

IN THE SUPREME COURT OF IOWA

CASE No. 19-1349

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

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, DISTRICT COURT JUDGE

**PLAINTIFFS-APPELLANTS RESISTANCE TO DEFEDANT-
APPELLEE'S APPLICATION FOR FURTHER REVIEW OF THE
IOWA COURT OF APPEALS DECISION FILED AUGUST 5, 2020**

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Questions Presented for Review

1. Whether the Court of Appeals was correct in reversing the district court's grant of summary judgment after the district court included a foreseeability factor to determine that the Defendant owed no duty to the Plaintiff-decedent.

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Statement Opposing Further Review

Defendant-Appellee's Application fails to satisfy any grounds for further review. According to Iowa Rule of Appellate Procedure 6.1103(1)(b), an application for further review *shall* allege precisely that the Court of Appeals either (1) entered a decision in conflict with a decision of this court or the court of appeals on an important matter (2) decided a substantial question of constitutional law or an important question of law that has not been, but should be, settled by the supreme court, (3) decided a case where there is an important question of changing legal principles, or (4) the case presents an issue of broad public importance that the supreme court should ultimately determine. Defendant concedes that the first ground for review is not met and states that grounds (2), (3), and (4) have all been satisfied. Not so.

The Court of Appeals' decision follows this Court's decision in *Thompson v. Kaczinski*, 774 N.W.2d 829, 838–39 (Iowa 2009), which adopted the Restatement (Third's) approach of how to determine whether a duty was owed in a negligence claim. The Restatement (Third) and *Thompson* expressly reject consideration of foreseeability in duty analysis. The question of duty was further developed in *Hoyt v. Gutterz Bowl & Lounge, LLC*, 829 N.W.2d 772, (Iowa 2013). No constitutional argument for

the question is presented by the Defendant-Appellee. This Court has ruled on the precise question of how to analyze whether a duty is owed, which is the only question presented to the Court of Appeals. If the Court of Appeals had upheld the district court's decision, the holding would be in direct contradiction of this Court's holdings in *Thompson* and *Hoyt*.

Table of Authorities

Cases

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Brief

I. Factual Background

This action arose on the night of August 22, 2015, when Plaintiff-decedent Daulton Holly (“Holly”) and his co-worker, Jordan Wills arrived via taxicab at Beach Girls. While at Beach Girls, employees witnessed Holly become increasingly more intoxicated. (Deposition of Jeremiah Kraemer, at 7:15-8:3; App. 464-485). At a point where Beach Girls employees felt that Holly was too intoxicated, Holly was told to leave without having a choice of returning inside of the establishment. (*Id.* at pg. 15:4-7; App. 464-485). A Beach Girls employee claims that he attempted to call Holly a cab, but that Holly, again extremely intoxicated, refused. (*Id.* at pg. 19:20-21; App. 464-485). At that time, the Beach Girls employee watched Holly walk down the driveway towards Raccoon River Drive. (*Id.* at pg. 18:4-17; App. 464-485). The employee was aware of the dangers facing Holly after being required to leave from Beach Girls on his own, while extremely intoxicated, in the middle of the night. (*Id.* at pg. 19:22-20:2; App. 464-485). The employee described that Holly was dressed in primarily all black clothes, that the road on which he left on was poorly lit, and that he thought it was not safe for Holly to be walking in his extremely intoxicated state. (*Id.* at pg. 19:22-20:2; App. 464-485).

Security camera footage from Beach Girls shows that Holly walked out of view at 1:29 A.M. A 911 call at 2:11 A.M. reported that a body, later identified as Holly was found face down on the 6400 block of Raccoon River Drive, just beyond the long Beach Girls driveway.

II. Procedural History

This action was brought against Defendants on August 18, 2017. Plaintiffs brought claims of negligence and loss of consortium against Defendants. Defendants filed a Motion for Summary Judgment on March 29, 2019. The district court, in its holding, improperly determined that Defendants owed no duty to Holly, and, thus granted Defendants' motion for summary judgment. (7-15-19 Order; App. 1086-1094). ("foreseeability must be evaluated in the relevant frame of time and place"). Plaintiffs' appealed this ruling. The Court of Appeals reversed the district court's holding because the district court's decision improperly considered foreseeability to ultimately (and incorrectly) determine that no duty existed. Defendants have now filed an Application for Further Review of the Court of Appeals' decision.

III. The Court of Appeals properly reversed the district court's holding that no duty was owed to Holly.

Though Defendant has propounded various arguments of how it claims the Court of Appeals erred —largely claiming that the Court of Appeals ignored questions of law and narrowed the scope of the district court's holding— the court's ruling was proper for three reasons. (1) First, in a case of general negligence, a duty of reasonable care is recognized at common-law. This duty is found in the Restatement and has been adopted by the Supreme Court of Iowa. *Thompson*, 774 N.W.2d at 834. Further, the Supreme Court has held that this duty extends to businesses where alcohol is consumed, such as Beach Girls. *Hoyt*, 829 N.W.2d at 777. (2) Second, the scope of the district court's holding was not improperly narrowed. Whether a duty was owed to Holly was the sole issue of law decided in the district court's holding of summary judgment, and, thus was the sole issue to be decided on appeal. (3) Lastly, the Court of Appeals recognized that the district court improperly used a foreseeability analysis in determining the question of whether a duty was owed, a test which has been expressly rejected by this Court. See *Thompson*, 774 N.W.2d at 834; see also *Hoyt*, 829 N.W.2d at 777. If the Court of Appeals had not reversed this decision, it would have directly contradicted this Court's precedent.

A. The Claim at issue is not treated as one of premises liability, but of general negligence.

Defendants pose this action as solely a premises liability claim, where it has been plead, and further discussed in Plaintiffs' briefings, that Defendants are negligent under common law. Just as in *Thompson* and *Hoyt*, the death of Holly has led Plaintiffs to bring, among others, a claim of negligence against Defendants. This claim is derived from Defendants breaching their common law duties to exercise reasonable care. *Thompson*, 774 N.W.2d at 834. This duty, as expressed in the Restatement (Third) and adopted by this Court, applies to all actors "when the actor's conduct creates a risk of physical harm." *Id.* citing Restatement (Third) of Torts: Liab. for Physical Harm § 7(a), at 90. The effect of the adoption of the Restatement is further explained in *Thompson*:

Thus, in most cases involving physical harm, courts "need not concern themselves with the existence or content of this ordinary duty," but instead may proceed directly to the elements of liability set forth in section 6. The general duty of reasonable care will apply in most cases, and thus courts "can rely directly on § 6 and need not refer to duty on a case-by-case basis."

Id. citing Restatement (Third) of Torts: Liab. for Physical Harm § 7(a), at 90.

The duty of reasonable care was applied particularly to businesses where alcohol is consumed in *Hoyt*, where the Supreme Court of Iowa held that the Restatement (Third) expressly intended to include this class within those owing a duty of care. 829 N.W.2d at 777. (“Tavern owners fit squarely within the class of business owners contemplated by section 40(b)(3) [of the Restatement]. Section 40 enumerates several justifications for requiring business owners to exercise due care”). This duty was found, not under a standard of premises liability, but one of general negligence. *Id.* at 775. (“[In *Thompson*] we adopted the general duty formulation of section 7 of the Restatement (Third)”).

B. The Court of Appeals, in its ruling, properly reviewed the sole issue of law decided by the district court, that is whether a duty to Holly existed.

Defendant alleges that the Court of Appeals narrowed the scope of the district court’s holding. Not so. The district court, in grant of summary judgment, simply addressed the issue of whether Holly was owed a duty. (7-15-19 Order; App. 1086-1094). (“The issue presented in Movants’ Summary Judgment Motion is whether they owed Daulton Holly (“Holly”) a duty of care, and if so, to what extent.”). The Court of Appeals correctly reversed the ruling as contradictory to this Court’s precedent.

1. Further Review is Not Warranted Because this is not a case of broad public importance. It changes no legal principles and applies established Supreme Court precedent. (6.1103(b)(4)).

As the sole question of law decided by the district court, the Court of Appeals properly recognized that the district court's analysis of whether Holly was owed a duty was conducted using pre-*Thompson* factors, including foreseeability of harm. If the Court of Appeals were to broaden the scope of the district court's decision—as the Defense wishes them to—to include all of the factors that it considered, the court would be deciding a question of fact, not one of law. “The assessment of the foreseeability of a risk is allocated by the Restatement (Third) to the factfinder, to be considered when the jury decides if the defendant failed to exercise reasonable care.” *Thompson*, 774 N.W.2d at 835.

2. Further Review is Not Warranted Because the Court of Appeals decision does not decide a substantial question of constitutional law or any other important question of law that has not already been settled by the Iowa Supreme Court. (6.1103(b)(2)).

Though Defendant-Appellee argues for a broader read of the district court's holding, neither the district court, the Court of Appeals, nor Defendant-Appellee have raised any question of constitutional law. Further, no argument has been expounded as to this question. The sole question of whether a business where alcohol is consumed has a duty of care cannot be

said to be unsettled by this Court. This question was answered in *Hoyt*, where this Court held that (1) foreseeability was not to be considered when asking a question of duty in a common law negligence case, and (2) businesses where alcohol is consumed fall “squarely within the class of business owners,” that owe a duty. 829 N.W.2d at 777.

C. The Court of Appeals correctly determined that the district court improperly used a test of foreseeability to determine the question of duty, a test that has been expressly rejected by this Court.

Defendant states that any duty owed to Holly has its limits. However, as a matter of law, a common-law duty of reasonable care was owed to Holly by the Defendants. The question of whether this duty was fulfilled, breached, or completed, by the Defendants would take us out of summary judgment posture, and into the position of factfinder. For it is the job of the factfinder to determine proximate causation, whether the type of harm that occurs is among those reasonably foreseeable potential harms that make a party's conduct negligent. *Hoyt*, 829 N.W.2d 772.

1. *Further Review is Not Warranted Because the Court of Appeals decision does not change legal principles, but rather follows the requirements of Iowa Supreme Court precedent in adopting the duty analysis from the Restatement Third of Torts. (6.1103(b)(3)).*

This Court, in *Thompson*, discussed (1) the reasons why the Restatement rejected a foreseeability test when determining a question of duty, and (2) the reasons why they ultimately adopted this approach:

The assessment of the foreseeability of a risk is allocated by the Restatement (Third) to the fact finder, to be considered when the jury decides if the defendant failed to exercise reasonable care.

Foreseeable risk is an element in the determination of negligence. In order to determine whether appropriate care was exercised, the factfinder must assess the foreseeable risk at the time of the defendant's alleged negligence. The extent of foreseeable risk depends on the specific facts of the case and cannot be usefully assessed for a category of cases; small changes in the facts may make a dramatic change in how much risk is foreseeable.... **[C]ourts should leave such determinations to juries unless no reasonable person could differ on the matter.**

774 N.W.2d at 835 citing Restatement (Third) of Torts: Liab. for Physical Harm § 7(a), at 97-98. (emphasis supplied).

Here, Defendants allowed Holly to become extremely intoxicated and forced him to leave the premises, removing him from a place of comparative safety inside Beach Girls. Whether these actions and omissions are considered reasonable—which may include a question of whether Holly

being struck by a driver was foreseeable under the circumstances—is a jury question. *Koenig v. Koenig*, 766 N.W.2d 635 (Iowa 2009).

2. *Further Review is Not Warranted Because the Court of Appeals decision is not in conflict with a decision of the Iowa Supreme Court. (6.1103(b)(1)).*

Defendants argue that the Court of Appeals ignored the reasoning of the district court because it did not fully deny that Defendants held a duty, but that the duty ceased when Holly left the property. However, the district court relied on a foreseeability analysis in determining the conclusion of the Defendants' duty. (7-15-19 Order; App. 1086-1094). (“foreseeability must be evaluated in the relevant frame of time and place”). This was improper.

This leaves the district court's policy considerations for finding that no duty existed. Thus, the Court of Appeals remanded the ruling for further proceedings. If it is held that no duty to Holly existed, it must be based *solely* on these policy considerations. This is precisely what this Court, in *Hoyt*, determined when asking the question of general duty owed by businesses where alcohol is consumed. After determining that the district court had improperly used foreseeability as a factor in its analysis, the Supreme Court determined duty, absent of foreseeability, by considering whether presented policy considerations justified exemption of businesses

where alcohol is consumed from the duty of care. 829 N.W.2d at 777.

(“Removing foreseeability from the duty analysis, we must consider whether some principle or strong policy consideration justifies exempting [Defendant], or the class of businesses where alcohol is consumed in general, from the duty to exercise reasonable care”).

This Court ultimately determined that businesses where alcohol is consumed fall within the class of those who owe a duty of care, as contemplated in section 40(b)(3) of the Restatement. *Id.* The question of duty, presented here, is no different than that which was answered by this Court in *Hoyt*. Thus, Defendant’s argument that the Court of Appeals should have affirmed the district court’s holding on alternative bases falls short. The district court’s policy considerations for finding no duty owed does not allow it to change the legal conclusion that this Court came to in *Hoyt*. That is that, as a matter of law, businesses where alcohol is consumed owe a duty of care to their patrons. 829 N.W.2d at 777.

Further, the policy considerations of the district court, in its improper holding, are related to foreseeability. Absent the district court’s foreseeability analysis, in which it stated that “foreseeability must be evaluated in the relevant frame of time and place,” it would have never arrived to the policy considerations to go along with it (that we should not

put business owners in a position of making judgment calls on intoxicated patrons) (7-15-19 Order; App. 1086-1094). Foreseeability plays a role in the district court's policy considerations and, thus its entire holding is tainted by improper analysis. Further, this analysis invades the province of the jury. The district court's use of foreseeability must be left to the factfinder.

IV. Conclusion

It is well settled law that Iowa does not consider foreseeability in evaluating whether a duty is owed in a common law negligence case. The district court incorrectly considered foreseeability. The Court of Appeals saw this error and reversed, remanding the case for further proceedings consistent with Iowa law. While Defendant-Appellee has spent much of its briefing re-alleging its arguments on the merits, it has failed to show that any of the grounds for further review have been met. The Court of Appeals' decision is consistent with this Court's precedents. It does not decide a substantial question of constitutional law or an area of the law that is unsettled. The Court of Appeals' decision does not change any legal principles and is not of great broad public importance, because it does not change how Iowa analyzes duty in common law negligence cases. For these reasons, the Application for Further Review should be denied.

**Certificate of Compliance with Typeface Requirements and
Type-Volume Limitation**

This **Resistance to Defendant-Appellee’s Application for Further Review** complies with the typeface and type-volume requirements of Iowa R. App. P. 6.1103(4) because:

This **Resistance to Defendant-Appellee’s Application for Further Review** has been prepared in a proportionally spaced typeface using Times New Roman in size 14 font, and contains 2,673 words, excluding the parts of the application exempted by Iowa R. App. P. 6.1103(4)(a).

September 4, 2020 _____

Date

/s/ Christopher D. Stombaugh _____

Christopher D. Stombaugh

Certificate of Service

The undersigned hereby certifies that the foregoing Resistance to Defendant-Appellee’s Application for Further Review was filed electronically with the Clerk of the Supreme Court of Iowa to be served via EDMS and/or e-mail on this 4th day of September, 2020, upon the parties listed below:

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September 4, 2020 _____

/s/ Christopher D. Stombaugh _____

Date

Christopher D. Stombaugh

IN THE COURT OF APPEALS OF IOWA

No. 19-1349
Filed August 5, 2020

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

vs.

LEGENDS FIELDHOUSE BAR AND GRILL, LLC, PRETTY WOMEN, INC., d/b/a THE BEACH GIRLS, J.P. PARKING, INC., JAMES E. PETRY, ABC CORP., a fictitious corporation and RONALD PAUL HAUSER,,
Defendants-Appellees.

Appeal from the Iowa District Court for Polk County, David M. Porter, Judge.

Plaintiffs appeal from the district court's order granting summary judgment in favor of defendants on the plaintiffs' negligence suit. **REVERSED AND REMANDED.**

Tiffany R. Wunderlin of Dicello, Levitt, & Gutzler, Platteville, Wisconsin, and R. Craig Oppel of Allbee & Barclay, P.C., Muscatine, for appellants.

Adam Zenor of Zenor Kuehner, P.L.C., Des Moines, and Sean M. Corpstein of Grefe & Sidney, P.L.C., Des Moines, for appellees.

Considered by Vaitheswaran, P.J., and Mullins and Ahlers, JJ.

VAITHESWARAN, Presiding Judge.

A security guard at Beach Girls strip club in West Des Moines told Daulton Holly to leave the establishment because he had too much to drink. He offered to call Holly a cab, but Holly refused and walked away. A driver who had been drinking at another establishment and was heading to the strip club ran over Holly on a local highway. Holly died.

The administrator of Holly's estate sued Beach Girls and others for negligence. She alleged in pertinent part that

[t]he negligent acts of the Beach Girls . . . 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.

Beach Girls denied the allegation and moved for summary judgment. The club asserted: "Plaintiffs' allegations of premises liability/negligence fails as a matter of law as to the landowner because the injury to Decedent-Plaintiff Daulton Holly did not occur on the premises or by an instrument that came from the premises." The district court granted the summary judgment motion, and the estate appealed.

"An actionable claim of negligence requires 'the existence of a duty to conform to a standard of conduct to protect others, a failure to conform to that standard, proximate cause, and damages.'" *Thompson v. Kaczinski*, 774 N.W.2d 829, 834 (Iowa 2009) (quoting *Stotts v. Eveleth*, 688 N.W.2d 803, 807 (Iowa 2004)). This case involved the duty prong.

That prong underwent a wholesale revision in *Thompson*, 774 N.W.2d at 834–35. Prior to *Thompson*, the supreme court endorsed the consideration of foreseeability in a duty analysis. *Id.* at 834. In *Thompson*, the court adopted the

view of the drafters of the Restatement (Third) of Torts, who disapproved of the application of a foreseeability factor in the duty analysis. *Id.* at 834–35. The court found “the drafters’ clarification of the duty analysis in the Restatement (Third) compelling.” *Id.* at 835. The court stated:

When the consideration of foreseeability is removed from the determination of duty, as we now hold it should be, there remains the question of whether a principle or strong policy consideration justifies the exemption of [the defendants]—as part of a class of defendants—from the duty to exercise reasonable care.

Id. The court concluded “no such principle or policy consideration exempts property owners from a duty to exercise reasonable care to avoid the placement of obstructions on a roadway.” *Id.* After finding that the district court “clearly considered foreseeability in concluding the defendants owed no duty in this case,” the court reversed the district court’s summary judgment ruling in favor of the defendants. *Id.* at 840.

The supreme court revisited the foreseeability question in *Hoyt v. Gutterz Bowl & Lounge L.L.C.*, 829 N.W.2d 772, 776 (Iowa 2013), an opinion involving a premises-liability claim against a bar owner. In the underlying opinion, the court of appeals emphasized “that the assessment of the foreseeability of a risk is no longer part of the duty determination (generally a legal question assigned to the court as gatekeeper), and is now considered part of the reasonable care and scope of liability elements (generally fact-laden questions left for the jury).” *See Hoyt v. Gutterz Bowl & Lounge, L.L.C.*, No. 11-0085, 2011 WL 5460653, at *4 (Iowa Ct. App. Nov. 9, 2011). The supreme court agreed and affirmed the court of appeals. *See Hoyt*, 829 N.W.2d at 776. The court stated, “For the same reasons we found

the Restatement (Third) compelling in *Thompson*, we find it compelling in the tavern owner–patron context.” *Id.* The court explained:

[F]oreseeability is central to the fact finder’s inquiries regarding breach and the range of harms for which an actor may be liable. Any overlap in the duty inquiry is likely to be redundant and confusing, and may well frustrate longstanding rationales for specific allocations of decision-making power between the judge and jury. The redundancy also gives rise to the possibility that judge and jury may reach inconsistent results regarding foreseeability, at odds with goals of procedural fairness, predictability, and treating like cases alike. For these reasons, we emphasize again our adoption of the duty analysis of the Restatement (Third).

Id. at 776–77 (citation omitted). *Thompson* and *Hoyt* set the landscape for the summary judgment ruling in this case.

The estate argues the district court failed to follow the holdings of those opinions and “erroneously considered foreseeability as a factor to determine duty.” As the estate notes, our review is for errors of law. See *Sain v. Cedar Rapids Cmty. Sch. Dist.*, 626 N.W.2d 115, 121 (Iowa 2001).

The district court enumerated the three pre-*Thompson* factors relevant to a duty analysis, including foreseeability, then said, “In consideration of the three factors set forth in *Thompson*, this court finds that while Holly was on [the club] premises, a special relationship, in fact, did exist, between them” and, “[a]s a result, [the club was] required to exercise reasonable care in maintaining Holly’s safety.” But the court determined the “duty ceased” when “Holly voluntarily left the premises.”¹ The court distinguished *Hoyt* on the facts and concluded the estate’s reliance on *Hoyt* was “misplaced.”

¹ We note that Holly was told to leave the premises. He chose to walk away from the parking lot rather than take a cab.

The pre-*Thompson* duty standard that incorporated foreseeability into the analysis is no longer extant. See *Mitchell v. Cedar Rapids Cmty. Sch. Dist.*, 832 N.W.2d 689, 702 (Iowa 2013) (acknowledging that “other jurisdictions, using the old duty framework[,] . . . have rejected the possibility of liability for injuries occurring after hours and off school grounds after concluding the injuries were unforeseeable” but reiterating “we have adopted the duty principles of the Restatement (Third) and will not consider foreseeability, or lack thereof, in making duty determinations” (citing *Hoyt*, 829 N.W.2d at 776–77; *Thompson*, 774 N.W.2d at 835)). Although the district court also cited policies favoring a finding of no duty, *Thompson* authorizes the incorporation of policy considerations in the duty analysis only after foreseeability is removed from the equation. 774 N.W.2d at 835; cf. *Benninghoven v. Hawkeye Hotels, Inc.*, No. 16-1374, 2017 WL 2684351, at *6 (Iowa Ct. App. June 21, 2017) (affirming district court’s determination as a matter of law that the defendants owed no duty to control an employee’s off-duty and off-premises behavior). Because foreseeability was not removed from the equation, we reverse the summary judgment ruling and remand for further proceedings. See *Eurich v. Bass Pro Outdoor World, L.L.C.*, No. 17-0302, 2017 WL 5179011, at *3 (Iowa Ct. App. Nov. 8, 2017).

REVERSED AND REMANDED.



IOWA APPELLATE COURTS

State of Iowa Courts

Case Number
19-1349

Case Title
Morris v. Legends Fieldhouse Bar and Grill, LLC.

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Court: Appellate Court
Case Title: Morris v. Legends Fieldhouse Bar and Grill, LLC.
Document(s) Submitted **Filed by or on behalf of**
OPINION: REVERSED & REMANDED Anuradha Vaitheswaran

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ZENOR, ADAM DANIEL for J.P. PARKING, INC, PRETTY WOMEN, INC, PETRY, JAMES E BATES, ADAM PATRICK for HAUSER, RONALD
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