IOWA SUPREME COURT

No. 19-1349

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

Plaintiffs-Appellants,

vs.

PRETTY WOMEN, INC., d/b/a THE BEACH GIRLS, J.P. PARKING, INC., and JAMES E. PETRY,

Defendants-Appellees.

APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY
HONORABLE DAVID PORTER, JUDGE

PLAINTIFFS-APPELLANTS FINAL BRIEF AND REQUEST FOR ORAL ARGUMENT

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PROOF OF SERVICE

On the 10th of December, 2019, I, the undersigned, do hereby certify that I or someone acting on my behalf did serve the Appellants' Final Brief and Request for Oral Argument electronically on all respective parties.

By: /s/ Tiffany R. Wunderlin
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CERTIFICATE OF SERVICE

On the 10th of December, 2019, I the undersigned, do hereby certify that I or someone acting on my behalf did electronically file Appellants' Final Brief and Request for Oral Argument.

By: /s/ Tiffany R. Wunderlin
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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

I. **WHETHER THE DISTRICT COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT FINDING DEFENDANTS OWED NO DUTY**

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Brody v. Ruby, 267 N.W.2d 902 (Iowa 1978).

Butler v. Hoover Nature Trail, Inc., 530 N.W.2d 85 (Iowa Ct. App. 1994).

Carey v. New Yorker of Worcester, Inc., 335 Mass. 450, 245 N.E.2d 420 (1969).

Clinkscales v. Nelson Sec., Inc., 697 N.W.2d 836 (Iowa 2005).

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Estate of Gottschalk v. Pomeroy Dev., Inc., 893 N.W.2d 579 (Iowa 2017).

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Peck v. Gerber, 154 Or. 126, 59 P.2d 675 (1936).

Priewe v. Bartz, 249 Minn. 488, 83 N.W.2d 116 (1957).

Regan v. Denbar, Inc., 514 N.W.2d 751 (Ct. App. 1994).

Sain v. Cedar Rapids Cmty. Sch. Dis., 626 N.W.2d 115 (2001).

Stevens v. Iowa Newspapers, Inc., 728 N.W.2d 823 (2007).

Thompson v. Kaczinski, 774 N.W.2d 772 (2013).

Van Fossen v. MidAmerican Energy Co., 777 N.W.2d 689 (Iowa 2009).

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Iowa Code § 710.7.

Iowa R. App. P. 6.904(3)(j).

Iowa R. App. P. 6.904(3)(p).

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ROUTING STATEMENT

This appeal should be transferred to the Iowa Court of Appeals as it involves the application of existing legal principles and issues appropriate for summary disposition. Iowa. R. App. P. 6.1101(2)(f) (2017).

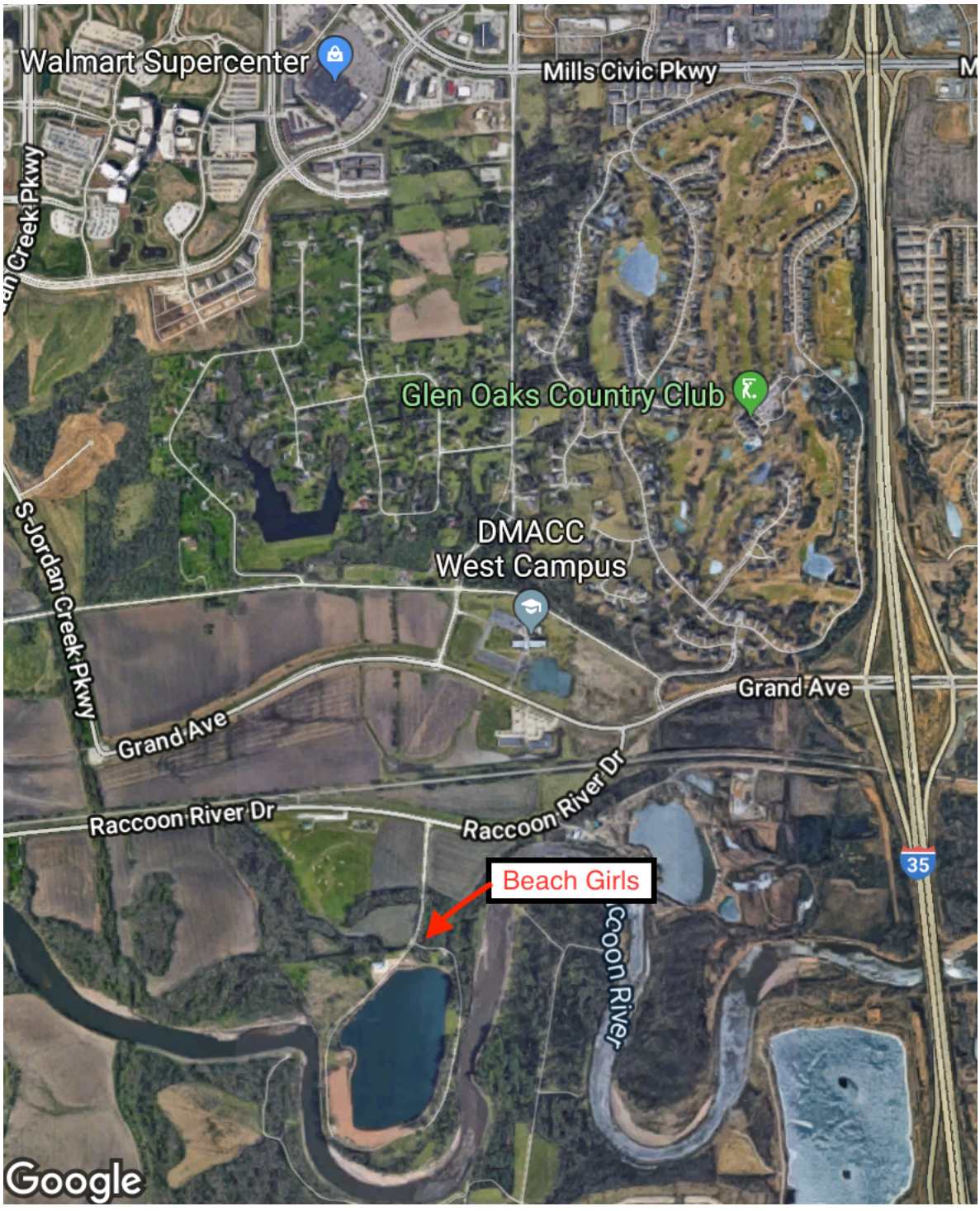
STATEMENT OF THE CASE

This case is a personal injury and wrongful death case stemming from the death of Daulton Holly on August 14, 2015. (Petition; App, 7-15). On March 29, 2019, Defendants, Pretty Women, Inc., d/b/a The Beach Girls, J.P. Parking, Inc., and James E. Petry, (hereinafter collectively "the Defendants") filed a Motion for Summary Judgment and Supporting Brief alleging they were entitled to summary judgment based on lack of duty owed to Daulton Holly at the time of his death. (Motion for Summary Judgment; App. 491-493; Supporting Brief; App. 494-505). Plaintiff filed a timely Resistance to Defendants' Motion for Summary Judgment on April 16, 2019 and a Supplemental Resistance on April 19, 2019. (Resistance; App. 506-529; Supplemental Resistance filed 4-19-19). Oral argument was conducted on May 24, 2019, with both parties presenting their arguments to the court. (5-24-19 Transcript of Oral Argument; App. 1066-1085). The District Court entered Summary Judgment for the Defendants on July 15, 2019 (7-15-19 Order; App. 1086-1094). Plaintiffs' filed a timely notice of appeal on August 13, 2019. (Notice of Appeal; App. 1095-1097).

STATEMENT OF THE FACTS

James Petry first opened a strip club at 6220 Raccoon River Drive in West Des Moines, Iowa in approximately 1993 under the corporate entity, Pretty Women, Inc. d/b/a The Doll House. (Defendants' Answers to Plaintiff's Interrogatories at IROG 15; App. 16-47). He later changed the name to The Beach Girls, but he does not recall the date of the change. (*Id*.). On September 15, 2004, the strip club business was assumed by JP Parking Inc. which is also owned by James Petry (*Id*.). James Petry has been the sole owner of each corporation owning and running the strip club at 6220 Raccoon River Drive. (*Id*.; Deposition of James Petry at 27:8-13; 36:13-37:2; App. 48-195). J&P Parking is still the business that Mr. Petry runs the strip club through. (Deposition of James Petry at 39:7-10; App. 48-195).

The strip club is located in a predominantly rural area at on the outskirts of West Des Moines, Iowa.



JP Parking Inc. has a liquor license and sells beer in one can, six can, or twelve can increments at the strip club. (Defendants Answers to Interrogatories at #18; App. 16-47; Liquor License filed 4-16-19 as Exhibit

C). However, the strip club also advertises itself as a BYOB establishment, allowing patrons to bring in their own beer, wine, or wine coolers.[1] The strip club is open Sunday through Tuesday from 7 P.M. until 3 A.M. and Wednesday – Saturday from 7 P.M. until 4 A.M. (J&P Parking Business Hours, Fees, & Rules; App. 196). The strip club charges a cover fee for entrance into the establishment that varies depending on day of the week and the sex of the patron. (*Id*.).

The strip club has rules posted for its patrons. Those rules include:

1. Wristbands must be kept on at all times or you will be asked to purchase a new one or leave.

2. All coolers, purses, and handbags will be inspected before entering the premises.

3. No cameras are permitted on the premises.

4. We reserve the right to refuse admittance.

5. Anyone fighting will be asked to leave the premises.

6. Anyone caught touching the entertainers inappropriately or acting inappropriately will be asked to leave the premises.

(*Id*). Notably, the strip club claimed that it did not have a company safety manual or its equivalent. (Defendants' Responses to Plaintiffs' Requests for Production of Documents at #12; App. 197-204).

[1] See https://www.beachgirlsbar.com

As for security guards, Mr. Petry testified that he relies on his employee, Kenny Ford to recruit large muscular gentlemen that he knows from the gym to work security at the strip club. (Deposition of James Petry at 54:15-22; 55:14-23; 56:15-19; App. 48-195). Mr. Petry leaves the security guards qualifications and on the job training up to Mr. Ford's discretion. (*Id*. at 55:14-23; 57:9-11; App. 48-195). For example, the security guard on the night Daulton Holly was killed was Jeremiah Kraemer. (Deposition of Jeremiah Kraemer at pg. 5; App. 464-485). Mr. Petry testified he was unaware if Mr. Kraemer had any special training or licensing before he signed up to work at the strip club. (*Id*. at 72:15-18; App. 464-485). Mr. Petry also testified that there were no policies and procedures or specific training for security at the strip club. (*Id*. at 90:4-17; App. 464-485).

Mr. Petry testified that his staff is trained to call a cab when a patron requests one. (Deposition of James Petry at 110:13-15; App. 48-195). He does not train the staff to try and determine whether someone needs a cab based on their intoxication level. (*Id*. at 11:9-20; App. 48-195).

> Q: Okay. Is – do they call for cabs if they – they believe someone is too intoxicated to drive, whether or not they ask for it or not?

A: It's not our policy to try and judge whether someone's had too much to drink.

(*Id*. at 11:4-8; App. 48-195).

James Petry testified that while the posted sign of rules says that they reserve the right to refuse admittance, he leaves it to the door attendant to make a judgment call on whether to admit someone into the gentleman's club. (Deposition of James Petry at pg. 49:16-50:23; App. 48-195). He testified that generally people will be refused admittance for being offensive to other patrons or otherwise having behavior issues. (*Id*. at 50:5-13; App. 48-195). As for rule 5, that anyone fighting will be asked to leave the premises, James Petry claimed that fights hardly happen at all at Beach Girls. (*Id*. at 50:24-51:15; App. 48-195).

Despite Mr. Petry's claims to safety at the strip club, in response to a FOIA request, the West Des Moines Police Department disclosed over 250 pages of police reports responding to calls at 6220 Raccoon River Drive for the five-year period between 2012 and 2018. (West Des Moines Police Department Reports for 6220 Raccoon River Drive; App. 205-463). The calls include several OWI arrests and other drunken driving crashes, both in the parking lot at Beach Girls and on the driveway between Beach Girls and

Raccoon River Drive, some resulting in property damage and some resulting in bodily injury. (*Id*.; App. 205-464).

On the night of August 22, 2015, a security guard at Beach Girls that night was aware that Daulton Holly and his co-worker, Jordan Wills arrived via taxi-cab at the strip club. (Deposition of Jeremiah Kraemer, at 7:15-8:3; App. 464-485). He observed that they brought beer with them to Beach Girls. (*Id*. at 9:18-10:1; App. 464-485). The security guard had been outside in front of the strip club smoking when they arrived in a taxicab and saw them arrive. (*Id*. at 7:15-8:3; App. 464-485). Later in the night, the same security guard became aware that Daulton Holly was from Tennessee because he was dropping his billfold and the security guard picked up his ID. (*Id*. at 7:15-8:3; App. 464-485).

The security guard believed that Daulton Holly was intoxicated because he was dropping his wallet, he had knocked some drinks off a table, and then he mistook the women's dressing room for the bathroom. (*Id*. at 7:15-8:3; App. 464-485). The security guard also observed that Daulton Holly had slurred speech and was staggering some when he walked. (*Id*. at 8:4-9:11; App. 464-485). The security guard stopped Daulton before he made it far into the dressing room and redirected him to the nearby door of the men's bathroom. (*Id*. at 10:24-11:13; App. 464-485).

The security guard described the scene when he and another security guard at Beach Girls decided to remove Daulton from inside the strip club as follows:

Q: Okay. And obviously you kicked him out, but I guess, was there a specific reason, or was it just a cumulative effect of how he was acting?

A: Well, we didn't kick him out. We escorted him out.

Q: Okay.

A: We didn't even put our hands on him. Like I said, he knocked some drinks off a table. He continually dropped his wallet, at least three times, and then tried to go in the girls' dance room, by accident of course. I don't think it was intentional. And by that time I let him use the restroom. He came back out. I just – you can't babysit him all night long, so I asked him to come up front with me, and I was going up. I radioed to one of the other security guards to get his friend, because he came there with a gentleman.

So I got them outside, and I said, "Sorry bud. You've had too much to drink. I can't let you go back inside the club. You can't be drunk in the club. You're just having issues right now. I can't let you go back in." And during that process, his friend came out. I said, "Here's the deal. He's intox" – "he's had a little too much. He just needs to go. You need to get him a cab. I don't know what you want to do, but he can't go back inside. You guys need to figure something out here."

So then they were kind of going back and forth a little bit and kind of arguing. Not like loud arguing, but just arguing. And his buddy didn't want to leave, of course. So then he started walking off, and I told his buddy, "You need to try and get him a cab. It's not safe for him to be walking out around here with dark clothes on." He continued to walk off, and his buddy said, "Well, he'll regret it tomorrow," and he walked back inside. And shortly after that is when he died.

(Deposition of Jeremiah Kraemer at pg. 12:2-13:20; App. 464-485) (emphasis supplied). During this altercation, Mr. Kraemer described Daulton Holly as "quite docile" and stated that Daulton did not become argumentative with him. (*Id*. at pg. 13:21-25; App. 464-485).

Mr. Kraemer described that part of his job duties was "to try to get customers home safely." (Deposition of Jeremiah Kraemer at pg. 18:18-23; App. 464-485). Regarding his job duties, Mr. Kraemer stated:

A: [Patrons] do consume alcohol, so it's actually my responsibility to make sure people get home safe, if possible. But also, I can't detain people for no good reason, so if they want to leave, they can leave.

Q: Okay. And if somebody doesn't want to call and get a cab, it's not necessarily your job to call one for them, is it?

A. No, it is not. We always offer them. I mean, it's always an option, and we always prefer it, even when they're being, let's say less than agreeable.

Q: Okay.

A: We still try and get home – somebody home safely.

(*Id*. at pg. 18:23-19:13; App. 464-485) (Emphasis supplied). Mr. Kraemer described the conversation between Daulton Holly and Jordan Wills as "bickering back and forth" and as "two friends arguing." (Deposition of Jeremiah Kraemer at pg. 15:18-25; App. 464-485). He heard they were arguing over leaving. Mr. Holly was told to leave but Jordan Wills wanted

to go back into the strip club. (*Id*. at pg. 15:18-16:13; App. 464-485). Importantly, Mr. Kraemer admitted that Mr. Holly did not have much of a choice about leaving because he could not go back inside. (*Id*. at pg. 15:4-7; App. 464-485).

During this time, Mr. Kraemer claims that he offered to get Daulton Holly a cab and then tried to talk Jordan Wills into calling a cab for Daulton because Mr. Kraemer knew they did not have a vehicle there in the parking lot. (*Id*. at pg. 19:14-19; App. 464-485). Mr. Kraemer claims that Daulton Holly refused the cab. (*Id*. at pg. 19:20-21; App. 464-485).

As Mr. Kraemer watched Daulton Holly walk down the driveway towards Raccoon River Drive. (*Id*. at pg. 18:4-17; App. 464-485). At that time Mr. Kraemer was aware of the dangers Daulton Holly was undertaking by walking away from Beach Girls on his own. Mr. Kraemer described that Raccoon River Drive near Beach Girls was a country road without very many streetlights. (*Id*. at pg. 19:22-20:2; App. 464-485). Mr. Kraemer also observed that Daulton Holly was wearing dark clothing, which he believed increased the danger of walking at night in the area. Mr. Kraemer stated:

Q: And Mr. Holly was dressed primarily all in black that night?

A: As far as I can remember, yes, all dark colors.

Q: And given that this area is not very well lit, you obviously thought it was not real safe for him to be walking in that condition?

A: Nope.

(*Id*. at pg. 20:3-10; App. 464-485).

According to the security camera footage from the strip club, Daulton Holly walked out of view at 1:29 A.M.[2] A 911 call at 2:11 A.M. reported that a body, later identified as Daulton Holly was found face down on the 6400 block of Raccoon River Drive. According to the autopsy that performed, Daulton Holly's blood alcohol level at the time of his death was 0.261 and he had THC in his system. (Autopsy filed 4-16-19 as Attachment H).

Dr. Henry Nipper, a toxicologist and expert witness disclosed by the Plaintiffs has examined the autopsy of Daulton Holly. It is Dr. Nipper's professional conclusion that because of the significant THC concentration and his very high BAC, the behaviors which would be expected of Mr. Holly are: emotional instability, loss of critical judgment, increased reaction time, sensory motor incoordination, impaired balance, slurred speech. (Affidavit of Dr. Henry Nipper at ¶ 13; App. 486-490). He also would have become disoriented, and shown mental confusion, and exaggerated emotional states

[2] This security camera footage was filed on 3-29-19 by the Defendants' as Exhibit M in Support of Defendants' Motion for Summary Judgment.

(fear, rage, grief, etc.) (*Id*.; App. 486-490). His visual acuity and glare recovery would have been reduced, and he likely showed poor perception of color, form, motion. (*Id*.; App. 486-490). He also might have become drowsy, apathetic or lethargic, and could have `passed out'. (*Id*.; App. 486-490). The effects of THC are additive to the effects of alcohol alone, producing greater impairment than alcohol alone. (*Id*.; App. 486-490). It is Dr. Nipper's opinion that at the time Mr. Holly was removed from Beach Girls, and afterward, in the parking lot, he was significantly impaired by the combination of alcohol and THC, and his impairment should have been appreciated by those around him. (*Id*. at ¶ 14; App. 486-490).

ARGUMENT

I. THE DISTRICT COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT FINDING DEFENDANTS OWED NO DUTY

The District Court's analysis of whether a duty was owed is fundamentally flawed from the outset because the District Court erroneously considered foreseeability as a factor to determine duty, which was expressly rejected in *Thompson v. Kaczinski*, 774 N.W.2d 772 (2013). The subsequent case of *Hoyt v. Gutterz Bowl & Lounge, L.L.C*., 829 N.W.2d 772 (2013) makes it clear that a duty to use reasonable care exists in this case, and that the Defendants failed to use reasonable care when their conduct removing

Mr. Holly from their club exposed him to third-party misconduct. *See id*. at 778 (citing Restatement (Third) § 19 cmt. *e*, at 218). This is especially true given that Iowa recognizes that taverns and strip clubs are business venues in which alcohol-fueled disturbances causing injury and even death are known to occur. *See e.g., Delgado v. Trax Bar & Grill*, 36 Cal.4th 224, 30 Cal.Rpt.3d 145, 113 P.3d 1159, 1169 (2005) (proprietor who serves intoxicating drinks must exercise reasonable care to protect patrons from injury at hands of fellow guests) (cited with approval in *Hoyt*, 829 N.W.2d at 779.) Defendants' employee, Mr. Kraemer clearly understood and appreciated the severity of the risks faced by Mr. Holly that night. Whether Mr. Kraemer acted with reasonable care in response to his knowledge of those risks, is more properly a question for the jury than to be decided on summary judgment. *See, Hoyt*, at 780 ("[W]e leave the breach question's foreseeability determination to juries unless no reasonable person could differ on the matter."). In sum, Plaintiffs showed the District Court that Defendants owed a duty of care and that they failed to exercise reasonable care under the circumstances of the case. The District Court's erroneous duty analysis amounts to an incorrect application of Iowa law, which accordingly should be reversed on appeal.

A. Error Preservation, Standard of Review, and Scope of Review

Plaintiffs have preserved error by arguing against summary judgment by both filing a resistance to the motion and in argument before the district court during a hearing on the matter on May 24, 2019. Following the District Court's ruling on summary judgment on July 15, 2019, the Plaintiffs filed a timely notice of appeal on August 13, 2019.

As for standard of review, this court has stated that it "review[s] the granting of a summary judgment motion for correction of errors at law." *In re Estate of Renwanz*, 561 N.W.2d 43, 44 (1997). The record before the district court is reviewed to determine whether a genuine issue of material fact existed and whether the district court correctly applied the law. *Sain v. Cedar Rapids Cmty. Sch. Dis.*, 626 N.W.2d 115, 121 (2001). 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. *Stevens v. Iowa Newspapers, Inc*., 728 N.W.2d 823, 827 (2007). On a motion for summary judgment, the district court must: "(1) view the facts in the light most favorable to the nonmoving party, and (2) consider on behalf of the nonmoving party every legitimate inference reasonably deduced from the records." *Van Fossen v. MidAmerican Energy Co.*, 777 N.W.2d 689, 692 (Iowa 2009). A legitimate inference is "rational,

reasonable, and otherwise permissible under the governing substantive law." *McIlravy v. N. River Ins.*, 653 N.W.2d 323, 328 (Iowa 2002) (quoting *Butler v. Hoover Nature Trail, Inc.*, 530 N.W.2d 85, 88 (Iowa Ct. App. 1994)).

"A genuine issue of fact exists if reasonable minds can differ on how an issue should be resolved." *Estate of Gottschalk v. Pomeroy Dev., Inc*., 893 N.W.2d 579, 584 (Iowa 2017) (quoting *Walker v. State*, 801 N.W.2d 548, 554 (Iowa 2011)). "A fact is material when it might affect the outcome of a lawsuit. *Id*. "Even if the facts are undisputed, summary judgment is not proper if reasonable minds could draw different inferences from them and thereby reach different conclusions." *Clinkscales v. Nelson Sec., Inc*., 697 N.W.2d 836, 841 (Iowa 2005); *accord Brody v. Ruby*, 267 N.W.2d 902, 904 (Iowa 1978).

The moving party bears the burden of demonstrating the nonexistence of a material fact question. *Bank of the W. v. Kline*, 782 N.W.2d 453, 456 (Iowa 2010). Finally, circumstantial evidence is equally probative as direct evidence. Iowa R. App. P. 6.904(3)(p).

It is well-settled that "questions of negligence or proximate cause are ordinarily for the jury," and "only in exceptional cases should they be decided as a matter of law." *Clinkscales v. Nelson, Sec., Inc*., 697 N.W.2d 836, 841 (2005); *see also, Virden v. Betts & Beer Constr. Co*., 656 N.W.2d

805, 807 (2003) (noting summary judgment is usually inappropriate in negligence cases).

B. Defendants Owed Daulton Holly a Duty to Exercise Reasonable Care. The District Court's Analysis of Duty is Contrary to *Thompson v. Kaczinski* and *Hoyt v. Gutterz Bowl & Lounge*.

Defendants argued that they were entitled to summary judgment on Plaintiffs' claims against them because they alleged they owed no duty to Daulton Holly on the night of his death. (Def. Memo in Support of Summary Judgment at pg. 5; App. 494-505). This argument has no support in the current law of Iowa, and accordingly the district court's reliance on outdated and overruled Iowa case law caused it to err in reaching a finding of no duty.

The District Court's analysis begins with a fundamental flaw by stating that the three factors it would consider in determining whether a duty is owed are: "(1) the relationship between the parties, (2) reasonable foreseeability of harm to the person who is injured, and (3) public policy considerations." (quoting *Thompson v. Kaczinski*, 774 N.W.2d 772, 834 (2013)) (7-15-19 Summary Judgment Order at pg. 4; App. 1086-1094). To rely on these three factors in crafting its analysis, the District Court erred because *Thompson* expressly rejected using foreseeability in duty analysis. *Thompson*, 774 N.W.2d at 835 ("We find the drafters' clarification of the

duty analysis in the Restatement (Third) compelling, and we now, therefore, adopt it.").

Instead of continuing to examine foreseeability in duty analysis, as the District Court attempted to do here, the Iowa Supreme Court, in *Thompson*, adopted the general duty formulation set forth in section 7 of the Restatement (Third) of Torts: Liability for Physical and Emotional Harm. *Thompson* specifically explained that "the assessment of the foreseeability of a risk" is no longer part of the duty analysis in evaluating a tort claim, and instead is to be considered when the fact finder decides whether a defendant has failed to exercise reasonable care. *Thompson v. Kaczinski*, 774 N.W.2d 829, 835 (Iowa 2009). In adopting this view, the court explained that no-duty rulings should be limited to exceptional cases in which "'an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases.'" *Id*. (quoting Restatement (Third) of Torts: Liability for Physical & Emotional Harm § 7(b), at 77 (2010) [hereinafter Restatement (Third)]).

When the consideration of foreseeability is removed from the determination of duty, as the *Thompson* decision announced it should, there remains the question of whether a principle or strong policy consideration justifies the exemption of the Defendants – as strip club owners - from the

duty to exercise reasonable care. Guidance on this issue comes from the Iowa Supreme Court in *Hoyt v. Gutterz Bowl & Lounge, L.L.C.*, 829 N.W.2d 772 (2013).

For the same reasons the Iowa Supreme Court found the Restatement (Third) compelling in *Thompson*, the Court also found it compelling in the tavern owner-patron context and adopted Restatement (Third) § 40 to find duty in that relationship. *See, Hoyt v. Gutterz Bowl & Lounge L.L.C.*, 829 N.W.2d at 776 (finding a duty to exercise reasonable care based on special relationships such as the business-patron relationship).

Amazingly, despite its extensive discussion of duty analysis in negligence cases, Defendants' Motion for Summary Judgment failed to discus *Hoyt* at all. This was a fundamental flaw in Defendants' motion because *Hoyt* has significantly similar facts to the case at hand and *Hoyt* adopts many specific principles from the Restatement (Third) regarding duty analysis that are important to assessing the duty in this case.

Similar to the current case, the facts and question in *Hoyt* involved what duty a tavern owner owed to its patron when he was harmed by the tortious acts of a third party. Specifically, *Hoyt v. Gutterz* involved an attack in the parking lot of a bowling alley. 829 N.W.2d at 773. Hoyt had been drinking at the Gutterz Bowl and Lounge. After consuming a couple beers,

Hoyt and one of his co-workers who was there with him confronted another man at the bar, Curtis Knapp, because tension had arisen between Hoyt and Knapp as a result of Hoyt's alleged mistreatment of the sister of Knapp's friend. *Id*. The waitress was concerned about the men's behavior and threatened to stop serving them unless they calmed down. *Id*. Hoyt ignored her request and the waitress requested and secured permission from Gutterz's owner to discontinue serving him. *Id*. Hoyt continued taunting Knapp and complained to the owner that he was not being served. *Id*. Shortly thereafter, the owner grew concerned an altercation might occur and asked Hoyt and his co-worker to leave. *Id*. As Hoyt walked through the parking lot toward his vehicle, Knapp approached him from behind and struck him in the back the head, knocking him unconscious. *Id*.

Hoyt filed a claim against Gutterz and Knapp alleging they were both liable for the injuries he sustained when Knapp assaulted him. *Id*. Gutterz moved for summary judgment alleging he owed no duty of reasonable care, there was no evidence of a breach of any duty, and the assault by Knapp and Hoyt's injury were not foreseeable. *Id*. at 774. The district court granted Gutterz's motion for summary judgment.

The Court of Appeals reversed and the Iowa Supreme Court affirmed the decision of the Court of Appeals, approving and adopting many specific

principles from the Restatement (Third) regarding duty analysis that are equally instructive in the case at hand.

The Iowa Supreme Court's decision in *Hoyt* was based on section 40 of the Restatement (Third). Section 40 of the Restatement (Third) describes duty principles based on special relationships such as business-patron relationships, as follows:

> (a) An actor in a special relationship with another owes the other a duty of reasonable care with regard to risks that arise within the scope of the relationship.
>
> (b) Special relationships giving rise to the duty provided in Subsection (a) include:
>
> (1) common carrier with its passengers,
> (2) an innkeeper with its guests,
> (3) a business or other possessor of land that holds its premises open to the public with those who are lawfully on the premises.
> …
> (7) a custodian with those in its custody, if:
> (a) the custodian is required by law to take custody or voluntarily takes custody of the other; and
> (b) the custodian has a superior ability to protect the other.

Restatement (Third) § 40 (2010).

Comment *g* explains that section 40's contemplated duties apply even in cases involving harm caused by a third party:

> The duty described in this Section applies regardless of the source of the risk. Thus, it applies to risks created by the individual at risk as well as those created by a third party's conduct, whether innocent, negligent, or intentional.

Id. § 40 cmt. *g*, at 42. Accordingly, section 40 modifies the general proposition of section that actors typically owe no duty to protect victims from the conduct of third parties and "clarifies that a duty of reasonable care applies as a result of these special relationships." *Hoyt*, 829 N.W.2d at 776. (emphasis supplied).

The Iowa Supreme Court in *Hoyt* reasoned that adopting the principles from the Restatement (Third) that "a duty exists whenever an actor has created a risk of harm and that risks arise out of the special relationships contemplated by section 40 encourages simplicity and predictability." *Id*. (emphasis supplied). Adoption of Restatement (Third) also ensures that no-duty rulings would be limited to "exceptional problems of policy or principle [which] promotes judicial transparency, encouraging judges to justify in explicit terms any reasons for declining to impose a duty in a given scenario." *Id*. (citing *Thompson*, 774 N.W.2d at 835; Restatement (Third § 7 cmt. *j*, at 82).

Removing foreseeability from the duty analysis, Defendants are required to justify exempting themselves or strip club owners in general, from the duty to exercise reasonable care. Owners of strip clubs, just as tavern owners, fit squarely within the class of business owners contemplated

by section 40(b)(3). In *Hoyt*, the Iowa Supreme Court cited to the Restatement (Third) for several justifications requiring business owners to exercise due care:

> The relationship identifies a specific person to be protected and thus provides a more limited and justified incursion on autonomy, especially when the relationship is entered into voluntarily. In addition, some relationships necessarily compromise a person's ability to self-protect, while leaving the actor in a superior position to protect that person. Many of the relationships also benefit the actor.

Restatement (Third) § 40 cmt. *h*, at 43. (Emphasis supplied).

While the District Court attempted to distinguish the facts *Hoyt* from the current case, because the District Court continued to focus on whether the Defendants in the current case could foresee the specific harm that eventually occurred to Daulton Holly, the District Court's strained factual distinctions do not hold water. *Thompson* and *Hoyt* make it clear that foreseeability of specific risk is no longer part of the duty analysis in evaluating tort claims, and "instead is to be considered when the fact finder decides whether a defendant has failed to exercise reasonable care." *Hoyt* at 774 (citing *Thompson* at 835). Most importantly, "no-duty rulings should be limited to exceptional cases in which 'an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases.'" *Hoyt*, at 775 (quoting Restatement (Third) of Torts: Liability for

Physical & Emotional Harm § 7(b), at 77 (2010)). "Such reasons of principles or policy justifying departure from a general duty to exercise reasonable care would not depend on the foreseeability of harm in any given case." *Id*. (Emphasis supplied). Accordingly, the District Court's reasoning that the "[Defendants] could have had no conceivable notice of the dangers" by a drunk driver, such as Hauser, is contrary to primary Iowa authority.

Additionally, the strained factual distinctions with *Hoyt* in the District Court's decision are largely based on mistaken application of the facts. First, the District Court was mistaken in finding no nexus between Hauser and the Defendants. The District Court mistakenly stated that Hauser was not a patron of the strip club. This is untrue. Hauser was not merely a passer-by on Raccoon River Drive near the strip club. He was a patron, who after drinking at a tavern in Van Meter, drove his car specifically to the strip club in order to continue drinking there past the normal bar time limits of other taverns. (Deposition of Ronald Hauser at pg. 49-51 & 57; App. 917-1065). It was during this trip to Beach Girls, shortly before the turn from Raccoon River Drive to the long driveway back to the strip club, that Hauser encountered Daulton Holly, and struck him with his vehicle (Autopsy filed 4-16-19 as Attachment H). Mr. Hauser then proceeded into Beach Girls and

continued drinking there until nearly 4:00 A.M. (Deposition of Ronald Hauser at pg. 67; App. 917-1065).

The District Court also attempted to distinguish *Hoyt* by pointing out that it was the defendant tavern in *Hoyt* that supplied to alcohol to both the plaintiff and the assailant. However, the same underlying rationale for imposing duty to tavern owners in *Hoyt* equally applies to owners of strip clubs, especially ones like Beach Girls that serve alcohol, allow patrons to bring in their own alcohol onto the premises, and are open to patrons much later than taverns. Just like taverns, Beach Girls creates a relationship with its patrons that through the sale and consumption of alcohol in their club, compromises the patron's ability to self-protect. This is to the financial benefit of the strip club, who profit from the cover charges they take in, from direct alcohol sales, and from increased services, such as private dances, that are purchased by patrons when their BAC is up and their inhibitions are down.

The District Court was also mistaken in stating that the Defendants "could have no conceivable notice of the dangers that Hauser posed to Holly." (7-15-19 Order Granting Summary Judgment at pg. 6; App. 1086-1094). The Defendants absolutely had notice that their patrons, especially those arriving in the early morning hours, are likely to be intoxicated and

engaged in intoxicated driving. West Des Moines Police Department records confirm that there were several OWI arrests and other drunken driving crashes, both in the parking lot at Beach Girls and on the driveway between Beach Girls and Raccoon River Drive, prior to the night Daulton Holly was killed. (West Des Moines Police Department Reports for 6220 Raccoon River Drive; App. 205-463). Moreover, Defendants' employee, Mr. Kraemer admitted that he understood the severe risks Mr. Holly faced because they had decided he could no longer remain in the strip club and had to leave. (Deposition of Jeremiah Kraemer at pg. 12:2-13:20; 15:4-7; 20:3-10; App. 464-485).

Finally, the District Court was mistaken when it stated that the largest distinction between the current case and *Hoyt* was the fact that the assault in *Hoyt* occurred on the defendant's property. (7-15-19 Order Granting Summary Judgment at pg. 6; App. 1086-1094). *Hoyt* expressly adopts the Restatement (Third) § 40, which makes it clear that the duty to use reasonable care stems from the relationship between the parties, not merely the property lines under some previous landowner duty analysis. *See, Hoyt*, 829 N.W.2d at 776 ("clarify[ing] that a duty of reasonable care applies as a result of these special relationships.") (emphasis supplied).

Regardless, even under duty analysis prior to *Thompson* and *Hoyt*, Iowa Courts have found a duty to use reasonable care in the business-patron relationship outside of the property of the defendant business. *See e.g.*, *Regan v. Denbar*, 514 N.W.2d 751 (Iowa Ct. App. 1994) (finding a fight between patrons in a public alley behind the defendant tavern was foreseeable and therefore should have been submitted to the jury).

The defendants' employee has admitted that he understood that part of his job responsibilities was getting patrons home safe. *See* Deposition of Jeremiah Kraemer at pg. pg. 18:23-19:13; App. 464-485. Mr. Kraemer also clearly understood and appreciated the risks Mr. Holly was exposed to that night. *See id*. at pg. 12:2-13:20; 20:3-10; App. 464-485) (stating, "[i]t's not save for him to be walking out around here with dark clothes on" and agreeing it was not safe for Mr. Holly to be walking in that condition). Such undertaking under the Restatement (Third) Sections 41, 42, 43, and/or 44 would lead to a duty to use reasonable care in the circumstances.

In sum, as defined by the Restatement (Third), *Thompson*, and *Hoyt*, Daulton Holly was clearly a patron of Beach Girls, and accordingly, the Defendants' duty of reasonable care extended to him. The District Court's erroneous duty analysis, considering foreseeability as a factor, amounts to an

incorrect application of Iowa law, which accordingly should be reversed on appeal.

C. Defendants Did Not Act With Reasonable Care

In this case, the Defendants did not act with reasonable care when it took Daulton Holly from the comparative safety inside the strip club to exposing him to the foreseeable dangers outside the premises without any means of making it to safety.

To assess whether the Defendants acted with reasonable care, the Iowa Supreme Court has identified multiple propositions to consider. *See Hoyt*, 829 N.W.2d at 777-78. First, the Restatement (Third) adds that in situations involving section 40 affirmative duties, such as business-patron relationship, Section 3's reasonable care analysis may be applied in determining whether a particular failure to act is unreasonable. *Id*. at 777 (citing Restatement (Third) § 3 cmt. *c*, at 30). Section 3 provides that a person acts negligently if the person does not exercise reasonable care under all the circumstances. *Id*.

Primary factors to consider in determining if the defendants' conduct lacks reasonable care are:

- the foreseeable likelihood that the person's conduct will result in harm;

- the foreseeable severity of any harm that may ensue; and
- the burden of precautions to eliminate or reduce the risk of harm.

Id. at § 3, at 29.

In addition, Section 19's specific application of the Section 3 principles explains that "[t]he conduct of a defendant can lack reasonable care insofar as it foreseeably combines with or permits the improper conduct of the plaintiff or a third party." *Hoyt*, at 778 (citing Restatement (Third) at § 19, at 215) (Emphasis supplied). Section 19 explains that there are situations where the defendant may create or increase the likelihood of injury by a third person. For example, section 19 provides that the defendant's conduct may bring the plaintiff to a location where the plaintiff is exposed to third-party misconduct. Restatement (Third) § 19 cmt. *e*, at 218; *see also*, *Hoyt* at 778. This is precisely what occurred in this case. Furthermore, a strip club is a business, like a tavern, that is an environment that foreseeably brings about the misconduct of a third parties, resulting in an injury to a plaintiff. *See*, *Hoyt* at 778. The foreseeability of the misconduct raises the issue of the appropriate level of care and the issue of whether the harm suffered by the plaintiff is within the range of risks that may make the strip club's conduct negligent in failing to exercise that care. *Id*.

Here, the security guard at the strip club removed the highly intoxicated Daulton Holly from the comparative safety of inside the strip club and placed him into the more dangerous situation outside the building with no safe transportation to leave, where the foreseeable likelihood of harm was substantially increased. From the testimony of Defendant's security guard, it was clear that Mr. Holly was not welcome to remain on the premises after he was removed from the strip club. Defendants' security guard testified that after he removed Daulton Holly from the strip club he told Mr. Holly's co-worker, "Here's the deal. He's intox" – "he's had a little too much. He just needs to go." (Deposition of Jeremiah Kraemer at pg. 12:2-13:20; App. 464-485) (Emphasis supplied). Mr. Kraemer also admitted that Mr. Holly did not have much of a choice about leaving because he could not go back inside. (*Id*. at 16:4-8; App. 464-485).

The substantial risk of harm outside of the strip club is evident from Mr. Kraemer's own admissions and the over 250 pages of police reports responding to that location for a host of criminal activities and risk of physical injury. The police reports show that such foreseeable harms included drunk drivers, physical fights, and otherwise falling down and/or

injuring himself.[3] These foreseeable risks come with the likely result of severe injury, including death. These risks were immediately recognized and appreciated by Defendants' security guard because once Mr. Holly began to walk away from the strip club, the security guard immediately told Mr. Holly's co-worker: "It's not safe for him to be walking out around here with dark clothes on." (Deposition of Jeremiah Kraemer at pg. 12:2-13:20; App. 464-485) (Emphasis supplied).

In contrast, the burden of acting with reasonable care is relatively small when compared to the severity of the likely harm. The security guard testified that Daulton Holly was being docile and non-argumentative with the staff at the strip club. *See* Deposition of Jeremiah Kraemer at pg. 13:21-25; App. 464-485. Given his extremely intoxicated condition, the burden placed on the Defendants' staff would have been as simple as keeping Daulton Holly engaged in small talk for 4-6 minutes outside the strip club,[4] while another staff member phoned the police to respond to the situation of a

[3] The West Des Moines Police Department disclosed over 250 pages of police reports for citations resulting from calls at 6220 Raccoon River Drive for the five-year period between 2012 and 2018. The calls include multiple OWI arrests and other drunken driving crashes, both in the parking lot at Beach Girls and on the driveway between Beach Girls and Raccoon River Drive. *See* Attachment F.

[4] *See* West Des Moines Police Department Records; App 205-463. The WDM police records frequently show response times in the 4-6 minute range to 6220 Raccoon River Drive in the early morning hours between midnight and 4 A.M.

patron with no safe means to leave.[5] Such simple actions could not be characterized as use of force, threat, or deception, to potentially open the strip club up for liability for a false imprisonment claim. *See* Iowa Code § 710.7.

Additionally, the Iowa Supreme Court in *Hoyt* looked to section 19 of the Restatement (Third), which illustrates scenarios where an actor's knowledge of the risk of negligent or intentional third-party conduct may provide a basis for liability as follows:

> [A]n actor engaging in certain conduct can foresee a considerable risk, either on account of the general prospect of other persons' negligence during the relevant frame of time and place, or because the actor has knowledge of the propensities of the particular person or person who are in the position to act negligently.

Restatement (Third) § 19 cmt. *f*, at 219. Indeed, section 19 confirms that the risk rendering a defendant's conduct negligent may be the "risk that potential victims will act in ways that unreasonably imperil their own safety." *Id*. § 19 cmt. *b*, at 216; *Hoyt*, at 779 (emphasis supplied). For example, taverns and strip clubs are business venues in which alcohol-fueled

[5] *See* Report of Mr. Patrick Murphy at pg. 7 ¶ 7; App. 530-916. Mr. Murphy reviewed the nearly 400 calls for service from the West Des Moines Police Department to 6220 Raccoon River Drive. He noted that within those calls are numerous occasions where police were called due to disorderly patrons and where either the responding officer took an intoxicated patron to their residence or a cab was called to pick them up.

disturbances causing injury and even death are known to occur. *See e.g., Delgado v. Trax Bar & Grill*, 36 Cal.4th 224, 30 Cal.Rpt.3d 145, 113 P.3d 1159, 1169 (2005) (proprietor who serves intoxicating drinks must exercise reasonable care to protect patrons from injury at hands of fellow guests); *Carey v. New Yorker of Worcester, Inc.*, 335 Mass. 450, 245 N.E.2d 420, 422 (1969) ("commotion and boisterous behavior and continued drinking" may be "warnings of trouble"); *Priewe v. Bartz*, 249 Minn. 488, 83 N.W.2d 116, 120 (1957) (presence of an intoxicated person upon the premises "immediately exposes the proprietor to the hazards of liability resulting from the unpredictable conduct of such person"); *Peck v. Gerber*, 154 Or. 126, 59 P.2d 675, 678 (1936) ("any place selling intoxicants for immediate consumption is potentially a disorderly place unless properly policed and patrolled."). In this context, in *Hoyt*, the Iowa Supreme Court found that while Hoyt may have initiated the conflict that led to the assault upon him, that fact could not serve as the basis for summary judgment that the Defendant acted reasonably under the circumstances. *Hoyt*, 829 N.W.2d at 780.

Here, the security guards determined that Daulton Holly was too intoxicated to remain inside their premises. Conversely, they allege that Daulton Holly had to make his own arrangements to safely remove himself

from the situation they placed him in outside the strip club. This runs directly contrary to the Restatement (Third) section 19 statement that the risk rendering a defendant's conduct negligent may be the "risk that potential victims will act in ways that unreasonably imperil their own safety." *Id*. § 19 cmt. *b*, at 216; *Hoyt*, at 779 (emphasis supplied); *see also*, *Hoyt* at 782 (finding Plaintiff-Hoyt's actions instigating the fight did not relieve the defendant of its duty to use reasonable care. Such consideration is more appropriate in the comparative fault analysis by the fact finder). Just as in *Hoyt*, whatever allegedly negligent behavior Defendants allege Daulton Holly engaged in cannot serve as a basis for summary judgment, but rather should be left for the finder of fact to determine applying the relevant breach and scope-of-liability analyses than to a court applying summary judgment rules.

Nor is this a case wherein Plaintiff is asking that the Defendants be required to affirmatively act as a rescuer of an individual who finds himself in a dangerous situation solely of his own making. Instead, it was the Defendants' choice to remove Daulton Holly from the relative safety of being intoxicated inside their place of business and forced him in his highly intoxicated state out into the dangers the Defendants knew existed. Defendants made this choice to place Mr. Holly in that situation and ran the

risk that in his highly intoxicated state, he may act in ways that imperil his own safety. *See*, *Hoyt* at 779.

In this case, the record clearly shows that the Defendants did not use reasonable care in its interactions with Daulton Holly, especially in light of the relative high risk of harm versus the low burden of taking reasonable common sense precautions in the situation. The Defendants could have exercised reasonable care by any of the following: (1) calling a cab for Daulton Holly despite his intoxicated denial that he wanted a cab, or (2) calling the police when Daulton Holly refused a cab to allow them to either arrest him for public intoxication or otherwise arrange a safe ride for him back to his hotel or (3) walking with Daulton Holly until police could arrive on the scene. *See e.g., Getson v. Edifice Lounge, Inc.*, 117 Ill.App.3d 707, 72 Ill.Dec. 826, 453 N.E.2d 131, 135 (1983) (finding defendant tavern's action in calling the police in response to a fight was reasonable action; *Regan v. Denbar, Inc.*, 514 N.W.2d 751, 753 (Ct. App. 1994) (finding defendant tavern's failure to call the police should have been considered evidence it failed to use reasonable care and reversing a directed verdict for the defendant). Instead, Defendants left Daulton Holly in a worse position than when they found him and exposed him to severe risk of foreseeable harm that they were actually aware existed.

Plaintiffs acknowledge that Beach Girls' duty in this case is not a strict or absolute liability, but instead expects that they would have fulfilled its duty by employing quick, common sense interventions. The relatively small burden of the quick interventions listed above pales in comparison to the dire and deathly consequences of the known risks that waited should the Defendants allow its highly intoxicated patrons to wander off down the road in the middle of the night.

Under the facts of this case, and given the relevant context of a strip club and the conduct known to occur there, the Plaintiffs respectfully request that the court deny Defendants' request that it rule that it acted reasonably as a matter of law. The question of what reasonable care required under these circumstances is for the jury; it is only in exceptional cases that such questions may be decided as matters of law. Iowa R. App. P. 6.904(3)(j). Given the factual issues here, and the preference for the jury to assess reasonable care, and the clear guidance of prior Iowa case law, the Defendants clearly did not exercise reasonable care, and summary judgment should have properly been denied.

D. The Foreseeable Risks Included that Daulton Holly Would Encounter an Intoxicated Driver Either Leaving or Coming to Beach Girls.

In special relationship cases, an actor's scope of liability may include harms that are different from the harms risked by the actor's failure to exercise reasonable care to ameliorate or eliminate risks that the special relationship requires the actor to attend to. Restatement (Third) § 29 cmt. *r*, at 511. "In other words, as a result of the bar-patron relationship, a range of risks may arise for which the bar has a duty of reasonable care, and in addition, a separate range of risks may arise to the extent the bar's conduct foreseeably combines with or permits the improper conduct of a third party." *Id*. (Emphasis supplied). With these principles in mind, when courts consider the scope-of-liability question on summary judgment, the Iowa Supreme Court has explained, the district court must:

> [I]nitially consider all of the range of harms risks by the defendant's conduct that the jury could find as a basis for determining [the defendant's] conduct tortious. Then, the court can compare the plaintiff's harm with the range of harms risks by the defendant to determine whether a reasonable jury might find the former among the latter.

Thompson, 774 N.W.2d at 838 (quoting Restatement (Third) § 29 cmt. *d*, at 496). The Iowa Supreme Court made it clear that "[w]here there are contending plausible characterizations of the range of reasonably foreseeable

harms arising from the defendant's conduct leading to different outcomes and requiring the drawing of an arbitrary line, the case should be left to the judgment and common sense of the fact finder. *Id*. Furthermore, *Hoyt* makes it clear that fairness concerns are best left to the fact finder applying the relevant standards in breach and scope-of-liability analysis and with comparative fault law, than to a court applying summary judgment rules. *Hoyt*, 829 N.W.2d at 782.

Here, the District Court did not expressly examine the scope of liability question because it had mistakenly used the foreseeability factor, contrary to *Thompson* and *Hoyt*, to find no duty was owed. *See* 7-15-19 Order Granting Summary Judgment at pg. 7; App. 1086-1094.

In this case, given the criminal history at the strip club, there was a large range of risks that arose when the Defendants choose to remove Daulton Holly from inside the premises for being too intoxicated but expected him to make safe arrangements for himself to get transportation back to his hotel. This range of risks included running into drunken drivers, getting into a physical fight with others in the parking lot, or otherwise becoming injured from a fall when left to on his own in that highly intoxicated condition. The recent police records and admissions by Mr. Kraemer made it clear that all of these risks were in the realm of

possibilities. It was also foreseeable that the defendants' actions would combine with negligent acts by third parties, such as intoxicated drivers. This risk was squarely within the scope of liability presented by the risks brought on by the Defendants' choice to remove Daulton Holly from the strip club.

While Defendants' alleged that Daulton Holly was highly intoxicated voluntarily, consideration of this fact is better left to fact finders applying (1) the relevant breach and scope-of-liability analysis, and (2) comparative fault law than to a court applying summary judgment rules. *See, Hoyt* at 782 (citing *Mulhern v. Catholic Health Initiatives*, 799 N.W.2d 104, 121 (Iowa 2011); Restatement (Third) § 29 cmt. *s*, at 511).

In sum, Plaintiffs showed the District Court that a reasonable fact finder could conclude that Holly's harm was within the appropriate scope of liability for the Defendants. Accordingly, Defendants were not entitled to summary judgment as a matter of law.

CONCLUSION

Based on all the authorities cited above, Plaintiffs showed the District Court that Defendants' owed a duty of care to Daulton Holly on the night he was killed by an intoxicated driver who was en-route to the Defendants' strip club. The District Court's analysis of whether a duty was owed was

fundamentally flawed from the outset because the District Court erroneously considered foreseeability as a factor to determine duty, which was expressly rejected in *Thompson v. Kaczinski*, 774 N.W.2d 772 (2013).

However, the controlling authority, *Hoyt,* makes it clear that Defendants' duty arose out of their special relationship with Daulton Holly and their undertaking of his care. It was Defendants' choice to remove Daulton Holly from the comparative safety of inside the strip club for being too intoxicated, and expose him to all of the foreseeable risks and dangers outside the strip club at 1:30 A.M knowing that in his intoxicated state, Daulton Holly may not be capable of making a decision in his best interest.

In sum, Plaintiffs showed the District Court that Defendants owed a duty of care and that they failed to exercise reasonable care under the circumstances of the case. The District Court's erroneous duty analysis amounts to an incorrect application of Iowa law, which accordingly should be reversed on appeal.

REQUEST FOR ORAL SUBMISSION

Plaintiffs-Appellants respectfully request the opportunity to be heard in oral argument on the submission of this appeal.

DATED this 10th day of December, 2019.

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CERTIFICATE OF COMPLIANCE

I. This brief complies with the type-volume limitations of Iowa R. App. P. 6.903(1) or (2) because this brief contains 10,083 words, excluding parts of the brief exempted by Iowa R. App. 6.903(1)(g)(1) (table of contents, table of authorities, statement of the issues, and certificates).

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Times New Roman, size 14 point font, in plain style except for case names and emphasis.

By: /s/ Tiffany R. Wunderlin_____