IN THE INDIANA COURT OF APPEALS

APPELLATE NO: 23A-CT-02059

HARJIT KAUR, Individually, and as the Special Administrator of the Estate of HARVAIL SINGH DHILLON, Deceased, Appellant-Plaintiff, vs. AMAZON, INC., a corporation; AMAZON.COM, INC., a corporation; AMAZON LOGISTICS, INC., a corporation; AMAZON.COM SERVICES LLC, MQJ1, a limited liability company; CF MOUNT COMFORT DST; a limited liability company, ICI TRANSPORT, LLC, a limited liability company; and WILLLIAM McPHEARSON, an individual, Appellees/Defendants.	) APPEAL FROM THE HAMILTON SUPERIOR COURT NO. 4) TRIAL COURT CAUSE NO. 29D04-2212-CT-010006) THE HONORABLE JUDGE RICHARD CAMPBELL

BRIEF OF APPELLEE CF MOUNT COMFORT DST

Barath S. Raman, #32116-49
Edmund L. Abel, #36293-49
J. Neal Bowling, #19278-41
LEWIS WAGNER, LLP
1411 Roosevelt Avenue, Suite 102
Indianapolis, IN 46201
Phone: (317) 237-0500
braman@lewiswagner.com
eabel@lewiswagner.com
nbowling@lewiswagner.com
Attorneys for Appellee CF Mount Comfort DST

TABLE OF CONTENTS

TABLE OF AUTHORITIES……...…5

STATEMENT OF ISSUES…….7

STATEMENT OF CASE……...8

STATEMENT OF FACTS……..8

SUMMARY OF ARGUMENT……...…9

STANDARD OF REVIEW……10

ARGUMENT…….11

I. The trial court correctly relied on *Hulen* when it held that Mount Comfort did not owe a duty to Harvail to protect him from injuries: (1) resulting from the actions of a third-party, over whom Mount Comfort maintained no control over; and (2) that resulted when Harvail was standing on an adjacent public roadway over which Mount Comfort neither owned nor controlled……11

II. If this Court agrees with the Estate's contention that *Hulen* is inapplicable, this Court should look to its decision in *Snyder Elevators*, which is more in line with the facts of this case, not *Ember* and *Holiday Rambler* as the Estate suggests……..16

III. The trial court correctly held that *Lutheran Hospital* is inapplicable, and even if applicable, the Estate's reliance on *Lutheran Hospital* is misplaced because Mount Comfort exerted no control over the adjacent public roadway……..18

IV. Mount Comfort did not assume a gratuitous duty……...19

V. The trial court's Order did not fail to draw all reasonable inferences in favor of the Estate, and even if it did, none of the reasonable inferences that the Estate references in its Brief are relevant to the Court's ultimate decision…….23

VI. Upholding the trial court's Order would not immunize property owners from all liability that causes harm to travelers on an adjacent roadway……..25

VII. Affirming the trial court's decision and refusing to expand the duty of landowners to protect parties from third-party tortfeasors on public roadways the landowner does not control is consistent with the majority of other jurisdictions…….27

VIII. Public policy does not support creating a new duty that expands the duty private landowners owe to invitees or other travelers on adjacent public roadways……35

A. The Parties' Relationship……36

B. The Reasonable Foreseeability of Harm…….37

C. Public Policy……..38

CONCLUSION……..41

WORD COUNT VERIFICATION……41

CERTIFICATE OF SERVICE……..42

TABLE OF AUTHORITIES

CASES

Albright, ex rel. Albright v. Univ. of Toledo, No. 01AP-130, 2001 WL 1084461, at *5 (Ohio Ct. App. Sept. 18, 2001)……35

Am. Legion Pioneer Post No. 340 v. Christon, 712 N.E.2d 532 (Ind. Ct. App. 1999)……..20

Arnold v. F.J. Hab, Inc., 745 N.E.2d 912 (Ind. Ct. App. 2001)……22

Auler v. Van Natta, 686 N.E.2d 172 (Ind. Ct. App. 1997)……...21, 22

Blake v. Dunn Farms, 413 N.E.2d 560 (Ind. 1980)……...13

Board of Comm'rs v. Hatton, 427 N.E.696 (Ind. Ct. App. 1981)……..21

Boggs ex rel. Boggs v. Lay, 164 S.W.3d 4 (Mo. Ct. App. 2005)……...30

Bradford v. Universal Const. Co., 644 So. 2d 864 (Ala. 1994)…….31

Burrell v. Meads, 569 N.E.2d 637 (Ind. 1991)……..12

Carignan v. New Hampshire Int'l Speedway, Inc., 151 N.H. 409, 858 A.2d 536 (2004)…….31

Carroll v. Job, 638 N.E.2d 467 (Ind. Ct. App. 1994)……..18, 26

Combs v. Atlanta Auto Auction, Inc., 287 Ga. App. 9, 650 S.E.2d 709 (2007)……31

Ember v. B.F.D., Inc., 490 N.E.2d764 (Ind. Ct. App. 1986)…….14, 18, 19, 21

Ferreira v. Strack, 636 A.2d 682 (R.I. 1994)……35

Fleming v. Garnett, 231 Conn. 77, 81, 646 A.2d 1308 (1994)……..31

Fox Dev., Inc. v. England, 837 N.E.2d 161 (Ind. Ct. App. 2005)…….10

Friedman v. City of Chicago, 333 Ill. App. 3d 1070, 777 N.E.2d 430 (2002)……..34

Garlick v. Trans Tech Logistics, Inc., 636 F. App'x 108 (3d Cir. 2015)……...31

Goodwin at Yeakle's Sports Bar & Grill, Inc., 62 N.E.3d 384 (Ind. 2016)……11, 35, 37

Hale v. Peabody Coal Co., 343 N.E.2d 316 (1976)……37

Heath v. Honker's Mini-Mart, Inc., 134 Idaho 711, 8 P.3d 1254 (Ct. App. 2000)……35

Hendricks Cty. v. Green, 120 N.E.3d 1118 (Ind. Ct. App. 2019)……..10

Hiland v. State, 879 N.E.2d 621 (Ind. Ct. App. 2008)……...26

HNMC, Inc. v. Chan, 637 S.W.3d 919 (Tex. App. 2021)……..33

HNMC, Inc. v. Chan, 683 S.W.3d 373 (Tex. 2024)……...32, 33, 34

Holiday Rambler Corp. v. Gessinger, 541 N.E.2d 559 (Ind. Ct. App. 1989)……..14, 15

Holter v. City of Sheyenne, 480 N.W.2d 736 (N.D. 1992)……34

Justice v. CSX Transp., Inc., 908 F.2d 119 (7th Cir. 1990)……...31

KS&E Sports v. Runnels, 72 N.E.3d 892 (Ind. 2017)……..10, 11

Langen v. Rushton, 138 Mich. App. 672, 360 N.W.2d 270 (1984)……...31

Laumann v. Plakakis, 84 N.C. App. 131, 351 S.E.2d 765 (1987)…….34

LBM Realty, LLC v. Mannia, 981 N.E.2d 569 (Ind. Ct. App. 2012)…….10

Looney v. Nestle Waters N. Am., Inc., 187 N.E.3d 867 (Ind. Ct. App.)…….35

Lutheran Hosp. of Indiana, Inc. v. Blaser, 634 N.E.2d 864 (Ind. Ct. App. 1994)…….19, 20, 26

McClure v. Strother, 570 N.E.2d 1319 (Ind. Ct. App. 1991)…….37

Nat'l R.R. Passenger Corp. v. Everton by Everton, 655 N.E.2d 360 (Ind. Ct. App. 1995)……...10

New Trend Beauty Sch., Inc. v. Indiana State Bd. of Beauty Culturist Examiners, 518 N.E.2d 1101, (Ind. Ct. App. 1988)…….10

Northern Indiana Public Service Co. v. Sharp, 790 N.E.2d 462 (Ind. 2003)……35

Ollar v. Spakes, 269 Ark. 488, 601 S.W.2d 868 (1980)……31

Pelak v. Ind. Indus. Servs., Inc., 831 N.E.2d 765 (Ind. Ct. App. 2005)…….11

Pitcairn v. Whiteside, 34 N.E.2d 943 (Ind. Ct. App. 1941)……...15

Precedent Partners I, L.P. v. Hulen, 863 N.E.2d 328 (Ind. Ct. App. 2007)……...passim

Reece v. Tyson Fresh Meats, Inc., 173 N.E.3d 1031 (Ind. 2021)……13, 26, 39

Roumbos v. Vazanellis, 95 N.E.3d 63 (Ind. 2018)…….12

Seaber v. Hotel Del Coronado, 1 Cal. App. 4th 481, 489 (1991)……..34

Shi v. Yi, 921 N.E.2d 31 (Ind. Ct. App. 2010)……...11

Sizemore v. Templeton Oil Co., 724 N.E.2d 647 (Ind. Ct. App. 2000)……38

Snyder Elevators, Inc. v. Baker, 529 N.E.2d 855 (Ind. Ct. App. 1988)……..16, 17, 38

State v. Flanigan, 489 N.E.2d 1216 (Ind. Ct. App. 1986)…….13

Stephens v. Bashas' Inc., 186 Ariz. 427 (Ct. App. 1996)……..28, 29

Sword v. NKC Hosps., Inc., 714 N.E.2d 142 (Ind. 1999)……37

Trs. of Ind. Univ. v. Spiegel, 186 N.E.3d 1151 (Ind. Ct. App. 2022)……10

Vasilenko v. Grace Family Church, 404 P.3d 1196 (Cal. 2017)……...20

Waldrip v. Waldrip, 976 N.E.2d 102 (Ind. Ct. App. 2012)……10

Webb v. Jarvis, 575 N.E.2d 992 (Ind. 1991)……..35

Wemple ex rel. Dang v. Dahman, 103 Haw. 385, 83 P.3d 100 (2004)……..35

Wishard Mem'l Hosp. v. Kerr, 846 N.E.2d 1083 (Ind. Ct. App. 2006)…….13

Yost v. Wabash College, 3 N.E.3d 509 (Ind. 2014)…….22

RULES

Ind. Appellate Rule 46……25

Ind. Appellate Rule 61……...24

Ind. Trial Rule 10……...10

Ind. Trial Rule 12……...11

SECONDARY AUTHORITY

Restatement (Third) of Torts § 42 (2012)……..22

STATEMENT OF ISSUES

I. Did CF Mount Comfort DST ("Mount Comfort") owe Harvail Singh Dhillon ("Harvail") a duty to protect him from the alleged negligence of a third-party driver, over whom Mount Comfort had no control, while Harvail was standing on an adjacent public roadway?

STATEMENT OF THE CASE

This lawsuit stems from an October 20, 2022, motor vehicle accident wherein Harvail was struck by a truck being driven by William McPhearson ("McPhearson") on County Road West 300 North (the "Accident"). Appellant's App. Vol. II at 29-30. As a result of the accident, Harvail died. *Id*. at 30. On December 21, 2022, Plaintiff Harjit Kaur, individually and as the special administrator of the Estate of Harvail Singh Dhillon (the "Estate"), filed a Complaint against McPhearson, McPhearson's employer ICI Transport, LLC ("ICI"), Mount Comfort, and Amazon Inc., Amazon.com Inc., Amazon Logistics, Inc., Amazon.com Services, LLC, and MQJI, LLC (collectively, "Amazon"). *Id*. at 131. The Estate eventually filed an Amended Complaint on March 20, 2023, and as part of the Amended Complaint, the Estate alleged that Mount Comfort was negligent due to a lack of proper lighting and signage. *Id*. at 33-42.

On June 9, 2023, Mount Comfort filed its Brief in Support of its Motion for Judgment on the Pleadings, arguing that Plaintiff's Amended Complaint failed to allege facts establishing that Mount Comfort owed Harvail the requisite duty of care at the time of the Accident. Appellant's Supp. App. Vol. II at 8. On June 14, 2023, Mount Comfort filed its Motion for Judgment on the Pleadings pursuant to Indiana Trial Rule 12(C). *Id*. at 5. The Estate filed its Response in Opposition to Mount Comfort's Motion for Judgment on the Pleadings on June 21, 2023. *Id*. at 20. Mount Comfort then filed its Reply in Support of its Motion for Judgment on the Pleadings on June 30, 2023. *Id*. at 32.

As the Estate detailed in its Appellant's Amended Consoidated Brief, Amazon moved for Judgment on the Pleadings prior to Mount Comfort, making nearly identical arguments to those Mount Comfort relied upon. Appellant's Br. at 6. The trial court granted Amazon's Motion for Judgment on the Pleadings on June 23, 2023, holding that Amazon, as the tenant of the subject real property, did not owe Harvail a duty of care under Indiana law. Appellant's App. Vol. II at 18-21. On October 17, 2023, the trial court granted Mount Comfort's Motion for Judgment on the Pleadings noting that its prior reasoning in granting Amazon's Motion for Judgment on the Pleadings applied equally to Mount Comfort as the landowner. Appellant's Supp. App. Vol. II at 2-4. Specifically, the trial court held that the Estate's reliance on this Court's decision in *Lutheran Hospital v. Blaser* was misplaced because *Precedent Partners I, L.P. v. Hulen* was the more applicable decision based on the facts as alleged in the Estate's Amended Complaint. Citing to *Hulen*, the trial court held that both Amazon and Mount Comfort owed no duty to guard Harvail against injury from the negligent acts of someone over whom Amazon and Mount Comfort had no control when the injury occurred off of Amazon's and Mount Comfort's premises. *Id*. at 3.

STATEMENT OF FACTS

Mount Comfort is the owner of the real property located at 4412 West 300 North, Greenfield, Indiana 46140. Appellant's App. Vol. II at 28-29. Amazon leases the subject property to operate and conduct business at the Amazon Warehouse. *Id*. On October 20, 2022, Harvail was operating his semitruck traveling eastbound on West 300 North when he stopped his vehicle in the center lane of the public roadway adjacent to the Amazon Warehouse. *Id*. at 29-30. Importantly, Harvail stopped in front of the second entrance to the Amazon Warehouse which was before the third and proper entrance for truck drivers. *Id*.; *see also* Appellees' Ap. Vol. II. At 39. After stopping, Harvail: (1) exited the semitruck; and (2) began crossing West 300 North on foot

toward the Amazon Warehouse. Appellant's App. Vol. II at 28-29. As he was attempting to cross the street, he was struck and killed by a tanker vehicle being operated by McPhearson. *Id*. The Amended Complaint contains no allegations that at the time of the Accident McPhearson was: (1) employed or contracted by Mount Comfort in any form; or (2) exiting or entering the Amazon Warehouse. *Id*. The Accident occurred on West 300 North. *Id*. There is no dispute that West 300 North is a public roadway that is neither owned nor controlled by Mount Comfort. *Id*. At no point prior to when the accident occurred was Harvail ever on the property owned by Mount Comfort. *Id*.

SUMMARY OF ARGUMENT

It is undisputed that: (1) Harvail parked his vehicle on West 300 North; (2) exited the vehicle while it was on West 300 North; (3) the Accident occurred on West 300 North; and (4) Harvail never entered property owned and/or controlled by Mount Comfort. Additionally, it is undisputed that Mount Comfort exercised no control over either West 300 North or McPhearson while he was operating his vehicle at the time of the Accident. Because the Accident occurred on a public roadway outside of Mount Comfort's control and was the result of the alleged negligence of an independent third-party, over whom Mount Comfort exercised no control, the trial court correctly relied on *Hulen* when it held that Mount Comfort did not owe Harvail a duty to protect him from third parties while he was not on property either owned or controlled by Mount Comfort.

Even if this Court agrees with the Estate and holds the trial court incorrectly relied on *Hulen* for its decision, this Court should still affirm the trial court's orders because there are no allegations that Mount Comfort: (1) exerted the necessary control over West 300 North or McPhearson; or (2) utilized its property in a manner that created physical or obstructive unsafe conditions on the public roadway. Absent either of these elements, Mount Comfort's duty cannot extend beyond the

perimeter of its property as the Estate maintains. The Estate's efforts to expand the duties of landowners for harms that occur off their property should therefore be denied.

STANDARD OF REVIEW

Indiana appellate courts apply a *de novo* standard of review to a trial court's ruling on a Motion for Judgment on the Pleadings. *KS&E Sports v. Runnels*, 72 N.E.3d 892, 898 (Ind. 2017). A judgment on the pleadings pursuant to Indiana Trial Rule 12(C) attacks the legal sufficiency of the pleadings. *Nat'l R.R. Passenger Corp. v. Everton by Everton*, 655 N.E.2d 360, 363 (Ind. Ct. App. 1995). When reviewing a Rule 12(C) motion, this Court may look only at the pleadings and any facts of which we may take judicial notice, with all well-pleaded material facts alleged in the complaint taken as admitted. *Waldrip v. Waldrip*, 976 N.E.2d 102, 110 (Ind. Ct. App. 2012). "The 'pleadings' consist of a complaint and an answer, a reply to any counterclaim, an answer to a cross-claim, a third-party complaint, and an answer to a third-party complaint." *Id.* (citing *Fox Dev., Inc. v. England*, 837 N.E.2d 161, 164 n. 1 (Ind. Ct. App. 2005)). Pleadings also consist of any written instruments attached to a pleading, pursuant to Indiana Trial Rule 9.2. *LBM Realty, LLC v. Mannia*, 981 N.E.2d 569, 576 n. 10 (Ind. Ct. App. 2012); *see also* Ind. Trial Rule 10(C) ("A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.").

When ruling on the motion the court is to "deem the moving party to have admitted 'all facts well pleaded, and the untruth of his own allegations which have been denied.'" *Hendricks Cty. v. Green*, 120 N.E.3d 1118, 1122 (Ind. Ct. App. 2019) (citing *New Trend Beauty Sch., Inc. v. Indiana State Bd. of Beauty Culturist Examiners*, 518 N.E.2d 1101, 1103 (Ind. Ct. App. 1988). However, "a court need not accept as true allegations that are contradicted by other allegations or exhibits attached to or incorporated in the pleading. Courts also need not accept as true conclusory, nonfactual assertions or legal conclusions." *Trs. of Ind. Univ. v. Spiegel*, 186 N.E.3d 1151, 1157

(Ind. Ct. App. 2022) (citing *Shi v. Yi*, 921 N.E.2d 31, 36-37 (Ind. Ct. App. 2010)). Because a Motion for Judgment on the Pleadings tests the sufficiency of the claims presented in the pleadings, it should be granted where it is clear from the face of the Complaint that under no circumstances could relief be granted. *KS&E Sports*, 72 N.E.3d at 898; *see also* Ind. Trial Rule 12(C).

ARGUMENT

To prevail on its negligence claim, the Estate must show: (1) Mount Comfort owed Harvail a duty; (2) Mount Comfort breached that duty by allowing its conduct to fall below the applicable standard of care; and (3) the Estate suffered a compensable injury proximately caused by Mount Comfort's breach of duty. *Goodwin at Yeakle's Sports Bar & Grill, Inc.*, 62 N.E.3d 384, 386 (Ind. 2016). Failure to establish a single one of these elements is fatal to the Estate's claim. *Pelak v. Ind. Indus. Servs., Inc.*, 831 N.E.2d 765, 769 (Ind. Ct. App. 2005). The trial court correctly held that the Estate's Amended Complaint failed to plead allegations against Mount Comfort that supported an established duty of care recognized under Indiana law; therefore, the trial court's judgment on the pleadings in favor of Mount Comfort and Amazon was proper and this Court should affirm the trial court's decision.

I. The trial court correctly relied on *Hulen* when it held that Mount Comfort did not owe a duty to Harvail to protect him from injuries: (1) resulting from the actions of a third-party, over whom Mount Comfort maintained no control over; and (2) that resulted when Harvail was standing on an adjacent public roadway over which Mount Comfort neither owned nor controlled.

The Estate's negligence claim against Mount Comfort is rooted in ordinary premises liability principles; namely, the Estate has alleged that Mount Comfort owed Harvail a duty to exercise reasonable care because Harvail was an invitee on the day of the accident. Appellant's App. Vol. II at 41-42 (Amended Complaint). However, the allegations set forth in the Estate's Amended Complaint defeat this argument. Mount Comfort concedes that a landowner is subject

to liability for harm to an invitee created by a condition on the land. *Burrell v. Meads*, 569 N.E.2d 637, 643 (Ind. 1991). That duty though only applies to invitees while they are present on the landowner's land. *Id*. at 639 (landowner must exercise reasonable care for protection of invitee "while he is on the landowner's premises."); *see also Roumbos v. Vazanellis*, 95 N.E.3d 63, 67 (Ind. 2018) ("Under Indiana premises-liability law, the owner or possessor of land owes the highest duty of care to its invitees: the duty to exercise reasonable care for their protection while they are on the premises."). To that end, Indiana courts have made clear that Indiana law "does not impose a duty on a business to guard against injury to the public from the negligent acts of someone over whom the business has no control and which injury occurs off the business' premises. *Precedent Partners I, L.P. v. Hulen*, 863 N.E.2d 328, 333 (Ind. Ct. App. 2007).

As the trial court noted in its Order, *Hulen* is particularly instructive. In *Hulen*, the plaintiff, a cyclist, suffered injuries after being struck by a truck while riding her bicycle on a public roadway in a housing development. *Id*. at 330. The plaintiff sued the housing developer and the homeowner's association, alleging they owed her a duty to: (1) redirect construction traffic; or (2) to post signs warning of construction traffic to ensure her safety on the public roadway, and their failure to do so created an unreasonable risk rendering them liable. *Id*. at 332. After considering the fact that the developer and the homeowner's association: (1) were not accountable for the driver that struck the plaintiff; and (2) had no control over the premises where the accident occurred; this Court held that no duty existed because, "the law does not impose a duty on a business to guard against injury to the public from the negligent acts of someone over whom the business has no control and which injury occurs off the business' premises. *Id*.

The Estate argues that *Hulen* is inapplicable, noting that unlike the cyclist in *Hulen*, Harvail was a business invitee and therefore should have been afforded additional protection. However,

this Court has previously rejected this argument holding that a landowner is not liable to its business invitees: (1) for the acts of a third-party over whom it had no control; and (2) when the injuries do not occur on the landowner's property. *State v. Flanigan*, 489 N.E.2d 1216, 1218 (Ind. Ct. App. 1986) (holding adjacent landowners were not liable for injuries suffered by their business invitees on an adjacent public road because the landowners, "had no relationship to the agency (the vehicle which struck the Flanigans) causing the injury"); *see also Blake v. Dunn Farms*, 413 N.E.2d 560, 566-567 (Ind. 1980) (rejecting the argument that a landowner's duty to persons on an adjacent road is similar to that of a landowner to a business invitee and holding that a landowner owed no duty to travelers on an adjacent roadway when it had no relationship to the agency causing the problem). In short, whether Harvail was an invitee or not is irrelevant because like the plaintiffs in *Hulen*, *Flanigan*, and *Blake*; Harvail's injuries were caused by a third party over whom Mount Comfort had no control over, and the injuries occurred on an adjacent public roadway over which Mount Comfort exercised no control over.

Support for the trial court's decision can be found in the Indiana Supreme Court's subsequent holding in *Reece v. Tyson Fresh Meats, Inc*.[1] In *Reece*, a motorist traveling on an adjacent public roadway claimed tall grass on Tyson's property obstructed the view of motorists using the roadway. *Reece v. Tyson Fresh Meats, Inc.*, 173 N.E.3d 1031, 1033 (Ind. 2021). The Court adopted a bright-line rule that when the condition on the land is contained on the land and does not create an intrusion that visits itself on the adjacent roadway, the landowner does not owe a duty to travelers on the roadway. *Id*. at 1040-41. Here, the Estate has alleged that Mount Comfort's negligence stems from inadequate signage and lighting on its property. Appellant's

[1] The trial court did not cite to *Reece*, this Court can affirm the trial court's Orders on any basis supported by the record. *Wishard Mem'l Hosp. v. Kerr*, 846 N.E.2d 1083, 1093 (Ind. Ct. App. 2006).

App. Vol. II at 42. Importantly, there are no allegations Mount Comfort's lighting or signage physically encroached onto West 300 North in any way. *Id*. Because the Amended Complaint does not allege that Mount Comfort created a physical encroachment on the roadway that caused Harvail's injuries, Mount Comfort cannot be liable for those injuries.

In asking this Court to reverse the Trial Court, the Estate relies on *Ember v. B.F.D., Inc.*, *Holiday Rambler Corp. v. Gessinger*, and *Lutheran Hosp. of Indiana, Inc. v. Blaser*. Appellant's Br. at 20. These cases are easily distinguishable.

First, in *Ember*, a pub patron was attacked after parking his vehicle at an adjacent property and attempting to enter the pub. *Ember v. B.F.D., Inc.*, 490 N.E.2d764, 768 (Ind. Ct. App. 1986). Ember ultimately sued the pub alleging that its duty extended to the adjacent property because the pub: (1) used the adjacent property for patrons to wait while waiting to enter the bar; (2) hired police officers to patrol and monitor patrons while on the adjacent property; and (3) told the neighborhood that the bar would protect the area, going so far as to distribute flyers to nearby residents requesting they contact the pub for any concerns. *Id*.at 769-70. Here, unlike *Ember*, there are no allegations that Mount Comfort used West 300 North in any way or took any affirmative action to control or give the perception of control over the adjacent roadway. Because the Estate has not alleged that Mount Comfort took any affirmative action to control West 300 North or even give the perception that it controlled West 300 North, *Ember* is inapplicable.

Likewise, this Court's holding in *Holiday Rambler Corp.* is irrelevant. In that case, the landowner allowed approximately 750 employees to exit its property via its driveways onto the adjacent public roadway at the same time, every day at the conclusion of the workday. *Holiday Rambler Corp. v. Gessinger*, 541 N.E.2d 559, 562 (Ind. Ct. App. 1989). Despite allowing a simultaneous mass exodus of vehicles from the property onto the adjacent public roadway, the

landowner allowed the vehicles to exit with no established traffic flow pattern. *Id*. Eventually, this led to an employee pulling out onto the road and suddenly stopping to avoid hitting two (2) other employees who had also exited the property. *Id.* This action ultimately led to a chain of events that caused an accident on the public roadway. *Id*. Importantly, in finding that the landowner's duty extended beyond its property, this Court focused its analysis on the relationship between the landowner and the cause of the problem on the adjacent roadway that led to the accident. *Id*. Because the landowner created a danger on the public roadway that led directly to plaintiff's injury, this Court found that the landowner owed a duty to the plaintiff; given the existence of this duty, this Corut reversed the trial court's grant of summary judgment to the landowner. *Id*. Specifically, this Court noted that "[if] he had not stopped eight feet into the road to avoid hitting two other employees also exiting from Utilimaster, Martha Marin would not have applied her brakes continuing the chain of events which eventually injured Gessinger."). This Court's focus on the *physical* intrusion created by the landowner in *Holiday Rambler* is particularly relevant because this Court, relying heavily on its prior holding in *Pitcairn v. Whiteside*, held that landowners owe a duty to the traveling public not to inhibit or otherwise physically obstruct travelers with free use of public roadways. *Id*. (citing *Pitcairn v. Whiteside*, 34 N.E.2d 943, 946 (Ind. Ct. App. 1941) (holding a landowner was liable for injuries on an adjacent public roadway after it sent heavy smoke onto the roadway because, "[t]he traveling public is entitled to make free use of highways and streets, and an occupier of land, which is adjacent to or in close proximity of such highway or street, has no right to so use the property occupied by him as to interrupt or interfere with the exercise of such right")).

As noted above, there are no allegations that Mount Comfort made use of West 300 North or created a risk that physically visited itself on West 300 North. Perhaps more importantly, there

are no allegations that Mount Comfort created any kind of intrusion, physical or otherwise, that obstructed or inhibited the free use of West 300 North for Harvail or any other traveler making use of the public roadway. The Estate has alleged that Harvail was confused while traveling on West 300 North, not that his free use of the road was inhibited in any way. Put another way, even if taken as true, the allegedly deficient lighting and signage did not create a physical restraint to Harvail's free use of the adjacent roadway, and it certainly did not put him at risk as he traveled along the road.[2]

II. If this Court agrees with the Estate's contention that *Hulen* is inapplicable, this Court should look to its decision in *Snyder Elevators*, which is more in line with the facts of this case, not *Ember* and *Holiday Rambler* as the Estate suggests.

Should this Court agree with the Estate and hold *Hulen* is distinguishable from the facts in this matter, it should not look to *Ember* or *Holiday Rambler* as the Estate suggests, rather, it should turn to *Snyder Elevators, Inc. v. Baker* since it is more analogous to the present case. In *Snyder Elevators*, Snyder operated a grain elevator located several blocks from an intersection that received shipments of grain by truck. *Snyder Elevators, Inc. v. Baker*, 529 N.E.2d 855, 856 (Ind. Ct. App. 1988). After being designated a recipient for forfeited grain, Snyder saw increased activity during the harvest months of 1986 resulting in 50-75 trucks per day arriving at the grain elevator. *Id.* However, Snyder's parking lot could only accommodate twenty-five (25) trucks. *Id.*

[2] The Estate's Amended Complaint contains a crucial misrepresentation, that Harvail parked near the second of two entrances and would pass the Amazon Warehouse if he drove further. Appellant's App. Vol. II at 29. In its Brief, the Estate again fails to acknowledge the Amazon Warehouse's third entrance while *Amicus Curiae* Indiana Trial Lawyers Association continues the Estate's original misrepresentation that the Amazon Warehouse had only two entrances at its facility. Appellant's Br. at 8; Amicus Br. at 10. It is undisputed that the Amazon Warehouse had three entrances, and the proper entrance for Harvail's truck was the third entrance which he would have arrived at had he continued to drive east. Appellees' App. Vol. II at 39. The Estate has made no allegations that inadequate lighting or signage hindered Harvail's ability to continue traveling east toward the proper entrance.

As a result, trucks customarily lined up along the neighboring public streets waiting to unload grain. *Id*. The city and residents eventually complained to Snyder and informed Snyder that the trucks on the public streets were creating an issue. *Id*. at 857. Despite Snyder's notice and actual knowledge of the danger, the practice continued. *Id*. On September 5, 1986, a motorist was traveling on the road near the Snyder grain elevator when her view of cross traffic at the intersection was obstructed by a grain truck parked on the public road. *Id*. As a result, the motorist's front bumper hit Baker's motorcycle causing an accident. *Id*. Baker eventually brought suit alleging negligence on the part of Snyder for allowing vehicles to park on the road and thereby creating a dangerous condition on the road. *Id*. Snyder moved for summary judgment, arguing it owed Baker no duty. The trial court granted but then vacated the motion. *Id*. at 856. This Court, after analyzing *Ember*, declined to expand a business owner's duty to the adjacent public roadways, holding that the general public would only benefit from a rule expanding liability in limited cases, "in which the defendant has maintained a hazardous condition or conducted some activity on the premises, beyond the mere fact of operating a business, which causes the off-premises injury." *Id*. at 858.

Like *Snyder Elevators*, Amazon, as the tenant of Mount Comfort's property, was operating a business in which third-party truck drivers delivered a product to a pre-determined location owned or operated by a private business. As this Court noted in *Sydner Elevators* when it refused to expand a business owner's liability to an adjacent public roadway when the adjacent landowner was merely operating said business, this Court should similarly hold that in order for liability to attach, Amazon and Mount Comfort should be engaged in behavior that is more than merely operating its business. Fatal to the Estate's claim, the undisputed evidence is that Harvail was operating his truck, while attempting to enter the Amazon Warehouse. No good reason exists for

this Court to abrogate established case law holding that a business must be doing something more than merely operating its business in a reasonable manner for liability to attach. As such, because the Accident occurred as part of Amazon's and Mount Comfort's ordinary business operations, neither party should be liable for the Accident.

Therefore, if this Court agrees with the Estate and finds *Hulen* inapplicable based on the facts, it should ignore the Estate's attempt to expand the landowner's duties onto public roadways utilizing *Ember* and *Holiday Rambler* and instead look to its holding in *Snyder Elevators* in rejecting the Estate's claims. As in *Sydnor Elevators*, because: (1) Mount Comfort exercised no control over McPherson, the third-party driver that struck Harvail; (2) the accident occurred on a public roadway; (3) Mount Comfort did not create a physical obstruction that interfered with a traveler's free use of the roadway; and (4) the accident occurred as a result of the ordinary operation of a Amazon's business operations, this Court should decline the Estate's invitation to extend Mount Comfort's duty to the public roadway.

III. The trial court correctly held that *Lutheran Hospital* is inapplicable, and even if applicable, the Estate's reliance on *Lutheran Hospital* is misplaced because Mount Comfort exerted no control over the adjacent public roadway.

Generally, the duty to ensure the safety of public roadways falls upon local governments and municipalities, not private landowners such as Mount Comfort that own property adjacent to the public roadway. *Carroll v. Job*, 638 N.E.2d 467, 469 (Ind. Ct. App. 1994). Mount Comfort acknowledges though that a landowner's duty to invitees can extend beyond its premises under specific exceptions. *Ember*, 490 N.E.2d at 772. In its brief, the Estate argues that this Court's holding in *Lutheran Hospital*, which details one of those exceptions, is appliable here and should be relied upon by this Court to overturn the trial court's Orders. The Estate omits key facts this Court considered in *Lutheran Hospital* which show that it is not applicable to this matter.

In *Lutheran Hospital*, the defendant hospital was located on the west side of a public roadway while its parking lot sat on the east side of the public roadway. *Lutheran Hosp. of Indiana, Inc. v. Blaser*, 634 N.E.2d 864, 869 (Ind. Ct. App. 1994). Because the hospital's exit doors were "mid-block" and sat directly across from the parking lot's exit ramp, pedestrians would frequently cross the public roadway mid-block and use the exit ramp to enter the parking lot. *Id*. Based on these facts, this Court concluded that the hospital was "funneling" pedestrian invitees to use the same exit ramp that vehicles were simultaneously using to exit the hospital's parking lot. *Id.* Importantly, the area where the subject exit ramp was owned by the City, not the hospital. *Id*. Thus, the Court reasoned that because: (1) both pedestrians and vehicles were "customarily" using the driveway; (2) in connection with their invitation; and (3) in a manner that created a dangerous condition; the hospital owed both sets of its invitees a duty to guard them against foreseeable injuries. *Id*. The *Lutheran Hospital* decision does not apply to this matter because there are no allegations that: (1) Mount Comfort maintained the requisite control over West 300 North; or (2) McPhearson was an invitee

In reaching its holding in *Lutheran Hospital*, this Court noted that a landowner's duty may extend beyond its business premises, "when it is reasonable for invitees to believe that the invitor controls premises adjacent to his own or where the invitor knows his invitees customarily use such adjacent premises in connection with the invitation." *Id*. at 870 (citing *Ember*, 490 N.E.2d at 772). Given the *Lutheran* Court's reliance on *Ember*, and its acknowledgment that the hospital owed a statutory duty to maintain the drive way area where the accident occurred, the element of control was significant to this Court's conclusion that the hospital owed its invitees a duty. While the Estate will likely argue that this Court's *Lutheran Hospital* decision was silent on the issue of control, such an argument would be in opposition to both this Court's subsequent analysis of

Lutheran Hospital as well as similar analysis from other jurisdictions. *See for instance,. Hulen*, 863 N.E.2d 328 at 323 (stating that a duty existed due to Lutheran Hospital use of the "exit" driveway of *its* parking lot) (emphasis added); *see also Vasilenko v. Grace Family Church*, 404 P.3d 1196, 1207 (Cal. 2017) ("In Lutheran Hospital…for instance, the defendant hospital was aware of the dangerous condition…and exercised control over the driveway, where the plaintiff's injuries occurred.").

In addition, unlike the tortfeasor in *Lutheran Hospital*, McPhearson was not a business invitee, thus, he was not an invitee who was "customarily" using the adjacent premises in connection with an invitation. This distinction is crucial because this Court's decision in *Lutheran Hospital* was based on the fact that both the driver and pedestrian were the hospital's invitees, and the hospital was exercising control over the exit ramp by knowingly funneling both sets of invitees to the same driveway. *Lutheran Hospital*, 634 N.E.2d at 870. Mount Comfort though did not funnel McPhearson, or any non-invitee anywhere on West 300 North. As the trial court's Order acknowledged, McPhearson was acting independent of any control from Mount Comfort or Amazon. This fact makes the *Lutheran Hospital* holding inapplicable, because in addition to having no control over the driveway, Mount Comfort had no control over the driver that caused the Accident.

IV. Mount Comfort did not assume a gratuitous duty.

The Estate's argument that Mount Comfort assumed a duty to truck driver invitees is equally unpersuasive. While the question of whether a landowner gratuitously assumed duty is generally a question for the jury, when there exists no genuine issue of material fact, assumption of a duty may be determined as a matter of law. *Am. Legion Pioneer Post No. 340 v. Christon*, 712 N.E.2d 532, 535 (Ind. Ct. App. 1999). Here, there is no genuine issue of material fact that

Mount Comfort did not assume a duty because the very allegation that Mount Comfort did so is contradictory on its face. In its Amended Complaint, the Estate alleges that Mount Comfort is liable specifically because of "[t]he lack of signage for Delivery Service Providers (D.S.P.s) like Harvail" which created a dangerous condition. Appellant's App. Vol. II at 42 (Amended Complaint). Yet, somehow, despite allegedly providing a lack of proper lighting and signage, the Estate then argues that Mount Comfort assumed a duty to Harvail via its lighting and signage. This contradictory argument makes it clear that under Indiana law Mount Comfort did not assume a duty to truck driver invitees traveling to the Amazon Warehouse because a landowner cannot gratuitously assume a duty absent affirmative conduct on the part of the landowner. *Ember*, 490 N.E.2d at 769 (citing *Board of Comm'rs v. Hatton*, 427 N.E.696, 699 (Ind. Ct. App. 1981). Mount Comfort cannot possibly be negligent for a lack of signage on its property while also demonstrating the affirmative conduct of placing signs to direct traffic, a necessity for Mount Comfort to gratuitously assume a duty to direct traffic.

Notwithstanding the self-contradictory nature of the Estate's theories, no basis exists for concluding that Mount Comfort assumed a duty. Section 324A of the Restatement (Second) of Torts parallels Indiana's doctrine of assumed duty. *Auler v. Van Natta*, 686 N.E.2d 172, 175 (Ind. Ct. App. 1997). Section 324A provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
>
> (a) his failure to exercise reasonable care increases the risk of such harm, or
>
> (b) he has undertaken to perform a duty owed by the other to the third person, or
>
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Id. (citing Restatement (Third) of Torts § 42 (2012)). While the Indiana Supreme Court has acknowledged that a party can gratuitously assume a duty, it has urged Indiana courts to exercise caution, and only find a party assumed a duty in "extreme circumstances[.]" *Yost v. Wabash College*, 3 N.E.3d 509, 518 (Ind. 2014).

The Estate's argument that Mount Comfort assumed a duty relies entirely on *Arnold v. F.J. Hab, Inc.*; however, the *Arnold* Court's holding is not applicable based on the facts pled in this matter. Appellant's Br. at 21-22. In *Arnold*, this Court held the landowner, who owned and operated a night club, assumed a duty of care to patrons for an incident that occurred on an adjacent property because club personnel controlled the flow of traffic in the parking lot. *Arnold v. F.J. Hab, Inc.*, 745 N.E.2d 912, 917 (Ind. Ct. App. 2001). In reaching that decision, this Court relied on testimony that: (1) the landowner controlled traffic inside the parking lot to keep it orderly; and (2) club representatives advised patrons to move their vehicles as part of the club's role in "keeping order in the [adjacent] parking lot." *Id*. Based on this testimony, the *Arnold* Court held that the club exercised some level of control over the adjacent parking lot creating an issue of fact as to whether the club assumed a duty. *Id*.

By contrast, the Estate's Amended Complaint contains no allegation that Mount Comfort exercised any level of control over West 300 North. In addition, there are also no allegations that Mount Comfort was either: (1) utilizing West 300 North for business purposes; or (2) explicitly stated an intent to maintain or control West 300 North. In short, Mount Comfort did nothing to affirmatively indicate it assumed any duty over West 300 North, a road it did not control, maintain, or oversee.

Finally, the Estate has failed to plead that Harvail relied on Mount Comfort in any way for the duty to help Harvail arrive safely at the Amazon Warehouse. Indeed, the Estate has pled the

opposite, that this was Harvail's first visit to the Amazon Warehouse, and he was only provided with an address and time to deliver the goods with no additional instruction. Appellant's App. Vol. II at 29. Because the Estate has failed to plead facts necessary to establish Mount Comfort gratuitously assumed a duty, the Estate's argument that Mount Comfort gratuitously assumed a duty must fail.

V. The trial court's Order did not fail to draw all reasonable inferences in favor of the Estate, and even if it did, none of the reasonable inferences that the Estate references in its Brief are relevant to the Court's ultimate decision.

The Estate also argues that the trial court failed to draw all reasonable inferences in its favor, as it is required to do when ruling on a Rule 12(C) Motion. The Estate first notes that the Court's June 23, 2023, Order stated Harvail parked his semi-tractor trailer *beside* West 300 North rather than *on* West 300 North as the Estate alleged in its Amended Complaint.[3] *Compare* Appellant's App Vol. II at 18 with Appellant's App. Vol. II at 29. Mount Comfort concedes that, for the purposes of Amazon and Mount Comfort's Rule 12(C) Motions, the trial court should have accepted the Estate's allegation that Harvail parked on West 300 North as true; however, the Estate fails establish how the trial court's confusion as to where Harvail parked his vehicle was any more than harmless error. Accepting the Estate's allegation as true would not have changed Harvail's status because he still would not have been on Mount Comfort's property. Whether his vehicle was parked on West 300 North or on the side of West 300 North has no bearing on Mount Comfort's duty because the Accident occurred entirely on West 300 North which Mount Comfort did not own or control. Further, where Harvail parked his vehicle has no bearing on the fact that Mount Comfort did not control McPhearson's actions on the day of the accident such that any

[3] The trial court's October 17, 2023, Order granting Mount Comfort judgment on the pleadings contained an identical statement from the trial court. Appellant's Supp. App. Vol. II at 2.

liability by McPhearson can then be imputed on Mount Comfort. Ultimately, where Harvail parked his vehicle is irrelevant because the relevant inquiry is whether Mount Comfort can be held liable for an accident that undoubtedly occurred on West 300 North, a public roadway.

While the Estate argues that pulling off on the side of West 300 North would be safer, there are no allegations in the Amended Complaint that Mount Comfort forced Harvail to park in the middle of the road or in any way prevented him from pulling onto the side of the road.[4] In short, any factual mistake by the trial court is plainly harmless error and provides no basis for this Court to reverse the trial court's Orders. *See* Ind. Appellate Rule 61(A) ("No error or defect in any ruling or order or in anything done or omitted by the trial court or by any of the parties is ground for granting relief or reversal on appeal where its probable impact, in light of all the evidence in the case, is sufficiently minor so as not to affect the substantial rights of the parties.")

The Estate next maintains that the trial court improperly assumed McPhearson was negligent when his vehicle struck Harvail. The Estate provides no reasoning for why McPhearson's lack of negligence would alter Mount Comfort's duty. Even so, the Estate's argument fails for two (2) reasons. First, the Estate is arguing that the trial court failed to draw all reasonable inferences in its favor by assuming the validity of the Estate's negligence allegations against McPhearson and ICI. Moreover, the Amended Complaint contains no inconsistent allegations or alternative arguments that would contradict the Estate's negligence allegations against McPhearson and ICI. The Amended Complaint also lacks any allegations that Mount Comfort is somehow vicariously liable for McPhearson's actions. Put another way, there is no

[4] While the Estate is entitled to all reasonable inferences, it is undisputed that Mount Comfort's property was located on the north side of West 300 North and because Harvail was traveling east, it would have been impossible for Mount Comfort to prevent Harvail from pulling off onto the South side of the road which Mount Comfort did not own or control.

alternative allegation the trial court was required to assume as true; therefore, there was no error on the part of the trial court. Second, regardless of the trial court's finding or inference of negligence on the part of McPhearson, it has no bearing on whether Mount Comfort owed Harvail the requisite duty of care. Specifically, negligent or not, McPhearson would still be an independent third-party (a point the Estate seemingly does not dispute) operating his vehicle outside of Mount Comfort's control on property that Mount Comfort does not control. Under those circumstances, Mount Comfort would have no duty to Harvail regardless of whether McPhearson was negligent. Therefore, any assumption by the trial court that McPhearson was negligent would have no bearing on the trial court's grant of judgment on the pleadings to Mount Comfort.

VI. Upholding the trial court's Order would not immunize property owners from all liability that causes harm to travelers on an adjacent roadway.

Amicus Curiae Indiana Trial Lawyers Association ("ITLA")[5] first argues that the trial court's holding must be overturned, otherwise Mount Comfort, Amazon, and landowners in general would be immunized for all liability as it relates to travelers on the adjacent roadways. Amicus Br. at 12 ("the Defendants below argued to the trial court that businesses have no duty, no matter what actions are taken on their own land, to those traveling on public roadways that are adjacent to the landowner's premises."). ITLA's argument though ignores both Mount Comfort's stated position and the trial court's holding in an attempt to exaggerate the potential impact should this Court uphold the trial court's Orders.

[5] As an initial note, ITLA's Amicus Brief devotes the initial portions of its Argument repeating the Estate's argument regarding Mount Comfort and Amazon's potential duties under Indiana law. Amicus Br. at 6-12. Pursuant to Indiana Appellate Rule 46(E), this portion of the Amicus Brief should be disregarded because it is no more than a repetition or restatement of the argument in the Estate's Appellant Brief. Ind. Appellate Rule 46.

ITLA's allegation that Mount Comfort is seeking absolute immunity for any potential harm to travelers on West 300 North clearly misstates Mount Comfort's position throughout the life of this matter. From the onset, Mount Comfort has maintained that, generally, the duty to ensure the safety of public roadways falls upon local governments who own and maintain the roadways, not private landowners adjacent to the public roadway. *Carroll*, 638 N.E.2d at 469. This position is rooted in this Court's prior holding that it is the duty of governmental entities, not private landowners, to provide the public with reasonably safe roads. *Hiland v. State*, 879 N.E.2d 621, 627 (Ind. Ct. App. 2008) ("the government is…required to provide *reasonably safe roads*) (emphasis in original). Mount Comfort though has acknowledged that while the general rule is that landowners are not liable for the safety of travelers from acts on independent third parties on adjacent public roadway, Indiana courts have recognized specific exceptions whereby an adjacent landowner's duty can extend off of its premises and onto the public roadway. To that end, Mount Comfort has acknowledged that landowners owe a duty to the traveling public to avoid creating hazardous conditions on their land that encroach or inhibit a traveler's free use of the roadway. Appellant's Supp. App. Vol. II at 13 (citing *Reece.*, 173 N.E.3d at 1034. Similarly, Mount Comfort has acknowledged that a landowner's duty may extend off its premises should it control an area outside of the premises that its owns. Appellant's Supp. App. Vol. II at 13 (citing *Lutheran Hosp.*, 634 N.E.2d at 873). Because the Estate has neither alleged that Mount Comfort created a condition on its property that physically encroached onto West 300 North nor that Mount Comfort exerted any control over West 300 North, upholding the trial court's decision would in no way implicate, much less negate altogether, the recognized exceptions to the general rule that landowners are not liable for injuries suffered on adjacent roadways.

ITLA's allegation also ignores the practical implication of the trial court's Orders. The Orders do not enshrine landowners with any new or additional immunity; rather, they merely acknowledge existing Indiana precedent that landowners are generally not liable: (1) for the actions of third parties they do not control; and (2) when an injury occurs off their premises. Mount Comfort has never argued that it is entitled to absolute immunity for any liability on adjacent roadways because, as Mount Comfort has conceded, Indiana courts have held that a landowner can be liable for injuries on adjacent roadways in certain circumstances. As the trial court maintained though, the Accident is not one of those circumstances, thus, ITLA's claim that upholding the trial court's Orders would somehow immunize all landowners from all future claims by travelers on adjacent roadways is baseless.

VII. Affirming the trial court's decision and refusing to expand the duty of landowners to protect parties from third-party tortfeasors on public roadways the landowner does not control is consistent with the majority of other jurisdictions.

First, there is no reason for this Court to turn to foreign jurisdictions for guidance on an issue Indiana courts have already addressed. As explained above, the trial court's reliance on *Hulen* is proper, and even if this Court disagrees, the holdings in *Reece* and *Snyder Electric* control and based on their clear precedent, this Court should affirm the trial court's Orders without conducting an expansive analysis of foreign jurisdictions. Simply put, Indiana courts have already rejected the legal arguments offered by the Estate and ITLA in an attempt to expand a landowner's duty off its premises, as such, there is no need for this Court to case law from outside jurisdictions. However, should this Court deem it necessary to evaluate other jurisdictions, it will find that the trial court's Orders are in line with the majority of other jurisdictions in terms of how they attach liability to landowners for accidents that occur on adjacent public roadways.

First, while ITLA alleges the majority of jurisdictions have adopted the Estate's position that liability should be expanded, a closer examination of the case law ITLA relies on shows that those cases are either not analogous to the facts in this matter or, more importantly, those courts required a level of control, similar to this Court in *Lutheran Hospital*, that is just not present here.

a. Arizona

ITLA first points to the Arizona Court of Appeals' decision in *Stephens v. Bashas' Inc.* Amicus Br. at 12-13. Stephens was hired to drive a load of groceries. *Stephens v. Bashas' Inc.*, 186 Ariz. 427, 428 (Ct. App. 1996). When Stephens arrived at the delivery location, he began turning onto the defendant's property when a security guard stopped him and told him to park somewhere off of the property. *Id*. Stephens proceeded to drive around neighboring streets looking for a place to park his vehicle, but "no parking" signs were posted elsewhere. *Id*. Stephens eventually parked his vehicle in the center lane of an adjacent roadway and returned to the defendant's property for instructions on how to enter. *Id*. at 429. While Stephens was eventually provided instructions on where and how to enter the defendant's property, he was never provided instructions regarding his continued parking on the adjacent roadway. *Id*. Importantly, according to the Court, the defendant had actual knowledge that drivers routinely parked in the middle of the adjacent street to open their rear doors prior to entering the defendant's property, and that is why the defendant's representatives were expected to tell truck drivers not to park in the center lane before the property opened its gates. *Id*. Stephens eventually saw his assigned dock open and prepared to pull his truck in per the instructions from the defendant's representative. *Id*. Stephens, knowing the size and layout of the defendant's property required him to open his rear door prior to pulling onto the defendant's property, exited his truck to do so and was struck by a vehicle also traveling on the adjacent roadway. *Id*.

Stephens sued the defendant for the injuries suffered in the accident. *Id*. The defendant moved for summary judgment, arguing that it did not owe Stephens a duty for injuries suffered on the public roadway, and the trial court granted the defendant's motion. *Id*. On appeal, the Arizona Court of Appeals reversed, holding the defendant owed Stephens a duty in part because Stephens had already entered the premises and received directions on how to proceed onto the adjacent property. *Id*. at 429-430 The Court also noted that the defendant's duty was based in part on the defendant's use of its property because the layout required drivers to open their rear doors on the adjacent roadway. *Id.* at 431. The Court of Appeals reasoned that when a landowner uses an adjoining roadway to its business' commercial advantage, it incurs a duty. *Id*. ("Stephens has not alleged that [the defendant] had a duty to control 35th Avenue. He instead contends that [the defendant] should have maintained its own premises so that space would have been available for him to open his doors off the roadway. When the activities conducted on the business premises affect the risk of injury off-premises, the landowner may have an obligation 'to correct the condition or guard against foreseeable injuries.'").

While ITLA maintains the *Stephens* decision is applicable to the facts of this matter, it is clearly distinguishable. First, it is undisputed that Harvail never entered the property owned by Mount Comfort and never was provided instructions on how to enter the property directly from either Mount Comfort or Amazon. Because of this, unlike in *Stephens*, there are no allegations that Harvail entered the Amazon Warehouse where he was provided instructions from any Mount Comfort or Amazon representative on how to operate his vehicle on West 300 North. Simply put, the defendant's level of involvement and actual knowledge of Stephens' entry to the property is not seen in this lawsuit. Similarly, the Arizona Court of Appeals clearly considered the defendant's use of the public roadway for its own commercial interest as a factor in finding it owed Stephens

a duty. Here, there are no allegations that Mount Comfort or Amazon was utilizing West 300 North in any kind of specific manner that gave it a commercial advantage. Because this factor is absent, the *Stephens* holding is clearly distinguishable and this Court should not consider it applicable to the present case.

b. Missouri

ITLA's reliance on *Boggs ex rel. Boggs v. Lay*, is also misplaced. In *Boggs*, the landowner was found liable after soybean trucks parked on a public roadway waiting for entrance onto the landowner's land blocked the view of a cyclist, causing an accident. *Boggs ex rel. Boggs v. Lay*, 164 S.W.3d 4, 17 (Mo. Ct. App. 2005). The *Boggs* Court acknowledged that Missouri courts have adopted the general rule that a property owner is under no duty to maintain a public road in a safe condition. *Id*. at 16. While this is the general rule, there are two exceptions whereby an adjacent landowner may be liable: (1) when a landowner puts an obstruction on a public road that was not part of the original construction in order to serve his own purposes; and (2) when a landowner makes use of the public road for some other purpose than merely using it as a road, such as a driveway or a private walkway. *Id*. While ITLA maintains that *Boggs* supports the Estate's argument that Mount Comfort owed Harvail a duty, a Missouri Court, beholden to Missouri's general rule and its two established exceptions, would likely disagree. Under Missouri's general rule, Mount Comfort owed Harvail no duty while he crossed the public roadway. Also, neither exception under Missouri law applies because: (1) Mount Comfort did not put an obstruction onto West 300 North; and (2) Mount Comfort did not utilize West 300 North for any purposes other than a public roadway. Like Indiana, Missouri courts do not recognize an exception to the general rule for alleged confusion on the roadway, the theory the Estate relies on to establish Mount

Comfort's alleged duty to Harvail. Because Missouri would not recognize such an exception, a Missouri court analyzing the instant case would likely find Mount Comfort owed Harvail no duty.

ITLA goes on to cite holdings from multiple jurisdictions all of which purportedly show courts extending a landowner's duty to public roadways. However, the cases upon which ITLA relies are factually distinct from this case, just as *Boggs* was, that is, the cases relied upon by ITLA only involve a finding that a landowner's duty extends to the public roadway when the landowner's use of the land creates a physical intrusion or physical hinderance onto the roadway. *See, e.g., Fleming v. Garnett*, 231 Conn. 77, 81, 646 A.2d 1308, 1311 (1994) (landowner found liable after truck exiting landowner's property created a physical obstruction on the road blocking all southbound lanes and leaving no room for other vehicles to pass); *Langen v. Rushton*, 138 Mich. App. 672, 675, 360 N.W.2d 270, 272 (1984) (holding a duty where the tortfeasor driver was exiting the landowner's property onto the public road thus creating the physical harm on the public roadway); *Justice v. CSX Transp., Inc.*, 908 F.2d 119, 123 (7th Cir. 1990) (when analyzing a landowner's duty of care to avoid creating visual obstacles that unreasonably imperil users of adjacent roadways, the Court noted"[t]he present case could be regarded as stronger for liability, because there *is* a physical obstruction"); *Ollar v. Spakes*, 269 Ark. 488, 491, 601 S.W.2d 868, 869 (1980) (analyzing duty where Plaintiff tripped on a physical impediment, specifically a crosstie placed on the property adjacent to the landowner's property); *Bradford v. Universal Const. Co.*, 644 So. 2d 864, 865 (Ala. 1994) (analyzing the duty after a sixty-pound piece of plywood was blown off the landowner's property and struck Plaintiff while he was on adjacent public land); *Carignan v. New Hampshire Int'l Speedway, Inc.*, 151 N.H. 409, 412, 858 A.2d 536, 539 (2004)

(holding a duty when a landowner's representative was directing traffic on an adjacent roadway, and the directly solely caused the subject accident)[6]

All ITLA has shown is that the majority of jurisdictions, including Indiana and all of the jurisdictions giving rise to the case that ITLA cites in its Brief, recognize a landowner's duty to refrain from using its land to create a physical impediment or obstacle on a public road. But Harvail does not allege that Mount Comfort used its property to create a physical hinderance to Harvail's use of West 300 North, thus, the cases upon which ITLA relies are wholly unapplicable.

Notably, ITLA's attempt to rely on the Texas Court of Appeals only undercuts their position. Amicus Br. at 16. ITLA cites the Texas Court of Appeals' decision in *HNMC, Inc. v. Chan*, a particularly instructive case because the Texas Court analyzed facts similar to the instant matter. Specifically, in *HNMC*, the defendant owned a hospital and parking lot which were separated by a public roadway. *HNMC, Inc. v. Chan*, 683 S.W.3d 373, 378 (Tex. 2024). Due to the configuration of the hospital exit and parking lot, there were multiple accidents involving pedestrians who: (1) had parked their vehicle in the parking lot; and (2) attempted to cross the public roadway to access the hospital. *Id*. Despite HNMC's actual knowledge of said accidents, the hospital did not take any remedial actions. *Id*. at 378-79. In 2015, the plaintiff, who worked

[6] Mount Comfort does not address ITLA's citation to *Combs v. Atlanta Auto Auction, Inc.* or *Garlick v. Trans Tech Logistics, Inc.* because it is clear both are inapplicable. In *Combs*, the Georgia Court of Appeals concluded that the adjacent roadway was not utilized as a public roadway and was instead utilized solely by the landowner, making it clearly distinguishable from the facts of this case. *Combs v. Atlanta Auto Auction, Inc.*, 287 Ga. App. 9, 16, 650 S.E.2d 709, 717 (2007) ("Based on the foregoing, it appears that the Auction treats this property as an extension of its own, or, at the very least, as the functional equivalent of a private driveway."). Similarly, the defendant in *Garlick* admitted that it assumed the duty, the Court therefore had no need to analyze whether one was owed. *Garlick v. Trans Tech Logistics, Inc.*, 636 F. App'x 108, 114 (3d Cir. 2015) ("Under the unique circumstances of this case, because Anadarko undertook a duty, by its own admission, to provide the safest available route to the site, it is for the jury to determine whether that duty was breached by providing only mileage measurements and failing to provide lights and signs at the turn-off that Garlick missed during his second trip to the site that night[.]").

as a nurse, exited the hospital and was attempting to cross the public roadway to enter the parking lot. *Id*. at 379. At the same time, a motorist was exiting the hospital's parking lot, and as he pulled onto the public roadway, he struck the plaintiff. *Id*.

HNMC argued that it owed no duty to the plaintiff since the accident had occurred on a public roadway. *Id*. On appeal, the Texas Court of Appeals recognized that "[t]he general rule is that a property owner, such as HNMC, has no duty to ensure the safety of a person who leaves the owner's property and suffers injury on an adjacent public roadway, or to ensure that person's safety against the dangerous acts of a third party." *HNMC, Inc. v. Chan*, 637 S.W.3d 919, 929 (Tex. App. 2021), *rev'd*, 683 S.W.3d 373 (Tex. 2024) (internal citations omitted). The Court of Appeals also noted that the rule stems from the fact that a landowner's duty "emanates from the owner's control over the occupied premises and therefore applies only to hazards existing on those premises; the duty does not extend beyond the limits of the premises owner's control." *Id*. Instead of adopting the general rule, the Texas Court of Appeals recognized a new duty specific to the facts of the situation. *HNMC*, 683 S.W.3d at 379. To that end, the Texas Court of Appeals created a new duty for landowners who knowingly act in a way that increases the danger to pedestrians on adjacent roadways. *HNMC*, 637 S.W.3d at 936.

In its Brief, despite a published Texas Supreme Court opinion, ITLA relies on an overturned Court of Appeals decision, in support of its position that this Court should expand premises liability for Mount Comfort and all landowners. Amicus Br. at 16. However, the Texas Supreme Court overturned the Court of Appeals' decision to create a new duty for landowners to pedestrians in adjacent streets was in error. *HNMC*, 683 S.W.3d at 381. Instead, the Texas Supreme Court, citing Restatement (Third) of Torts: Phys. & Emot. Harm § 54 (2012) cmt. D, and applying reasoning in line with the trial court's Orders in the instant matter, held that HNMC had

no duty to ensure the plaintiff's safety because: (1) she was injured in a public roadway adjacent to HNMC's property; and (2) the accident was caused by the actions of an independent third-party driver over whom HNMC had no control. *Id*. at 382. The Court went on to hold that to the extent HNMC would owe the plaintiff a duty, it would be limited to only the areas of the public roadway over which HNMC actually exercised some level of control. *Id*. at 384.

Like HNMC, Mount Comfort exercised no control over West 300 North or McPherson, and because of that, like HNMC, Mount Comfort owed no duty to protect Harvail from an independent third-party actor while he attempted to cross the public roadway. Contrary to ITLA's assertion, by overturning the Texas Court of Appeals, the Texas Supreme Court put Texas law in line with the majority of jurisdictions, including Indiana, that require a property owner to either: (1) create a physical obstruction on the public roadway; or (2) exert some level of control over the abutting roadway or property in order for a duty to attach for the actions of third-party tortfeasors over whom they do not control for accidents on adjacent public roadways. *See e.g., Seaber v. Hotel Del Coronado*, 1 Cal. App. 4th 481, 489 (1991) (holding that due to lack of control, landowner did not owe invitee duty to protect him from third-party motorists while he was on adjacent public roadway despite invitees use of crosswalk for egress that landowner requested be installed and knew was potentially dangerous); *Friedman v. City of Chicago*, 333 Ill. App. 3d 1070, 1074, 777 N.E.2d 430, 433 (2002) (landowner not liable for injuries off premises, even those used for ingress and egress, when not under landowner's control); *Laumann v. Plakakis*, 84 N.C. App. 131, 133, 351 S.E.2d 765, 767 (1987) (upholding the trial court's dismissal pursuant to Rule 12(b)(6) holding landowner owed no duty to the plaintiff while crossing street in part because the danger from third parties to jaywalkers like Plaintiff were not a hidden, dangerous condition, and landowner only owed duty when its action created the dangerous condition); *Holter v. City of*

Sheyenne, 480 N.W.2d 736, 738 (N.D. 1992) (when analyzing landowners duty for injuries on adjacent roadway, "[t]he key factor to finding that a property owner owes no duty to an injured party is that the owner has no control over the property where the injury occurred or the instrumentality causing the injury."); *Ferreira v. Strack*, 636 A.2d 682, 685 (R.I. 1994) (holding church owed no duty to pedestrian injured in public roadway because church exercised no control over public roadway); *Heath v. Honker's Mini-Mart, Inc.*, 134 Idaho 711, 714-15, 8 P.3d 1254, 1257-58 (Ct. App. 2000) (holding landowner owed no duty to business invitee entering property after slip and fall on adjacent property not controlled by landowner); *Wemple ex rel. Dang v. Dahman*, 103 Haw. 385, 393, 83 P.3d 100, 108 (2004) (holding that for the purposes of premises liability claims, the test for determining liability is degree of control); *Albright, ex rel. Albright v. Univ. of Toledo*, No. 01AP-130, 2001 WL 1084461, at *5 (Ohio Ct. App. Sept. 18, 2001) (holding university did not owe a duty to pedestrian struck by vehicle on adjacent public roadway because university did no have control of public roadway).

VIII. Public policy does not support creating a new duty that expands the duty private landowners owe to invitees or other travelers on adjacent public roadways.

For the reasons stated above, it is clear that under existing Indiana law, the facts of this matter do not necessitate this Court analyze whether to expand Mount Comfort's duties, and the duties of landowners generally, to third parties on the adjacent roadway. *Goodwin*, 62 N.E.3d 384 at 387 (citing *Northern Indiana Public Service Co. v. Sharp*, 790 N.E.2d 462, 465 (Ind. 2003) ("although the *Webb* three-part balancing test is a useful tool in determining whether a duty exists, this is so 'only in those instances where the element of duty has not already been declared or otherwise articulated'."). Should the Court deem existing case law insufficient given the facts of this case, then when, as here, a party seeks to expand or create a new duty not previously recognized under Indiana law, this Court should utilize the *Webb v. Jarvis* three-part balancing test

to determine whether a duty exists. *Looney v. Nestle Waters N. Am., Inc*., 187 N.E.3d 867, 873 (Ind. Ct. App.) (citing *Webb v. Jarvis*, 575 N.E.2d 992, 995 (Ind. 1991), *disapproved of on other grounds*). The three-factor tests balances: (1) the parties' relationship; (2) the reasonable foreseeability of harm; and (3) public policy. *Id*. When all three factors are considered, it is clear that this Court should not expand the duty of private landowners for potential harm from third parties that occurs off of their premises.

A. The Parties' Relationship

First, the Amended Complaint contains no allegation that Mount Comfort had any relationship with either McPhearson or ICI. Appellant's App. Vol. II at 41-42. This fact is reflected in the trial court's Order, which noted that Amazon, and by extension Mount Comfort, exerted no control over McPhearson or ICI. Appellant's Supp. App Vol. II at 3-4. The Amended Complaint also contains no allegation that Harvail had any relationship with Mount Comfort. Appellant's App. Vol. II at 41-42. Indeed, the Amended Complaint alleges that Harvail was an independent contractor contracted by Amazon, with no similar allegation as to Mount Comfort. *Id*. at 27.

The Estate may argue its allegations against Amazon apply equally to Mount Comfort due to the Estate's incorporation of previous allegations in its Amended Complaint. Appellant's Br. at 25 ("The Amended Complaint sets forth a count against Mount Comfort incorporating by reference each and every allegation against Amazon[.]"). The Amended Complaint's allegations directed specifically at Amazon by name though are just that, allegations against Amazon, and the Estate cannot rely on a generic incorporation to impute allegations made directly against Amazon onto Mount Comfort. Doing so would defeat the purpose of notice pleading, as Mount Comfort

could not possibly assume allegations directed specifically at another party by name apply to Mount Comfort as well.

Even if the Estate could apply its allegations directly against Amazon to Mount Comfort, it would be irrelevant, because Harvail was an independent contractor, meaning neither Amazon or Mount Comfort would owe Harvail any duty in the context of their relationship because it is well-established that under Indiana law, a principal has no duty to provide an independent contractor with a safe place to work. *See McClure v. Strother*, 570 N.E.2d 1319, 1321 (Ind. Ct. App. 1991); *see also Sword v. NKC Hosps., Inc.*, 714 N.E.2d 142, 148 (Ind. 1999) ("The theory behind non-liability for independent contractors is that it would be unfair to hold a master liable for the conduct of another when the master has no control over that conduct."); *Hale v. Peabody Coal Co.*, 343 N.E.2d 316, 321 (1976) ("An independent contractor is one exercising an independent employment under a contract to do certain work by his own methods, without subjection to the control of his employer, except as to the product or result of the work. When the person employing may prescribe what shall be done, but not how it is to be done, or who is to do it, the person so employed is a contractor and not a servant."). Because there is no relationship between Mount Comfort and any of the parties involved in the Accident, even if this Court stretched Plaintiff's interpretation of the Amended Complaint such that Harvail was considered Mount Comfort's independent contractor, this factor weight heavily in favor of not extending Mount Comfort's duty to Harvail while he was on the public roadway.

B. The Reasonable Foreseeability of Harm

The foreseeability factor also weighs against the creation of a new duty for landowners. When analyzing foreseeability, "the mere fact that a particular outcome is 'sufficiently likely' is not enough to give rise to a duty. *Goodwin*, 62 N.E.3d at 392. Instead, this Court must, "assess

whether there is some probability or likelihood of harm that is serious enough to induce a reasonable person to take precautions to avoid it." *Id.* Here, the Estate has failed to allege sufficient facts that it is likely that a driver would choose to park his vehicle in the middle of a highway, exit that vehicle, and then walk into oncoming traffic. This is especially true given neither Amazon nor Mount Comfort did anything to impede Harvail's progress on West 300 North, meaning he was not inhibited in any way from proceeding to the third and correct entrance or, if truly confused regarding where to go, pulling over in a number of safer locations to cross West 300 North in a less dangerous manner. Simply put, because Mount Comfort could not foresee that: (1) Harvail would park his vehicle in the middle of the roadway; (2) get out of his vehicle; and (3) step directly into McPhearson's line of traffic, this factor weighs in favor of not creating a new duty.

C. Public Policy

The final factor this Court must consider is the public policy implications of creating a new duty. This Court has already considered whether to expand the duty of landowners to provide safe ingress and egress and held that "public policy considerations weigh against the extension of the duty to provide safe ingress and egress outside of the business owner's premises." *Sizemore v. Templeton Oil Co.*, 724 N.E.2d 647, 654 (Ind. Ct. App. 2000). This Court reached that decision because it remains unclear how a private landowner would discharge any such duty. *Id.* As discussed above, this Court has also refused to expand the duty of private businesses onto public roadways when they are doing nothing more than acting in the standard course of business. *Snyder Electric*, 529 N.E.2d at 858. ITLA's public policy argument does nothing to address the concerns this Court raised in both *Sizemore* and *Snyder Electric*, specifically, how a private landowner can discharge a duty to ensure independent contractors do not get confused when delivering goods or

how private landowners can prevent potential invitees from suffering harm at the hands of fellow travelers over which the landowner has no control. ITLA's failure to address these concerns is especially problematic when, as here, private businesses are merely operating a business using standard, widely accepted methods.

Public policy also weighs against expanding a landowner's duty off its premises because unlike the requirements Indiana courts have previously mandated, namely physical encroachment onto the road or some form of control over the adjacent property, creating a duty to avoid confusion or other mental states could be untenable. By eliminating the physical encroachment and/or control requirement, businesses and landowners may be liable any time a driver claims a nebulous mental state such as confusion or distraction. These lawsuits would require the Court and a jury to judge a plaintiff's mental state, creating fertile ground for frivolous lawsuits given there is no way to prove confusion or a plaintiff's mental state generally. The Indiana Supreme Court has already tacitly acknowledged this concern in *Reece*, noting that any expansion of a landowner's duty off of its premises could not be subject to a standard that is "unworkably malleable" when it instead adopted a "bright-line rule" regarding a landowner's liability to motorists on adjacent public roadways. *Reece*, 173 N.E.3d at 1040.

The Estate may argue it is not seeking this kind of radical overhaul and argue instead that this expansion applies to situations like Harvail's in which a potential business invitee is trying to enter a property, but even this narrow expansion of a business or landowner's duty would have wide ranging effects on liability. Business and landowners frequently direct potential business invitees to their premises, sometimes using signs miles away from the actual location.[7] If a driver is allegedly distracted by one of these signs, or allegedly confused by the sign's instructions, and

[7] Anyone who has driven on an interstate knows and understands these signs are ubiquitous.

that driver becomes involved in an accident, the Estate argues for a new duty that would hold that landowner liable for its signage. The potential for a flurry of baseless new lawsuits against landowners and businesses citing this expanded new duty, lawsuits that will rely on nothing more than the assessment of the plaintiff's mental state, is reason enough for this Court to find public policy weighs against ITLA's request this Court expand landowners' duties. The new duty ITLA and the Estate seek clearly expands current Indiana premises liability in an untenable manner, and for that reason this Court should uphold the trial court's Orders in the interest of maintaining premises liability precedent and keeping Indiana in line with the majority of other jurisdictions.

Finaly, both ITLA and the Estate intimate that because Amazon is one of "the most profitable corporate entities in the world" it should have borne the costs necessary to remediate the allegedly negligent signage and lighting. Appellant's App. Vol II at 40; *see also,* Amicus Br. at 19. While there may be some value in painting Amazon and Mount Comfort as profitable corporate entities in front of a jury, their profits are irrelevant to any alleged duty they may have as it relates to the adjacent roadway. This is because any decision by this Court would apply to not just Amazon, which allegedly "generat[es] tens of millions of dollars in revenue every day;" it will also apply to all private landowners, including small businesses that generate minimal revenue and to private households that generate no revenue at all but regularly provide directions and instructions to independent contractors working for product and food delivery services. In short, the Estate's intimation that Amazon's resources effect this Court's public policy analysis should be disregarded, and this Court should follow its own guidance in *Sizemore* and *Snyder Electric* and hold that public policy weighs against expanding a landowner's duty to provide safe ingress and egress outside of the landowner's premises.

CONCLUSION

The Estate's Amended Complaint fails to state a claim against Mount Comfort upon which relief can be granted. Taking all allegations contained within the Amended Complaint as true, it is clear that the Estate cannot in any way succeed on its negligence claim against Mount Comfort. A negligence claim requires a defendant owe the Plaintiff a duty. Because a landowner does not owe a duty to ensure the safety of motorists or pedestrians from allegedly negligent third parties on an adjacent public roadway over which it maintains no control, the Amended Complaint does not satisfy this requirement and the trial court's Order granting Mount Comfort's Motion for Judgment on the Pleadings should be upheld.

WORD COUNT CERTIFICATE

I verify that, including footnotes, this brief contains no more than 14,000 words.

Respectfully submitted,

LEWIS WAGNER, LLP

/s/ Barath S. Raman
BARATH S. RAMAN, #32116-49
EDMUND L. ABEL, #36293-49
J. NEAL BOWLING, #19278-41
Counsel for CF Mount Comfort DST

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of April, 2024, the foregoing Brief of Appellee CF Mount Comfort DST was filed in the Court of Appeals proceeding using the Indiana Electronic Filing System ("IEFS") which served the foregoing to the following counsel of record:

Brandon A. Yosha
Alexander C. Trueblood
Louis Buddy Yosha
Bryan C. Tisch
YOSHA COOK & TISCH
9102 North Meridian Street, Suite 535
Indianapolis, IN 46260

Thomas R. Schultz
SCHULTZ & POGUE, LLP
520 Indiana Avenue
Indianapolis, IN 46202

Edward M. O'Brien
Cyrus G. Dutton
Philip G. Rizzo
WILSON ELSER MOSKOWITZ
EDELMAN & DICKER LLP
100 Mallard Creek Road Suite 250
Louisville, Kentucky 40207

Charles Hubley
Chase Wilson
HURST LIMONTES LLC
50 S. Meridian Street, Suite 600
Indianapolis, Indiana 46240

/s/ Barath S. Raman
BARATH S. RAMAN

LEWIS WAGNER, LLP
1411 Roosevelt Avenue, Suite 102
Indianapolis, IN 46201
Phone: (317) 237-0500
braman@lewiswagner.com
eabel@lewiswagner.com
nbowling@lewiswagner.com