IN THE INDIANA SUPREME COURT

MAHARI MRACH OUKBU and NITSIHITI ABRAHAM, *Appellant-Plaintiff*, v. AMAZON, INC.; AMAZON.COM, INC.; AMAZON LOGISTICS, INC.; AMAZON.COM SERVICES LLC, MQJ1; CF MOUNT COMFORT, DST; BRUCE . GIBSON; CITY OF GREENFIELD, INDIANA; HANCOCK COUNTY BOARD OF COMMISSIONERS; HANCOCK COUNTRY PLANNINGCOMMISSION; HANCOCK COUNTY HIGHWAY DEPARTMENT, *Appellees-Defendants*.	)	ON PETITION TO TRANSFER FROM THE INDIANA COURT OF APPEALS CAUSE NO. 24A-CT-00254 APPEAL FROM THE HAMILTON SUPERIOR TRIAL COURT CAUSE NO. 29D05-2308-CT-007700 THE HON. J. DAVID NAJJAR, TRIAL JUDGE

DEFENDANT/APPELLEE CF MOUNT COMFORT DST'S AMENDED PETITION TO TRANSFER

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QUESTIONS PRESENTED ON TRANSFER

1. Where a landowner exercises no control over an adjacent public roadway, is a person on that roadway, who has not stepped onto the landowner's property, considered an invitee?

2. In determining the nature and extent of any duty owed to an invitee, should a court inquire into prior, non-imminent incidents on the land?

3. Does a landowner whose activities do not extend onto an adjoining public roadway owe a duty of reasonable care to persons who are on that roadway and not on its property?

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BACKGROUND AND PRIOR TREATMENT OF ISSUES ON TRANSFER

Pursuant to Indiana Appellate Rule 57(G)(3), CF Mount Comfort DST ("Mount Comfort") refers the Court to the Statement of the Case and Statement of Facts portions of their brief in the Court of Appeals.[1]

On September 27, 2024, the Court of Appeals issued its opinion (the "Opinion") in which it reversed the Hamilton Superior Court's (the "Trial Court's") grant of Mount Comfort's Motion for Judgment on the Pleadings. Specifically, the Court of Appeals found that Plaintiffs/Appellants Mahari Mrach Oukbu and Nitsihiti Abraham pled facts sufficient to find a duty owed by Mount Comfort to Oukbu and Abraham, and thus that the Trial Court had erred in granting Mount Comfort's Motion.

Mount Comfort petitions this Court to grant transfer and to reverse the decision of the Court of Appeals.

ARGUMENT

Oukbu's Complaint pleaded facts which, even if accepted to be true, would show that Mount Comfort owed no duty to him as a matter of law. Thus, the Trial Court correctly granted Mount Comfort's Motion for Judgment on the Pleadings. The Court of Appeals' decision overturning the Trial Court's judgment conflicts with key decisions from both this Court and the Indiana Court of Appeals on the question of duty. Thus, bases exist for granting transfer under Indiana Appellate Rule 57(H)(1) and (2).

[1] Mount Comfort's May 24, 2024, Appellee's Brief, pp. 5-7.

1. Oukbu was not an invitee.

While the Opinion does not explicitly state that Oukbu was an invitee, it appears to tacitly assume that he was; as such, the Court of Appeals held that Mount Comfort and Amazon owed Oukbu the duties that a landowner ordinarily owes to an invitee. For instance, the Opinion bases its finding of duty primarily upon *Lutheran Hospital of Indiana, Inc. v. Blaser*, 634 N.E.2d 864 (Ind. Ct. App. 1994), a case involving a duty owed to an invitee.[2] The Opinion also distinguishes this Court's holding in *Reece v. Tyson Fresh Meets, Inc.*, 173 N.E.3d 1031 (Ind. 2021), discussed in more detail below, on the ground that the plaintiff in *Reece* was not an invitee. Therefore, there appears to be an underlying assumption that Oukbu was considered an invitee on the day of the accident; however, this assumption is in conflict with established Supreme Court and Court of Appeals precedent.[3]

Under decisions of both the Indiana Supreme Court and the Indiana Court of Appeals, a possessor of land owes a duty of reasonable care to an invitee. *Burrell v. Meads*, 569 N.E.2d 637, 640-41 (Ind. 1991). But to be an invitee, a person must enter upon the land. "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***." *Roumbos v. Vazanellis*, 95 N.E.3d 63, 66 (Ind. 2018) (emphasis added).

[2] Opinion, p. 9.
[3] *Id.*, p. 8-9.

Oukbu's Complaint makes clear that he never entered or came onto the property owned or otherwise controlled by Mount Comfort or Amazon.[4] Thus, even accepting Oukbu's allegations as true, he could not have been an invitee, and consequently, Mount Comfort never owed him the duty of reasonable care that a possessor of property ordinarily owes to an invitee. It is well-settled 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).

Because it is undisputed that Mount Comfort did not own or control the public roadway where Oukbu was injured, the Court of Appeals' reliance on *Lutheran Hospital of Indiana, Inc. v. Blaser*, 634 N.E.2d 864 (Ind. Ct. App. 1994) is misplaced.[5] In *Lutheran*, patients of a hospital were served by a parking lot across a two-lane city street. *Id*. at 867. The hospital had a circular driveway with an entrance covered by a canopy which was immediately across the street from the parking lot. *Id*. at 869. This was the hospital's most conspicuous entrance. *Id*. "Visual cues drew pedestrians to cross mid-block at the circular drive in front of the canopy entrance." For instance, there were concrete pads on each side of the street that appeared to accommodate pedestrians crossing the street. *Id*.

[4] Appellants' App. Vol. II at 44, Amended Complaint, Para. 12-26.
[5] Opinion, p. 9.

In the parking lot itself, a guardhouse was adjacent to a driveway that was illuminated and "of a shape associated with the entrance and exit of parking lots." To approaching traffic, "the driveway and guardhouse appear as part of the parking lot's entrance." *Id*. However, the driveway was in fact an exit for cars, and drivers could not tell that it was an exit until alongside or starting to turn into the driveway. *Id*. Given the position and appearance of the driveway on the parking lot, as well as the adjacent hospital entrance and concrete pads that appeared to accommodate pedestrian traffic, the Lutheran Hospital court concluded that the hospital was "funneling" pedestrians and cars into the driveway. *Id*.

The plaintiff and her husband, who was scheduled to be admitted to the hospital for surgery, entered the parking lot through the driveway, parked, and crossed the street to the covered entrance of the hospital. *Id*. at 867. Upon leaving, the plaintiff crossed the street again back to the parking lot and began walking up the driveway. She was then struck and injured by a vehicle turning into the driveway. *Id*.

After the trial court entered judgment for the plaintiff, the hospital appealed, contending that it owed no duty to the plaintiff. Disagreeing, the Court of Appeals found that the plaintiff was an invitee of the hospital, and thus owed plaintiff "a duty to exercise reasonable care for her protection." *Id*. at 868.

The facts of *Lutheran Hospital* are completely different than the facts of this case.[6] Unlike the instant case, the plaintiff in *Lutheran Hospital* had entered and exited the

[6] It is unclear that the holding of *Lutheran Hospital* is congruent with the later *Goodwin/Cavanaugh* line of cases, discussed below, clarifying how foreseeability is to be

hospital several times. *Id*. at 867 (noting that "Each day she visited [husband], [plaintiff] parked in the same parking lot and crossed to and from the hospital in the same place"). Therefore, she was unquestionably an invitee. In this case, there is no dispute that Oukbu had never come onto the property.

Moreover, the accident in *Lutheran Hospital* occurred on a right of way onto which the hospital's business had extended. *Id*. at 870. Indeed, the Court of Appeals characterized the hospital's actions as "***funneling*** of pedestrians and vehicular traffic into the drive way of the parking lot…" *Id*. at 869 (emphasis added). This funneling established a degree of control on land beyond the border of the hospital's property. For this reason, the *Lutheran Hospital* court found no error in a jury instruction which read:

> An owner's duty of reasonable care may be extended beyond the owner's business premises when it is reasonable for invitees to believe the owner controls those premises adjacent to its own or when the owner knows invitees customarily use the adjacent in connection with the invitation; but that duty of reasonable care cannot be extended beyond the limits of the owner's ***actual control of those adjacent premises***.

Id. at 872, note 7 (emphasis added).

By contrast, in this case, there is no dispute that Oukbu never entered land controlled by Mount Comfort or Amazon. There is no allegation that Mount Comfort

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determined in the context of duty to an invitee. More specifically, in evaluating foreseeability in the context of duty, the *Lutheran* Court referenced historical data regarding how vehicles would routinely travel in the wrong direction while trying to enter the parking lot. *Id.* at 864-869. Regardless, the facts of *Lutheran Hospital* are different enough from the facts of this case that this Court could reverse the Court of Appeals decision below without specifically overturning the holding of *Lutheran Hospital*.

or Amazon "funneled" vehicles and pedestrians into a particular narrow space as part of its business activities, as did the hospital in *Lutheran Hospital*. There is no allegation that Mount Comfort or Amazon in any way controlled the public roadway adjacent to the property. Thus, the Court of Appeals decision/assumption that Oukbu was considered an invitee, despite never coming onto the subject property or onto property into which Mount Comfort or Amazon directed or funneled him, dramatically expands the category of "invitee" and the consequent the duty of a landowner, as set forth in *Burrell* and *Roumbus*.

2. Mount Comfort and Amazon engaged in no activities that extended onto the public roadway.

Where a party has not entered upon the property, and is thus not an invitee, but is still on an adjacent roadway, a landowner may owe a duty of reasonable care to that party if the landowner creates a hazard that physically extends onto the roadway. *Holiday Rambler Corp. v. Gessinger*, 541 N.E.2d 559, 562 (Ind. Ct. App. 1989) (holding that a business owed a duty to those on the adjacent roadway when it created a hazard by allowing approximately 750 employees to exit its property and enter the roadway at the conclusion of every workday). Conversely, it has long been the law in Indiana that a landowner owes no duty to persons on adjacent roadways where the landowner's activities do not extend onto the roadway.

In *State v. Flanigan*, 489 N.E.2d 1216 (Ind. Ct. App. 1986), the defendant operated a flea market that allegedly had inadequate parking for visitors. The plaintiffs parked their vehicle some distance away and walked along the highway to the flea market.

While on the highway, but before they arrived at the flea market, they were struck by another vehicle and injured. *Id*. at 1217. The plaintiffs sued the operator of the flea market on the ground that it was "negligent for failing to provide a safe place to park and/or adequate traffic control to allow pedestrian travel." *Id*.

In reversing the trial court's denial of the flea market's motion for summary judgment, the Court of Appeals asked whether the flea market owed any duty to the plaintiffs. *Id*. at 1218. The Court first looked to *Blake v. Dunn Farms*, 413 N.E.2d 560 (Ind. 1980), in which the Indiana Supreme Court found that the owner of a farm bore no duty to a motorist who was injured when a tenant's horse escaped the farm and was hit by the motorist. *Blake*, 413 N.E.2d at 564. Relying on *Blake v. Dunn Farms*, 413 N.E.2d 560 (Ind. 1980), the Court answered this question of duty in the negative.

> Here, as in *Blake,* the owners of the property…had no relationship to the agency (the vehicle which struck the [plaintiffs]) causing the injury. To impose liability upon [the operators of the flea market], under the circumstances of this case, for the acts of a third party over whom they had no control, and which occurred not on their property but on a public highway over which they had no control would clearly be contrary to the principles announced in *Blake.*

Flanigan, 489 N.E.2d at 1218.

This Court reaffirmed this principle more recently in *Reece v. Tyson Fresh Meats, Inc*., 173 N.E.3d 1031 (Ind. 2021). In *Reece*, the plaintiff was injured when a car pulled into an intersection and collided with the motorcycle he was riding. *Id*. at 1033. The plaintiff sued the owner of the land adjacent to the intersection on the ground that tall grass on the land, which did not extend onto the roadway, blocked the view of the driver of the car and prevented him from seeing the plaintiff's oncoming motorcycle.

Id. The trial court granted the landowner's motion for summary judgment, and the Court of Appeals affirmed.

This Court then granted transfer on the question of whether the landowner owed a duty to motorists on the adjacent road. *Id*. In answering this question, the Court adopted a "bright-line" rule that landowners are only responsible for conditions that they create and that extend upon the roadway:

> [W]e adopt the bright-line rule the Court of Appeals announced in *Sheley*: landowners owe a duty to passing motorists on adjacent highways not to create "hazardous conditions that visit themselves upon the roadway"; but when a land use or condition that may impose a visual obstruction is "wholly contained on a landowner's property, there is no duty to the traveling public."

Id. at 1034 (quoting *Sheley v. Cross*, 680 N.E.2d 10, 13 (Ind. Ct. App. 1997)). Because the grass was entirely on the landowner's property and did not extend onto the road, the landowner did not have a duty to those on the roadway. *Id*.

The facts of *Flanigan* are strikingly similar to the instant case. Specifically, like in *Flanigan*, Oukbu has alleged in its Complaint that: (1) he never entered upon land owned or controlled by Mount Comfort or Amazon; (2) he was injured upon a public roadway over which neither Mount Comfort nor Amazon exercised control; and (3) the injury was caused by a third party over whom neither Mount Comfort nor Amazon exercised any control. Given the similarities between *Flanigan* and the present case, the Court of Appeals Opinion has created two contradictory opinions regarding the duty that a landowner owes to someone who: (1) attempts to access or enter a landowner's property but has not yet done so; and (2) is injured on an adjacent public roadway while

attempting to access the subject property. The Court of Appeals Opinion could have expressly overruled *Flanigan*; however, it did not. Therefore, the discrepancy in rulings between two nearly identical cases provides a basis pursuant to Appellate Rule 57(H)(1) for this Court to accept Mount Comfort's Petition to Transfer.

The Court of Appeals Opinion below acknowledged *Reece* but read it narrowly to apply only to objects that may block the view of a person on the roadway.[7] Mount Comfort respectfully contends that nothing warrants such a narrow reading. While the specific issue in *Reece* (and in *Sheley*, whose rule it adopted) was a visual obstruction, the reasoning of the opinion applies to "hazardous conditions" in general, of which visual obstructions are simply a subclass. Thus, the more reasonable reading of *Reece* is that it applies to hazards that are contained entirely upon the land and that do not physically intrude onto the roadway. Moreover, allegedly confusing signage is more akin to a visual obstruction, inasmuch as both involve a possible problem with visual perception. If a visual obstruction wholly contained on the property cannot give rise to a duty to those on the highway, it would be incongruous to find that confusing signage, also wholly contained on a defendant's property, ***can*** give rise to a duty.

Mount Comfort also respectfully contends that the Court of Appeals misconstrued *Reece* as dictating a different standard for visual obstructions that injure passing motorists, on one hand, and those who intend to enter upon the land and become invitees, on the other. "Moreover, *Reece* involved a landowner's duty to passing motorists on an adjacent highway, and the Court specifically rejected that such

[7] Opinion, p. 9.

a duty should be the same as that owed to a business invitee."[8] In support of this statement, the Court of Appeals cited footnote 3 of the *Reece* opinion, which states:

> At oral argument, and for the first time, Reece explicitly argued that a landowner's duty to passing motorists on an adjacent highway should be the same as a landowner's duty to a business invitee. This Court already rejected such an argument in *Blake*, emphasizing that "[a] particular landowner does not invite all persons using the highway for their own purposes to make that use or traverse that part of the highway adjacent to his own property."

Reece, 173 N.E. 3d at 1040, note 3. The Court's language in footnote 3 makes clear that it was simply explaining that passing motorists are not invitees, and thus do not enjoy the benefit of the duty of reasonable care that a landowner owes to an invitee. The Court was not stating that a duty might exist for would-be invitees but does not exist for passing motorists. Thus, the fact that Oukbu may have intended to (but did not) enter upon land owned by Mount Comfort is irrelevant and does not afford him a legal status any different from the status of a passing motorist with respect to hazards that do not physically intrude upon the roadway. The Court of Appeals' unduly narrow reading of *Reece* provides a basis under Appellate Rule 57(H)(2) to grant transfer.

Because Mount Comfort and Amazon were not engaging in any activity that physically extended onto the roadway where Oukbu was injured, consistent with *Flanigan* and *Reece*, no duty can be found from the *Holiday Rambler* line of cases.

[8] Opinion, p. 9.

3. Even if Oukbu was an invitee, the harm that he suffered was not reasonably foreseeable as a matter of law.

In *Goodwin v. Yeakle's Sports Bar and Grill, Inc.*, 62 N.E.3d 384 (Ind. 2016), this Court explained that to determine the scope of the duty that landowners owe to invitees, courts must ask whether the harm in question was generally foreseeable. "This is not a 'redetermination' of the duty a landowner owes its invitees. Rather, the focus is on the point and manner in which we evaluate whether foreseeability does or does not exist." *Id.* at 389.

However, foreseeability for purposes of duty is different from foreseeability in the proximate cause context. At the duty stage, the foreseeability inquiry is lesser than at the proximate cause stage:

> [T]he foreseeability component of the duty analysis must be something different than the foreseeability component of proximate cause. More precisely, it must be a lesser inquiry…the foreseeability component of proximate cause requires an evaluation of the facts of the actual occurrence, while the foreseeability component of duty requires a more general analysis of the broad type of plaintiff and harm involved, without regard to the facts of the actual occurrence.

Id. at 390 (quoting *Goldsberry v. Grubbs*, 672 N.E.2d 475, 479 (Ind. Ct. App. 1996). This was later affirmed by this Court in *Cavanaugh's Sports Bar & Eatery, Ltd. v. Porterfield*, 140 N.E.3d 837, 844 (Ind. 2020).

The plaintiff in *Goodwin* was a patron of a sports bar who was injured by another patron. He contended that his injury was foreseeable because there had been several police runs to the bar, as well as evidence that it was "located in 'not the best community.'" *Id.* at 392. However, the Court found that while evidence of specific

occurrences may be relevant to showing the foreseeability component of proximate causation, such incidents are irrelevant for purposes of the duty analysis. Rather, the foreseeability inquiry at the duty stage asks what is the broad type of plaintiff and what is the broad type of harm. *Id*. at 393.

The Court then explained that "[t]he broad type of plaintiff here is a patron of a sports bar and the harm is the probability or likelihood of a criminal attack, namely: a shooting inside a bar." *Id*. Concluding that "we do not believe that bar owners routinely contemplate that one bar patron might suddenly shoot another," the Court found that the harm that the plaintiff suffered was not foreseeable. "In sum we hold that a shooting inside a neighborhood bar is not foreseeable as a matter of law." *Id*. at 394. *See also Cavanaugh's Sports Bar*, 140 N.E.3d at 844 (holding that the plaintiff's attempt to point to police runs and other prior incidents as evidence of imminent harm was improper as "historical evidence…should play no role when we evaluate 'foreseeability as a component of duty.'").

In determining whether Mount Comfort and Amazon owed a duty to Oukbu, the Court of Appeals completely disregarded the *Goodwin* analysis[9] and clear instructions and guidance in *Cavanaugh's Sports Bar*. Instead, the Court of Appeals looked at specific and prior instances wherein truck drivers allegedly: (1) arrived at the facility; (2) had become confused about which entry they were supposed to use; and (3) parked and got

[9] The Opinion makes no mention of *Goodwin* or its progeny even though these cases were discussed in the parties' briefing and at oral argument.

out of their trucks on the public roadway.[10] But this is exactly the sort of evidence that this Court explained is irrelevant in determining foreseeability in the context of whether a landowner owes the requisite duty of care. Rather, the proper inquiry is whether a fulfillment center, or a landowner leasing to a fulfillment center, would ordinarily expect a truck driver to: (1) park his truck on the adjacent highway; and (2) walk into oncoming traffic., just as the proper inquiry in *Goodwin* was whether patrons of a neighborhood bar can be expected to shoot one another. Clearly, the answer is no.[11] Thus, even if Oukbu was an invitee (he was not), neither Mount Comfort nor Amazon owed him a duty to protect him from an act that was utterly unforeseeable as a matter of law.

But because the Court of Appeals completely disregarded the *Goodwin* and the *Cavanaugh's Sports Bar* analysis, it never got to the point of asking this fundamental question. Instead, it began and ended its analysis with exactly the sort of evidence that this Court has said is not relevant in determining foreseeability in the duty context. For this reason, the Court of Appeals reached the erroneous conclusion that Mount Comfort and Amazon owed a duty to Oukbu to protect him from the harm that he suffered, that is, being hit by a vehicle driven by a third party over whom Mount Comfort exercised no control.

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[10] Opinion at p. 11.

[11] Under the *Goodwin/Cavanaugh* line of cases, the test is not whether the harm is possible and can be foreseen, since "almost any outcome is possible and can be foreseen," but whether the likelihood of the harm is so high that a reasonable person would take precautions to avoid it. *Goodwin*, 62 N.E.3d at 392.

CONCLUSION

For all of the foregoing reasons, CF Mount Comfort DST respectfully prays that this Court reverse the decision of the Court of Appeals below and enter an order affirming the Trial Court's grant of judgment on the pleadings.

Respectfully submitted,

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WORD COUNT CERTIFICATE

I verify that this Amended Petition to Transfer, excluding cover information, Table of Contents, Table of Authorities, Signature Block, Word Count Certificate, and Certificate of Service, contains no more than 4,200 words.

s/Barath S. Raman
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CERTIFICATE OF SERVICE

I hereby certify that on November 22, 2024, the foregoing Amended Petition to Transfer was filed with the Clerk of the Indiana Supreme Court, Court of Appeals, and Tax Court.

I also certify that on November 22, 2024, the foregoing was served by the Court's electronic filing system which automatically generated electronic service upon:

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