**IN THE COURT OF APPEALS OF IOWA**

No. 7-415 / 06-2043
Filed July 12, 2007

**MARK S. NELLIS and AMY S. NELLIS,**
Plaintiffs-Appellants,

**vs.**

**TOWN OF SUTHERLAND,**
Defendant-Appellee,

and

BARBARA PEROUKANEA, d/b/a COUNTRY HOUSE,
and GARY WILSON,
Defendants.

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Appeal from the Iowa District Court for O'Brien County, John P. Duffy, Judge.

Plaintiffs appeal a district court summary judgment ruling dismissing their personal injury action against a municipality. **AFFIRMED.**

David A. Scott of Cornwall, Avery, Bjornstad & Scott, Spencer, for appellants.

Douglas A. Haag of Patterson Law Firm, L.L.P., Des Moines, for appellee.

Considered by Sackett, C.J., and Vogel and Miller, JJ.

**MILLER, J.**

Mark and Amy Nellis appeal from a district court summary judgment ruling dismissing their personal injury action against the Town of Sutherland (Town). We affirm the district court.

## I. BACKGROUND FACTS AND PROCEEDINGS.

The summary judgment record reveals the following undisputed facts. On September 1, 2003, Mark Nellis attended a concert and street dance held as part of an annual Labor Day celebration in the Town. Nellis was listening to the band Zwarte perform, when another spectator, Gary Wilson, climbed up onto the stage with the band. Wilson leapt from the stage into the crowd and landed on Nellis.

The Labor Day celebration, which has been held in the Town for over seventy years, was organized by a group of private citizens known as the Labor Day Celebration Committee (committee). The Town allowed members of the committee to close a public street for the concert and street dance. The Town also issued liquor permits for the operation of a beer garden during the concert and street dance. Volunteers from the Town's fire department sold admission tickets at the entrance to the event. One or two of the Town's police officers occasionally patrolled the area throughout the band's performance. The committee hired additional officers from the city of Cherokee to provide extra security. Some of the proceeds from the event were donated to the Town.

Nellis filed a personal injury lawsuit against the Town, alleging it failed to exercise reasonable care to protect him from Wilson's act in jumping off the stage at the annual Labor Day celebration concert and street dance, which he asserted the Town "permitted, promoted and sponsored." The Town filed a

motion for summary judgment arguing it did not have a duty to protect Nellis from Wilson's actions. The Town further argued summary judgment was appropriate on the basis of the immunity granted to it in Iowa Code section 670.4(10) (2005). The district court determined the Town did not owe Nellis the duty imposed on possessors of land by Restatement (Second) of Torts section 344 (1965) because it "had no 'business purposes' in connection with the celebration and street dance." The district court also concluded the statutory immunity asserted by the Town was applicable. The district court accordingly granted summary judgment in favor of the Town.

Mark and Amy Nellis appeal. They claim "the district court erred in concluding that the Town had no duty because it did not hold its street open for business purposes."

## II. SCOPE AND STANDARDS OF REVIEW.

We review the district court's summary judgment rulings for the correction of errors at law. Iowa R. App. P. 6.4; *Faeth v. State Farm Mut. Auto. Ins. Co.*, 707 N.W.2d 328, 331 (Iowa 2005). Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits show there is no genuine issue of material fact, and the moving party is entitled to a judgment as a matter of law. Iowa R. Civ. P. 1.981(3); *Grinnell Mut. Reins. Co. v. Jungling*, 654 N.W.2d 530, 535 (Iowa 2002). A fact question arises if reasonable minds can differ on how the issue should be resolved. *Grinnell Mut. Reins.*, 654 N.W.2d at 535. No fact question arises if the only conflict concerns legal consequences flowing from undisputed facts. *Id*.

While negligence actions are seldom capable of summary adjudication, the threshold question in any tort case is whether the defendant owed the plaintiff a duty of care. *Sankey v. Richenberger*, 456 N.W.2d 206, 207 (Iowa 1990). "Whether such a duty arises out of the parties' relationship is always a matter of law for the court." *Hoffnagle v. McDonald's Corp.*, 522 N.W.2d 808, 811 (Iowa 1994).

**III. MERITS.**

A person normally has no duty to prevent a third person from causing harm to another. *Morgan v. Perlowski*, 508 N.W.2d 724, 726 (Iowa 1993); Restatement (Second) of Torts § 315. However, exceptions to this general rule arise when a special relationship exists between the persons involved. *Morgan*, 508 N.W.2d at 726. In this case, Nellis contends the source of the Town's duty is Section 344 of the Restatement (Second) of Torts, which provides:

> A *possessor* of land who holds it open to the public for entry for his *business purposes* is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to
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> (a) discover that such acts are being done or are likely to be done, or
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> (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise protect them against it.

(Emphasis added.)

Whether a person is a "possessor" of land is a threshold issue to determination of liability under section 344. *Hoffnagle*, 522 N.W.2d at 813. In order to determine whether a person is a possessor, the court must examine the extent of the person's control of the property. *Id.* (citing Restatement (Second) of Torts § 328E). Nellis argues the Town is liable as a possessor of land under

section 344 because a "municipality has general control of and responsibility for its streets." We disagree.

The mere fact of ownership is not sufficient to impose liability pursuant to section 344. *Galloway v. Bankers Trust Co.*, 420 N.W.2d 437, 441 (Iowa 1988) (noting "[w]hile ownership includes the right of possession and control," possession may be "'loaned' to another, thereby conferring the duty to make the premises safe while simultaneously absolving oneself of responsibility." (internal quotation omitted)). Even if a person is a "possessor" within the meaning of the Restatement rule, liability is imposed "only when he holds his land open to the public for entry for his business purposes."[1] Restatement (Second) of Torts § 344, cmt. a. We agree with the district court's conclusion that the Town did not owe a duty of care to Nellis under section 344 because it "had no 'business purposes' in connection with the concert and street dance."

The committee planned and conducted the annual Labor Day celebration. No employee or elected official of the Town was a member of the committee. The Town does not receive any profits from the event although the committee typically donates a portion of the proceeds from the celebration to the Town. The Town granted the committee's request to close the street, but it did not assist the members of the committee in erecting fences and barricades to block access to the street. Members of the committee hired officers from a different municipality to provide security at the concert and street dance, though one or two of the Town's police officers walked through the event in the course of their normal duties. Members of the Town's volunteer fire department took tickets at the gate

[1] We accordingly need not and do not reach the question of whether the Town is a "possessor of land" within the meaning of section 344.

to the concert and street dance. However, these individuals were not compensated by the committee or the Town for their efforts. The Town's only other action in connection with the event was issuing liquor permits to two taverns. The Town was not otherwise involved in the planning or operation of the Labor Day celebration.

The Town's limited involvement with the celebration is insufficient to render it "[a] possessor of land who holds it open to the public for entry for his business purposes. . . ." Restatement (Second) of Torts § 344. Unlike the city in *Summy v. City of Des Moines*, 708 N.W.2d 333, 344 (Iowa 2006), where the supreme court found the city owed a duty of care to a golfer who was injured on a city-owned and operated golf course, the Town had no "business purpose" in connection with the concert and street dance. *See also Fiala v. Rains*, 519 N.W.2d 386, 390 (Iowa 1994) (finding a homeowner did not owe a duty under section 344 to a social guest in her home). We therefore conclude the district court did not err in determining the Town owed no duty to Nellis under section 344.[2] Summary judgment was properly granted. We accordingly affirm the decision of the district court.

[2] The Town also argues it does not owe Nellis a duty of care pursuant to the public duty doctrine, and it is immune from liability for its actions in issuing liquor permits and granting a permit to close the street under Iowa Code section 670.4(10). Both of these issues were presented to the district court. The district court did not address the public duty doctrine, but it did conclude the Town was statutorily immune from liability. Although we may affirm the district court's decision "on any basis appearing in the record and urged by the prevailing party," *In re Estate of Voss*, 553 N.W.2d 878, 879, n.1 (Iowa 1996), we need not reach these two issues because of our conclusion that the district court was correct in finding the Town did not owe Nellis a duty under section 344.

## IV. CONCLUSION.

We agree with the district court's conclusion that the Town did not owe a duty of care to Nellis under section 344 because the Town did not hold its land open to the public for its business purposes. The district court properly dismissed the claims against the Town, and its summary judgment ruling is affirmed.

**AFFIRMED.**