Filed: 3/25/2024 3:48 PM

IN THE INDIANA COURT OF APPEALS
CAUSE NO. 24A-CT-00254

MAHARI MRACH OUKBU and NITSIHITI ABRAHAM, Appellants, Plaintiffs below, v. 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; and, BRUCE L. GIBSON, an Individual, CITY OF GREENFIELD, INDIANA HANCOCK COUNTY BOARD OF COMMISSIONERS, HANCOCK COUNTY PLANNING COMMISSION, and HANCOCK COUNTY HIGHWAY DEPT., Appellees, Defendants below,	)	APPEAL FROM THE HAMILTON SUPERIOR COURT 5 TRIAL COURT CASE NO.: 29D05-2308-CT-007700 THE HONORABLE DAVID K. NAJJAR, JUDGE.

APPELLANTS' BRIEF

Brandon Yosha, No. 36138-29
Bryan C. Tisch, No. 24693-49
Alexander C. Trueblood, No. 31804-49
YOSHA LAW
9102 N. Meridian Street, Suite 535
Indianapolis, IN 46260
Phone: (317) 334-9200
Fax: (317) 315-5143
Email: byosha@yoshalaw.com
btisch@yoshalaw.com
atrueblood@yoshalaw.com

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I. Statement of Issues

1. Under the allegations in the Amended Complaint, are there any circumstances where Amazon and Mount Comfort could be held liable for their conscious decision to continue to use signs they knew were incomplete, confusing, and dangerous to direct incoming truck drivers Amazon invited onto their premises to make deliveries?

II. Statement of the Case

This negligence action seeking damages for personal injuries arises from an incident on September 2, 2022, in which the Plaintiff, Mahari Mrach Oukbu (hereinafter, "Mahari") was severely injured after exiting the truck he was driving while attempting to enter a fulfillment center operated, maintained, controlled, and managed by employees and/or agents of Defendant Amazon.com, Inc. and its subsidiaries, in order to make a delivery of goods to the fulfillment center.[1] (Appellants' App. Vol. II, pp. 44-49). Mahari's wife, Plaintiff Nitsihiti Abraham (hereinafter, "Nitsihiti"), also brought a loss of consortium claim arising from the same set of circumstances. (Appellants' App. Vol. II, pp. 68-69). Mahari and Nitsihiti brought this action on April 24, 2023 against the Amazon Defendants and CF Mount Comfort, DST ("Mount Comfort"), among others, alleging that Amazon and Mount Comfort negligently designed, maintained, and controlled the entrance to their fulfillment center and had actual knowledge that the confusing layout of the fulfillment center's entrances was routinely endangering arriving truck drivers by causing them to become confused and exit their trucks on County Road 300 North immediately

[1] For the purposes of the Motion for Judgment on the Pleadings giving rise to this appeal, the parties have not distinguished between Defendants Amazon, Inc.; Amazon.com, Inc.; Amazon Logistics, Inc.; and Amazon.com Services, LLC, MQJ1, and have collectively referred to them as either "Amazon" or the "Amazon Defendants."

outside the fulfillment center's entrance. (Appellants' App. Vol. II, pp. 5, 24-43). Mahari and Nitsihiti amended their Complaint on July 6, 2023, adding additional defendants and supplementing the factual allegations supporting their claims against Amazon and Mount Comfort. (Appellants' App. Vol. II, pp. 9, 44-71).

On October 10, 2023, the Amazon Defendants filed a Trial Rule 12(C) Motion for Judgment on the Pleadings and Memorandum of Law in support thereof, arguing that the allegations in the Amended Complaint did not establish a duty owed by the Amazon Defendants to Mahari, and further arguing that any alleged negligence by Amazon could not have proximately caused Mahari's injuries. (Appellants' App. Vol. II, pp. 14, 72-94). Mahari and Nitsihiti filed their Response in Opposition to the Amazon Defendants' Motion for Judgment on the Pleadings on October 30, 2023, arguing that the Amended Complaint sufficiently alleged that Amazon had breached its well-settled duty to provide a safe means of ingress for Mahari as its business invitee under Indiana law. (Appellants' App. Vol. II, pp. 15, 109-29). Mahari and Nitsihiti further asserted that Amazon had assumed a duty to direct incoming truck traffic by virtue of posting signs prohibiting trucks from using the first two entrances to its facility when arriving from the west. (*Id*.). The Amazon Defendants filed a Reply in Support of their Motion for Judgment on the Pleadings on November 13, 2023. (Appellants' App. Vol. II, pp. 16, 130-46).

On October 12, 2023, Mount Comfort filed a Trial Rule 12(C) Motion for Judgment on the Pleadings and Brief in support thereof.[2] (Appellants' App. Vol. II, pp. 14, 95-108). The arguments

[2] For reasons unknown to the Parties, Mount Comfort's Brief in Support of its Motion for Judgment on the Pleadings does not appear on the Trial Court's chronological case summary, and was not served on the Plaintiffs via the Indiana E-Filing System despite having been e-filed on October 12, 2023. (Appellants' App. Vol. II, p. 14).

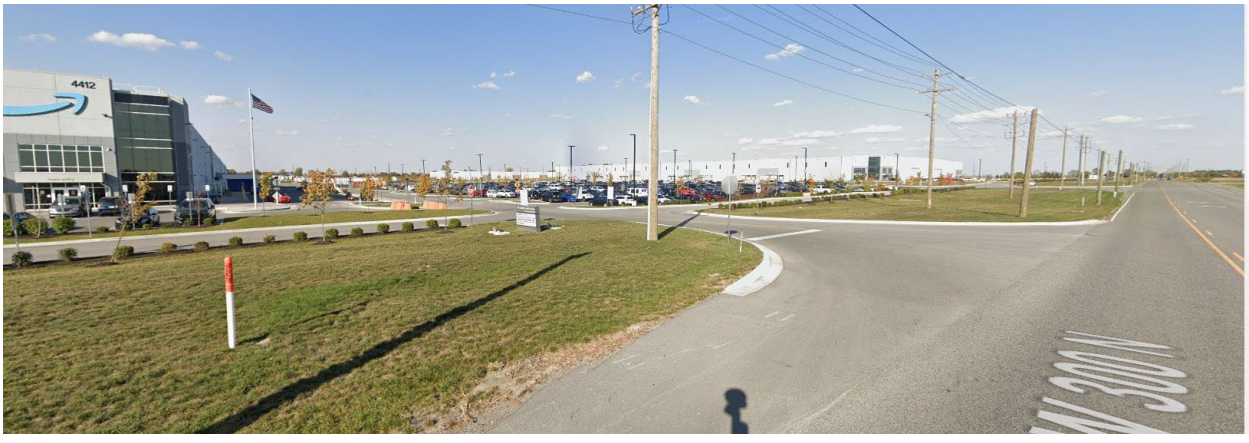
presented in Mount Comfort's Motion for Judgment on the Pleadings and supporting Brief were essentially identical to those made by the Amazon Defendants in their Motion for Judgment on the Pleadings, with the exception that unlike the Amazon Defendants, Mount Comfort did not argue that it was entitled to judgment on the pleadings on the issue of proximate cause. (*Id.*). Mahari and Nitsihiti filed a Response in Opposition to Mount Comfort's Motion for Judgment on the Pleadings on November 22, 2023. (Appellants' App. Vol. II, pp. 16, 147-63). Mount Comfort filed a Reply in Support of its Motion for Judgment on the Pleadings on December 6, 2023. (Appellants' App. Vol. II, pp. 17, 164-74).

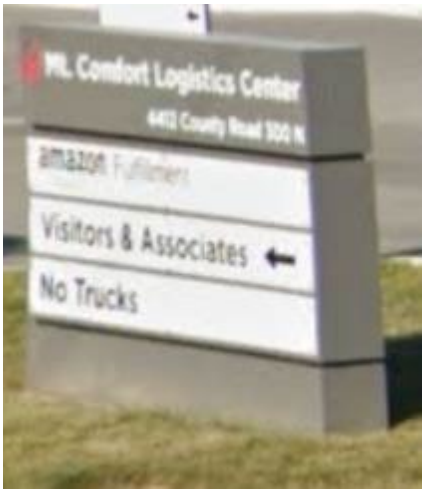
The Trial Court did not hold oral arguments on the Motions for Judgment on the Pleadings filed by Amazon or Mount Comfort. Instead, it issued an Order on January 4, 2024 granting both Motions for Judgment on the Pleadings, as well as a Motion to Dismiss that had been filed by the Hancock County Board of Commissioners, Hancock County Planning Commission, and Hancock County Highway Department (collectively "Hancock County").[3] (Appellants' App. Vol. II, pp. 17-23). The Trial Court in its January 4, 2024 Order found that "neither Amazon nor Mount Comfort had a duty to guard against injury to Mahari from the negligent acts of someone over whom they had no control and when the injury occurred off their premises," and that there was "no just reason for delay," and therefore directed judgment to be entered in favor of the Amazon Defendants and Mount Comfort. (Appellants' App. Vol. II, pp. 22-23). *See* Ind. R. Trial P. 54(B); Ind. R. App. P. 2(H)(2). Mahari and Nitsihiti filed their Notice of Appeal to initiate this appeal on February 1, 2024. (Appellants' App. Vol. II, p. 17).

[3] The Appellants are not appealing the portions of the Trial Court's Order pertaining to Hancock County's Motion to Dismiss.

III. Statement of Facts

Defendants Amazon, Inc.; Amazon.com, Inc.; Amazon Logistics, Inc.; and Amazon.com Services, LLC, MQJ1 (collectively, "Amazon" or the "Amazon Defendants") operate, maintain, control, and manage a fulfillment center known as "MQJ1" (hereinafter, the "Fulfillment Center") located at 4412 West County Road 300 North, in Greenfield, Indiana. (Appellants' App. Vol. II, pp. 45-46). Mount Comfort owns the Fulfillment Center. (*Id.*). Drivers approaching the Fulfillment Center from the west encounter two main entrances to the Fulfillment Center along the north side of County Road 300 North before passing the Fulfillment Center altogether. (Appellants' App. Vol. II, pp. 46-48). Small signs indicating that commercial trucks are not permitted to use these entrances were placed on Amazon's premises at both of these entrances. (Appellants' App. Vol. II, pp. 47-49). At all relevant times prior to and including September 2, 2022, there was no signage posted at either of these two main entrances to inform incoming truck drivers as to where they were expected to enter the Fulfillment Center's premises. (*Id.*). The Amended Complaint includes images showing the layout and "no trucks" signage at the second entrance to the Fulfillment Center from the west:





(Appellants' App. Vol. II, pp. 47-48).

In pre-dawn hours of September 2, 2022, Mahari traveled to the Fulfillment Center to deliver a truckload of goods at Amazon's request. (Appellants' App. Vol. II, pp. 46-49, 51). As he arrived to the Fulfillment Center from the west, Mahari encountered the two entrances bearing no-truck signs. (Appellants' App. Vol. II, pp. 46-48). Amazon had not provided Mahari with any instructions or other guidance as to how he was supposed to enter the Fulfillment Center, nor had it provided him with any point of contact to inquire as to that information. (*Id*.). From his vantage point as he arrived at the second entrance, Mahari was unable to discern any other entrances serving the Fulfillment Center. (Appellants' App. Vol. II, p. 48). Although Mahari had no way of knowing this at the time, Amazon expected him to enter at a third entrance, which was approximately 500 feet east of the Fulfillment Center building. (*Id*.). Confused about how to enter the Fulfillment Center when the only two apparent entrances were marked with "no trucks" signs, Mahari parked his truck in the middle lane of County Road 300 North, a dedicated bi-directional turn lane, and exited his truck to try to discern how he was supposed to enter the Fulfillment Center. (Appellants' App. Vol. II, pp. 47-49). Immediately after exiting his truck, Mahari was struck and

severely injured by a vehicle driven by an eastbound motorist, Defendant Bruce L. Gibson. (Appellants' App. Vol. II, p. 49).

Even before Mahari was injured, Amazon had *actual knowledge* that the confusing layout and inadequate signage at its Fulfillment Center's entrances was routinely endangering arriving truck drivers by causing them to become confused and exit their trucks on County Road 300 North immediately outside the fulfillment center's entrance. (Appellants' App. Vol. II, pp. 50-53). Specifically, immediately after Mahari was struck and injured, an Amazon employee who had witnessed Mr. Oukbu's injuries told investigating police officers that **Amazon sees lost truck drivers get out of their trucks at that spot every day**. (Appellants' App. Vol. II, pp. 52-53). Further, Mr. Gibson, the driver who struck Mahari, told Greenfield Police that "you see these truck drivers all the time stopping and getting out here." (Appellants' App. Vol. II, p. 51). Mount Comfort likewise had actual or constructive knowledge of this dangerous condition. (Appellants' App. Vol. II, pp. 59-61). The lack of surprise expressed in the comments by the Amazon employee and Mr. Gibson after Mahari was struck is telling; this tragic, preventable accident was entirely predictable based on Amazon and Mount Comfort's failure to remedy the dangerous condition of the Fulfillment Center's entrance.

Despite having this actual knowledge that the confusing layout and signage at the Fulfillment Center was routinely endangering arriving truck drivers, *Amazon and Mount Comfort did absolutely nothing to remedy this known hazard*. (Appellants' App. Vol. II, pp. 52-54). Amazon and Mount Comfort had adequate means to improve the visibility and clarity of the signage at the entrances to the MQJ1 Fulfillment Center when they first learned that truck drivers were becoming confused and stopping and exiting their trucks in the road outside the fulfillment

center before Mahari was injured, but failed to do so until long after they learned of Mahari's injuries. (Appellants' App. Vol. II, pp. 54, 59-61).

IV. Summary of Argument

Amazon and Mount Comfort had actual and constructive knowledge that the confusing layout and signage at the entrance to the Fulfillment Center was causing arriving delivery truck drivers to become confused and exit their trucks onto County Road 300 North *every day*. Indiana law recognizes a duty owed by a business to exercise reasonable care to protect invitees even beyond the boundaries of its premises where the business' use of its own premises creates a danger to those outside the premises, and where the business is aware that its invitees customarily use the areas outside the premises in connection with the invitation. *See Ember v. B.F.D., Inc.*, 490 N.E.2d 764, 772-73 (Ind. Ct. App. 1986) and *Lutheran Hosp. v. Blaser*, 634 N.E.2d 864, 868-73 (Ind. Ct. App. 1994).

Although the Trial Court based its judgment on *Precedent Partners v. Hulen*, 863 N.E.2d 328, 332-33 (Ind. Ct. App. 2007), that case is inapplicable to the facts alleged in the Amended Complaint here. There was no connection between the defendants' conduct or use of their premises and the plaintiff's injuries in *Precedent Partners*. Conversely, in this case, the dangerous condition that foreseeably resulted in Mahari's injuries was directly created by Amazon's and Mount Comfort's use of their premises, and Amazon had actual knowledge of both the dangerous condition and the daily endangerment of its business invitees as a result thereof. Mount Comfort also had actual or constructive knowledge of the dangerous condition and the resulting daily endangerment of invitees arriving to the premises.

Further, by placing "no-truck" signs on their premises at the first two entrances to the fulfillment center when approaching from the west, Amazon and Mount Comfort assumed a duty to inform eastbound delivery truck drivers as to where they would be permitted to enter the Fulfillment Center. *See Ember*, 490 N.E.2d at 772-73. The natural and foreseeable consequence of Amazon and Mount Comfort's failure to do so was that arriving delivery truck drivers routinely became confused and exited their trucks to try to determine where they would be permitted to enter the Fulfillment Center.

The Judgment on the Pleadings below was reached without properly drawing all reasonable inferences in favor of Mahari and Nitsihiti as required under Trial Rule 12(C), and the Trial Court instead misstated key facts alleged in the Amended Complaint and drew critical inferences *against* Mahari and Nitsihiti in reaching its decision. These fundamental errors require reversal of the Judgment on the Pleadings below and remand to the Trial Court for further proceedings.

V. Argument

A. Standard of Review

Indiana appellate courts review a trial court's ruling on an Indiana Trial Rule 12(C) motion *de novo*, accepting as true the material facts alleged in the Complaint and basing the ruling solely on the pleadings. *Veolia Water Indianapolis, LLC v. Nat'l Tr. Ins. Co.*, 3 N.E.3d 1, 5 (Ind. 2014). Judgment on the pleadings under Trial Rule 12(C) may only be granted or affirmed "where it is clear from the face of the complaint that ***under no circumstances could relief be granted***." *Id* (emphasis added). Where, as in this case, "a Trial Rule 12(C) motion for judgment on the pleadings essentially argues that the complaint fails to state a claim upon which relief can be granted, [appellate courts] treat it as a Trial Rule 12(B)(6) motion." *Reo Holdings Series 3 v. Trowbridge*,

184 N.E.3d 718 (Ind. Ct. App. 2022). As such, the Court "should not only consider the pleadings in the light most favorable to the plaintiff, but also draw ***every reasonable inference*** in favor of the non-moving party." *Veolia Water Indianapolis*, 3 N.E.3d at 5 (emphasis added). By this standard, a motion for judgment on the pleadings may be granted *only* if it is apparent that the facts alleged in the complaint are incapable of supporting relief *under any set of circumstances*. *Id*, *citing Town of Plainfield v. Town of Avon*, 757 N.E.2d 705, 709-710 (Ind. Ct. App. 2001). Stated differently, a motion for judgment on the pleadings must be denied if the Complaint states "any allegations whatsoever upon which relief could have been granted." *Mart v. Hess*, 703 N.E.2d 190, 193 (Ind. Ct. App. 1998), *citing Barth Electric Co. v. Traylor Bros., Inc.*, 553 N.E.2d 504, 505-506 (Ind. Ct. App. 1990).

It is axiomatic that the principles of notice pleading are utilized in Indiana. *See Grzan v. Charter Hosp. of N.W. Ind*, 702 N.E.2d 786, 793 (Ind. Ct. App. 1998). Ind. Trial Rule 8(F) provides that "all pleadings shall be so construed as to do substantial justice, lead to disposition on the merits, and avoid litigation of procedural points." *Id* at 794. Notice pleading is designed to "discourage battles over mere form of statement that have occurred either to delay trial on the merits or to prevent a party from having a trial because of mistakes in statement." *Id., citing Miller v. Memorial Hosp. of South Bend*, 679 N.E.2d 1329, 1332 (Ind. 1997). Under Indiana's notice pleading system, a pleading need not adopt a specific legal theory of recovery to be adhered to throughout the case. *ARC Const. Mgmt., LLC v. Zelenak*, 962 N.E.2d 692, 697 (Ind. Ct. App. 2012); *see also Miller*, 679 N.E.2d at 1332 (emphasis added). Instead, a plaintiff "essentially need only plead the operative facts involved in the litigation." *See Miller,* 679 N.E.2d at 1332 *citing State v. Rankin,* 294 N.E.2d 604, 606 (Ind. 1973).

B. Amazon and Mount Comfort owed a duty to protect invitees from foreseeable harm arising from the dangerous condition they created, even before those invitees entered their premises.

It is well settled under Indiana law that an invitor owes its business invitees a duty of reasonable care to provide a safe and suitable means of ingress and egress to its business premises. *See, e.g., Lutheran Hosp. v. Blaser*, 634 N.E.2d 864, 869 (Ind. Ct. App. 1994) ("an invitor's duty to exercise reasonable care includes a duty to provide a safe and suitable means of ingress and egress, and may extend to warning of or protection from a danger that originates from third persons."). This duty is not limited to invitees on the premises but extends to invitees who are not yet on the premises if such invitees may nonetheless be endangered by conditions on the premises. *See Ember v. B.F.D., Inc.*, 490 N.E.2d 764, 772 (Ind. Ct. App. 1986) ("when the activities conducted on the business premises affect the risk of injury off the premises, the landowner may be under a duty to correct the condition or guard against foreseeable injuries."); *see also Lutheran Hospital*, 634 N.E.2d at 870. Further, "the owner of land adjacent to a highway owes the duty to the traveling public to prevent injury to travelers upon the highway from any unreasonable risks created by the property's dangerous condition which the landowner knew or should have known about." *Holiday Rambler Corp. v. Gessinger*, 541 N.E.2d 559, 562 (Ind. Ct. App. 1989).

In this case, Amazon and Mount Comfort owed all these duties to Mahari, an independent contractor invited to the Fulfillment Center. The Amended Complaint properly asserts allegations which, when taken as true as required on a Rule 12(C) motion, more than adequately support the inference that Amazon and Mount Comfort breached these duties and thereby proximately caused Mahri's injuries. Specifically, Mahari and Nitsihiti allege that Amazon and Mount Comfort's confusing and defective signage and lack of lighting at the Fulfillment Center created a dangerous

condition. (Appellants' App. Vol. II, pp. 50-51, 59-61). Mahari and Nitsihiti further allege that Amazon and Mount Comfort *knew* this dangerous condition was causing confused truck driver invitees traveling from the west to stop and get out of their trucks in the middle of the road at or near the spot where Mahari was injured *every day*. (Appellants' App. Vol. II, pp. 50-53, 59-61). Nonetheless, despite Amazon's *actual knowledge* of this dangerous condition created by the confusing and defective signage and lack of lighting on its property, Amazon and Mount Comfort failed to warn their invitees of this latent peril. (Appellants' App. Vol. II, pp. 50-55, 59-61).

The facts of *Lutheran Hospital* are particularly instructive in this case. In *Lutheran Hospital*, the defendant hospital had actual or constructive knowledge that pedestrian invitees were regularly crossing the street mid-block instead of at a marked crosswalk to reach the hospital, and walking through a public right-of-way marked "exit" to travel between their cars and the hospital. 634 N.E.2d at 869-70. The pedestrians were doing so because the layout and signage at the hospital's entrance and parking lot were inadequate and confusing, such that "visual cues draw pedestrians to cross mid-block at the circular drive." *Id.* The hospital also knew or should have known that each night, three or four cars mistakenly turned into the "exit" right-of-way, while others began to do so before realizing their mistake and changing course. *Id*. This was also the result of the hospital's confusing layout and signage, which made the location of the hospital's actual entrance unclear:

> To approaching vehicles on Fairfield Avenue, this sign, the driveway and guardhouse appear as part of the parking lot's entrance. However, the Fairfield Avenue "entrance" is for delivery trucks only, and is an "exit" for automobiles. An automobile driver cannot tell that this is an "exit" until he is alongside it or starting to turn into the driveway.

Id. When Joy Blaser, a pedestrian invitee of the hospital, was struck by a car and injured while she

was outside the hospital's premises and attempting to enter the hospital via the *public right of way* serving as the "exit," this Court held that Lutheran Hospital owed her a duty of care to protect her from precisely such an incident:

> From this evidence, the factfinder could infer that automobiles were turning into the "exit" driveway of the parking lot with the mistaken idea that it was an entrance, and pedestrians were crossing mid-block on Fairfield Avenue and walking into the "exit" driveway towards their cars. This funnelling of pedestrian and vehicular traffic into the drive way of the parking lot created a dangerous condition that Lutheran was either cognizant of or should have reasonably foreseen. The accident which occurred, that is, Blaser struck from behind by an automobile turning into the parking lot "exit" while she was walking on its drive way, was precisely the result of the dangerous condition which Lutheran should have foreseen. Thus, this accident was sufficiently foreseeable to require Lutheran to protect its invitees from such an unfortunate mishap.

Id.

Mahari and Nitsihiti's allegations in the Amended Complaint in this case paint a nearly identical picture. Just like Lutheran Hospital, Amazon and Mount Comfort knew or should have known that as a result of the Fulfillment Center's confusing layout and signage, drivers approaching to enter the Fulfillment Center were becoming confused and were unable to tell that what appeared to be an entrance was actually an exit until they were right next to it. (Appellants' App. Vol. II, pp. 46-53, 59-61). Further, just as Lutheran Hospital's confusing visual cues drew pedestrians to enter through the "exit" right of way, Amazon and Mount Comfort's confusing layout and signage drew arriving truck drivers to exit their trucks *every day* "in hopes of learning where and how to enter this fulfillment center." (Appellants' App. Vol. II, pp. 50-53, 59-61).

This Court in *Ember* further explained the rule that an owner or occupier of land owes a duty to those in "adjoining areas which harbor a dangerous condition created by the owner's special benefit or use of such areas." 490 N.E.2d at 773. Citing cases from other jurisdictions extending

liability beyond a business' premises under such circumstances, this Court explained that "[i]f these cases severed liability at the business' front door, a business invitor could invade the public streets for its economic benefit while simultaneously absolving itself from liability otherwise imposed just a few feet away under identical circumstances." *Id*. By the same token, because Amazon and Mount Comfort knew that truck driver invitees were routinely exiting their vehicles on the road immediately outside the entrance to the Fulfillment Cener due to the confusing layout and signage preventing them from entering the facility, they cannot escape liability based solely on the fact that Mahari was injured on the road a few feet beyond the boundaries of the Fulfillment Center's premises.

The Trial Court nonetheless distinguished *Lutheran Hospital*, holding that:

> In [*Lutheran Hospital*], the hospital's use of their premises proximately caused the plaintiffs' injuries. The hospital had allowed pedestrians and automobiles to use the "exit" driveway of its parking lot as an entrance without adequate safeguards or warnings. There are no such allegations in the present case.

(Appellants' App. Vol. II, pp. 22-23). However, this Court in *Lutheran Hospital* held that

> 'A duty of reasonable care may be extended beyond the 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**.' . . . Because Lutheran knew the manner in which its invitees, both pedestrians and drivers, customarily used the driveway of the "exit" in connection with its invitation, it is under a duty to correct the dangerous conditions and guard against foreseeable injuries.

634 N.E.2d at 870 (citing *Ember*, 490 N.E.2d at 772) (emphasis added). In other words, Lutheran Hospital owed a duty because it knew pedestrians and drivers were using the exit driveway as an entrance to the parking lot and failed to rectify the confusing layout and signage that had led them

to do so – not because it affirmatively allowed them to do so.[4] By the same token, the Amended Complaint alleges that Amazon and Mount Comfort knew incoming delivery drivers were exiting their trucks on County Road 300 North when attempting to enter the Fulfillment Center, yet failed to rectify the confusing layout and signage that led them to do so. As such, the allegations in the Amended Complaint support a finding of the same duty that this Court recognized under the nearly identical factual circumstances of *Lutheran Hospital*.

C. Precedent Partners v. Hulen is inapplicable because Amazon and Mount Comfort's affirmative negligent conduct and control over the actions of their invitees created a known danger that foreseeably resulted in Mahari's injuries.

Rather than follow this Court's holding in *Lutheran Hospital*, the Trial Court incorrectly analogized this case to *Precedent Partners v. Hulen*, 863 N.E.2d 328, 332-33 (Ind. Ct. App. 2007), a case which is neither factually nor procedurally akin to this one. (Appellants' App. Vol. II, pp. 21-22). In *Precedent Partners,* a young girl was riding her bicycle through a newly developed subdivision, when she was struck by a pickup truck driven by a contractor who had been performing work on one of the homes in the subdivision. The girl's parents sued the subdivision's developer and homeowners' association, asserting that they were negligent because "(1) the median impeded motorist's views of the roadway; (2) the defendants failed to construct a separate entrance for 'construction traffic;' and (3) the defendants failed to erect signs warning of 'construction traffic.'" 863 N.E.2d at 330-31. After both sides were allowed to engage in

[4] Amazon has repeatedly argued that the duty recognized in *Lutheran Hospital* was based on the hospital's alleged control over the area beyond its premises where Ms. Blaser was injured. As the above-quoted language shows, the duty arose not from any alleged control, but from the hospital's knowledge that its invitees were customarily using the off-premises exit drive in a way that endangered pedestrians like Ms. Blaser.

discovery, this Court held there was no evidence a hazardous condition existed or that the injuries were caused by the landowner's conduct or any hazard on its premises. *Id*. at 332-33. The designated evidence showed nothing unusual or dangerous. *Id*. There was no connection between the pickup truck driver and the HOA or Precedent Partners. *Id*. The injured girl was not an invitee of the defendants. *Id*. In short, there was no causal connection between the HOA or Precedent Partners and the girl's injuries, nor was there any foreseeable danger against which the HOA or Precedent Partners were required to protect the girl. *Id*. Ultimately, based on these facts, this Court found that summary judgment for the defendants in *Precedent Partners* was proper because the plaintiff "*failed to establish that Precedent . . . caused, created, or had notice of an allegedly dangerous or hazardous condition*." *Id.* at 333 (emphasis added). The injured girl was not an invitee of either defendant, and "[t]he designated evidence [did] not show that anything Precedent or the Association did on the property they owned or over which they had any control created a hazardous condition that caused the accident." *Id*. at 332.

That is not the case here. Specifically, the Amended Complaint alleges that Amazon and Mount Comfort's confusing and defective signage and lack of lighting on the Fulfillment Center's premises created a dangerous condition that Amazon and Mount Comfort *knew* was endangering truck driver invitees *every day*. (Appellants' App. Vol. II, pp. 50-53, 59-61). Further, the Amended Complaint notes that it was entirely foreseeable that Mahari would be endangered by this condition, as Mr. Gibson explained that "you see these truck drivers all the time stopping and getting out here." (Appellants' App. Vol. II, pp. 51-53, 59-61). In short, the Amended Complaint alleges that Amazon and Mount Comfort created a dangerous condition that foreseeably resulted in Mahari becoming lost and confused, attempting to walk across an area where vehicles regularly

drive, and being struck by a passing motorist – precisely the types of causal connections and foreseeable dangers that were lacking in *Precedent Partners*. The circumstances of this case are nearly identical to those presented in *Lutheran Hospital*, where this Court observed that

> the evidence is not that an automobile acting in an unusual or extraordinary manner hit Blaser, but rather, that an automobile turned into the driveway of the "exit" just like other vehicles did each day and hit a pedestrian who crossed mid-block and walked onto the driveway of the "exit," just as pedestrians did each day. The occurrence was in the ordinary and normal course of events, an incident to the ordinary operation of an automobile, and thus, not [unforeseeable].

Lutheran Hospital, 634 N.E.2d at 870.

In *Precedent Partners*, this Court found that "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." 863 N.E.2d at 330-31 (citing *Snyder Elevators, Inc. v. Baker,* 529 N.E.2d 855, 859 (Ind. Ct. App. 1988) (emphasis added). "Precedent and Meadows did not have control over the intersection sufficient to impose a duty under premises liability." *Id* at 331. In the present case, the allegations of the Amended Complaint and the reasonable inferences to be drawn therefrom show that Amazon and Mount Comfort did in fact exercise control over truck drivers arriving to its premises on County Road 300 North by virtue of the "no truck" signs that prevented eastbound truck drivers from turning left to enter the Fulfillment Center at the first two entrances.

Further, unlike in *Precedent* Partners, where the Court found that "Neither Precedent Partners nor the Association was accountable for the conduct of [the defendant driver] and neither controlled the premises where the accident occurred," the same cannot be said for this case. The Amended Complaint alleges that Amazon and Mount Comfort's signage was placed specifically to affect the conduct of travelers on the roadway. The Amended Complaint further alleges that the

signage directly influenced the conduct of Mahari, who otherwise would not have exited his truck but for the confusing nature of the signage. (Appellants' App. Vol. II, pp. 46-49, 58-60).

Because Mahari and Nitsihiti alleged that Amazon and Mount Comfort created and had actual knowledge of a hazardous condition at the entrance to the Fulfillment Center, and further had actual knowledge that invitees were customarily using the area immediately outside their premises in a way that foreseeably exposed them to these dangers, *Precedent Partners* is inapplicable. The outcome of Amazon and Mount Comfort's motions should instead be governed by *Ember*, *Lutheran Hospital,* and *Holiday Rambler*, each of which held that a landowner who creates and/or has knowledge of a dangerous condition owes a duty to warn or protect those who might be injured by that dangerous condition, regardless of whether the injury might occur on or off the defendant's premises.

D. Amazon and Mount Comfort gratuitously assumed and breached a duty of care by their use of improper and incomplete signage to direct truck driver invitees, like Mahari, on where to enter the premises to deliver goods.

In addition to the duty that arises where the use of a defendant's property creates a danger to those off the premises, "Indiana recognizes the gratuitous assumption of duty by one who, through affirmative conduct or agreement, assumes and undertakes a duty to act." *Ember*, 490 N.E.2d at 766 (holding pub gratuitously assumed a duty to patrons off-premises by patrolling surrounding areas and circulating flyers to call the pub about off-premises disturbances). Such affirmative conduct creates the requisite special relationship between the parties and the corresponding duty to act in the manner of a reasonably prudent person. *Id.* The question of whether a defendant's conduct was sufficient to assume a duty of care is a question for a jury, not one to be disposed of before discovery can even be commenced. *Id*. ("the actor's affirmative

conduct and representations must be evaluated by a jury to determine whether a duty was gratuitously assumed.").

In *Arnold v. F.J. Hab, Inc.*, 745 N.E.2d 912, 915 (Ind. Ct. App. 2001), a patron of a nightclub was injured on a public sidewalk outside the nightclub when she was struck by a car exiting the nightclub's parking lot across the street. 745 N.E.2d at 913. While the nightclub did not direct patrons to specific parking spaces and its security officer testified that the nightclub "did not conduct any traffic control, per se," the nightclub's staff did advise drivers not to park inside the throughway of the parking lot or block the entrances and exits of the parking lot. *Id*. This Court held that this was sufficient to present a question for the jury as to whether the nightclub had assumed a duty of care to control the parking lot traffic for the protection of its patrons, and reversed the trial court's summary judgment order on the plaintiff's theory of assumed duty. 745 N.E.2d at 916.

Like the nightclub in *Arnold*, Amazon and Mount Comfort, by virtue of their "no truck" signs, instructed invitees as to where they were not permitted to enter the Fulfillment Center. By doing so, Amazon and Mount Comfort assumed a duty to exercise reasonable care in directing incoming truck traffic arriving to the facility. As was the case in *Arnold*, the existence and extent of this duty is a question for the jury, not for judgment as a matter of law by the Court. *Id*. at 915-16 ("the existence and extent of such duty are ordinarily questions for the trier of fact"). These allegations in the Amended Complaint properly allege the assumption and breach of a gratuitous duty to properly guide truck drivers Amazon and Mount Comfort invited onto their premises.

E. The Trial Court failed to draw reasonable inferences in the Plaintiff's favor.

In its January 3, 2024 Order granting Amazon and Mount Comfort's Motions for Judgment

on the Pleadings, the Trial Court stated that the Amended Complaint "does not allege that Mahari ever entered Amazon or Mount Comfort's premises or even attempted to enter the premises." (Appellants' App. Vol. II, p. 20). However, the Amended Complaint includes allegations that Mahari, on the date he was injured, was traveling to the Fulfillment Center to drop off products and goods at Amazon's request; that Mahari prepared to turn left to enter the Fulfillment Center at the westernmost entrance before encountering a "no trucks" sign; that Mahari then approached the second entrance, intending to turn left to enter the Fulfillment Center; and that Mahari exited his truck in an attempt to locate any Amazon personnel who could direct him to an entrance Amazon would permit him to use. (Appellants' App. Vol. II, pp. 46-49). While these allegations certainly support a reasonable inference that Mahari was attempting to enter Amazon and Mount Comfort's premises at the time he was struck and injured, the Trial Court offered no explanation as to why it did not draw such an inference as required on a Motion for Judgment on the Pleadings. *See Veolia Water Indianapolis*, 3 N.E.3d at 5 (trial court evaluating Rule 12(C) motion must "not only consider the pleadings in the light most favorable to the plaintiff, but also draw ***every reasonable inference*** in favor of the non-moving party.").

Further, the Trial Court stated in its January 3, 2024 Order that the "Mahari decided to park his semi-tractor trailer **beside** the public highway, County Road West 300 North." (Appellants' App. Vol. II, p. 19) (emphasis added). To the contrary, the Amended Complaint alleges that Mahari "was in the two-way turn lane **at the center of County Road 300 North, between the eastbound and westbound lanes of travel**" when he brought his truck to a stop. (Appellants' App. Vol. II, p. 47) (emphasis added). This distinction is significant, as Mahari may have had an opportunity to safely exit his truck if there had been an opportunity for him to pull off to the side of the road.

Instead, as alleged in the Amended Complaint, Mahari was essentially stranded in the middle of County Road 300 North without the ability to perform a U-turn.

Because the Trial Court failed to draw all of these reasonable inferences in favor of the non-moving party, its Order granting Amazon and Mount Comfort's Motions for Judgment on the Pleadings must be reversed.

F. The Judgment erroneously relied on inconsistent alternative allegations in the Amended Complaint instead of drawing all reasonable inferences in favor of the Plaintiff.

In explaining its decision to hold that Amazon and Mount Comfort owed no duty to Mahari, the Trial Court asserted that "neither Amazon nor Mount Comfort had a duty to guard against injury to Mahari from the negligent acts of someone over whom they had no control and when the injury occurred off their premises." (Appellants' App. Vol. II, p. 19). However, this improperly assumes that Bruce Gibson, the driver who struck Mahari, was negligent. While Mahari and Nitsihiti alleged that Mr. Gibson was negligent in their Amended Complaint, this does not foreclose the possibility that Mr. Gibson was exercising all due care and was nonetheless unable to avoid striking Mahari after Amazon and Mount Comfort's negligence caused him to become stranded in the roadway. *See Scott County Family YMCA, Inc. v. Hobbs*, 817 N.E.2d 603, 606 (Ind. Ct. App. 2004) (noting that "the Indiana Rules of Trial Procedure contemplate and authorize inconsistent, alternative claims").

An alternative allegation against one defendant cannot serve to defeat an inconsistent alternative allegation against another defendant. *Id*. Thus, in ruling on the Motions for Judgment on the Pleadings, the Trial Court was required to presume that Mr. Gibson was *not* negligent. *Id*.; *see also Veolia Water Indianapolis, LLC*, 3 N.E.3d at 5 (noting that a court considering a motion

for judgment on the pleadings "should not only consider the pleadings in the light most favorable to the plaintiff, but also draw every reasonable inference in favor of the non-moving party."). To hold otherwise would doom claims against multiple defendants under Indiana's Comparative Fault Act, as each defendant could simply claim that the allegations against the other defendants relieve it of liability.

In reality, the allegations in the Amended Complaint demonstrate that these invited, confused truck drivers and westbound motorists were foreseeably brought together by the acts of Amazon and Mount Comfort, not by sheer happenstance or the negligence (if any) of westbound motorists alone. This Court addressed and rejected a similar argument by the defendant in *Lutheran Hospital*, holding that:

> the evidence is not that an automobile acting in an unusual or extraordinary manner hit Blaser, but rather, that an automobile turned into the driveway of the "exit" just like other vehicles did each day and hit a pedestrian who crossed mid-block and walked onto the driveway of the "exit," just as pedestrians did each day. The occurrence was in the ordinary and normal course of events, an incident to the ordinary operation of an automobile, and thus, not [unforeseeable].

Lutheran Hospital, 634 N.E.2d at 870. Because Amazon and Mount Comfort created conditions which they knew led invitee truck drivers to exit their trucks onto County Road 300 North *every day*, their argument likewise must fail.

G. As the owner of the Fulfillment Center, Mount Comfort owed Mahari the same duty as Amazon did.

All of the above-referenced allegations and arguments establishing a duty owed to Mahari by Amazon apply equally to Mount Comfort, as the owner of the Fulfillment Center. Mount Comfort's Motion for Judgment on the Pleadings relied on the same arguments made by Amazon, and the Trial Court addressed the two Motions jointly in its January 4, 2024 Order granting the

two Motions. (Appellants' App. Vol. II, pp. 20-23). The Amended Complaint sets forth a count against Mount Comfort incorporating by reference each and every allegation against Amazon, and alleges that Mount Comfort, by and through its contractors, agents, and employees, created the hazardous condition, knew or should have known of the existence of the hazardous, and nonetheless failed to remedy the hazardous condition or warn Mahari of the hazard. (Appellants' App. Vol. II, pp. 59-61). For the purposes of this appeal, the analysis of Mount Comfort's duty is identical to the analysis of Amazon's duty.

It is of course possible that Mount Comfort's knowledge of the hazardous condition may differ from Amazon's knowledge. However, because this action has not yet reached the discovery stage, it is not yet possible to determine the precise extent of Mount Comfort's knowledge (or Amazon's knowledge for that matter). For this reason, the Court must presume for the purpose of this appeal and the Motions for Judgment on the Pleadings that Mount Comfort also had actual knowledge of the hazardous condition. *See Veolia Water Indianapolis, LLC*, 3 N.E.3d at 5 (noting that a court considering a motion for judgment on the pleadings "should not only consider the pleadings in the light most favorable to the plaintiff, but also draw every reasonable inference in favor of the non-moving party."). Accordingly, the Amended Complaint properly asserts allegations establishing that Mount Comfort owed a duty to Mahari.

VI. Conclusion

For the reasons stated herein, Appellants Mahari Mrach Oukbu and Nitsihiti Abraham respectfully request that this Court reverse the Trial Court's entry of judgment on the pleadings for the Amazon Defendants and Mount Comfort, and remand this matter to the Trial Court for further proceedings.

Brief of Appellants, Mahari Mrach Oukbu and Nitshihiti Abraham

Respectfully submitted,

YOSHA LAW

/s/ Alexander C. Trueblood
Brandon A. Yosha, No. 36138-29
Bryan C. Tisch, No. 24693-49
Alexander C. Trueblood, No. 31804-49
9102 N. Meridian Street, Suite 535
Indianapolis, IN 46260
Ph: (317)334-9200
Fax: (317)315-5143
Email: byosha@yoshalaw.com
lbyosha@yoshalaw.com
btisch@yoshalaw.com
atrueblood@yoshalaw.com
Attorneys for Appellants Mahari Mrach Oukbu and Nitsihiti Abraham

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I verify that this Brief contains fewer than 14,000 words.

/s/ Alexander C. Trueblood
Alexander C. Trueblood
Attorney for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on March 25, 2024, the foregoing was filed via the IEFS to the following counsel of record:

Daniel M. Witte
Travelers Staff Counsel
Counsel for Defendants Hancock County Board of Commissioners, Hancock County Planning Commission, and Hancock County Highway Department

Patrick J. Murphy
State Farm Litigation Counsel
Counsel for Defendant Bruce L. Gibson

Philip G. Rizzo
Edward A. DeVries
Katherine E. Tapp
Edward M. O'Brien
Wilson Elser Moskowitz Edelman & Dicker, LLP
Counsel for Amazon Defendants

Barath S. Raman
Edmund L. Abel
J. Neal Bowling
Lewis Wagner, LLP
Counsel for Defendant CF Mount Comfort DST

R. Andrew Hahn
Selective Staff Counsel of Indiana
Counsel for City of Greenfield

By: */s/ Alexander C. Trueblood*

YOSHA LAW
9102 N. Meridian Street, Ste. 535
Indianapolis, IN 46260
(317) 334-9200 Tel
(317) 566-3578 Fax