Filed: 5/24/2024 2:52 PM

IN THE INDIANA COURT OF APPEALS

APPELLATE NO: 24A-CT-00254

MAHARI MRACH OUKBU and NITSIHITI ABRAHAM Appellants, vs. AMAZON, INC.; AMAZON.COM, INC.; AMAZON LOGISTICS, INC.; AMAZON.COM SERVICES, LLC, MQJ1; CF MOUNT COMFORT DST; BRUCE L. GIBSON; CITY OF GREENFIELD, INDIANA; HANCOCK COUNTY BOARD OF COMMISSIONERS; HANCOCK COUNTY PLANNING COMMISSION; and HANCOCK COUNTY HIGHWAY DEPT., Appellees.	) APPEAL FROM THE HAMILTON SUPERIOR COURT NO. 5))) TRIAL COURT CAUSE NO. 29D05-2308-CT-007700))) THE HONORABLE DAVID K. NAJJAR, JUDGE)))))))))

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

CASES

STATEMENT OF ISSUES

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

STATEMENT OF THE CASE

This lawsuit stems from a September 2, 2022, motor vehicle accident wherein Oukbu was struck by a truck being driven by Bruce Gibson ("Gibson") on County Road West 300 North (the "Accident"). Appellants' App. Vol. II at 44-71 (Amended Complaint). As a result of the Accident, Oukbu sustained multiple injuries. *Id*. at 49. On April 24, 2023, Oukbu and his wife Nitsihiti Abraham ("Abraham") (collectively, the "Appellants"), filed their Complaint against Gibson, Mount Comfort, and Amazon Inc., Amazon.com Inc., Amazon Logistics, Inc., Amazon.com Services, LLC, and MQJI, LLC (collectively, "Amazon"). *Id*. at 5. Appellants eventually filed an Amended Complaint on July 6, 2023, in which Appellants added additional defendants and alleged that Mount Comfort was negligent due to a lack of proper lighting and signage. *Id*. at 44-71. Appellants also brought a loss of consortium claim on behalf of Abraham. *Id*.

On October 12, 2023, Mount Comfort filed its Motion for Judgment on the Pleadings pursuant to Indiana Trial Rule 12(C) and its accompanying 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 Oukbu the requisite duty of care at the time of the Accident. *Id*. at 95-108. Appellants filed their Response in Opposition to Mount Comfort's Motion for Judgment on the Pleadings on November 22, 2023. *Id*. at 147-163. Mount Comfort then filed its

Reply in Support of its Motion for Judgment on the Pleadings on December 6, 2023. *Id*. at 164-173.[1]

On January 4, 2024, the trial court granted Amazon and Mount Comfort's Motion, holding that neither Amazon nor Mount Comfort owed Oukbu a duty of care under Indiana law. *Id*. at 18-23. Specifically, the trial court held that Appellants' 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 Amended Complaint. *Id*. Citing to *Hulen*, the trial court held that both Amazon and Mount Comfort owed no duty to guard Oukbu against injury from the negligent acts of someone over whom Amazon and Mount Comfort had no control when the injury did not occur on Amazon's and Mount Comfort's premises but rather occurred on a public roadway. *Id*.

STATEMENT OF FACTS

Mount Comfort is the owner of the real property located at 4412 West 300 North, Greenfield, Indiana 46140. Appellants' App. Vol. II at 46 (Amended Complaint). Amazon leases the subject property to operate and conduct business at the Amazon Warehouse. *Id*. at 45. On September 2, 2022, Oukbu 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 46-47. Importantly, Oukbu stopped in front of the second entrance to the Amazon Warehouse which was before the third and proper entrance for truck drivers. *Id*. at 47-49; *see also* Appellees' App. Vol. II. at 49 (Amazon's Answer). After stopping, Oukbu: (1) exited the semitruck; and (2) began crossing West 300 North on foot toward the Amazon Warehouse.

[1] Amazon also moved for Judgment on the Pleadings making similar arguments to those in Mount Comfort's briefing. Appellants' Br. at 6.

Appellants' App. Vol. II at 49 (Amended Complaint). As he was attempting to cross the street, he was struck by a vehicle operated by Gibson. *Id.* It is undisputed that Oukbu was struck on West 300 North and not while present on Mount Comfort's land. *Id*. There are no allegations in the Amended Complaint that Gibson was: (1) employed or contracted by Mount Comfort in any form; and/or (2) exiting or entering the Amazon Warehouse. *Id*. The Accident occurred on West 300 North. *Id*. There is also no dispute that West 300 North is a public roadway owned, maintained, and/or controlled by the City of Greenfield and/or the Hancock County Board of Commissioners, Hancock County Planning Commission, and the Hancock County Highway Department. *Id*. at 64-66. At no point prior to when the accident occurred was Oukbu ever on the property owned by Mount Comfort. *Id*.

SUMMARY OF ARGUMENT

It is undisputed that: (1) Oukbu 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) Oukbu 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 Gibson 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 Oukbu 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 Appellants and holds the trial court incorrectly relied on *Hulen* for its decision, this Court should still affirm the trial court's order because there are no allegations that Mount Comfort: (1) exerted the necessary control over West 300 North or Gibson;

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 Appellants maintain. Appellants' efforts to expand the duties of landowners for harms that occur off of 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 their negligence claim, Appellants must show: (1) Mount Comfort owed Oukbu a duty; (2) Mount Comfort breached that duty by allowing its conduct to fall below the applicable standard of care; and (3) Appellants 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 Appellants' claim. *Pelak v. Ind. Indus. Servs., Inc.*, 831 N.E.2d 765, 769 (Ind. Ct. App. 2005). The trial court correctly held that Appellants' 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 Oukbu 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 Oukbu was standing on an adjacent public roadway over which Mount Comfort neither owned nor controlled.

The Appellants' negligence claim against Mount Comfort is rooted in ordinary premises liability principles; namely, Appellants have alleged that Mount Comfort owed Oukbu a duty to exercise reasonable care because Oukbu was an invitee on the day of the accident. Appellants'

App. Vol. II at 59-61 (Amended Complaint). However, the allegations set forth in the Amended Complaint defeat the initial premise that much of Appellants' argument is based on, specifically, that Oukbu was a business invitee at the time of the Accident. 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."). It is undisputed that Oukbu was never present on land owned or controlled by Mount Comfort or Amazon. Appellants' App. Vol. II at 49 (Amended Complaint). Because Oukbu was never present on land owned or controlled by Mount Comfort or Amazon, Oukbu never gained business invitee status or the heightened duty that comes with it. While Appellants Brief attempts to confer business invitee status on Oukbu by continuously referring to Oukbu as an invitee and arguing that case law analyzing a landowner's duty to an invitee is applicable, there are simply no allegations in the Amended Complaint that support the proposition that Oukbu was a business invitee.

Because Oukbu was not an invitee at the time of the accident, this Court should analyze Mount Comfort's duty in the context of the duty Mount Comfort would owe to any third party traveling on an adjacent roadway. 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 here given the applicable standard. 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*.

Appellants argue that *Hulen* is inapplicable, noting that unlike the cyclist in *Hulen*, Oukbu 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 Oukbu was an invitee or not is irrelevant because like the plaintiffs in *Hulen, Flanigan,* and *Blake*; Oukbu's injuries were caused by a third party over whom Mount Comfort had no control, and the injuries occurred on an adjacent public roadway over which Mount Comfort exercised no control.

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*.[2] 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 a physical 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, Appellants have alleged that Mount Comfort's negligence stems from inadequate signage and lighting on its property. Appellants' App. Vol. II at 59-61 (Amended Complaint). 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 Oukbu's injuries, Mount Comfort cannot be liable for those injuries.

Appellants will likely argue that *Reece* is inapplicable because the injured party in *Reece* was a third-party traveler on the road whereas Oukbu was allegedly a business invitee. This argument lacks merit. As discussed above, Oukbu never gained business invitee status or the heightened duty that comes with it because he never entered onto property owned or controlled by

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

Mount Comfort or Amazon. Appellants' App. Vol. II at 49 (Amended Complaint). Appellants may also urge this Court to adopt a narrow interpretation of *Reece*, citing to dicta in the decision that the holding should be "confined to visual obstructions that do not come in contact with traveling motorists." *Reece*, 173 N.E.3d at 1041. Doing so would require this Court analyze the Indiana Supreme Court's language out of context because the *Reece* Court noted that it was narrowing its holding so that courts would not interpret its decision to apply in situations where there is contact with conditions on the land. *Id*. ("Second, our holding is confined to visual obstructions that do not come in contact with traveling motorists, and it does not address situations where a motorist comes **in contact** with a condition that is wholly contained on the land.") (bold in original). The Indiana Supreme Court's decision to limit *Reece* by excluding its application to situations whereby a motorist comes into contact with conditions on the land implies that such limits should not be placed on other conditions that are visual in nature. Appellants have not alleged their damages were caused by a visual obstruction on the land, but they have alleged they were caused by visual confusion on the land; and there is no indication the *Reece* Court sought to limit its holding so that it would apply to visual obstruction but not visual confusion. Indeed, by specifically limiting its holding so that it does not apply to physical contact, the *Reece* Court anticipates its holding to be applicable to other conditions on the land that lack the element of contact with passersby. To hold otherwise would render the holding *Reece* obsolete.

Finally, any attempt by Appellants to distinguish *Reece* ignores one of the primary concerns the *Reece* Court addressed, a concern also present here. Adopting Appellants' position and eliminating the physical encroachment requirement would make businesses and landowners potentially 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 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 adopted a "bright-line rule" regarding a landowner's liability to motorists on adjacent public roadways. *Reece*, 173 N.E.3d at 1040. Appellants may argue they are not seeking this kind of radical overhaul and argue instead that the expansion they seek applies to situations like Oukbu'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. 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 acknowledging a duty to prevent visual confusion to passersby on adjacent roads.

II. The case law Appellants encourage this Court to rely on is distinguishable from the facts of this matter.

In asking this Court to reverse the Trial Court, Appellants rely on *Ember v. B.F.D., Inc.*, and *Holiday Rambler Corp. v. Gessinger*. Appellants' Br. at 13. These cases are easily distinguishable though.

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 Appellants have 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*. During one of these mass exits, an employee pulled onto the road before stopping suddenly 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 physical problem on the adjacent roadway that led to the accident. *Id*. Because the landowner created a physical danger on the public roadway that led directly to the plaintiff's injury, this Court found that the landowner owed a duty to the plaintiff. *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 [Plaintiff]." *Id*. 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 Oukbu or any other traveler making use of the public roadway. Appellants have alleged only that Oukbu 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 Oukbu's free use of the adjacent roadway, and it certainly did not put him at risk as he traveled along the road.[3]

[3] Appellants' Amended Complaint contains crucial misrepresentations that: (1) the two entrances Oukbu observed were the two "main entrances"; and (2) Oukbu would pass the Amazon Warehouse if he drove further. Appellants' App. Vol. II at 55-60 (Amended Complaint). In their Brief, the Appellants continue these misrepresentations. Appellants' Br. at 7. It is undisputed that the Amazon Warehouse had three entrances, and the proper entrance for Oukbu's truck was the third entrance which he would have arrived at had he continued to drive east. Appellees' App. Vol. II at 49 (Amazon's Answer). Appellants have made no allegations that inadequate lighting or signage hindered Oukbu's ability to continue traveling east toward the proper entrance.

III. If this Court agrees with Appellants' 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 Appellants suggest.

Should this Court agree with Appellants and hold *Hulen* is distinguishable from the facts in this matter, it should not look to *Ember* or *Holiday Rambler* as Appellants suggests. Instead, 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 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*. Due to the increased business, 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. This practice continued despite Snyder's notice and actual knowledge of the potential danger. *Id*. On the date of the incident, 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. *Id*. On appeal, this Court, after analyzing *Ember*, declined to expand a business owner's duty to the adjacent public roadways. *Id*. at 858. In reaching this decision this Court held 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. In *Sydner Elevators*, this Court refused to expand a business owner's liability to an adjacent public roadway when it was merely operating said business, and this Court should apply that holding here because Amazon and Mount Comfort were engaged in behavior standard for operating their businesses. Fatal to the Appellants' claim, the undisputed evidence is that Oukbu was operating his truck, while attempting to enter the Amazon Warehouse for standard, reasonable business purposes. 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.

If this Court finds *Hulen* inapplicable based on the facts, it should ignore the Appellants' attempt to expand the landowner's duties onto public roadways utilizing *Ember* and *Holiday Rambler* and instead look to its holding in *Snyder Elevators*. As in *Sydnor Elevators*, because: (1) Mount Comfort exercised no control over Gibson, the third-party driver that struck Oukbu; (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 Appellants' invitation to extend Mount Comfort's duty to the public roadway.

IV. The trial court correctly held that *Lutheran Hospital* is inapplicable, and even if applicable, Appellants' 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 their Brief, Appellants argue 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 Order. Appellants though omit 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) Gibson 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 relevant to this Court's conclusion that the hospital owed its invitees a duty. While Appellants 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*, Gibson 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 Gibson,

or any non-invitee anywhere on West 300 North. As the trial court's Order acknowledged, Gibson 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.

V. Mount Comfort did not assume a gratuitous duty.

Appellants' 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, Appellants allege that Mount Comfort is liable specifically because of "[t]he lack of signage for truck driver invites like Plaintiff" created a dangerous condition. Appellants' App. Vol. II at 60 (Amended Complaint). Yet, somehow, despite allegedly providing a lack of proper lighting and signage, Appellants argue that Mount Comfort assumed a duty to Oukbu 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 lighting and signage on its property while also demonstrating the affirmative conduct of placing lights and signs to direct traffic, a necessity for Mount Comfort to gratuitously assume a duty to direct traffic.

Notwithstanding the self-contradictory nature of Appellants' 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).

Appellants' 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. Appellants' Br. at 20-21. 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 adjacent 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 actively controlled traffic inside the adjacent 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 Amended Complaint contains no allegation that Mount Comfort exercised any level of control over West 300 North. There are also no allegations that Mount Comfort: (1) utilized 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, Appellants have failed to plead that Oukbu relied on Mount Comfort in any way for his safe arrival at the Amazon Warehouse. Indeed, Appellants have pled the opposite, that this was Oukbu'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. Appellants' App. Vol. II at 51 (Amended Complaint). Because the Appellants have failed to plead facts necessary to establish Mount Comfort gratuitously assumed a duty, their argument that Mount Comfort gratuitously assumed a duty must fail.

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

Appellants also argue that the trial court failed to draw all reasonable inferences in their favor, as it is required to do when ruling on a Rule 12(C) Motion. Appellants first note that the Court's January 4, 2024, Order stated Oukbu parked his semi-tractor trailer *beside* West 300 North rather than *on* West 300 North as Appellants alleged in their Amended Complaint. *Compare* Appellants' App Vol. II at 19 (Order) with Appellants' App. Vol. II at 47 (Amended Complaint). Mount Comfort concedes that, for the purposes of Amazon and Mount Comfort's Rule 12(C) Motions, the trial court should have accepted Appellants' allegation that Oukbu parked on West

300 North as true; however, Appellants fail to establish how the trial court's confusion as to where Oukbu parked his vehicle was any more than harmless error. Accepting Appellants' allegation as true would not have changed Oukbu'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 Oukbu parked his vehicle has no bearing on the fact that Mount Comfort did not control Gibson's actions on the day of the Accident such that any liability by Gibson can then be imputed on Mount Comfort. Ultimately, where Oukbu 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 Appellants argue 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 Oukbu 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 Order. *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.")

[4] While Appellants are 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 Oukbu was traveling east, it would have been impossible for Mount Comfort to prevent Oukbu from pulling off onto the south side of the road which Mount Comfort did not own or control.

Appellants next maintains that the trial court improperly assumed Gibson was negligent when his vehicle struck Oukbu. Appellants provides no reasoning for why Gibson's lack of negligence would alter Mount Comfort's duty. Even so, Appellants' argument fails for two (2) reasons. First, Appellants are arguing that the trial court failed to draw all reasonable inferences in its favor by assuming the validity of Appellants' negligence allegations against Gibson. Moreover, the Amended Complaint contains no inconsistent allegations or alternative arguments that would contradict Appellants' negligence allegations against Gibson. The Amended Complaint also lacks any allegations that Mount Comfort is somehow vicariously liable for Gibson's actions. Put another way, there is no 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 Gibson, it has no bearing on whether Mount Comfort owed Oukbu the requisite duty of care. Specifically, negligent or not, Gibson would still be an independent third-party (a point Appellants seemingly do 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 Oukbu regardless of whether Gibson was negligent. Therefore, any assumption by the trial court that Gibson was negligent would have no bearing on the trial court's grant of judgment on the pleadings to Mount Comfort.

CONCLUSION

Appellants' 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 Appellants 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 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 24th day of May, 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
Bryan C. Tisch
Louis "Buddy" Yosha
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, IV
Philip G. Rizzo
WILSON ELSER MOSKOWITZ
EDELMAN & DICKER LLP
100 Mallard Creek Road, Suite 250
Louisville, KY 40207

/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