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 REPLY FINAL BRIEF

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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' Reply Final Brief 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' Reply Final Brief.

By: /s/ Tiffany R. Wunderlin
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INTRODUCTION

Nothing in the Defendants' response brief corrects the fundamental error in the District Court's analysis of duty in this case. While Defendants' brief focuses on prior case law outlining premises liability, the fact remains that the District Court clearly erred when it considered foreseeability as the a factor to determine duty, which is a factor expressly rejected in *Thompson v. Kaczinski*, 774 N.W.2d 829 (2009). *Thompson*, and subsequent cases, including *Hoyt v. Gutterz Bowl & Lounge*, *L.L.C.*, 829 N.W.2d 772 (2013), make it clear that every Iowan, whether property owner or not, possesses a duty to exercise reasonable care when their conduct creates a risk of physical harm. *See Thompson*, 774 at 834 (adopting the duty analysis of the Restatement (Third) of Torts that "[a]n actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm"). In other words, Iowa tort law requires that people take responsibility for their own actions and the dangerous situations those actions create.

Here, the question is whether Defendants failed to use reasonable care in their decision and conduct removing Mr. Holly from their club, with the knowledge that their conduct exposed Mr. Holly to third-party misconduct. *See Hoyt*, 829 N.W.2d at 778 (citing Restatement (Third) § 19 cmt. e, at 218

("Defendant's] conduct may bring the plaintiff to a location where the plaintiff is exposed to third-party misconduct.")). The undisputed evidence is that Defendants' employee, Mr. Kraemer, clearly understood and appreciated the severity of the risks faced by Mr. Holly that night once Defendants removed him from the safety of the club and demanded that he leave. Whether Mr. Kraemer acted with reasonable care in response to his knowledge of those risks, is a question for the jury, not a foreseeability determination for the District Court to decide in its analysis of duty. *See id*., 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, and Defendants' arguments on appeal do not rehabilitate the District Court's erroneous analysis. Accordingly, the District Court's decision granting summary judgment for lack of duty should be reversed on appeal.

ARGUMENT

A. This is Not Simply a Premises Liability Claim. Defendants-Appellants Owed a Common Law Duty to Exercise Reasonable Care.

On preliminary note, Plaintiffs-Appellants' claims were never based on premises liability, but instead are based on common law negligence. Plaintiffs' petition shows that their claims against Beach Girls resound in simple common law negligence. Specifically, Count II asserts Plaintiffs' general negligence claims against Beach Girls, stating:

> 24. The negligent acts of the Beach Girls and/or J.P. Parking Inc. and/or James E. Petry employees, staff, agents, and/or officers in ejecting Daulton Holly from its premises when he was clearly too intoxicated to drive or otherwise safely make it back to his hotel without assistance was a direct and proximate cause of the damages sustained by the decedent, Daulton Holly.
>
> 25. Beach Girls and/or J.P. Parking Inc. and/or James E. Petry is vicariously liable for the negligent acts of its employees, staff, agents, and/or officers who were negligent in ejecting Daulton Holly from its premises.
>
> 26. Beach Girls and/or J.P. Parking and/or James E. Petry is vicariously liable for the negligent acts of employees, staff, agents, and/or officers under the doctrine of respondeat superior, corporate liability, and ostensible agency.

(Petition at pg. 6 ¶¶ 24-26; App. 7-15).

Defendants' brief extensively relies on premises liability law. However, limiting its analysis to premises liability cases incorrectly provides

this court with only a limited view of the whole picture of duty analysis under current Iowa common law negligence law.

The seminal case on duty for common law negligence in Iowa is currently, *Thompson v. Kaczinski*, 774 N.W.2d 829 (2009). *Thompson* makes it clear that Iowa follows the Restatement (Third) of Torts view on duty. Specifically, for common law duty, the Restatement (Third) of Torts adopts the following duty standard:

> An actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm.

Restatement (Third) of Torts: Liab. For Physical Harm § 7(a) at 90. This general duty of reasonable care applies in most cases and thus courts "need not refer to duty on a case-by-case basis. *Thompson*, at 834-35 (quoting Restatement (Third) of Torts: Liab. For Physical Harm § 7(a) at 90). Instead, only in exceptional cases, the general duty to exercise reasonable care can be displaced or modified. *Id*. (citing Restatement (Third) of Torts: Liab. For Physical Harm at § 6 cmt f., at 81-82).

Thompson explains the correct analysis for finding no duty in such exceptional cases as follows:

> An exceptional case is one in which "an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases." *Id*. at § 7(b), at 90. In such an exceptional case, when the court rules as a matter of

> law that no duty is owed by actors in a category of cases, the ruling "should be explained and justified based on articulated policies or principles that justify exempting [such] actors from liability or modifying the ordinary duty of reasonable care." *Id*. § 7 cmt. j, at 98. Reasons of policy and principle justifying a departure from the general duty to exercise reasonable care do not depend on the **foreseeability** of harm based on the specific facts of a case. *Id*.

Thompson, 774 N.W.2d at 835 (emphasis supplied). Accordingly, *Thompson* moves the assessment of foreseeability of a risk to the fact finder, to be considered when the jury decides if the defendant failed to exercise reasonable care. *Id*.

Defendants' motion for summary judgment solely alleged that Plaintiffs' claims failed as a matter of law because Defendants allegedly owed no legal duty to Daulton Holly. (Defendants' Motion for Summary Judgment at pg. 1-2; App. 491-493; Defendants' Brief in Support of Summary Judgment at pg. 4-9;App. 494-505).

Rather than applying the general duty standard adopted in *Thompson*, and examining whether articulated policies and principles justify exempting Defendants from liability or modifying the ordinary duty of reasonable care, the District Court erroneously examined foreseeability to determine no duty existed. (7-15-19 Summary Judgment Order at pg. 4-5; App. 1086-1094). This foreseeability factor was expressly overruled in *Thompson*. *Id*. at 835.

Furthermore, despite the Defendants' and the District Court's emphasis that Daulton Holly's death occurred off of the Defendants' property, *Thompson* makes it clear that the general duty of care can apply beyond property borders. For example, in *Thompson*, the defendants made the decision on their property to disassemble a trampoline and leave the component parts unsecured in the yard. *Thompson*, 774 N.W.2d at 831. That decision on the property ultimately lead to defendants causing injury to Thompson off of their property when he struck the trampoline in the roadway.

Likewise, here in the present case, the Defendants, through its employees, primarily Mr. Kraemer, made the choice on its property that Daulton Holly was no longer welcome to stay because he was too intoxicated and had to leave. (Deposition of Jeremiah Kraemer at pg. 12:2-13:20; App. 464-485). Importantly, Mr. Kraemer admitted that Mr. Holly did not have a meaningful choice about leaving because he could not go back inside, which undisputedly contradicts Defendants' repeated claims that Daulton Holly "voluntarily" left the premises. (*Id*. at pg. 15:4-7; App. 464-485) (*see also* Section C, *infra,* for discussion of how Daulton Holly did not "voluntarily" leave the premises). This decision by the Defendants brought Daulton Holly to the location where he was exposed to third-party

misconduct. *See Hoyt*, 829 N.W.2d at 778 (citing Restatement (Third) § 19 cmt. e, at 218).

Accordingly, *Thompson* and *Hoyt* show that foreseeability is no longer a factor in duty analysis under Iowa law and that the general duty to use reasonable care when an actor's conduct creates a risk of physical harm extends beyond property boundaries. The District Court's reliance on the foreseeability factor and limitation of general duty to within the Defendants' property boundary is clearly erroneous and should, respectfully, be reversed.

B. Defendants Have Not Shown Why A Strip Club That Allows Patrons to Drink on Its Premises Should Be Exempted from General Duty Requirements.

Under the Restatement (Third) analysis of duty, Defendants are required to justify exempting themselves or strip club owners in general, from the duty to exercise reasonable care. 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). 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); *Priewe v. Bartz*, 249 Minn. 488, 83 N.W.3d 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") (both cases cited with approval in *Hoyt*, 829 N.W.2d at 779).

Owners of strip clubs, just as tavern owners, fit squarely within the class of business owners contemplated by section 40(b)(3). While Defendants' brief asserts that it does not "serve" alcohol in an attempt to imply they should be held to a lower standard than tavern owners, this is a half-truth at best. The Defendants' strip club is a "BYOB" establishment that allows its patrons to bring in alcohol and consume it on the premises. (Deposition of James Petry pg. 100:20-101:5; App. 48-195). Mr. Petry, the owner of the defendant corporations, also admitted that part of the nature of the defendants' business is that people are consuming alcohol. (*Id*. at 118:1-5; App. 48-195).

In *Hoyt*, the Iowa Supreme Court cited to the Restatement (Third) for several justifications requiring business owners, including 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). The same justifications that existed for applying general duty to tavern owners based on their special relationship with its patrons should apply to BYOB establishments. Defendants have offered no argument that would exclude them from this category.

C. Daulton Holly Did Not "Voluntarily" Leave the Defendants' Property.

Both the Defendants and the District Court rely heavily on the alleged fact that Daulton Holly "voluntarily" left the Defendants' premises to argue that any duty that had existed then ceased. As discussed above, Iowa's general duty to use reasonable care applies beyond mere property boundaries. (*See* Section A, *supra*). Regardless, when compared to the facts of *Hoyt*, it is clear that the actions of the Defendants in this case removing

Daulton Holly from their club have no material distinction to the actions of the defendants in *Hoyt*. As such, the Defendants and District Court's attempted distinction of *Hoyt* is misplaced and erroneous.

In *Hoyt*, the defendant's employee may have simply requested that Hoyt and his assailant leave the bowling alley. 829 N.W.2d 772 at 773. In *Hoyt*, the Iowa Supreme Court noted that the parties had different recollections of how exactly the patrons were requested to leave. The defendants' employee's account suggested that he escorted the men to their trucks in the parking lot and then returned to the kitchen. *See Hoyt*, 829 N.W.2d at fn. 1. The plaintiff, Hoyt, and the third-party tortfeasor, Brittain, instead recalled that after defendant's employee told them to leave, they exited the tavern and walked themselves to their vehicles. *Id*. Regardless, whether the patrons in *Hoyt* walked out of the bowling alley on their own ability after they were asked to leave or whether the Defendant's employee escorted them to their vehicles in the parking lot, the distinction between these factual scenarios was not a material difference for the Iowa Supreme Court of Appeals. *See Hoyt*, 829 N.W.2d at fn. 1. Similarly, it is a distinction without a difference here.

Daulton Holly no more "voluntarily" left the Defendants' premises than the patrons in *Hoyt*. The Defendants' security guard described the scene

when he and another security guard decided to remove Daulton from the strip club as follows:

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."

(Deposition of Jeremiah Kraemer at pg. 12:2-13:20; App. 464-485) (emphasis supplied). Moreover, Mr. Kraemer admitted that Mr. Holly did not have a meaningful choice about leaving because he could not go back inside. (*Id*. at pg. 15:4-7; App. 464-485).

Mr. Petry, the owner of the Defendant corporations, also confirmed that when patrons are ejected, they are expected to completely leave the premises.

Q. Okay. What happens when a security person, slash, bouncer ejects someone out of Beach Girls in the wintertime?
A. Well, as I said, I mean, if they're acting inappropriate to the rules, they're just asked to leave the property. That's …
Q. And once they are outside the – the – the physical door of the establishment, is there any consideration for weather conditions or anything like that?
A. Well, they would still be on the property. They would still be asked to leave.
Q. So are they – when they are ejected physically by security personnel, are they taken essentially out past the end of the parking lot or to their vehicle, or how does that go?
A. Usually out the doors from where the people reside inside and are told to leave.
Q. All right. And what if they stay? I mean, stay outside, but – but still on the premises.
A. Well, they're asked to leave the whole property. So, I mean, if they're not working towards that goal, then, you know, we would have an issue.

(Deposition of James Petry at pg. 105:21-106:20; App. 48-195)(emphasis supplied). As shown in the map provided in the factual section of Plaintiff-Appellant first proof brief, to force a patron entirely off the premises is to for the patron into the middle of nowhere, a virtual no man's land with miles of country road between the patron and any other business establishment that would be open at 1:30 A.M. *See* Appellants' Proof Brief at pg. 12.

Accordingly, just as in *Hoyt*, it was the Defendants' decision that forced Daulton Holly into a situation wherein Defendants undisputedly were

aware of the danger,[1] and Daulton Holly was injured by the tortious actions of a third-party. To allege that Daulton Holly "voluntarily" left the premises and that such action justifies finding no duty is a misapplication of *Hoyt* to the facts of this case.

D. The Special Relationship Between Defendants and Daulton Holly Required Defendants to Act Reasonably Under the Circumstances.

Plaintiffs are not asserting that Defendants owed a duty to Daulton Holly that lasted into perpetuity. It is undisputed that Daulton Holly was a patron at the Defendants' strip club. As a patron, Defendants owed him a duty based on that special relationship under the Restatement (Third) of Torts, section 40, as adopted in *Hoyt*. Defendants do not dispute this argument either.

Under the general requirements defining special relationships in section 40, when a patron truly decides on their own volition voluntarily to leave the business premises, such as when you leave a grocery store because you have finished purchasing your groceries, then yes, the special relationship between the business-owner and its patron likely ends.

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[1] Defendants' employee admitted that he knew it was not safe for Daulton Holly to leave the premises on foot, at night, in dark clothing. Deposition of Jeremiah Kraemer at pg. 12:2-13:20; App.464-485 ("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.').

However, as shown above and argued to the District Court, those are not the facts of this case.

In this situation, the question of this case becomes whether the defendant business-owner can unilaterally decide to remove a patron against his will, and in doing so, directly force the patron into a situation that the defendant business-owner actually knows is dangerous and is a danger that the patron would not be in but for the choice of the business-owner. A finding of no duty in this situation flies in the face of the principles the Restatement (Third) of Torts is based upon and contrary to its basic tenet that "an actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm." Restatement (Third) of Torts at §7(a) at 90. (quoted and adopted in *Thompson*, 774 N.W.3d at 834).

Here, Defendants' action in forcing Daulton Holly to completely leave its premises created the risk that he would be harmed in a number of ways, including the tortious acts of third parties, such as drunk drivers like Mr. Hauser. Iowa specifically recognizes 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*, 829 N.W.2d at 778.

Section 19 of the Restatement (Third) of Torts sets forth examples of situations where the defendant may be negligence because it creates or increases the likelihood of injury by a third person:

> [T]he defendant's conduct … may bring the plaintiff to a location where the plaintiff is exposed to third-party misconduct; or that conduct may bring the third party to a location that enables the third party to inflict harm on the plaintiff; or the defendant's business operations may create a physical environment where instances of misconduct are likely to take place[.]

Hoyt, at 778 (quoting Restatement (Third) § 19 cmt. e, at 218). Section 19 of the Restatement (Third) also 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 person's negligence during the relevant frame of time and place, or because the actor has knowledge of the propensities of the particular person or persons who are in a position ot act negligently.

Hoyt, at 779 (quoting Restatement (Third) § 19 cmt. f, at 219).

Here, Defendants cannot claim that the injury to Daulton Holly was unforeseeable, because it is undisputed their employee appreciated the risk and expressed that risk to Mr. Holly's companion. (Deposition of Jeremiah Kraemer at pg. 12:2-13:20; App. 464-485) ("It's not safe for him to be

walking out around here with dark clothes on"). Defendants' duty of reasonable care applied, just as Gutterz's duty of care applied in *Hoyt*, "regardless of the source of the risk." *Id*. at 779. The duty applied to risks arising from Daulton Holly's conduct, as well as those created by a third party's conduct, whether innocent, negligent, or intentional, just as in *Hoyt*. *Id*. Indeed, section 19 confirms that the risk rendering a defendants' conduct negligent may be the "risk that potential victims will act in ways that unreasonably imperil their own safety." *Id*. (quoting Restatement (Third) of Torts § 19 cmt. b, at 216).

Overall, *Hoyt* shows that the Defendants cannot take an extremely vulnerable patron from a place of relative safety and place him in a more dangerous situation without exposing themselves to liability. Simply put, Defendants cannot put someone into a worse situation than they were in and then claim no duty to act despite undisputedly knowing the risks and failing to act in any way whatsoever. To do so would essentially allow defendants who have a special relationship with a patron to force the patron to walk the proverbial plank into a sea of dangers – dangers the defendant is undisputedly aware of and dangers that the vulnerable patron may not be able to appreciate or contend with because of their state.

Regardless, the question of what reasonable care required under these circumstances is for the jury to determine. It is only in exceptional cases that such questions may be decided as matters of law. Iowa R. App. 6.904(3). Given the competing facts in this case, and the court's preference for the jury's assessment of reasonable care, it was error for the District Court to conclude Defendants conduct constituted reasonable care as a matter of law.

E. Defendants' Version of the Facts Are Disputed

Defendants assert that the facts of this case are "simple and straightforward" but that could not be farther from the truth. The difference in the factual sections presented by both parties shows the fundamental disagreement between them on what the material facts of this case truly are.

Moreover, the only people who were present at the time of Daulton Holly's death, were Daulton Holly and Ronald Hauser. Ronald Hauser has no recollection of actually striking Daulton Holly or where that occurred. (Deposition of Ronald Hauser at pg. 109:1-4; App. 917-1065). Despite absence of any first hand account of how the crash between Mr. Hauser and Daulton Holly occurred, Defendants' briefs assert that Daulton Holly must have been laying in the road, passed out due to his intoxication, when he was

struck by Mr. Hauser due to the damage on Mr. Hauser's vehicle. This is pure speculation.

Given the physical evidence, it is equally as likely that Daulton Holly could have been startled by the lights of Mr. Hauser's vehicle, fallen to the ground, and then be struck by Mr. Hauser's vehicle. This fact pattern would be consistent with the observations of Dr. Henry Nipper, a toxicologist and expert witness disclosed by the Plaintiffs to examine 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 (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).

In sum, Defendants' assertion that the facts of this case are simple and undisputed, is simply not true.

CONCLUSION

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, of *Thompson* and *Hoyt,* makes it clear that Defendants' had a general duty to use reasonable care that arose out of their special relationship with Daulton Holly. Iowa authority shows that the general duty applies regardless of property boundaries. It was the 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. Whether that was a reasonable choice under the circumstances is more properly a jury determination.

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 in the face of undisputedly knowing the risks. The District Court's erroneous duty analysis amounts to an incorrect application of Iowa law, which accordingly should be reversed on appeal.

Dated this 10th day of December, 2019.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on December 10, 2019, I electronically filed the foregoing Reply Proof Brief with the Clerk of the Supreme Court by using the Iowa Electronic Document Management System, which will send notice of electronic filing to the following. Per Rule 16.317(1)(a), this constitutes service of the document for purposes of the Iowa Court Rules.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Iowa R. App. P. 6.903(1) or (2) because this brief contains 5,116 words, excluding parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1) (table of contents, table of authorities, statement of 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 expect for case names and emphasis.

By: *Tiffany R. Wunderlin*