IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

RITA SUNDERMANN

Plaintiff,

v.

HY-VEE, INC. AND SWEETBRIAR II, LLC,

Defendants.

Case No. CI 15-10787

ORDER REGARDING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

On December 4, 2017 Hy-Vee, Inc. and Sweetbriar II, LLC [hereinafter collectively ("Hy-Vee")] filed a Summary Judgment Motion against Rita Sundermann ("Sundermann"). A motion for summary judgment hearing was held on February 16, 2018. Present for the Plaintiff was Mr. Matthew Lathrop, Esq. Present for the Defendant was Mr. Raymond Walden, Esq. The Court received into evidence exhibits 1 through 17.

The parties presented excellent oral arguments, submitted well-written legal arguments. The Court incorporates and attaches copies of Ex. 9-a computer graphics diagram and Ex. 12-a panoramic photograph of the Hy-Vee parking lot and air pump into this order.

STANDARD OF REVIEW

Summary judgment is proper when the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material fact or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Neb. Rev. Stat.* § 25-1332 (Reissue 2008); *see also Peterson v. Homesite Indem. Co.*, 287 Neb. 48, 54,

840 N.W.2d 885, 891 (2013). In reviewing a motion for summary judgment, courts view the evidence in the light most favorable to the non-moving party and give such party the benefit of all reasonable inferences deducible from the evidence. *Hughes v. Sch. Dist. of Aurora*, 290 Neb. 47, 52, 858 N.W.2d 590, 594 (2015). Where reasonable minds may differ as to whether an inference supporting the ultimate conclusion can be drawn, courts should not grant summary judgment. *McKinney v. Okoye*, 287 Neb. 261, 274, 842 N.W.2d 581, 593 (2014). Granting summary judgment is an extreme remedy because doing so may dispose of a crucial question in the litigation, or the litigation itself, and may thereby deny a trial to the nonmoving party. *Schade v. Cty. of Cheyenne*, 254 Neb. 228, 231, 575 N.W.2d 622, 625 (1998). Conversely, overruling a motion for summary judgment inflicts no real harm upon the moving party. *Id.*

FACTS

The following evidence, taken together in light of the applicable law, satisfies the defendant's burden to make prima facie case. It includes admissions made through pleadings and discovery, and deposition testimony.

The operative pleadings are the Amended Complaint ("AC") and the Answer to Amended Complaint ("AAC"), and the Court takes judicial notice of the admissions arising from the pleadings. The exhibits supporting the motion are:

1. Investigative Report by defense expert Jason D. Stigge dated October 23, 2017.
2. Report by plaintiff's expert Daniel J. Robison, dated February 9, 2017 (consisting of 6 pages, but numbered on the second through sixth pages

as 1 through 5. References will be to the page as marked, with the first page referenced as "p. 0".)

3. Deposition of Rita Sundermann, except for pages dealing only with personal background and damages.
4. Deposition of Robert William Swanson.

Parties' Admissions

1. Defendants Hy-Vee, Inc. and Sweetbriar I, LLC [hereinafter collectively ("Hy-Vee")], owned, respectively, the store at 3410 N. 156th St., Omaha, Nebraska, and the real estate under and surrounding the store, pursuant to a ground lease. (AC 2, 4-8; AAC 3, 5-9) Hy-Vee built a filling station and convenience store on part of the property. (AC 9; AAC 10)
2. On the north side of the filling station and convenience store there is grassy area, then a drive to enter and exit the parking area and a row of six parking stalls. (AC 10; AAC 11)
3. Located near the grassy area between the building and drive on the north of the building was an air compressor and hose for filling tires. (AC 11; AAC 12)
4. There was no designated space to park for use of the tire filling station. (AC 18; AAC 19)
5. In order to use the compressor, drivers could pull up to the south curb of the drive on the north end of the building, park his or her car, get out, and begin filling the tires. (AC 20; AAC 21) (As described in the

deposition, drivers could instead park in a marked stall around the corner of the building.)

6. The right-angle parking spaces were 24 feet from the south curb, to the north of this area. (AC 22; AAC 23) (Expert reports clarify that the measurement, stated by both experts as 25 feet, is the width of the drive lane, and does not include the additional depth of the parking spots off the drive lane. Ex. 1, p. 2; Ex. 3, p. 0)
7. On or about March 2, 2012, in the late afternoon, a driver parked his pickup truck in one of the right-angle parking stalls, north of the convenience store. (AC 23; AAC 24) This driver is not identified in pleadings, but has been identified through discovery as Robert William Swanson ("Swanson"). (Ex. 4)
8. Shortly after this, a second driver, plaintiff Rita Sundermann ("Sundermann"), entered the drive intending to put air into the tires of her car, and stopped her car at the south curb of the entrance to use the tire compressor. (AC 24, 26; AAC 25, 27)
9. The first driver, Swanson, returned and began backing his vehicle out of the parking stall, and backed into Sundermann. (AC 27, 29; AAC 28, 30)

Rita Sundermann's Deposition Testimony (Ex. 3)

10. Before the date of the accident, Sundermann had gone to the subject Hy-Vee convenience store to buy gas and for other business

and had previously used the tire air hose there. (Ex. 3, 26:16-24, 27:22-24, 34:21-24)

11. Sundermann stopped the day of her injury to put gas in car and fill tires. (Ex. 3, 31:15—18; 32:2-33:18).

12. Sundermann Stopped at the air station on her way out, facing west. (Ex. 3. 32:2-33:18).

13. When she went to the Hy-Vee on the day of the accident, it was just before dusk, there was no rain, and no snow or ice on the pavement. (Ex. 3, 26:25-27:9)

14. The air pumping station was on the north side of the convenience store building, north of that was an east-to-west driving lane, and on the north side of the drive lane were a few parking stalls which faced to the north away from the building. (Ex. 3, 28:5-31:14)

15. Sundermann parked her car along the south curb of the drive lane in front of the air pump, with her car facing to the west. (Ex. 3, 31:15-32:23) Other times she had used the air pump, she had parked in the same place along the curb on the north side of the store. (Ex. 3, 35:4-11)

16. She knew about a designated parking space at the northeast corner of the building out of the driving lane, but said another car was parked there when she drove up for air, and said she had never parked in that designated spot previous times she had used the air pump and had always parked along the curb in the drive lane. (Ex. 3, 33:24-35:7)

17. There was no sign or curb marking on the north side beside the air pump indicating a no-parking area. (Ex. 3, 35:8-22, 125:9-12)

18. She realized the road that she had stopped on is a through street to get to the parking lot area, and she was aware of traffic there. (Ex. 3, 38:5-12)

19. When Sundermann stopped at the air pump, she saw there were several cars and a pickup in the spaces to the north. (Ex. 3, 36:4-11)

20. She first filled the driver's side front and rear tires (on the building side of the car), then moved around to the passenger's side to fill those tires, looping the hose over her hood. (Ex. 3, 36:14-37:11)

21. At the same time, Sundermann was watching for traffic from all directions, she was trying to put air into her tire; she could not observe all directions and accomplish this task. (Ex. 3, 37:12-25; 38:20-24; 40:1-21; 42:14-43:16)

22. Sundermann, while trying to fill her tires with air "kept looking both ways and listening..." "I was paying attention to what was going on around me." (Ex. 3 42:23-43:5; 38:20-24).

23. When she moved to the passenger side (on the drive lane side of the car), she saw the cars still in the parking spot to the north, with no one in them, including the pickup, which appeared to have no one inside, no brake lights on, no exhaust, and no indication that it was running at all. (Ex. 3, 37:12-38:4, 40:11-21)

24. As she came to the passenger's side, she was looking both ways for traffic going east/west on that street. (Ex. 3, 38:13-24) She knew she was putting herself in a dangerous position crouching down behind the parked cars, was "very aware" of the parked cars in the stalls to the north of the drive lane and looked at them before she crouched down. (Ex. 3, 43:9-13, 47:19-48:5)

25. As she filled her passenger's side front tire, she was crouching, able to turn her head to see east and west along the street; but her back was to the north. (Ex. 3, 39:22-40:10)

26. While crouching at the passenger's side front tire, she saw a car pass her slowly going from west to east, but did not recall seeing someone walk over toward the north parking spots. (Ex. 3, 42:5-21, 45:4-7)

27. She heard the pickup's ignition behind her, and heard the pickup coming toward her, and stood up, still facing her car. (Ex. 3, 43:13-16, 45:8-46:5, 66:2-9)

28. Sundermann did not have time to look around or to move around to the front of her car to get out of the way of the rear of the truck once she heard the ignition and stood up. (Ex. 3, 46:22-47:11)

29. She was still facing her car when she was hit. (Ex. 3, 47:12-14)

30. She had no idea how fast the truck was moving when it hit her or what part of the truck hit her. (Ex. 3, 50:1-7)

31. Sundermann said she bore a little bit of responsibility for causing the accident, because she knew that the air pump was not in a good

spot and could have gone somewhere else for air, but "I chose to be there," and said that the driver of the pickup bore more responsibility, because he had to know her car was there. (E3, 48:6-49:8)

Robert Swanson's Testimony (Ex. 4)

32. Robert Swanson was employed by Hy-Vee as a cashier in the gas station at the time of Sundermann's accident. (Ex. 4, 8:17-9:22,)

33. Employees were supposed to park in the area where he had parked the day of the accident or in another location not in front of the building. (Ex. 4, 14:21-15:12)

34. There were six parking stalls north of the convenience store/gas station building. (Ex. 4, 16:18-17:2)

35. Swanson observed people at least half the time, when using the air hose, stopped facing east versus facing west. (Ex. 4 26:2-18).

36. It was common that people would park in the drive to use the air hose. (Ex. 4 20:16-21:7 25:17-24).

37. The day of the accident, he had parked his pickup in the third spot from the east of those six. (Ex. 4, 17:3-6) These spots to the north was where he parked most of the time, and was well familiar with that location. (Ex. 4, 18:8-16)

38. At the time, there also was an air pump located on the sidewalk on the northeast corner of the building facing to the east. (Ex. 4, 18:21-24, 20:8-15)

39. Swanson had seen customers parking in the first stall to the north on the east (front) side of the building or else on the north side to use the air hose. (Ex. 4, 20:16-21:7, 24:1-17)

40. The sign on the front of the air pump that says "Free Air" faced toward the east. (Ex. 4, 23:22-25)

41. Swanson was familiar with how far the hose would extend from the machine. (Ex. 4, 24:21-25)

42. No one needed to tell him before the accident that cars sometimes parked to the north of the building to use the air hose, and no signs told customers where to park to use it. (Ex. 4, 28:12-19) He never needed a warning on March 2, 2012, to know that people would sometimes use air to the north of the building. (Ex. 4, 37:24-38:5)

43. In his role as a cashier, Swanson never told customers using the air compressor where they should park while doing so. (Ex. 4, 28:4-7) Nor did he report to anybody at Hy-Vee that he felt the air setup was unsafe or that they should not allow cars to pull up on the north side to use the air hose, although he personally thought it should not be that way. (Ex. 4, 28:20-29:19).

44. Before the accident, Swanson thought cars pulling up on the north side to use the air hose was dangerous because the driveway was busy and it was hard to watch cars go by. (Ex. 4, 28:23-30:2)

45. Before the accident Swanson had been leaving a parking spot to the north of the building and encountered someone getting air several times. (Ex. 4, 30:3-20)

46. Those previous times that he encountered someone pumping air while leaving, he would take special care to make sure it was clear with no one going both directions and making sure there was nobody behind him, and it was his practice to sit to wait until they were done. (Ex. 4, 30:21-31:11)

47. He said there was enough room to back out of the third stall from the east if someone were parked in the spot on the north side of the air pump, though one would have to turn hard to back out. (Ex. 4, 68:14-69:25). A driver backing out of a stall to the north, would have to "cut your tires real hard" to miss a car in the drive aisle, using air station. (Ex. 4. 69:5-11).

48. During the time he worked at the same station from 2009 until the accident, he never saw or learned of anyone else being injured while pumping air on the north side of the building. (Ex. 4, 31:24-33:1)

49. The day of the accident, Swanson was driving a Ford F-150 pickup truck. (Ex. 4, 38:16-19)

50. Swanson had just gotten off work and was heading home. (Ex. 4, 40:5-7)

51. He left the store and walked along the sidewalk past the air pump, across the drive lane, and to his pickup, but did not see Sundermann's car parked. (Ex. 4, 45:1-21)

52. It was dusk, and dark enough that he turned on his headlights. (Ex. 4, 42:15-42:4)

53. He started his pickup and waited for three or four cars to pass by in the drive lane, taking 15 to 30 seconds, maybe. (Ex. 4, 45:22-46:18)

54. He also, while sitting in the truck, with the engine on and in Park, talked with his wife on his phone for two or three minutes. (Ex. 4, 60:16-62:8) The call was finished before he started into reverse. (Ex. 4, 62:23-63:7)

55. When Swanson backed out of his stall, he did look behind. It was Sundermann's presence behind his truck, which he did not expect and which startled him into reacting setting off the chain of events. (Ex. 4 45:16-48:7)

56. As he started into reverse and moved backward "very little," Swanson saw Sundermann's car—not her personally—when he looked in his rearview mirrors and through the back window and wanted to hit the brake to stop, but his foot slipped off the brake. (Ex. 4, 41:8-22, 46:19-47:12-48:7) Upon seeing her car there, he knew someone probably was filling with air. (Ex. 4, 59:2-4)

57. He put his truck in reverse, had his foot on the brake, saw her car, then his foot slipped off the brake. (Ex. 4, 47:13-19) His truck had

moved very little—maybe a foot—before his foot slipped. (Ex. 4, 47:20-48:4)

58. His foot slipped from the brake onto the gas and he went right back on the brake, but it was too late. (Ex. 4, 48:21-49:1)

59. He does not recall his tires squealing while moving in reverse, but he also does not refute an investigating officer's account that the backward acceleration caused the vehicle to leave acceleration marks from both tires on the pavement, and agrees that his vehicle accelerated heavily. (Ex. 4, 50:2-21, 70:2-21, 71:15-23)

60. Swanson said his foot slipping was a complete surprise and caused him a moment of panic until he figured what was going on. (Ex. 4, 50:22-51:3) Nothing of the sort had ever happened to him as a driver. (Ex. 4, 57:9-23)

61. Had Swanson's foot not slipped off the brake, he would have had "plenty of room" to stop and carry out his normal practice of sitting and waiting for someone filling tires behind him to finish and leave, and he would not have hit her. (Ex. 4, 48:8-20, 54:1-4, 59:20-25)

62. Swanson never denied the accident was his fault. (Ex. 4, 65:1-3)

63. Swanson settled with Sundermann with respect to her negligence claim against him, money was paid to her as part of that agreement, and she released her claims against him. (Ex. 4, 65:4-22)

Expert Reports (Exs. 1 & 2)

64. The reports of defense expert Jason Stigge and plaintiff's expert Daniel Robison (Ex. 1 & 2) are offered not for the opinions on which they disagree, but for the points on which they agree or at least do not conflict.

65. Both experts describe the space between curbs for the drive lane or "drive aisle" on the north side of the Hy-Vee gas station as 25 feet. (Ex. 1, p. 2; Ex. 2, p. 0) The six perpendicular parking spots are to the north of the north side of the drive aisle, and so do not figure into the 25-foot width. (Ex. 1, p. 2; Ex. 2, p. 0)

66. One report uses a Google Earth photograph to show the area, with a red arrow pointing to the location of the air pump. (Ex. 1, p. 1, fig. 1) The other uses illustrations not marking the location of the air pump. (Ex. 2, foll. p. 5)

67. Mr. Stigge took as given the Douglas County Sheriff's report that included Mr. Swanson's description of his foot slipping off the brake and onto the gas pedal and the deputy's observation of acceleration marks on the pavement. (Ex. 1, p. 3) Mr. Robison's report cites a description of the accident by plaintiff's attorney for the basic facts when he wrote that Swanson "backed up and struck Sundermann," without mentioning the foot slippage or acceleration marks on the pavement. (Ex. 2, p. 0)

68. The reports differ on opinions about causation, on applicability of certain standards, on the nature of convenience store areas as having

to either integrate vehicular and pedestrian movements through the same areas or as having to separate each function to avoid conflict, and even on such basic facts as which way Ms. Sundermann's car was facing, but these differences are not relevant to the present motion.

69. One relevant point, on which Stigge comments but on which Robison entirely ignores, is whether the accident would have happened even if a dedicated parking area for filling tires had been built in the 16-to-20-foot strip between the building and the south curb of the drive lane, as Robison advocated in his report (Ex. 2, p. 4) Robison did not address the effect of foot slippage and unexpected backward acceleration in the wider area he said should have been provided. Stigge did address that point, saying this:

a. "The acceleration marks lead to the conclusion that Mr. Swanson had depressed the accelerator to the floor, maximum throttle." (Ex. 1, p. 22)

b. "Through information gathered at the scene inspection and automotive accident reconstruction techniques, it is estimated that Mr. Swanson was traveling approximately 15 miles per hour when he struck Mrs. Sundermann and her vehicle. The distance across the aisle to contact with Mrs. Sundermann would have been traveled by the F-150 in approximately 1.5 seconds." (Id.)

c. Citing a passage of the deposition of Mr. Robison (not included here), Stigge referred to Robison's opinion that a dedicated area

for the air pump between the drive lane and the north side of the building "would have been reasonabl[y] safe and prevented the conflict between Mrs. Sundermann filling her tires and Mr. Swanson losing control of his vehicle while backing out of the perpendicular parking stalls," and estimated that Robison's proposal would have moved Ms. Sundermann and her vehicle about 10 feet to the south. (Ex. 1, p. 23)

d. "Given the circumstances of the incident, that is that Mr. Swanson's foot slipped form [sic] the brake pedal to the accelerator, leaving him in a state of fear and panic, this additional 10 feet would have only given Mr. Swanson more room to accelerate toward Mrs. Sundermann and her vehicle. The additional 10 feet would add only approximately 0.4 seconds to the time Mr. Swanson's truck traveled before striking Mrs. Sundermann, and increase the impact speed to approximately 19 miles per hour." (Ex. 1, p. 24)

e. For those reasons, Robison's plan for a wider space between the parked cars to the north of the drive aisle and a dedicated strip to its south would not have eliminated conflict between Swanson's truck and Ms. Sundermann. (Ex. 1, pp. 24, 26)

70. Nothing in Robison's report indicates that he did any type of accident reconstruction analysis. (Ex. 2)

71. In the conclusions portion of his report, Mr. Robison concludes by stating (what is common sense) that "Exterior amenities at filling stations/convenience stores should be designed, designated and maintained for safe use." (Robison Report, Ex.2, p.5).

ANALYSIS

A. The Nebraska Supreme Court reframed the issue of foreseeability: The lack of foreseeable risk in a specific case may be a basis for a no-breach determination but not a no-duty determination.

The threshold issue in any negligence action is whether the defendant owes a legal duty to the plaintiff. *Fu v. State*, 263 Neb. 848, 643 N.W.2d 659 (2002). The question of whether a legal duty exists for actionable negligence is a question of law, dependent on the facts in the particular situation. *Anderson v. Nashua Corp.*, 246 Neb. 420, 519 N.W.2d 275 (1994). The core issue of this motion for summary judgment given the facts as contained in the pleadings, depositions, admissions, and affidavits is whether Hy-Vee owed a duty to Sundermann.

If there is no legal duty, there can be no actionable negligence. *Fuhrman v. State,* 265 Neb. 176, 655 N.W.2d 866 (2003). One cannot be negligent in failing to perform an act, which it did not in the first instance have a duty or obligation to perform. *Travelers Indemnity Co. v. Center Bank*, 202 Neb. 294, 275 N.W.2d 73 (1979).

Section 37 of Second Restatement (Third) of Torts: Liability for Physical and Emotional Harm (2012), which the Supreme Court of Nebraska referred to approvingly in *Ginapp v. City of Bellevue*, explains that an actor whose conduct

has not created a risk of physical harm to another has no duty of care to that other person, unless an affirmative duty created by another circumstance is applicable. *Ginapp v. City of Bellevue*, 282 Neb. 1027, 809 N.W. 2d 487 (2012). The Court in *Ginapp v. City of Bellevue*, held

> When discussing a defendant's duty to control the behavior of a third party, we have previously relied on the Restatement (Second) of Torts, which provides that there is no duty to control the conduct of a third person as to prevent him from causing physical harm to another unless "a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct," and explains that "[o]ne who takes charge of a third person whom he knows or should know [is] likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.

Ginapp v. City of Bellevue, 282 Neb. 1027, at1032-1034 809 N.W. 2d 487, 492-493 (2012). The Second Restatement (Third) of Torts similarly explains that an actor whose conduct has not created a risk of physical harm to another has no duty of care to the other unless an affirmative duty created by another circumstance is applicable, but that "[a]n actor in a special relationship with another owes a duty of reasonable care to third persons with regard to risks posed by the other that arise within the scope of the relationship." Such an affirmative duty can arise from the circumstance of a special relationship. The Supreme Court of Nebraska recently adopted certain special relationship provisions found in the Second Restatement (Third), supra. In particular, the Supreme Court of Nebraska adopted special relationship provisions in § 40 regarding the duty owed to another with regard to risks that arise within the relationship. See, *Peterson v. Kings Gate Partners*, 290 Neb. 658, 861 N.W.2d

444 (2015) (landlord-tenant relationship in § 40(b)(6)); *Martensen v. Rejda Bros.*, 283 Neb. 279, 808 N.W.2d 855 (2012) (employer-employee relationship in § 40(b)(4)); *Rodriguez v. Catholic Health Initiatives*, 297 Neb. 1, (2017) (special relationship exists we note that the comments to § 41 state that custodial relationships include a jailer of a dangerous criminal and hospitals for the mentally ill and for those with contagious diseases.) See Second Restatement (Third), supra, § 41, comment f.

Section 40 of Second Restatement (Third) of Torts, states: "An actor in a special relationship with another owes a duty of reasonable care to third parties with regard to risks posed by the other that arise within the scope of the relationship." See § 40 of Second Restatement (Third) of Torts. Section 40(b) (3) of Second Restatement (Third) of Torts lists special relationships, including the custodial relationship as follows: "Duty of business or other possessor of land who holds it premises open to the public." In short, businesses and other possessors of land who hold their land open to the public owe a duty of reasonable care to persons lawfully on their land who become ill or are endangered by risks created by third parties.

In *Peterson v. Kings Gate Partners*, the Supreme Court of Nebraska reiterated that it adopted the "duty" analysis set forth in the Restatement (Third) of Torts. See *Peterson v. Kings Gate Partners*, 290 Neb. 658, 861 N.W.2d 444 (2015). The Supreme Court of Nebraska in *A.W. v. Lancaster Cty. Sch. Dist.* held,

> Foreseeable risk is an element of the determination of negligence, not legal duty. In order to determine whether appropriate care was exercised, the fact finder must assess the foreseeable risk at the time

> of the defendant's alleged negligence. The extent of foreseeable risk depends on the specific facts of the case and cannot be usefully assessed for a category of cases; small changes in the facts may make a dramatic change in how much risk is foreseeable. Thus, courts should leave such determinations to the trier of fact unless no reasonable person could differ on the matter.

A.W. v. Lancaster Cty. Sch. Dist. 0001, 280 Neb. 205, at 216 784 N.W. 2d 907 at 917 (2010). As the Nebraska Supreme Court stated in *Peterson v. Kings Gate Partners*, "after *A.W.* the existence of a duty generally serves as a legal conclusion that an actor must exercise that degree of care as would be exercised by a reasonable person under the circumstances." *A.W.* 280 Neb. 205, at 216 784 N.W. 2d 907 at 917 (2010) cited in *Peterson v. Kings Gate Partners*, 290 Neb. 658, 861 N.W.2d 444 (2015). Additionally, "duty rules are meant to serve as broadly applicable guidelines for public behavior, i.e. rules of law applicable to a category of cases." Id. at 212-13, 784 N.W. 2d at 914-15 cited in *Peterson v. Kings Gate Partners*, 290 Neb. 658, 861 N.W.2d 444 (2015). "Whether a duty exists is a policy decision." *A.W.*, *supra* note 5 cited in *Peterson v. Kings Gate Partners*, 290 Neb. 658, 861 N.W.2d 444 (2015).

Pursuant to the Restatement (Third), "an actor has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm." *A.W.*, supra note 1; Restatement, supra note 2, §7 (a) cited in *Latzel v. Bartek*, 288 Neb. 1 at 21, 846 N.W.2d 153 at 168 (2014). In *A.W.*, the Nebraska Supreme Court "reframed the issue of foreseeability: The lack of foreseeable risk in a specific case may be a basis for a no-breach determination but not a no-duty determination." *A.W.*, supra note 1; Restatement, supra note 2, §7 (a) cited in

Latzel v. Bartek, 288 Neb. 1 at 21, 846 N.W.2d 153 at 168 (2014). In *Latzel v. Bartek*, in the concurring opinion, the Supreme Court of Nebraska underscored its ruling in *A.W.* holding, "**while foreseeability is usually an issue of fact, a court may decide the issue as matter of law 'where reasonable people could not disagree about the unforeseeability of the injury.**" (Emphasis added) *A.W.* 280 Neb. 205, at 218 784 N.W. 2d 907 at 918 (2010) cited in *Latzel v. Bartek*, 288 Neb. 1 at 22, 846 N.W.2d 153 at 168 (2014). The Court finds that Hy-Vee owes a legal duty to all patrons, including Sundermann at the gas station premises.

B. Foreseeable Risk is an Element in the Determination of Breach of Duty and not Legal Duty.

This Court will follow the *A.W.* protocol and examine the issue of foreseeability in the context of whether Hy-Vee breached a duty of care to Sundermann. The Court finds that Hy-Vee did not breach the duty of care to Sundermann. As a result, Hy-Vee was not negligent in the present case. Under the Restatement (Third) formulation,

> A person acts negligently if the person does not exercise reasonable care under all the circumstances. Primary factors to consider in ascertaining whether a person's conduct lacks reasonable care are the foreseeable likelihood that the persons conduct will result in harm, the foreseeable severity of any harm that may ensue, and the burden of precautions to eliminate or reduce the risk of harm."
>
> In this context, the "extent of foreseeable risk depends on the specific facts of the case" and "small changes in the facts may make a dramatic change in how much risk is foreseeable.

See *A.W. v. Lancaster Cty. Sch. Dist. 0001*, supra note 1, 280 Neb. at 218, 784 N.W.2d at 918, quoting *Restatement*, supra note 2, § 3 cite in *Latzel v. Bartek*, 288 Neb. 1 at 22, 846 N.W.2d 153 at 168 (2014). The accident in this case was not foreseeable by Hy-Vee as a matter of law. Whether a breach of duty has occurred depends upon whether the resulting injury was a reasonably foreseeable consequence of the defendants' conduct. "If the defendant could not reasonably foresee any injury as the result of this act, or if his conduct was reasonable in the light of what he could anticipate, there is no negligence, and no liability." Prosser, Torts, § 43 p. 250 (4th Edition 1971).

No reported cases in Nebraska has addressed the question whether it is foreseeable that person filling its vehicle's tires with air at a gas station will be hit by the driver of another vehicle whose foot slipped off the break onto the accelerator and caused injury to a plaintiff. Other Appellate Courts in foreign jurisdictions have addressed similar issues relating to the foreseeability of intervening events.

In *Gonzalez v. Kennedy Mobil Serv.*, 274 Ill. App.3d 1077, 211 Ill. Dec. 162, 654 N.E.2d 624, (1995) plaintiff's decedent was filling his car with gasoline when another vehicle struck him. The driver of the other vehicle (Injerra) had left it with the engine running at the air pump in front of the service station's garage. Although Injerra's vehicle had been left in park, it circled backwards a distance of between 137 and 245 feet and struck plaintiff's decedent. No accidents involving motor vehicles, let alone one even remotely similar to that accident had occurred in the 20 years that Kennedy Mobil's president had been operating the

premises. Moreover, signs at each gas pump warned motorists to stop their engines while outside of their cars. The Illinois Court of Appeals relying on *Anderson v. Woodlawn Shell* held that "the accident involving the decedent was a tragic, yet unforeseeable, event caused by the negligence of a third-party over which Kennedy Mobil had no control. The general duty of reasonable care which Mobil and Kennedy Mobil owed to the decedent did not extend to the particular risk which the decedent encountered." See *Gonzalez v. Kennedy Mobil Serv.*, 274 Ill. App. 3d, at 1087, 211 Ill. Dec., at 168, 654 N.E.2d, at 630 (1995).

A similar accident occurred in *Anderson v. Woodlawn Shell.* In *Anderson v. Woodlawn Shell,* a gas station customer left her vehicle in park, with the engine running and the emergency brake not engaged, as she prepaid the cashier. Her vehicle moved toward plaintiff, who was pumping gasoline into her own vehicle, and plaintiff's legs were pinned between the two vehicles. The proprietor of the gas station testified that he had no knowledge of any prior accidents during the four years in which he had operated the self-serve station. See *Anderson v. Woodlawn Shell,* 132 Ill. App. 3d 580, 87 Ill. Dec. 871, 478 N.E.2d 10 (1985). The court noted, "[i]n retrospect, plaintiff can assert that defendants should have foreseen that the unfortunate event in this case might conceivably occur. However, it is clear that such an occurrence was not 'objectively reasonable to expect' " *Anderson v. Woodlawn Shell,* supra, 132 Ill.App.3d, at 582–583, 87 Ill. Dec., at 874, 478 N.E.2d, at 13, (1985) quoting *Winnett v. Winnett,* 57 Ill.2d 7, 13, 310 N.E.2d 1, 5).

In *Spurlock v. Schwegmann Bros. Giant Supermarket*, 475 So.2d 20 (La. App. 4th Circuit 1985), plaintiff's decedent was pinned against his automobile by another automobile left in neutral, with its engine running. The court held that "[t]here is no reason to believe that gas station owners should anticipate that automobiles will be negligently propelled forward, with or without a person in the car, into someone pumping gas at the rear of another car" *Spurlock v. Schwegmann Bros. Giant Supermarket*, 475 So.2d, at 23. The court held that the incident was not foreseeable as a matter of law. *Spurlock v. Schwegmann Bros. Giant Supermarket*, 475 So.2d, at 24.

In *Di Ponzio v. Riordan and United Refining Company of Pennsylvania, d/b/a Kwik Fill, and Rochester Gasoline Corp.*, 645 N.Y.S.2d 368, 224 A.D.2d 139 (1996) a gas station patron sued gas station owners to recover for injuries plaintiff sustained when another patron's unattended parked car, with its motor running, inexplicably moved and struck plaintiff. The Court held, "here there is no evidence that any of the gas station personnel (even if they had known that Riordan's engine was running) could reasonably have foreseen that Riordan's vehicle would move backwards on its own, on level ground, for no apparent reason, especially after it had sat motionless for six minutes." See *Di Ponzio v. Riordan and United Refining Company of Pennsylvania, d/b/a Kwik Fill, and Rochester Gasoline Corp.*, 645 N.Y.S.2d 368, 224 A.D.2d 139 at 146 (1996).

Several New York cases hold that the relationship between a gas station owner and a patron does not give rise to a duty on the part of the owner to protect the patron from being struck by an unattended vehicle of another patron. See

Pulka v. Edelman, 40 N.Y.2d 781, 783–785, 390 N.Y.S.2d 393, 358 N.E.2d 1019, rearg. denied 41 N.Y.2d 901, 393 N.Y.S.2d 1028, 362 N.E.2d 640; *Grandy v. Bavaro*, 134 A.D.2d 957, 521 N.Y.S.2d 956, lv denied 71 N.Y.2d 802, 527 N.Y.S.2d 768, 522 N.E.2d 1066; *Stone v. Williams*, 97 A.D.2d 509, 467 N.Y.S.2d 879, affd 64 N.Y.2d 639, 485 N.Y.S.2d 42, 474 N.E.2d 250).

In the case of *Young v. Atlantic Richfield Co.*, 400 Mass. 837, 512 N.E.2d 272 (1987) involved a wrongful death action that was brought against owner of mini-serve gasoline station and its lessee, arising out of accident wherein 15–year-old was struck by another customer's car while replacing gas cap on his mother's automobile, and decedent's mother also sought recovery for negligent infliction of emotional stress. The Superior Court, Norfolk County, Andrew Gill Meyer, J., entered judgment on jury's special verdicts for decedent's estate and decedent's mother, and owner appealed. The Supreme Judicial Court, Nolan, J., held that: (1) any negligence in failing to post sign stating that attendant would pump gas was not proximate cause of decedent's injuries; (2) owner had no duty to post warning about other automobiles in area; and (3) placing air pump at gasoline islands, thereby increasing traffic at island, was not negligent. See *Young v. Atlantic Richfield Co.*, 400 Mass. 837, 512 N.E.2d 272 (1987). In reversing the judgment the court held, "Arco had a duty to design the station in a safe manner where vehicles had sufficient room to maneuver and patrons were not unreasonably placed at risk, but the locations of the air pump at the gasoline island gives no indication that Arco violated this duty." See *Young v. Atlantic Richfield Co.*, 400 Mass. 837, at 842 512 N.E.2d 272 at 276 (1987). The court

reasoned, "the air pump created no greater danger than would the presence of another gas pump. Although the air pump increased traffic at the island, just as an additional gas pump would have done, the increased possibility of injury which could result from increased traffic is a risk which is obvious and not unreasonable. Arco is only required to use reasonable care to make its stations reasonably safe." See *Young v. Atlantic Richfield Co.*, 400 Mass. 837, 512 N.E.2d 272 (1987).

No reasonable jury could find a breach of duty in this case.

First, the complaint about the Hy-Vee station's site design is that it presents risks inherent in any design involving people on foot and people in cars. The two share the same limited space and have to be careful about the normal hazards, such as inattentive drivers not seeing pedestrians, pedestrians not seeing cars, vehicles passing one another in already narrow lanes, etc. However, this accident involved a driver who saw the plaintiff's car and was responding with safe and appropriate action, but then his foot slipped onto the gas and his truck roared backwards before he could realize what had happened.

In *Thomas v. Board of Trustees of the Neb. State Colleges*, 296 Neb. 726, 895 N.W.2d 692 (2017), the court said the rules do not require precision in foreseeing the exact hazard or consequence which happens, but said "the existing circumstances must have a direct relationship to the harm incurred." Id. at 735-36, 895 N.W.2d at 700. While the court acknowledged that college and dormitory authorities were aware of incidents indicating that a particular student's past behavior had been "seriously problematic" for the school and other

students, including a background check showing a past robbery conviction and a past rape charge that was dropped, and also inappropriate sexual behavior toward female students, and the Board could have anticipated continued problems, it explained why this was not a reasonably foreseeable risk under the breach-of-duty element:

> [N]o reasonable fact finder could find that the harm that occurred was a reasonably foreseeable risk based upon the circumstances present in this case. That is, nothing in the record indicates there was a risk that Keadle's conduct would result in the abduction, rape, and murder of another student. In order to make a risk of attack foreseeable, the circumstances to be considered must have a direct relationship to the harm incurred. See Pittman v. Rivera, 293 Neb. 569, 879 N.W.2d 12 (2016). Such direct relationship between the circumstances of the case and the harm allegedly incurred by Thomas is lacking. We agree with the underlying reasoning of the district court when it granted summary judgment in favor of the Board.

Id. at 737, at 895 N.W.2d 700-01.

In the present case, the obvious risks involved the proximity of traffic flow and parking spaces, and Sundermann admitted that she was aware of those risks and was keeping a lookout for other traffic and for cars backing from the spaces behind. However, a car going into uncontrolled acceleration because of a foot slipping off the brake does not have a direct relationship with those foreseeable risks.

As noted, *A.W.* rewrote how to ask questions, regarding breach of duty. This is clear in how the Nebraska Supreme Court handled duty and foreseeability issues in an intersection visibility case, *Latzel v. Bartek*, 288 Neb. 1, 846 N.W.2d 153 (2014). The defendants owned land at the corners of an intersection of

county roads lacking traffic signs, and they admitted the corn they planted right up to the edge of the ditches could obstruct vision for drivers going through the intersection. The Supreme Court noted its adoption of Restatement (Third) principles for duty and breach of duty, but pulled back from specifically replacing old rules about intervening causes with the new rules, because the lower court did not address breach of duty. Id. at 19-20, 846 N.W.2d at 167. The court accepted as given the district court's finding about duty and breach of duty, talked about the new Restatement rules without applying them, then held under traditional rules that both drivers going through the blind intersection without heed for the obvious danger were intervening causes relieving the defendants of liability. Id. at 9-10, 13-20, 846 N.W.2d at 161-62, 163-67. The particular ruling in terms of the evidence and the intervening-cause rule was that "[t]here was no evidence that the landowners could have reasonably foreseen the drivers' conduct." Id. at 20, 846 N.W.2d at 167. Accordingly, the court upheld summary judgment for the landowners.

The concurring opinion in *Latzel* shows how even the Restatement (Third) restructuring of the analysis would lead to the same path out the courtroom door. Justice Stephan applied the Restatement (Third) protocol from *A.W.* and, rather than look at foreseeability through the lens of causation and intervening cause, instead found that the evidence could give no support for a finding of foreseeability under the part of the *A.W.* test dealing with breach of duty. *Id.* at 22-23, 846 N.W.2d at 168-69.

As Justice Stephan noted, the alleged negligence of the farmer defendants was in how closely they planted corn in relation to the intersection. He observed that the farmers had been doing this for 35 years, that it was a typical practice in the area, and that neither they nor the drivers involved in the crash had never heard of any other accident in the county due to corn planted up to the ditches along county roads. *Id.* at 22-23, 846 N.W.2d at 169. Applying the new rules, Judge Stephan said even testimony about speeding on county roads and admitted obstruction of vision due to corn did not support an inference that a traffic accident was a reasonably foreseeable risk of the manner in which the defendants grew their corn. He quoted one of the new rules: "The authors of the Restatement (Third) recognized that, in determining whether specific conduct constitutes negligence, 'the law itself must take care to avoid requiring excessive precautions of actors relating to harms that are immediately due to the improper conduct of third parties, even when that improper conduct can be regarded as somewhat foreseeable.'" *Id.* (quoting Restatement (Third) of Torts § 19, comment g., at 221).

Latzel is significant for the present case because of parallels in the nature of the two cases. Both cases involve human alteration of land in a way that poses a risk of harm in some imaginable circumstance. Justice Stephan illustrated how the new way of thinking about negligence elements and the roles of the judge and jury leads to a conclusion in the present case that the risk that actually came to fruition was not reasonably foreseeable and how the possessor of the land does not have a duty to alter the way the land is configured to protect

against anything that motorists might do to harm one another or harm pedestrians. In *Latzel*, it was the restriction of visibility for motorists approaching the intersection. Here it is the restriction in space for vehicle movement in the area of the air pump. If the action of motorists going through an unregulated intersection without slowing to check for traffic is not reasonably foreseeable under the breach-of-duty element of the *A.W.* approach, then neither is a slipped foot and uncontrolled acceleration from a driver operating a truck parked in a convenience store parking spot.

Latzel is an illustration of how something that is very much imaginable still is legally beyond the reasonable bounds of foreseeability because it involves the decisions that persons on the land make in reaction to obvious conditions. *Latzel* applies the Restatement principles (or older concepts with the same result) to find a lack of reasonable foreseeability as a matter of law to an occurrence that is easily conceivable but rare enough that none of the parties had heard of it happening in their county. Similarly, Mr. Swanson, in his many years of driving, had never had his foot slip off the brake and onto the gas, and in his years of working at the station had never heard of an accident involving a car verse car or a car verse pedestrian at the air pump.

Second, the alleged duty focuses on architectural choices about fitting the various normal features of a gas station into a finite space, and then deciding over time to keep the design as is. Given enough space and enough financial resources a gas station designer might be able to come up with a design that isolates every area involving a motor vehicle from every area where a customer

or visitor might be outside of a vehicle. But it is hard to imagine profitable operation of a convenience store while keeping foot traffic away from car traffic between the pumps and the store. Maybe eliminate the store and require payment at the pump. Of course, drivers step out of vehicles to operate the pumps, so the pumps would have to be far from one another, and maybe separated by barriers, so that even drivers of vehicles experiencing driver distraction, sudden unconsciousness, accidental accelerations, or other causes of loss of control could not reach and strike someone at a gas pump.

"Duty rules are meant to serve as broadly applicable guidelines for public behavior, i.e., rules of law applicable to a category of cases." *A.W.* v. *Lancaster County School Dist. 0001*, 280 Neb. 205, 212-13, 784 N.W.2d 907, 914-15 (2010). Plaintiff's theory of liability focuses on protecting just one activity at a gas station from the possibility of a driver's foot slipping or other vehicular negligence near a customer filling tires with air. The same requirements about spatial isolation of that activity from traffic would apply to every other potential pedestrian/vehicle conflict for a reasonable jury to be able to conclude that a design duty applicable to the air pump area has been breached.

C. Public Policy

The present case involves the duty of those in control of the property to design away a hazard, but the public policy and duty issues are informed by *A.W.* and Restatement (Third) principles to warn about an obvious hazard on land.

The Court applies the principles of *A.W.* and the Restatement (Third) in holding that design of a gas station's external spaces with respect to pedestrians and vehicular flow is best addressed by the Court as a matter of law, that it should make a "no-duty determination . . . grounded in public policy and based upon legislative facts, not adjudicative facts arising out of the particular circumstances of the case," 280 Neb. at 213, 784 N.W.2d 907, 915, and that it should hold that it is the responsibility of the people using the gas station, its parking areas, its traffic lanes, and its outside amenities to adapt to the open and obvious risks apparent in the design and use reasonable care to avoid risks, rather than impose a duty on the station operator and land owner to design or redesign the area to separate pedestrians from moving vehicles no matter the effects on the basic purposes that draw customers to the site.

In *McReynolds v. Riu Resorts & Hotels, S.A.*, 293 Neb. 345, 880 N.W.2d 43 (2016), the duty question was whether a travel company was liable to a guest whose resort room was robbed because the agency knew the design of the room keys displayed the room number, allowing thieves an easy way to know when a room was rented but unoccupied, but did not warn its clients. The Court specifically relied on the public policy part of the new Restatement approach in finding that no duty existed as a matter of law to warn about the "obvious risk created by the key system. Because this particular risk of the defective key system was obvious, it was incumbent upon McReynolds to avoid the obvious danger it created." *Id.* at 354, 880 N.W.2d at 49. The court concluded in the procedural context that matches the one in the present case, "Because no duty

was owed, there was no negligence, and the lower court properly granted summary judgment as to this claim." *Id.* at 355, 880 N.W.2d at 49.

The most recent Nebraska Supreme Court decision to apply the principles of *A.W.* and the Restatement (Third) was *Benard v. McDowall, LLC*, 298 Neb. 398, 904 N.W.2d 679 (2017). Although the posture of the case, involving a suit against a landlord by a guest of a rental house's tenant who was injured in a fall on an obviously broken step about which the tenant knew, did not touch on public policy considerations, it is helpful for two reasons. First, the high court said the trial court did not err in ruling for the landlord on the warning issue, where nothing in the record showed the risk was concealed or difficult to appreciate. *Id.* at 406-07, 904 N.W.2d at 686. That is, nothing about the new analytical approach that changes the old rule about the lack of duty to warn of an open and obvious defect on land. Second, when the court turned to the question of a duty to repair the broken step, it confirmed the general rule that the landowner has no duty to a visitor to make repairs to leased property, and instead looked to specific lease language to find that the landlord had undertaken a contractual duty to make major repairs. *Id.* at 407, 904 N.W.2d at 687.

D. Findings of Fact and Conclusions of law

In the present case, Hy-Vee had no opportunity and thus no obligation, to protect Sundermann against the unforeseeable risk that the third party's truck would strike her because the driver's foot slipped off the break and pressed hard onto the accelerator causing the truck to lunge backward. The relationship

between a gas station owner, like Hy-Vee, and a patron, like Sundermann, does not give rise to a breach of duty on the part of Hy-Vee to protect the patron from being struck by a truck that was negligently operated by another person. There is no evidence of accidents involving motor vehicles, let alone one even remotely similar to the accident that occurred on this Hy-Vee gas station premises. The accident involving Sundermann was tragic, yet an unforeseeable event caused by the negligence of a third party. Hy-Vee had no control over the negligent operation of the truck by the third party.

Hy-Vee had no control over the stubborn fact that Swanson's foot slipped off the brake and pressed hard onto the accelerator causing the truck to lunge backward at a high rate of speed thus striking and injuring Sundermann. Moreover, the incident is not foreseeable as a matter of law because Hy-Vee could not reasonably foresee or anticipate that Swanson's foot would come off the break and press heavily on the accelerator as he was backing up in his truck causing the truck to strike and injure Sundermann as she was putting air into her tires. There is no evidence of prior similar accidents on the Hy-Vee gas station premises that would have served as notice to Hy-Vee that such an accident was probable or possible. That the accident, which occurred in this case, was conceivable or even possible is insufficient to extend to Hy-Vee that it beached its duty of care because Hy-Vee did not encompass such a risk. To say Hy-Vee breached its duty would be to impose on it a general duty to anticipate and guard against the unpredictable negligence of third parties. The standard is "reasonable care." Under the facts of this case, Swanson was in the best

position to prevent the injury to Sundermann. The facts presented in this case reveal that the accident involving Sundermann and Swanson was caused by the negligence of Swanson. Swanson's admitted negligence in operating his truck in reverse was an unforeseeable efficient intervening cause of his truck striking Sundermann, which severed the conduct of the landowner- Hy-Vee to Sundermann's injuries. See *Latzel v. Bartek*, 288 Neb. 1 at 22, 846 N.W.2d 153 at 168 (2014). I conclude as a matter of law that Hy-Vee did not breach its duty and thus there is no negligence on the part of Hy-Vee because the accident was not a reasonably foreseeable consequence of Hy-Vee's conduct. I conclude as a matter of law that Sweetbriar II, LLC did not breach its duty and thus there is no negligence on the part of Sweetbriar II, LLC because the accident was not a reasonably foreseeable consequence of Sweetbriar II, LLC's conduct.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Hy-Vee's motion for summary judgment is sustained.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Sweet Briar II L.L.C.'s motion for summary judgment is sustained.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the trial by jury is cancelled and the Clerk of the Douglas County District Court is ordered to close the case.

DATED this 23rd day of February 2018.

BY THE COURT:

Honorable Horacio J. Wheelock
District Court Judge

Cc Mr. Matthew Lathrop, Esq.
Mr. Raymond Walden, Esq.

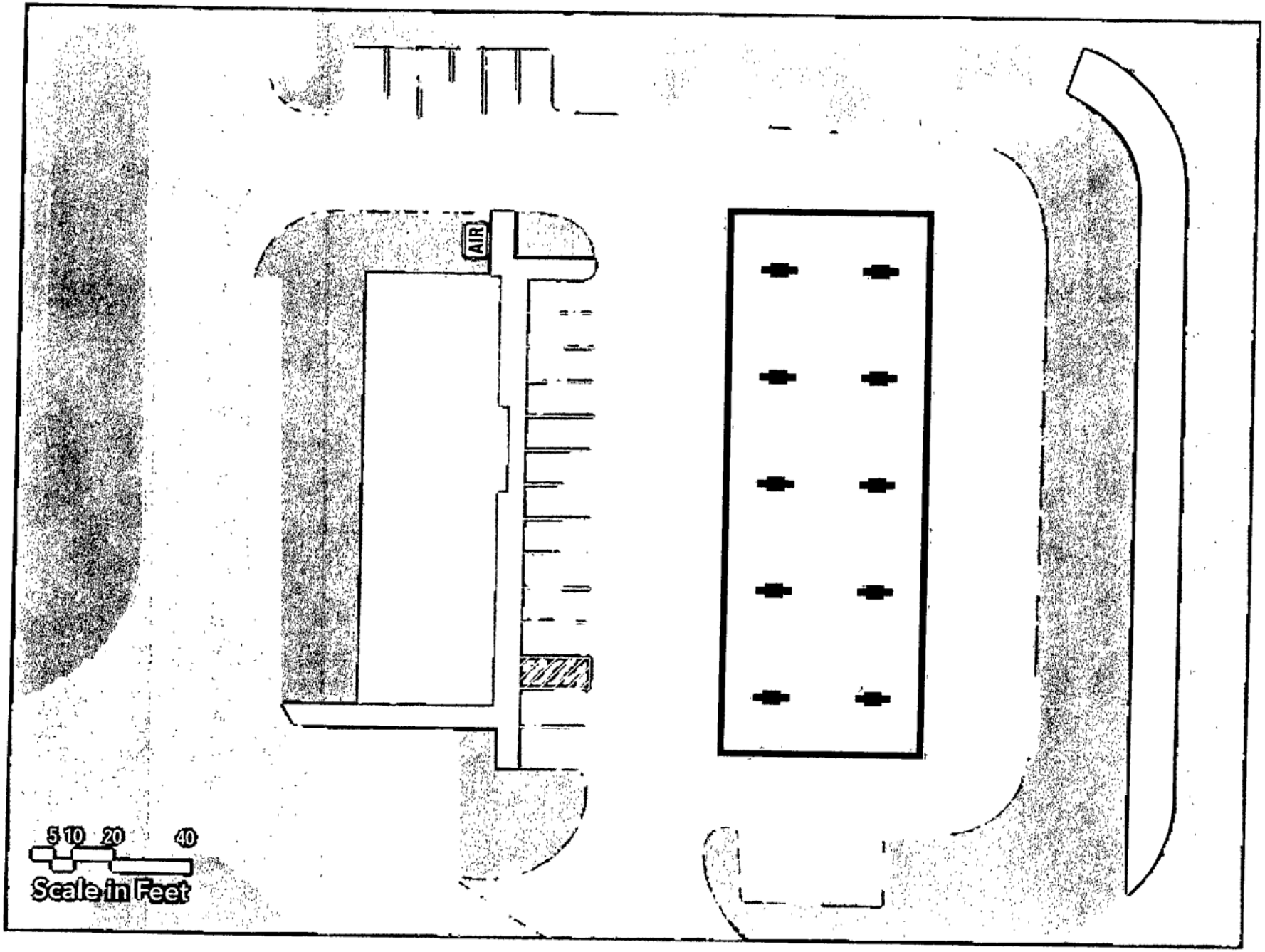

EXHIBIT 9

EXHIBIT

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CERTIFICATE OF SERVICE

I, the undersigned, certify that on February 23, 2018 , I served a copy of the foregoing document upon the following persons at the addresses given, by mailing by United States Mail, postage prepaid, or via E-mail:

Raymond E Walden
rwalden@woglaw.com

Matthew A Lathrop
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Date: February 23, 2018 BY THE COURT: John M. Friend
CLERK

FOURTH DISTRICT COURT
DOUGLAS COUNTY, NEBRASKA

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

RITA SUNDERMANN, Plaintiff, vs. HYVEE, INC. and, SWEETBRIAR II, LLC, Defendants.	)	CASE NO. CI 15-10787 PRAECIPE FOR TRANSCRIPT

TO: THE CLERK OF THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

COMES NOW the Plaintiff, Rita Sundermann, and requests a transcript to be filed in the above-captioned case pursuant to Neb. Rev. Stat. § 25-1912 and in accordance with Neb. Ct. Rule § 2-104 of the Nebraska Supreme Court and Court of Appeals. The transcript shall include the following:

1. Plaintiff's Complaint filed December 21, 2015;
2. Plaintiff's Amended Complaint filed January 12, 2016;
3. Answer of Defendants filed January 29, 2016;
4. Motion for Summary Judgment filed by Defendants on December 4, 2017;
5. Order granting Defendants' Motion for Summary judgment and dismissing Complaint entered February 23, 2018; and
6. Trial Court's Docket Sheet.

DATED this 15th day of March, 2018.

Respectfully submitted,

RITA SUNDERMANN, Plaintiff

By: /s/ Matthew A. Lathrop
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Attorney for Plaintiff

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing was served on the defendants by email and United States mail postage prepaid on this 15th day of March, 2018 to:

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/s/Matthew A. Lathrop

Certificate of Service

I hereby certify that on Thursday, March 15, 2018 I provided a true and correct copy of the Praecipe-Appeal Transcript to the following:

Signature: /s/ Lathrop,Matthew,A (Bar Number: 19558)