

STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket No. CUM-26-53

ESTATE OF RAMONA GOWENS et al.

Plaintiffs-Appellants

v.

BPI PARTNERS, LLC et al.

Defendants-Appellees

On Appeal from the Cumberland County Superior Court

**BRIEF OF APPELLEES BPI PARTNERS, LLC
and MIGIS HOTEL GROUP, LLC**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	3
FACTUAL BACKGROUND AND PROCEDURAL HISTORY.....	4
STATEMENT OF THE ISSUES PRESENTED.....	7
ARGUMENT.....	8
I. Under Maine law the Inn did not owe its guests a duty of care while using the Cliff Walk.....	8
II. The summary judgment record does not support the existence of a duty even under the expanded scope of liability the Estate proposes.....	12
III. The Florida and Indiana cases the Estate cites do not support the existence of a duty here.....	21
CONCLUSION.....	24
CERTIFICATE OF SERVICE.....	25

TABLE OF AUTHORITIES

<i>Belyea v. Shiretown Motor Inn, LP</i> , 2010 ME 75, 2 A.3d 276.....	12
<i>Brewer v. Roosevelt Motor Lodge</i> , 295 A.2d 647 (Me. 1972).....	11
<i>Ember v. B.F.D., Inc.</i> , 490 N.E.2d 764, 766 (Ind. Ct. App. 1986), <i>opinion modified on denial of reh'g</i> , 521 N.E.2d 981 (Ind. Ct. App. 1988).....	21-23
<i>Holiday Inns, Inc. v. Shelburne</i> , 576 So.2d 322 (Fla. 4th DCA 1991)...	21, 23
<i>Libby v. Perry</i> , 311 A.2d 527 (Me. 1973).....	6, 7, 10, 11, 13, 20
<i>McMahon v. McMahon</i> , 2019 ME 11, 200 A.3d 789.....	9
<i>Pelletier v. Fort Kent Golf Club</i> , 662 A.2d 220 (Me. 1995).....	6, 7, 10, 11, 13

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

BPI Partners, LLC and Migis Hotel Group, LLC (together, “the Inn”) own the land and buildings of the Black Point Inn. Ramona Gowens’ catastrophic accident, over which her probate estate and her sister Sonia Hall (together, “the Estate”) sued the Inn, happened on the Cliff Walk, a coastal trail around the Prouts Neck peninsula that has a tradition of public access or public visitation. A. 133 (Plaintiff’s Opposition to Defendants’ Statement of Material Facts) ¶ 1. Black Point Inn does not own the Cliff Walk, nor does it inspect or maintain the Cliff Walk. A. 139– 140, ¶¶ 28, 30. The Prouts Neck Improvement Association, which functions as a voluntary homeowners association for the Prouts Neck community, maintains the Cliff Walk. A. 134-35, 137 ¶¶ 5–6, 18. If guests asked whether it owned the Cliff Walk the Inn would tell them it did not. A. 253 (Defendants’ Opposition to Plaintiffs’ Additional Statement of Material Facts) ¶ 30. There is no evidence that Ramona Gowens or Sonia Hall believed the Inn owned the Cliff Walk.

The Inn’s website described the Cliff Walk as a “1.75 mile trek along the shoreline’s magnificent cliffs[.]” A. 206 (Ex K. to Plaintiff’s Statement of Additional Material Facts). The nearest entrance to the Cliff Walk is a three-to-five minute walk from the Inn. A. 144 (Plaintiff’s Statement of

Additional Material Facts) ¶ 22. The Inn’s website listed the Cliff Walk as one of the “recreational resort amenities and activities at the Black Point Inn” A. 144, 206 (Plaintiff’s Statement of Additional Material Facts) ¶ 27 & Ex. K. Also on the list of “amenities and activities” are “Two, 1.5 mile sandy beaches” (Scarborough Beach and Ferry Beach) which are not even located on Prouts Neck and are obviously not owned or controlled by the Inn. *Id.*; A. 143 (Plaintiffs’ Additional Statement of Material Facts) ¶ 19 (“It is roughly a two-mile walk from either of the Ferry Beach or Scarborough Beach parking lots to the Checkley Point entrance of the Cliff Walk.”).

Contrary to the suggestion in the Estate’s brief, unsupported by any record citation, that the entire Prouts Neck peninsula “appears” to “outsiders like Sonia and Ramona” to be “a single, exclusive resort” (Blue Br. 5), the Estate acknowledges that located on Prouts Neck are “multi-million-dollar residences” (Blue Br. 4), which presumably would not be part of “a single . . . resort” with a hotel. An aerial photo of Prouts Neck on page 6 of the Estate’s brief shows the Inn, and also numerous other structures that appear to be houses.

The Inn moved for summary judgment on the grounds that (1) because it does not own the Cliff Walk, it owed the Plaintiffs no duty of care with respect to the Cliff Walk, and (2) the Inn is immune in any event under

the Recreational Land Use Statute, 14 M.R.S. 159-A. Plaintiffs' response, as summarized by the trial court, went like this:

While Plaintiffs concede that Defendants do not own the Cliff Walk, Plaintiffs argue Defendants nevertheless owed a duty of care on the basis that Defendants' invitation to use or expectation that guests of the Inn would use the Cliff Walk created the manifestation of intent to control the land on which Plaintiffs were injured and thus created a duty of care to Plaintiffs, or in the alternative, Defendants are not within one of the protected classes of owners or caretakers to whom 14 M.R.S. § 159-A provides immunity.

A. 17–18.

The trial court observed that “a landowner or possessor’s duty to invitees may extend beyond the premises ‘under his control or occupancy to include the approaches which they are expressly or impliedly invited to use or which they would reasonably be expected to use, even though these approaches be not under the invitor’s absolute control.” A. 18 (quoting *Libby v. Perry*, 311 A.2d 527, 535 (Me. 1973)). The trial court added that “liability may . . . attach where the property owner ‘manifested an intention to have control over the land on which the defect was located.” A. 18 (quoting *Pelletier v. Fort Kent Golf Club*, 662 A.2d 220, 222 (Me. 1995)). The trial court determined that neither basis for liability could be supported by the facts in the summary judgment record.

The trial court found it dispositive that in the cases Plaintiffs relied on (*Libby* and *Pelletier*), the “plaintiffs were injured while in areas *necessary* for the use of the landowner’s premises”—an adjacent parking lot in *Libby*, train tracks that crossed a golf course in *Pelletier* (A. 19, emphasis added)—whereas use of the Inn “does not necessitate the use of the Cliff Walk” (A. 21), which is not an “approach” to the Inn, but rather a tourist attraction three to five minutes away. The trial court further concluded that although the Inn “promoted the Cliff Walk and provided directional information to the Cliff Walk,” the “advertisement of a nearby, recreational attraction” does not “create[] a manifestation of intent by [the Inn] to control the Cliff Walk.” A. 21 (“The court disagrees with Plaintiffs’ contention that the extended duty contemplated in aforementioned precedent reaches beyond the discussed circumstances—walkways, approaches, adjacent parking lots, and land otherwise necessary to use a landowner’s property—to encompass neighboring, recreational attractions that a local area has to offer and a local business desires to promote.”). The Estate appealed.

STATEMENT OF THE ISSUES PRESENTED

1. Was the trial court correct in ruling that the Inn did not owe its guests a duty of care under Maine law while they were using a hiking trail

that the Inn neither owns nor controls and that guests do not need to use to access or stay at the Inn?

2. Would summary judgment still be correct under the expanded theory of liability the Estate urges the Court to adopt where there is no evidence that the Inn created the impression that it owned or controlled the Cliff Walk?

ARGUMENT

The Inn did not have a duty to protect its guests while they used the Cliff Walk, either under Maine law as it now exists or under the new rule the Estate would have the Court announce.

I. Under Maine law the Inn did not owe its guests a duty of care while using the Cliff Walk.

The Estate’s argument begins with the assertion that “[t]he Trial Court overlooked the Inn’s heightened duty of care.” Blue Br. 14. According to the trial court, “the Inn was not an ordinary landowner here—it was an innkeeper. This case is about that special relationship between an innkeeper and paying guests—a special relationship that creates a heightened duty to protect guests” Blue Br. 15.

It may be that the trial court “overlooked” this potential framing of the case,¹ but the Estate is in no position to fault it for doing so, because in its summary judgment pleading the Estate said nothing about the heightened innkeeper duty of care or the special relationship it now asserts is the key to this case. The argument the Estate advances for the first time on appeal has therefore been waived. *See McMahon v. McMahn*, 2019 ME 11, ¶ 16, 200 A.3d 789, 794 (“The general rule governing proper appellate procedure is that a party who seeks to raise an issue for the first time at the appellate level is held, in legal effect, to have ‘waived’ the issue insofar as he utilizes it to attack a judgment already entered and from which an appeal is taken; therefore, appellate review will be denied to such question.”) (quotation marks omitted); *see also id.* (“[P]roper appellate practice will not allow a party to shift his ground on appeal and come up with new theories after being unsuccessful on the theory presented in the trial court. It is a well settled universal rule of appellate procedure that a case will not be reviewed by an appellate court on a theory different from that on which it was tried in the court below.”).

The reason why the Estate tries to pivot on appeal to an argument based on the innkeeper’s duty of care is not hard to discern: the cases on

¹ The trial court cited a case on innkeeper duties (A. 18) but did use that lens to conduct its analysis.

ordinary premises liability do not support liability on the facts here. In *Libby v. Perry*, 311 A.2d 527 (Me. 1973), the owner of a building where a dance was held was found to be liable for an injury a guest sustained when he slipped on ice “as he stepped off the steps leading to the [building]” onto “the immediate area that a patron of the dance would have to use to make his exit following the close of the ball.” *Id.* at 535. The accident happened on “the immediate approaches to the steps leading to the . . . building” *Id.* at 534. The Court observed that “[i]t is self evident from the record that, if the approaches to the [building] could not be used by the patrons . . . , then the dance itself could not be held.” *Id.* at 535. Here, in contrast, the Cliff Walk is not an “approach” to the Inn as that term was used in *Libby*; it is not contiguous with the building (as in *Libby*), but instead is three to five minutes away; and there is no reason why patrons could not use the Inn without also using the Cliff Walk. None of the key circumstances on which *Libby* turned are present here.

Equally unhelpful to the Estate is *Pelletier v. Fort Kent Golf Club*, 662 A.2d 220 (Me. 1995), where the plaintiff was injured when a golf ball ricocheted off of railroad tracks that crossed a golf course owned by the defendant. *Id.* at 221. The owner of the golf course was found to be liable for the plaintiff’s injury, even though it did not own the railroad tracks, because

using the golf course “necessarily involved traversing the tracks.” *Id.* at 222. As with *Libby*, *Pelletier* does not apply here because the Cliff Walk does not cross the Inn’s property and patronizing the Inn does not require using the Cliff Walk.

Even if the argument had been preserved, the Estate’s appeal to special duties owed by innkeepers would not change the outcome. The cases the Estate cites deal with duties innkeepers have been found to owe to guests while the guests or their property were *on the premises* of the inn. In *Brewer v. Roosevelt Motor Lodge*, 295 A.2d 647 (Me. 1972), the plaintiff was assaulted by a third party while in her room at a motel; the Court declared that “a proprietor of an inn, hotel, motel, restaurant, or similar establishment is liable for an assault upon a guest or patron by another guest, patron or third person where he has reason to anticipate such assault, and fails to exercise reasonable care under the circumstances to prevent the assault or interfere with its execution.” *Id.* at 651. *Brewer* is about the duty innkeepers may owe to protect guests *at the Inn* against third parties; it does not support the existence of a duty to guests who leave the inn to visit nearby attractions, as happened here. *See id.* at 653 (“innkeepers . . . are by the common law insurers of . . . personal property of the guest, including moneys and watches, *which are placed within the inn*

or hotel”) (emphasis added). Unhelpful to the Estate for the same reason is *Belyea v. Shiretown Motor Inn, LP*, 2010 ME 75, ¶ 11, 2 A.3d 276, 279, where the plaintiff was assaulted by third parties in the motel’s parking lot.² Indeed, the Estate’s own brief acknowledges that the import of the innkeeper-guest relationship is that it “creates a positive duty to exercise reasonable care to protect guests from dangerous conditions *on the premises*” Blue Br. 16 (quotation marks omitted, emphasis added). That is not what happened here.

II. The summary judgment record does not support the existence of a duty even under the expanded scope of liability the Estate proposes.

Seeking to get around the problem of the cases they cite not fitting their facts, Plaintiffs argue for a new and expanded version of the duty innkeepers owe to their guests, asking the Court to recognize “a special relationship that creates a heightened duty to protect guests from a potentially dangerous condition that guests reasonably believe the Inn controls.” Blue Br. 15. The Estate criticizes the trial court for “holding that defendants only have a duty of care on non-owned land that they actually control or that is ‘necessary’ for the use of the landowner’s premises.” Blue Br. 17. But as just explained, the extension of premises liability principles

² In neither case was the inn found to be liable for the plaintiff’s injuries.

the Court recognized in *Libby* and *Pelletier* is limited to locations that guests necessarily use in order to visit the premises the defendant owns.

According to the Estate, “two factors make this situation different from the cases the Trial Court relied on.” Blue Br. 17. The first is that “the Trial Court did not analyze the duty in the context of the heightened duty of care that every innkeeper owes to its guests.” *Id.* That (again) is because the Estate did not argue for the imposition of such a duty in its summary judgment pleading. The second argument the Estate offers for getting around the clear limits of *Libby* and *Pelletier* is that “the Trial Court did not consider the unique geographical exclusivity that the Inn enjoyed *vis a vis* the Cliff Walk” *Id.* The “geographical exclusivity” claim is in service of the argument that while the Inn does not own the Cliff Walk, it has “*created the appearance that it does.*” Blue Br. 18 (emphasis in original). There are a number of problems with the proposed expansion of either the ordinary premises liability or innkeeper duty to locations guests *believe* the Inn controls as a way of salvaging the Estate’s claims against the Inn.

In addition to the fact that the argument has been waived and is unsupported by Maine law, the summary judgment record does not support the facts the Estate would have to prove to prevail on this novel theory. There is no evidence that either Ramona Gowens or Sonia Hall believed the

Inn controlled the Cliff Walk. Or that guests generally believed it did. The Estate points to evidence that *some* guests were surprised that the Inn *didn't know if the Cliff Walk was open*, but it is an unsupported leap to get from that evidence to the claim the Estate advances that “[t]he inn was aware that guests *often* were confused whether the Inn *owns* the Cliff Walk.” Blue Br. 19 (emphasis added). Because common sense would indicate that a hotel should know the hours of a nearby tourist attraction it was encouraging guests to visit, the fact that guests sometimes expected the Inn to know the Cliff Walk’s hours is not evidence that they believe the Inn owned the Cliff Walk.

The Estate tries to manufacture support for the factual claim that “[t]he Inn was aware that guests often were confused whether the Inn owns the Cliff Walk” (Blue Br. 19, citing A. 145 (Plaintiffs’ Statement of Additional Material Facts) ¶ 30). But the testimony it cites does not support the critical claim that “guests were often confused” about the Inn maybe owning the Cliff Walk.³

The Inn’s Guest Services Manager Elizabeth Southard was asked at her deposition whether the Inn specifically told people it did not own the

³ While “[n]either the head of Prouts Neck homeowners association nor the Scarborough police officer who patrols Prouts Neck is sure who owns the Cliff Walk” (Blue Br. 7–8), there is no evidence that either thinks the Inn might own it.

Cliff Walk, and she answered “No, unless they asked us if it was our property and then we would say no.” (A. 189, transcript page 55). Counsel then says “In order to ask that . . . there has to be some question in their mind” about whether the Inn owns the Cliff Walk. Southard responds (because the statement is of course true) “Correct.” She then says: “People would ask if it was open or closed and I would say I don’t know. They would say how don’t you know and I would say it’s not opened by us, we don’t decide if it’s opened or closed. That’s pretty much the instance they would ask if it was owned by us.” *Id.* So Southard’s testimony was not that “Guests were often confused about whether the Inn owned the Cliff Walk,” or anything like that. She testified that guests sometimes would ask if it was open or closed—a thing one would ask a hotel about a nearby attraction whether or not one thought the hotel *owned* the nearby attraction; when she said she didn’t know, “[t]hey would say how don’t you know” (which makes sense given that one would expect a hotel to have that information); and she would say “it’s not opened by us, we don’t decide” This testimony would support a statement along the lines of *some guests were puzzled that the Inn didn’t know what the Cliff Walk’s hours were, and might in that context ask if the Inn owned it.* But it is not evidence that “Guests were often confused about whether the Inn owned the Cliff Walk.”

Nor does the evidence support the claim that the Inn “*created the appearance*” that it controls the Cliff Walk, or was “manifesting intent to control” the Cliff Walk (Blue Br. 18, emphasis in original) such that a reasonable person would have assumed that it did. As a threshold point, it would be unreasonable on its face to assume that a hotel owns a “1.75 mile trek along the shoreline’s magnificent cliffs” (A. 206) that is located three to five minutes away from the hotel on the other side of the peninsula (see Blue Br. 6, photo). It is not common for long coastal hiking trails to be privately owned, or for hotels to own tourist attractions that are a three to five minute walk away from them. It would be odd for the Inn’s guests to assume that it owned the Cliff Walk.

The Estate tries to get around this by insisting that “the Cliff Walk was prominently advertised by the Inn as a hotel amenity” (Blue Br. 15). A threshold problem with this argument is that while the Cliff Walk was listed on the Inn’s website under the heading “recreational resort amenities and activities” (A. 206), so were “Two, 1.5 mile sandy beaches” (Scarborough Beach and Ferry Beach). *Id.* By the Estate’s logic, if listing the Cliff Walk under the heading “recreational resort amenities and activities” created the appearance that the Inn owned the Cliff Walk, listing Scarborough Beach and Ferry Beach created the appearances that they were owned by the Inn.

The proposed inference makes little sense. It is obvious that “recreational resort amenities and activities” (A. 206) is being used to mean something other than *things the Inn owns and controls*.

It is also instructive that the website lists “resort services” that are all things the Inn owns and directly provides (such as parking, coffee, newspapers), and also “[a]dditional recreational resort amenities and activities” that include some things the Inn owns and directly provides (fitness room, bikes, kayaks), but also the 1.5 mile beaches and “[b]ird and nature sanctuaries” (see Blue Br. 4, ariel photo showing bird sanctuary in middle of peninsula, not next to the Inn). While the word “amenity” could in theory be used to mean a thing the Inn owns and directly provides, here it unmistakably is not being used that way.

The same analysis applies to the other promotional document the Estate cites. Under “Hotel Services and Amenities” (A. 212–13) are listed services the Inn does own or provide (gift shop, massage, valet parking, wake-up calls). Under “Recreational Activities” (A. 214) are listed “access to two of Maine’s most exclusive beaches”; “access to the golf course at the Prouts Neck Country Club . . . for a fee”; assistance with getting access to “another [golf] course”; tennis (“available through the Prouts Neck Country

Club for a fee”); and “walking” on the Cliff Walk. It would not be reasonable for a guest to infer that the Inn owns all of these things.

Nor would it be reasonable (as the Estate urges) for guests to infer that the Inn owned the Cliff Walk from the fact that the Inn has an easement that lets guests walk to it (Blue Br. 15), any more than a hotel providing shuttle bus service to a nearby tourist attraction would support an inference that it owned the tourist attraction. Especially where (as here) the tourist attraction is a long coastal hike, not something a hotel would reasonably be expected to own.

Also not supported by the evidence is the Estate’s “unique geographical exclusivity” argument (Blue Br. 17)—the notion that simply by virtue of its location on a peninsula, the Inn somehow should be held to have created the appearance that it owned the Cliff Walk because the Inn and the Cliff Walk are each part of “a small, contained area” that “appears to be part of a unified resort enclave” *Id.* at 18. There are numerous other buildings (private residences) on the peninsula. *See* A. 227 (aerial photograph); Blue Br. 6 (aerial photograph). While a nice rhetorical flourish, the suggestion that the Inn “stands sentry” (Blue Br. 4) at the entrance to Prouts Neck in a way that gives arriving guests the impression that it controls everything that lies beyond assumes that arriving guests can see

that they are crossing a narrow strip of land with water on both sides, a fact for which there is no evidence in the summary judgment record. *See* Blue Br. 4 & 6 (aerial photographs suggesting otherwise).⁴

It is just not true that “[t]he Inn enjoyed virtually sole, exclusive access to an adjacent attraction” or that “the Inn is the *only* way visitors can access the Cliff Walk easily” (Blue Br. 20, emphasis in original)—this ignores the owners and guests of the many residences on the peninsula, and members of the public who bicycle, walk, run, or otherwise make their way to the Cliff Walk without needing to park cars there. There is no reason why guests would perceive a peninsula that has on it a hotel and numerous houses as a “unified resort enclave” that the Inn owned—or, if a guest was under that mistaken impression, how it could be said that the Inn had “created the appearance” (Blue Br. 18) that gave rise to their mistake. While there may be some disputed facts surrounding public access at the entrance to the Cliff Walk nearest to the Inn, it is undisputed that the public may access the Cliff Walk at the other entrance, and there is no evidence that the Inn tried to conceal that fact from its guests. *See* A. 133–34, 136 (Plaintiffs’ Opposition to Defendants’ Statement of Material Facts) ¶¶ 2 & 13 (not disputing that the public may access the Cliff Walk at Checkley Point).

⁴ Another piece of rhetoric that on reflection means little is the notion that everything else on the peninsula “emanate[s] from the Inn” Blue Br. 4.

To recap: because the premises liability cases it cited in the trial court do not support liability here, the Estate now bases its argument on the duty owed by innkeepers to their guests. But those cases do not support liability either. The Estate therefore urges the Court to expand the law on premises liability to cover a new scenario where a defendant has “created the impression” that it owns something it does not in fact own. But even if that were the law, the facts in the summary judgment record would not be sufficient for a reasonable jury to find that the Inn created the impression that it owned the Cliff Walk. This is not, then, a “unique set of facts” (Blue Br. 20) that supports the creation of the new rule the Estate proposes.

Perhaps sensing these problems, the Estate appeals to the “totality of the circumstances” as the basis for concluding that “the Inn appeared to its guests to control the Cliff Walk.” Blue Br. 21. But its source for that standard is *Libby*, where the Court was talking about looking to the totality of the circumstances to determine whether the premises are reasonably safe. *See* 311 A.2d at 535. It does not follow that such an amorphous standard is appropriate for deciding whether the Inn owes a duty in the first place. In any event, if the Court applies that standard, the evidence in the summary judgment record does not support the finding the Inn would have the jury make.

III. The Florida and Indiana cases the Estate cites do not support the existence of a duty here.

The Florida and Indiana cases the Estate cites, even if this Court were to follow them, do not salvage the Estate's claims. The plaintiffs in *Holiday Inns, Inc. v. Shelburne*, 576 So.2d 322 (Fla. 4th DCA 1991), had been injured in a lot outside a bar where many of its patrons parked; liability was found there because "appellants knew their patrons customarily used adjacent premises for parking *in order to patronize the . . . Bar*" and had "parked on the adjacent lots in accordance with the *instructions* of the security guards." *Id.* at 329 (emphasis added). Here, while the Cliff Walk was one of the nearby attractions the Inn described to its guests, visiting the Cliff Walk is not something guests had to or were instructed to do in order to stay at the Inn.

The Florida court in *Shelburne* relied extensively on the Indiana case of *Ember v. B.F.D., Inc.*, 490 N.E.2d 764, 766 (Ind. Ct. App. 1986), *opinion modified on denial of reh'g*, 521 N.E.2d 981 (Ind. Ct. App. 1988), another case where patrons sued a bar for injuries sustained just outside it. After noting that the bar "used the abutting sidewalk, and perhaps the adjacent street and parking lots, to contain its waiting customers," the court held that the plaintiffs could proceed on a premises liability theory because "in this case 'the premises' may not be limited to the area actually owned or

leased by the Pub because its business activities extended beyond its legal boundaries.” *Id.* at 772. Here, in contrast, the Inn does not “use” the Cliff Walk for any purposes (any more than it “uses” nearby public beaches by telling guests about them), and its “business activities” are not “extended” to the Cliff Walk. The court also determined that a jury could find that the pub had “assumed a duty to patrol the area surrounding its premises and to protect persons in its vicinity from criminal or harmful activity”, because it had “distributed a flyer emblazoned with its phone number which implored area residents to call the Pub before the police in case of problems in the neighborhood.” *Id.* at 770.

The *Ember* court wrote that “[a] duty of reasonable care may be extended beyond the business premises when it is reasonable for invitees to believe 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.* While it would have been reasonable in *Ember* for invitees to believe the bar controlled the adjacent location given that the bar used it to provide parking and “to contain its waiting customers,” the Inn did not use the Cliff Walk as a necessary part of its business operations, but simply noted it as a nearby attraction. The Estate emphasizes the “or where the invitor knows his invitees customarily use

such adjacent premises in connection with the invitation” language in the above quotation (Blue Br. 23), but the mere fact that “invitees customarily use” property that is nearby cannot be enough to extend liability to injuries sustained on that property. If it were, every hotel located near a tourist attraction that is described in its promotional materials would be liable for injuries its guests sustained there. That would not be a sensible rule.

The dispositive fact in both *Ember* and *Shelburne* is that the defendant used the adjacent area to operate its business. *See Ember*, 490 N.E.2d at 772 (the bar “used the abutting sidewalk, and perhaps the adjacent street and parking lots, to contain its waiting customers.”); *Shelburne*, 576 So.2d at 329 (the bar “knew their patrons customarily used adjacent premises for parking in order to patronize the . . . Bar” and had “parked on the adjacent lots in accordance with the instructions of the security guards.”). Nothing like that happened here: the Inn does not need its guests to use the Cliff Walk in order to operate its business. Summary judgment would be warranted even under the out of state cases the Estate cites.

CONCLUSION

For the foregoing reasons the trial court's decision should be affirmed.

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CERTIFICATE OF SERVICE

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