp. 54, 104-105, 107-108, 595). His account that his fall was the result of sleepwalking remains the same from the date of the fall and through the discovery in the litigation. Stebens had a history of sleep walking before he started his college career at Iowa State University. (Stebens' deposition, pp. 51:19 to 53:3, App. p. 103).

ROUTING STATEMENT

In accordance with the criteria found at Rule 6.1101 of the Iowa Rules of Appellate Procedure, this case should be routed to the Iowa Court of Appeals for consideration.

Standard of Review and Preservation of Error

The standard of review for summary judgment cases is well settled. An appellate court will review summary judgment motions for correction of errors at law. *Carr v. Bankers Trust Co.*, 546 N.W.2d 901, 903 (Iowa 1996); Iowa R. App. P. 6.907. Summary judgment is appropriate only when the entire record demonstrates that no genuine issue of material fact exists and

the moving party is entitled to judgment as a matter of law. *Id.* The evidence is reviewed in the light most favorable to the nonmoving party. *Mason v. Vision Iowa Bd.*, 700 N.W.2d 349, 353 (Iowa 2005).

A party resisting a motion for summary judgment cannot rely on the mere assertions in his pleadings but must come forward with evidence to demonstrate that a genuine issue of fact is presented. The record on summary judgment includes the pleadings, depositions, affidavits, and exhibits presented. *Carr*, 546 N.W.2d at 903.

The summary judgment filings constitute the record made, along with the exhibit and oral arguments. Such pleadings filed, deposition testimony and the exhibits attached preserve the issues for appellate review.

ARGUMENT

I. PENNEY CANNOT BE LIABLE FOR HARM HIS ACTIONS DID NOT CAUSE.

Justice Uhlenhopp, in his dissenting opinion in *Daboll*, expressed the virtue of summary judgment succinctly:

The very purpose of summary judgment procedure is to ascertain whether a party has essential evidence or whether his claim or defense exists only on paper.

Daboll v. Hoden, 222 N.W.2d 727, 737 (Iowa 1974). Stebens produced no actual evidence that Penney caused his harm, but instead, exonerated the actions of Penney by affirming that the supplying of alcohol was not a cause

(Stebens' deposition, pp. 130: 21 – 131: 2, App. p. 105). Later in the deposition, he went on to confirm that Penney was not the cause:

Q. Same question as to Kyle Penney, you don't blame Kyle Penney for your falling out of the window, do you?

A. No.

(Stebens' deposition, p. 218: 13-16, App. p. 108). Then, he published the truth to all of the friends on Facebook - "...I fell out of a window cause I was sleep walking." (Penney's Statement of Material Facts, Exhibit A, App. p. 101). Thus, the facts are undisputed and result in a dismissal of the claim against Penney.

Restatement (Third) of Torts, § 26 – Factual Cause, relates to factual cause of an event. This section provides:

Tortious conduct must be a factual cause of harm for liability to be imposed. Conduct is a factual cause of harm when the harm would not have occurred absent the conduct.

Id. Royal Indemnity Co. v. Factory Mutual Insurance Co., 786 N.W.2d 839, 850 - 52 (Iowa 2010), held that the insurance company failed to prove that a condition or deficiency overlooked by the insurer in its inspection increased the risk of the loss that actually occurred. The *Royal* court found that there was no evidence that the alleged deficiencies of a fire inspection would have made the fire loss more likely to occur than if the inspection had been properly performed because none of the problems that was thought to have

deposition, pp. 121: 18-23, 128: 8-25, 130: 21 to 131: 2, 143: 9 to 144: 3, 202: 11-17, 218: 13-16 App. pp. 54, 104-105, 107-108, 595). Stebens' admissions provide the factual and legal determination that the claim against Penney cannot stand. *Luther v. Loewi*, 549 F.2d 1173, 1175 (8th Cir. 1977). A party cannot offer testimony that contradicts his earlier statements, made under oath, to create a genuine issue of material fact to defeat a summary judgment. *Progressive v. McDonough*, 608 F.3d 388, 391 (8th Cir. 2010).

Causation is a question for the jury, save in exceptional cases where the facts are so clear and undisputed, and the relation of cause and effect so apparent to every candid mind, that but one conclusion may be fairly drawn. *Restatement (Third) of Torts*, § 29, comment d. Stebens testified under oath, in his deposition, that Penney did nothing to cause his fall, that he did not blame him, that alcohol was not the cause of the fall, but that he was sleep walking and fell out the window. (Stebens' deposition, pp. 121: 18-23, 128: 8-25, 130: 21 to 131: 2, 143: 9 to 144: 3, 202: 11-17, 218: 13-16; App. pp. 54, 104-105, 107-108, 595). As a matter of law, the factual cause is not the supplying of alcohol, but the sleepwalking. Given those undisputed facts and admissions, there is no viable claim against Penney as his action of providing alcohol is not the factual cause of Stebens' injuries.

In this case, the only sworn evidence of Kaleb Stebens' is in his

Stebens' unqualified statement that Kyle Penney had nothing to do with this incident and that alcohol had nothing to do with his falling out of the window. The time to come forward with any contradictory evidence was at the time of the summary judgment hearing. "To mount a successful resistance, the challenger must come forward with specific facts constituting *competent* evidence in support of the claim advanced." *Winkel v. Erpelding*, 526 N.W.2d 316, 318 (Iowa 1995)(emphasis added). That was not done and it is fatal to this case.

The lone allegation in the Petition against Penney was that supplying alcohol was a cause of the damage and injury to Stebens. (Petition, ¶¶ 40-41; App. p. 8). In resistance to the Penney summary judgment motion, the only contradicting evidence asserted by Stebens was Kyle Penney's Answers to Interrogatories, signed on June 10, 2011. (Answer to Interrogatory No. 18, App p. 253). The deposition of Kaleb Stebens was taken on June 16, 2011, after Penney signed his interrogatories. As an affirmative defense, a defendant is required to raise every defense in law or fact to any pleading.

In this case, by his initial pleading, the Petition, Stebens' attorney indicated that Penney was negligent by providing alcohol. (Petition, ¶ 40, App p. 8). Penney raised an affirmative defense in response to that

was the cause of the fall and thus, there was no conflict about what happened under Stebens' evidence and there were no issues about the alcohol. The answer to Interrogatory 18 is a "shield, not a sword". Once the true allegations were made clear by way of sworn testimony at deposition, Penney can then act on those allegations and assert that there is no evidence that ties the purchase of alcohol as a cause to Stebens' injuries.

CONCLUSION

Given Stebens' unwavering conclusion that Penney did nothing to cause his injuries and that the fall was the result of his sleepwalking, there was no basis to submit the case to a fact finder as there is no factual proof to show that Penney was the cause of such injuries.

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WRITING SAMPLE #2

STATEMENT OF THE CASE

On May 30, 2008, James M. Gummert (“Gummert”) filed suit, grounded in a premises liability theory regarding an assault by a third party (Quigley) occurring on June 3, 2006, on the property of Anthony Paglia (“Tony”) in Marshall County, Iowa. (Pet. ¶ 8, App. pp. 1-3). Tony moved for summary judgment arguing he had no duty to protect Gummert from Quigley, who was not invited to the going-away party Greg Paglia (“Greg”), Tony’s son, was having for a friend. (Motion Summary Judgment (“MSJ”), 5/18/09, and Amended MSJ, App. pp. 12-32, 35-60).

Tony set out a number of undisputed material facts in his Statement of Material Facts and Amended Statement of Material Facts, all of which were admitted by Gummert. (Statement of Facts, 5/18/09 and Amended Statement of Facts, 6/25/09, Plt. Response to Statement of Facts, 6/1/09, and Response to Amended Statement of Facts, 7/6/09, App. pp. 23-25, 46-48). Prior to the summary judgment hearing, Gummert filed no separate Statement of Facts of his own and only filed a Resistance and Amended Resistance to the summary judgment filings. (Plt. Resistance to Deft. MSJ and Amended Resistance to Deft. MSJ, 6/1/09, and 7/6/09, respectively, App. pp. 61-64). A Memorandum of Authorities supporting Gummert’s Resistance was filed on July 7, 2009, after the hearing. (App. pp. 65-67).

A “Mr. Quigley,” who had not been invited to the party, arrived at about 1:00 a.m. with a car full of people when most of the people who had been invited were already at the party. (Gummert Dep. 31:16, Ex. A; Greg Dep. 7:14-19, 8:22-9:7, Ex. C, App. pp. 53, 59-60). Before Quigley even got past the driveway, Greg went out and told the Quigley group to leave because they were not invited. (Greg Dep. 7:14-19, 8:22-9:1, 9:16-19, Ex. C, App. pp. 59-60).

As Quigley and his group walked down the driveway to leave, Gummert pushed Quigley to the ground and told him to get out of there before he “got hurt.” (Gummert Dep. 28:22-29:5, 30:14-20, Ex. A; Greg Depo. 5:24-6:2, 6:3-21, 7:14-8:4, Ex. C, App. pp. 52-53, 59). Gummert indicated he did not know Quigley before this evening. (Gummert Dep. 28:14-19, 30:21-22, App. pp. 52-53). Quigley and his group did go back down to the end of the long driveway and down the highway where they had parked, and as far as Gummert knew, the Quigley group left. (Gummert Dep. 30:17-20, 31:4-6, 33:9-33:4, Ex. A; Greg Dep. 9:22-25, Ex. C, App. pp. 53-54, 60). Gummert witnessed Quigley actually leave the premises and walk down the highway. (Gummert Dep. 33:9-17, App. p. 54).

Instead of leaving, Quigley got some object from the car and walked back up the driveway, where Quigley unexpectedly hit Gummert in the face

(Iowa 1978). The underlying facts are to be viewed in the light most favorable to the party opposing the motion and reversal is appropriate only if it appears from the record that there is an unresolved issue of material fact. *Id.* at 795-96.

Preservation of Error: This issue was properly preserved for appeal through Gummert's Response to Tony's Motion for Summary Judgment. (Pl. Resp. to MSJ., App. at pp. 33-34, 61-64).

Argument: Whether an actionable duty is owed by a defendant to a plaintiff under a given set of facts is a question of law for the court. *Leonard v. State*, 491 N.W.2d 508, 509 (Iowa 1992). In Iowa, generally a person has no duty to prevent a third person from causing harm to another. *Morgan v. Perlowski*, 508 N.W.2d 724, 726 (Iowa 1993); *Fiala v. Rains*, 519 N.W.2d 386, 389 (Iowa 1994). There are exceptions to this general rule found at *Restatement (Second) of Torts*, §§ 315-320. Relevant to this case, §318 provides:

§ 318. Duty of Possessor of Land or Chattels to Control Conduct of Licensee

If the actor permits a third person to use land or chattels in his possession otherwise than as a servant, he is, if present under a duty to exercise reasonable care so to control the conduct of the third person as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if the actor

Unlike the Morgan case, Tony had no notice of any commotion so as to aid the guests or exercise control over Quigley and had no reason to know of his ability to control the third party as Quigley had barely made it up the driveway. (App. pp. 53-54, 56-57, 59-60). The Restatement section deals specifically with the duty to control the conduct of third persons. “The duty described in Restatement section 318 [is to be viewed] quite narrowly, guided by the principle that the scope of the duty turns on the foreseeability of harm to the injured person.” *Morgan*, 508 N.W.2d at 727. Furthermore, section 318 is directed at controlling those coming on the property with consent. *Pierce v. Staley*, 587 N.W.2d 484, 488 (Iowa 1998). The duty to control the conduct of a guest on the property arises from the existence of a special relationship between the possessor of land and that person on the property with consent. *Davis v. Kwik-Shop*, 504 N.W.2d 877, 879 (Iowa 1993).

In another case dealing with the *Restatement (Second) of Torts*, § 318, the Iowa Supreme Court held in *Pierce v. Staley* that the homeowner, Staley, had no duty to protect Pierce, who was attacked at the defendant’s home. 587 N.W.2d 484, 488 (Iowa 1998). Staley was not home at the time of the attack of the plaintiff. *Id.* at 486. Her son was at home, however, and had informed Staley approximately two hours before the attack that three

danger and thus, liability would not be imposed under any theory. *Id.* at 389.

Here, the evidence as provided to the trial court is simple. Tony was aware of the going-away party, there were no issues about the behavior of any *guests*, the uninvited crew was asked to leave before any problems arose with guests, Gummert assaulted the third person/Quigley as he was *leaving* the party, and Greg and Gummert saw Quigley leave and walk down the highway towards his vehicle. (App. pp. 50-60). Tony may have some general duty to exercise reasonable care to control the conduct of a third person to prevent him from harming others, but this duty cannot extend to random acts of violence that occur without warning. (*See, Comment C, §318, Restatement (Second) of Torts*)(not subject to liability if no particular reason to suppose there will be any necessity to control the behavior of third person). Moreover, Gummert instigated a physical confrontation with the alleged assailant and no theory of liability exists requiring Tony to protect Gummert from Gummert's own actions toward Quigley. (*See, Johnson v. Sherman, 2006 Iowa App. LEXIS 755 (Iowa App.)(No.6321/05-1264)*)(Gummert's assault of Quigley likely an independent, superseding cause of Quigley's retaliation).

ability to control the acts of Quigley and therefore prevent injury to Gummert.

II. ACCEPTING ALL OF PAGLIA'S FACTS, GUMMERT PRODUCED NO OTHER MATERIAL FACT THAT WOULD ESTABLISH LIABILITY.

Standard of Review: A district court's decision concerning summary judgment is reviewed for correction of errors at law. *Burbach v. Radon Analytical Labs., Inc.*, 652 N.W.2d 135, 136 (Iowa 2002). On appeal, the reviewing court's task is to determine only whether the law was correctly applied. *See Frohwein v. Haesemeyer*, 264 N.W.2d 792, 796 (Iowa 1978). The underlying facts are to be viewed in the light most favorable to the party opposing the motion and to reverse if it appears from the record that there is an unresolved issue of material fact. *Id.* at 795-96.

Preservation of Error: This issue was properly preserved for appeal through Plaintiff's Response to Tony's Motion for Summary Judgment. (Amended Resistance to Dft's Amended MSJ, 7/6/09, App. at pp. 33-34, 61-64).

Argument: Tony set out the undisputed material facts that were gathered from the depositions in this case. (Amended Statement of Material Facts, 6/25/09, ¶ 1-13, App. at pp. 46-48). Gummert agreed with each and every fact presented and provided no separate statement of fact that would

explain why the facts saved his case from dismissal. Iowa R. Civ. P. 1.981 (5),(6). Unfortunately, for the first time in his Brief, Gummert asserts a statement that Paglia had worked in a bar for 11 years, which is not a fact presented in this record, and certainly had no relevance in any event. (Compare, Gummert Brief, p. 9, with Statement of Facts, 6/25/09, Ex. B, pp. 9-12, 21-24, App. at pp. 56-57, 73).

If, upon the basis of such materials before the Court as would be competent proof at trial, the Court would be compelled to direct a verdict for the movant, then it is proper to render summary judgment. *Sherwood v. Nissen*, 179 N.W.2d 336, 339 (Iowa 1970). The purpose of a summary judgment proceeding is to enable a party to obtain judgment promptly and without expense and delay of trial where there is no genuine issue of fact to be tried. *Moser v. Thorp Sales Corp.*, 312 N.W.2d 881, 890 (Iowa 1981). Fact issues are only material when a dispute over them might affect the outcome of the suit. *Thompson v. City of Des Moines*, 564 N.W.2d 839, 941 (Iowa 1997). A factual issue does not arise simply from the claim that one exists. *Humphries v. Methodist Episcopal Church*, 566 N.W.2d 869, 872 (Iowa 1997).

In the case at bar, Gummert did not and frankly could not show any facts that afforded him the opportunity to try this case to a jury.