

73305-2

73305-2

NO. 73305-2

COURT OF APPEALS STATE OF WASHINGTON
DIVISION I

JACKSON MIKA,

Appellant,

v.

JBC ENTERTAINMENT HOLDINGS INC., a Corporation doing business in the State of Washington; JBC OF SEATTLE, WA, INC., a Washington business, a subsidiary of JBC ENTERTAINMENT HOLDINGS INC.; an entity, owner of JBC ENTERTAINMENT HOLDINGS INC.; GAMEWORKS ENTERTAINMENT LLC, a Corporation doing business in the State of Washington; MARQUIS HOLMES, an individual, dba. BOSS LIFE ENTERTAINMENT, JANE DOE, Husband and wife, and their community, TONY HUMPHREYS, an individual, Husband and wife, and their community,

Respondents.

BRIEF OF RESPONDENT HUMPHREYS

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I. INTRODUCTION

On October 13, 2014, King County Superior Court Judge William Downing granted Defendant/Respondent Tony Humphreys's Second Motion for Summary Judgment against Plaintiff/Appellant Jackson Mika's claim for personal injuries. Tony Humphreys was a Regional Manager for JBC Entertainment, Inc., a parent company of JBC of Seattle. Plaintiff/Appellant Jackson Mika alleges that he was patron of Seattle, d/b/a Jillian's Billiards Club on March 21, 2010, when he sustained a gunshot wound from an unidentified person. Mr. Humphreys was not present on the night of the incident and, in fact, had instructed that the promotion planned by an Assistant Manager at JBC Seattle not go forward. While Mr. Mika claims that Mr. Humphreys owed him a personal duty to provide security on the night in question, Mr. Humphreys was an employee of JBC Entertainment, not JBC Seattle, and he in no way assumed duties to Mr. Mika to protect him against the unknown gunman. Even if he did assume such duties, Mika presents no evidence that Mr. Humphreys violated them. Mr. Humphreys instructed that the event in question not occur, did not hire staff or supervise daily operations at JBC Seattle and had no way to foresee the insubordinate actions of the assistant manager.

II. ASSIGNMENTS OF ERROR

Assignments of Error

Respondent Tony Humphreys assigns no error to the Superior Court's decision.

Issues Pertaining to Assignments of Error

Mr. Humphreys believes that Mr. Mika has misstated the issues on appeal and that the sole issue before this court is stated more properly as:

Whether the Superior Court properly granted Mr. Humphreys's Second Motion for Summary Judgment, where:

1. The Superior Court was on notice of the prior order on summary judgment and expressly found good cause to revise the prior order;
2. No special relationship between existed between Mr. Humphreys and Mr. Mika;
3. No special relationship between existed between Mr. Humphreys and the person who fired the gun;
4. Mr. Humphreys was merely an employee of the parent company of JBC of Seattle, the entity that possessed the premises;
5. Mr. Humphreys did not hire or supervise the employee who organized the event on the night of the shooting;

6. Mr. Humphreys did not know or have any reason to know that the employee would disregard instructions and host the event at which Mr. Mika was injured;

7. Mr. Mika failed to present proof that any conduct of Mr. Humphreys was a proximate cause of Mr. Mika's injury.

III. STATEMENT OF THE CASE

A. **This action stems from an alleged shooting at JBC Seattle in the South Lake Union neighborhood of Seattle.**

On March 21, 2010, Jackson Mika allegedly sustained a gunshot wound while at Jillian's Billiards Club ("Jillian's") in the Lake Union neighborhood of Seattle. CP 846 ¶¶ 24-25. At the time, Jillian's was operated by JBC of Seattle, WA, Inc. ("JBC of Seattle"), a Delaware Corporation. CP 858 ¶¶ 5-6. JBC of Seattle, in turn, was wholly owned by JBC Entertainment Holdings, Inc. ("JBC Entertainment") which is also a corporation domiciled in Delaware. CP 858 ¶ 6; CP 862, 863, 865. JBC operated seven restaurants nationwide which employed approximately 500 people in various work roles. CP 862, 865. Neither JBC Entertainment nor JBC of Seattle owns the building where Jillian's is located. CP 862-863.

The event of March 20 and 21, 2010 at Jillian's occurred **without the knowledge of Mr. Humphreys**. CP 867-68. An assistant manager at

Jillian's, former defendant Michael Knudsen, agreed to host the function without authority and without seeking permission from the management of either JBC entity. CP 867, 870-871 ¶¶ 2, 14-16). In fact, Mr. Humphreys shortly before the event **expressly informed Mr. Knudsen and other local management at Jillian's that no promotions were to be held while Mr. Humphreys was out of state**, including March 20-21, 2010, when this event did occur. CP 862-863 ¶ 14.

B. Mr. Humphreys was a Regional Manager for JBC Entertainment Holdings and not responsible for daily operations at Jillian's in Seattle, a separate business entity.

Mr. Humphreys was an employee of JBC Entertainment with the title of Regional Manager. CP 868 ¶¶ 3-4. He was at no time an employee of JBC of Seattle. *Id.* His duties included oversight of six different establishments operated as independent entities throughout the United States, including restaurants/bars in California, Illinois, and New Hampshire. *Id.* ¶ 5. Each of these business establishments were independent corporations. Each was staffed with a "General Manger" who was in fact the local manager responsible for the operation of the restaurant and an assistant unit manager ("AUM"). CP 869 ¶ 7. In the case of Jillian's, the local manger before December of 2010 was Rick Coleman. When Mr. Coleman left, he was replaced by Chris Young who

was the local manager in March 2010 at the time of the alleged incident.

Id. ¶ 9.

Mr. Humphreys's duties did not include day-to-day administrative work and management of any of these six establishments, including Jillian's. CP 867-868 ¶¶ 5-7. He did not hire local staff. He did not perform reporting requirements to local or state governments. CP 869 ¶ 7. He did not perform staff training. The local managers had these responsibilities. *Id.* ¶¶ 7-8. Mr. Humphreys depended on the manager for status reports and feedback gathered from employees during visits to the establishments. CP 868-69 ¶ 6.

The duties of the local manager, such as Mr. Coleman and Mr. Young at Jillian's, included ensuring that the bar was complying with local reporting requirements to state and local entities. This would have included filing a safety plan such as required by the City of Seattle. CP 869.

Michael Knudsen was an AUM at Jillian's. Employed by Jillian's in March 2009, Mr. Knudsen was hired by then local manager Rick Coleman. *Id.* ¶ 9. **Mr. Knudsen was not hired to promote events at Jillian's.** His job duties included tending bar and ensuring that daily shifts were adequately staffed, and he would do these tasks under the supervision of the manager. *Id.* ¶ 9. Mr. Knudsen testified that his chain

of command required that he report to the general manager at the restaurant, not Mr. Humphreys. CP 876. His contact with Mr. Humphreys was minimal. Mr. Knudsen testified at deposition:

Q. Have you ever had personal contact with Mr. Humphries [sic]?

A. Yes.

Q. Under what circumstances, please?

A. Just general employment-related things. As far as, you know, bar operations, service operations, things of that nature.

Q. Was your contact regularly with him or periodically? How would you describe that?

A. Periodically.

Q. Okay. Was it prompted by an event or was it just a routine thing that you went through?

A. Routine. I mean, as far as I know, he lived in the area, so when he wasn't bouncing around from store to store, he would swing into the Seattle location.

CP 876-77.

C. Mr. Humphreys expressly ordered that the promotion of March 20-21, 2010 not go forward.

Jillian's employees Mr. Knudsen and Katie Benjamin acted without authority and violated express instructions to them by permitting the event of March 20 and 21 to occur. CP 871. Former defendant Marquis Holmes, dba Boss Life Entertainment, approached Michael

Knudsen prior to March 20, 2010 about holding a promotion at Jillian's. CP 881-82. Knudsen testified that Holmes asked if he was interested in holding the promotion with him, to which Knudsen answered "absolutely." CP 882. Knudsen acknowledges that he failed to inform any of his supervisors with regard to this agreement. *Id.* Mr. Holmes and Mr. Knudsen did not reduce the agreement to writing. CP 882-883.

In fact, Mr. Humphreys had already instructed Jillian's management, including Mr. Knudsen, that no promotions were to go forward while he was out of state:

In one such visit, I met with Jillian's staff in Seattle in early March 2010. I had planned to travel out-of-state for a vacation in a few days and wanted to discuss operations with the interim manager, Chris Young, before leaving. I met with Mr. Young as well as the assistant, Michael Knudsen, and other people in management. At that meeting, I instructed that there would be no promotions while I was on vacation. This would include any promotion in which JBC would be a partner with an independent promoter or other third party. I am aware that Mr. Knudsen clearly understood my instructions given his testimony in this lawsuit.

CP 870-71 ¶ 14. Mr. Knudsen admitted in his deposition that he knew that Mr. Humphreys had instructed him not to hold any events while Mr. Humphreys was on vacation. CP 889-890. Mr. Knudsen also admitted that he knew that promotions had to be approved by management and that Mr. Humphreys had not approved the event. CP 891.

Mr. Knudsen assumed that the promotion would include featured music of hip-hop artist “Rapper Lloyd.” CP 883. The event would include music played by a disc jockey with a guest appearance by Lloyd sometime during the evening. CP 884. Mr. Knudsen testified that he agreed with Marquis Holmes to have additional security personnel present. CP 880. While Mr. Knudsen was the only manager on duty on the evening of March 20, 2010, he scheduled Brock Robinson to oversee security at particular events and to serve as a door host. CP 880, 885. Mr. Knudsen testified that Mr. Robinson was ultimately responsible for security on the night in question. *Id.* But Mr. Knudsen was in charge of supervising the staff that night:

Q. Do you remember the night of March 20th, 2010?

A. Most of it, yes.

Q. ... What were you doing at Jillian’s at that time on that date?

A. I was the manager on duty.

Q. Okay. What does that mean?

A. That means I was supervising the staff that was working that night, as well as being in charge of operations that evening.

CP 896-897.

On or around March 16, 2010, while in Hawaii, Mr. Humphreys was first advised by Jillian’s employee Katie Benjamin about the

promotion involving Mr. Knudsen. CP 871 ¶ 15. Upon learning of the proposed event, he directed in no uncertain terms that the promotion not go forward. *Id.* Mr. Humphreys specifically instructed Ms. Benjamin to tell Mr. Knudsen of this decision. Mr. Humphreys instructed Mr. Knudsen twice not to go forward with the promotion. *Id.*

Jillian's promotions to that date were typically directed at corporate customers, with Jillian's acting as the sole promoter. CP 871-72. Corporate employees could come to a private party and enjoy the games, food, drinks, and dancing at the bar. *Id.* This unauthorized promotion, in contrast, was very different in that it involved hip-hop music promoted by an outside entity, "Boss Entertainment," with no understanding of or control over the character or number of patrons who would visit Jillian's for that event.

Mr. Knudsen knew full well that his employer directed that this event not occur. He testified at deposition:

Q: ... Is it correct to say that you were told by Mr. Humphreys or you understood that Mr. Humphreys did not want any promoter-based events to take place at Jillian's of Seattle, but you arranged to have such an event occur anyway; is that fair?

A: Yes.

Q: And it's your understanding that it was that action of having an event without authorization that lead to your termination; is that right?

A: Correct.

CP 889-890.

Mr. Knudsen also testified:

Q: Who did have a role at Jillian's in bringing this artist named Lloyd to Jillian's that night?

A: That would be Marquis Holmes.

Q: How about you? Did you have anything to do with it?

A: Yes.

Q: Anyone else at Jillian's?

A: No.

CP 891.

Despite the presence of additional security, a fight broke out among patrons at Jillian's in the early morning hours of March 21, 2010. While security staff intervened, escorting patrons who participated in the fight off the premises, a single gunshot rang out, allegedly striking plaintiff. CP 878-79, 887-88.

D. Mr. Mika added Tony Humphreys as an individual defendant despite his status as an employee of corporate defendant JBC Entertainment.

On February 15, 2012, Mr. Mika filed a First Amended Complaint that added defendants Tony Humphreys and Greg Stevens as defendants. CP 846. Mr. Mika essentially alleged that Mr. Stevens and

Mr. Humphreys had the same duties as did the business that operated the restaurant where Mr. Mika was injured. CP 1, 791. He alleged that both individuals were personally responsible for negligent hiring and supervision of an Assistant Unit Manager, Michael Knudsen, who hosted the event in question without authorization from any superior at JBC. CP 796 ¶¶ 31-32. He alleged that Mr. Stevens and Mr. Humphreys personally had a duty to comply with Seattle Municipal Code ordinances requiring a nightclub to file a safety plan. CP 797. Yet the Declaration of his liability expert, Daniel Kennedy, makes no reference to Mr. Humphreys's responsibility for the safety plan. CP 420.

E. Superior Court Judge William Downing granted Defendant's Second Motion for Summary Judgment after finding compelling grounds that the previous order denying summary judgment was error.

In July 2012, the Superior Court denied Mr. Humphreys's and Mr. Stevens' Motion for Summary Judgment, seeking dismissal of all claims against them. CP 181. Mr. Stevens filed an additional motion, seeking dismissal for lack of jurisdiction. All claims against Mr. Stevens were dismissed on June 23, 2014, after remand of the case by this court. CP 831. Following acceptance of discretionary review, this court reversed the earlier order denying summary judgment to Mr. Stevens. *Mika v. Stevens*, No. 69413-8-1 (Dec. 23, 2013).

Throughout Mr. Stevens' appeal, Mr. Mika continued to claim that Mr. Humphreys, as a Regional Manager of JBC Entertainment, a parent company, had personal responsibility for the alleged failure of security on March 21, 2010 at an event held at JBC of Seattle d/b/a Jillian's Billiard's Club ("Jillian's"), a subsidiary of JBC. CP 791.

On September 11, 2014, Mr. Humphreys filed a Second Motion for Summary Judgment to be heard by Judge Downing. CP 521. On October 13, 2014, Judge Downing granting summary judgment to Mr. Humphreys, finding no issues of material fact and finding clear error in the court's previous denial of summary judgment. CP 755. He wrote:

Twenty-seven months ago, in July of 2012, another judge of this Court heard several summary judgment motions in this case. Among them was the motion brought on behalf of Mr. Humphreys seeking his dismissal from the lawsuit based on argument similar to (though not identical with) those raised in the present motion. At that time, the motion was denied by a judge who has since retired.

As a general rule (a recent two-year stint on the family law calendar comes to mind) it is a decidedly poor policy to allow for a renewed arguments before a different judge in a way that constitutes, or seems to constitute, forum shopping. This does not appear to be the situation in the present case. First, there has been no subterfuge on the part of the moving party who termed his motion a "second motion" and explained the reasons for its renewal. The arguments and the evidence have been further developed since the summer of 2012. Furthermore, having reviewed the transcript of the earlier judge's ruling on the previous motion, the undersigned is not convinced that the issues raised were given the serious consideration they deserved at

the time and deserved today. (Certainly, to prolong the life of the plaintiff's case with the expectation of directing a verdict for the defendant in a few months' time serves nobody's purposes.) Under all these circumstances, the previous ruling is better viewed as subject to revision prior to entry of final judgment. Thus systemically a desirable aim of attorney deterrence must give way to loftier goals.

CP 756-57.

Judge Downing therefore denied Mr. Mika's Motion to Strike the Second Motion Summary Judgment under King County Local Court Rule 7(b)(7) and declined to apply the "law of the case" doctrine to the court's previous order. Judge Downing wrote:

The plaintiff Jackson Mika was injured by the criminal acts of a patron of a business operated by the corporate entity known as "JBC of Seattle." Mr. Humphreys was an employee — not an officer — of the separate corporation for which he worked — "JBC Entertainment Holdings" of which "JBC of Seattle" is or was a subsidiary. Mr. Humphreys act would be deemed the acts of the corporate entity that would be his employer. However, for the law to impose an individual duty of care upon Mr. Humphreys to protect against the criminal acts of a third party, it would need to be said that he had a "special relationship" with either Mr. Mika or the man who injured him. This cannot be said. Nor can any tenable theory of "piercing the corporate veil" produce individual liability on the part of Mr. Humphreys.

Were there an individual duty on the part of Mr. Humphreys towards Mr. Mika, there remains an absence of evidence tending to establish any breach of this duty. Controlling or directing staffing or security at the event in question was not within the bailiwick of Mr. Humphreys. In fact, the undisputed evidence is that Mr. Humphreys had given direct orders to the local management that the event was not to take place and it only

did occur through direct insubordination. There is no basis upon which to find that the plaintiff's unfortunate injuries were proximately caused by any breach of a cognizable duty by Tony Humphreys.

CP 757-58.

Mr. Mika later moved to dismiss voluntary all claims against defendants JBC Entertainment Holdings, Inc. and JBC of Seattle, Inc.; the Superior Court's dismissal order to that effect was entered on March 3, 2015. CP 765. Mr. Mika has appealed summary judgment orders in favor of three defendants, Mr. Humphreys, Gemini Investments, and Gameworks Entertainment, LLC. CP 767.

IV. SUMMARY OF ARGUMENT

The Superior Court properly granted summary judgment of dismissal to Mr. Humphreys, who owed no legal duty to Mr. Mika to protect him from the criminal acts of an unknown entity. Mr. Mika allegedly sustained a gunshot wound while a patron at defendant JBC of Seattle, d/b/a as Jillian's Billiards Club ("Jillian's") in the early morning hours of March 21, 2010. Mr. Humphreys was an employee — Regional Manager of JBC Entertainment Holdings — of a parent company to Jillian's. He was not present on the night of the occurrence and assumed no duties as to either Mr. Mika or the gunman. Neither was he a "Nightclub Operator" as defined under Seattle Municipal Code ordinance that required that the operator file a safety plan with the police, albeit

without specific requirements for the plan's content. To the extent such duties existed, those duties fell on Jillian's as the premises owner, not on individual employees of the company, let alone employees of a different corporate entity.

Second, there is no material evidence that Mr. Humphreys personally breached any duties owed to Mr. Mika. The record is undisputed that the promotion held at Jillian's on the night of the incident occurred despite Mr. Humphreys's clear directions that the event not take place. Only an act of insubordination by an assistant manager at Jillian's, Michael Knudsen, allowed the promotion to go forward at all.

Third, Mr. Mika's claims of negligent hiring and supervision are without merit as Mr. Humphreys did not personally hire Mr. Knudsen and did not supervise him. Moreover, there is no evidence that anyone at JBC was on notice that Mr. Knudsen was a potential danger to others, or, for that matter, that he would be insubordinate and decide to host a third party promotion at his own discretion. Finally, Mr. Mika can only speculate that any acts or omissions of Mr. Humphreys were a proximate cause of his injury. His expert asserts that security on the night in question should have included screening for guns because the nature of the hip-hop music that night made violence more probable. But a trier of fact would be left to speculate that such security would have deterred the gunman in this

case from entering the establishment. Moreover, as there is no evidence of the motive for the shooting, the parties are simply left to guess why the shooting occurred.

V. ARGUMENT

A. **Because there was no final judgment pursuant to CR 54(b), all orders dispensing of fewer than all claims or fewer than all parties are subject to revision at any time.**

While complaining that Judge Downing's order was contrary to an earlier ruling of a different judge, Mika concedes that Judge Downing had authority to consider the motion despite the earlier order. App. Br. at 37-38. In fact, CR 54(b) provides that no order is final, including summary judgment, which does not address all claims of all parties in the action without a specific finding of the court:

... In the absence of such findings, determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties ... is subject to revision at any time before the entry of judgment adjudicating all claims and the rights and liabilities of all the parties.

CR 54(b) (emphasis added). *See also Fluor Enterprises, Inc. v. Walter Const., Ltd.*, 141 Wn. App. 761, 766, 172 P.3d 368 (2007).

King County Local Court Rule 7(b)(7) also provides that no party will bring the same motion a second time to a different judge without attesting that the motion was previously made, identifying the previous

judge and his or her order, and stating new facts or circumstances that merit a different ruling. Judge Downing's Order specifically set forth in his order that he was satisfied with the showing that counsel for Mr. Humphreys made in this regard. CP 755. Counsel for Mr. Mika appears to acknowledge this, arguing that his client suffered an injustice simply because Judge Downing was wrong in granting summary judgment on the merits. App. Br. at 38. But as shown below, Judge Downing properly recognized multiple grounds for summary judgment of dismissal of the claims against Mr. Humphreys.

B. This court may affirm the trial court's order granting summary judgment on multiple grounds.

An order granting summary judgment is reviewed *de novo* and may be affirmed on any basis supported by the record. *Electrical Workers v. Trig Electric*, 142 Wn.2d 431, 434-435, 13 P.3d 622 (2000). The summary judgment standard is well established. Summary judgment is proper if papers on file show there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). The moving party bears the burden of showing the absence of an issue of fact or evidence to support the nonmoving party's case. *Hash v. Children's Orthopedic Hosp. and Med. Ctr.*, 110 Wn.2d 912, 915, 757 P.2d 507 (1988); *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216,

225-26, n1, 770 P.2d 182 (1989). As will be shown below: (1) Mr. Humphreys, as an employee of JBC Entertainment Holdings, owed no duties to plaintiff, who was attending an unauthorized event at JBC of Seattle; (2) he personally was not a night club operator under Seattle Municipal Court rules; (3) even assuming that Mr. Humphreys personally owed any duties, he breached no such duty in light of his direct instructions that the promotion not go forward; and (4) Mr. Mika failed to prove that Mr. Humphreys's acts or omissions were not the proximate cause of injuries, which were instead the result of a single gunshot from an unknown person.

C. As a matter of law, individual employees of JBC Entertainment Holdings have no liability to a patron of JBC of Seattle, Inc. d/b/a Jillian's Billiards Club.

Nowhere does the record suggest that Mr. Humphreys was a corporate officer of Jillian's or JBC Entertainment. There is no allegation, much less proof, that Mr. Humphrey was an officer or director of either company. However, even if there were, Washington recognizes the general rule that an officer is not liable for corporate liabilities. *Rapid Settlements, Ltd., v. Symetra Life Ins., Co.*, 166 Wn. App. 683, 692, 271 P.3d. 925 (2012); *Block v. Olympic Health Spa*, 24 Wn. App. 938, 944, 604 P.2d 1317 (1979). Although a corporation does not always shield officers from liability, this is not a case in which Mr. Mika could ever

successfully pierce the corporate veil to impose liability on Mr. Humphreys, as the elements of the claim cannot be met. *Rapid Settlements, Ltd.*, 166 Wn. App. at 692. The cases in which corporate officers or directors were found personally liable for the torts of their respective corporations involve actions that are knowingly and intentionally committed, or are blatantly wrong or fraudulent, and often rise to the level of criminal activity. See *Dodson v. Economy Equipment Co.*, 188 Wash. 340, 343, 62 P.2d 708 (1936); *Johnson v. Harrigan-Peach Land Dev. Co.*, 79 Wn.2d 745, 753, 489 P.2d 923 (1971); *Grayson v. Nordic Const. Co.*, 92 Wn.2d 548, 551, 554, 599 P.2d 1271 (1979). Mr. Mika does not even allege, much less prove, such knowing, intentional, fraudulent, or criminal misconduct by Mr. Humphreys or any other defendant here.

Here, Mr. Humphreys was an employee of JBC Entertainment Holdings, not JBC of Seattle. JBC Entertainment Holdings was a separate corporate entity from JBC of Seattle. Only the latter owned and operated the establishment where the March 21, 2010, shooting occurred. CP 858, 867. Mr. Mika cannot disregard the corporate forms of these two discrete corporations and somehow treat them as one and the same. Even if he could, Mr. Mika would have this court ignore that JBC Entertainment Holdings was the only corporation that employed Mr. Humphreys.

Neither JBC nor Jillian's is an alter ego of Mr. Humphreys. Nor do any facts exist to support any disregard of the corporate form and the well-settled liability protection that Washington law confers on individual employees and officers of corporations.

D. As a matter of law, Mr. Humphreys had no special relationship with Mr. Mika or the alleged assailant that would give rise to a legal duty to Mr. Mika.

Whether a duty exists is a question of law. *Tae Kim v. Budget Rent a Car Systems, Inc.*, 143 Wn.2d 190, 195, 15 P.3d 1283 (2001) (citation omitted). "The general rule at common law is that a private person does not have a duty to protect others from the criminal acts of third parties." *Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d 192, 199, 943 P.2d 286 (1997) (citation omitted). The exceptions to the rule generally fall into one of two categories: (1) where there is a "special relationship" between the defendant and the victim which may give rise to such a duty, *Niece v. Elmview Group Home*, 131 Wn.2d 39, 43, 929 P.2d 420 (1997) (defendant entrusted with the care of a dependent); or (2) where there is a special relationship between the defendant and a criminal party. *See, e.g., Hertog v. City of Seattle*, 138 Wn.2d 265, 979 P.2d 400 (1999). *See also generally Kim*, 143 Wn.2d at 196-97.

In either circumstance, the basis of the duty derives from Restatement (Second) of Torts § 315 (1965). *See, e.g., Niece*, 131 Wn.2d

at 43 (citing *Petersen v. State*, 100 Wn.2d 421, 426, 671 P.2d 230 (1983)); *Sheikh v. Choe*, 156 Wn.2d 441, 448, 128 P.3d 574 (2006) (citation omitted). It provides:

(a) a special relationship exists between the defendant and the third person which imposes a duty upon the defendant to control the third person's conduct, or (b) a special relation exists between the defendant and the other which gives the other a right to protection.

Restatement (Second) of Torts § 315 (1965). “A duty will be imposed under Section 315 **only where there is a ‘definite, established and continuing relationship between the defendant and the third party.’**” *Hertog*, 138 Wn.2d at 276; see also *Taggart v. State*, 118 Wn.2d 195, 219, 822 P.2d 243 (1992); *Honcoop v. State*, 111 Wn.2d 182, 193, 759 P.2d 1188 (1988); *Hungerford v. State Dept. of Corrections*, 135 Wn. App. 240, 256, 139 P.3d 1131 (2006); *Stenger v. State*, 104 Wn. App. 393, 400, 16 P.3d 655 (2001).

The court in *Estate of Davis v. State Dept. of Corrections*, 127 Wn. App. 833, 113 P.3d 487 (2005) held that a single meeting between a doctor and patient was insufficient as a matter of law to create a “special relationship.” In *Davis*, Andrew Erickson had been arrested, violated his probation by using marijuana, and threatened to commit suicide. He was on community supervision, and he was released on the condition that he undergo a psychological anger-control evaluation and comply with the

resulting treatment requirements. *Id.* at 837. Mr. Erickson met with William Jones, a licensed mental health counselor. *Id.* at 837-38. About two weeks later, Mr. Erickson killed Mr. Davis. *Id.* at 838. In affirming summary judgment of dismissal of claims against the County and DOC brought by the estate of Mr. Davis for failing to supervise Mr. Erickson under a “special relationship” theory, the court concluded that there was no “definite, established, and continuing relationship” between the counselor Mr. Jones and Mr. Erickson. Specifically, the court concluded:

Mr. Jones saw Mr. Erickson only one time. He performed an initial assessment to determine if Mr. Erickson would benefit from further counseling. This sole contact is not a definite, established, and continuing relationship that would trigger a legal duty. Summary judgment dismissal of the claims against the County was proper.

Id. at 841-42. In no reported case has a Washington court found the existence of a special relationship simply based on co-employment, even where one employee supervises the other.

Here, Mr. Humphreys has never met the assailant in this case, never met the security or door host, Mr. Robinson, and had only periodic contacts with Mr. Knudsen. Mr. Humphreys was not even employed by the same employer. While they did speak on occasion about general business matters, both Mr. Knudsen and Mr. Humphreys attest that the issue of Jillian’s security was not a topic discussed between them. CP 869

¶ 8; CP 876-877. There is certainly nothing in the relationship between them that would give rise to a “special relationship.”

E. Mr. Humphreys did not invite Mr. Mika to patronize Jillian’s and did not possess the property so as to create any legal duty to protect Mr. Mika from the criminal act of a third party.

Under Washington law, business establishments have a duty to use reasonable care to protect business invitees from harm caused by others:

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

discover that such acts are being done or are likely to be done, or

give a warning adequate to enable the visitor to avoid the harm, or otherwise to protect them against it.

Restatement (Second) of Torts §341A (emphasis added). As the Washington Supreme Court has held:

We hold a business owes a duty to its invitees to protect them from imminent criminal harm and reasonably foreseeable criminal conduct by third parties.

Nivens v. 7-Eleven Hoagy’s Corner, 133 Wn.2d. 192, 205, 943 P.2d 286 (1997). The same rule applies to businesses that serve alcohol. *Christen v. Lee*, 113 Wn.2d. 479, 504, 780 P.2d 1307 (1989).

However, in all of these cases, it is the “possessor of land,” the

Restatement defines that term, that owes the duty. An individual employee of that entity does not. *See, e.g., Ingersoll v. DeBartolo, Inc.*, 123 Wn.2d 649, 655, 869 P.2d 1014 (1994). The Court in *Ingersoll*, for example, considered a slip-and-fall claim against a shopping mall. Plaintiff sued both the mall and the maintenance service. In affirming summary judgment of dismissal, the Court pointed out that the shopping mall where the fall occurred had duties under the Restatement, while the duties, if any, of the janitorial service would have arisen out of its contractual obligation. The Court rejected plaintiff's argument that both had concurrent duties.

There is no evidence that Mr. Humphreys owed any such duty to Mr. Mika simply by performing his role in management of JBC Entertainment Holdings. Mr. Humphreys had no responsibility to supervise security at Jillian's, to train staff, or to develop a security protocol for the establishment. His role as regional manager extended only to the oversight of the profitability of the establishments supervised, not to the management and control of the various staffs and procedures.

F. The Seattle Municipal Code does not impose any legal duty on Mr. Humphreys.

Mr. Mika argues that Mr. Humphreys has legal duties under Seattle Municipal Code § 10.11.010 *et seq.* but fails to establish that

Mr. Humphreys personally had the duty to comply with the ordinance. The ordinance is addressed to the “nightclub operator,” which includes a sole proprietorship, partnerships, corporation, association, or other public or private organization. SMC 10.11.010-.020; CP 715. But the ordinance omits any reference to the employees or officers of these business entities. Mr. Humphreys, as a Regional Manager of JBC Entertainment, with oversight over six different restaurants across the country, is not the nightclub operator. There is no indication in the ordinance that the City of Seattle intended for it to create liability as broadly as counsel for Mr. Mika indicates.

Mr. Mika seeks to rewrite the ordinance so that it would apply to Mr. Humphreys by arguing that the “Responsible Corporate Officer Doctrine” applies. App. Br. at 40. But he fails to cite any authority in defining the rule. Failure to cite authority in support of a legal argument precludes appellate review of that issue. *Camer v. Seattle Post-Intelligencer*, 45 Wn. App. 29, 36, 723 P.2d 1195 (1986). The Responsible Corporate Officer Doctrine in Washington is limited to an officer’s personal actions or approval of subordinates conduct in violating public ordinances and applies liability only to the penalties imposed for those violations. *K.P. McNamara Northwest, Inc. v. Wash. State Dept. of Ecology*, 173 Wn. App. 104, 142; 292 P.3d 812 (2013); *Wash. State Dept.*

of Ecology v. Lundgren, 94 Wn. App. 236, 244; 971 P.2d. 948 (1999). No reported Washington authority imposes tort liability on an employee manager to third parties under the doctrine. And Mr. Mika offered no evidence that Mr. Humphreys specifically violated the Seattle Municipal Code or any other regulation. This is in stark contrast to case authority cited by Mr. Mika where the *negligence per se* analysis was based either on regulations directed at a corporate defendant, *Kness v. Truck Trailer Equip. Co.*, 81 Wn.2d 251, 257, 501 P.2d 285 (1972); or involved a commercial vehicle regulation expressly imposing a duty on the individual truck driver. *NeSmith v. Bowden*, 17 Wn. App. 602,607, 563 P.2d 1322 (1975).

If the Responsible Corporate Officer Doctrine were to apply, which it does not, then violation of the Seattle Municipal Ordinance would subject the establishment to a penalty, but nowhere states that it is intended to create a duty owed to nightclub patrons. SMC § 10.11.020. *A fortiori*, the ordinance certainly was never intended to create liability for Mr. Humphreys, who did not have responsibility for daily operation of the business establishment.

Even if Mr. Humphreys did owe a legal duty to comply with Seattle Municipal Code, Mr. Mika is not among the protected class required for the ordinance to be evidence of negligence. *Potter v. Wilbur-Ellis Co.*, 62 Wn.

App. 318, 814 P.2d 670 (1991). The breach of a legal duty is admissible as evidence of negligence under RCW 5.40.050 only when the damage results from the very hazard against which the statute seeks to protect. *Id.* at 324-25. SMC § 10.11.010 applies only to the reporting of safety protocol to the City. It says nothing about the standards that must be implemented. Nothing in the ordinance details a duty to protect plaintiff from a “hazard” or screen for guns or mandates what must be done to extend protection to patrons.

F. There is no evidence that Mr. Humphreys breached any duties owed to Mr. Mika.

Even if Mr. Mika could show the existence of a legal duty that Mr. Humphreys owed Mr. Mika, there is no evidence that he violated any such duty. Mr. Mika argues that Mr. Humphreys failed to adequately supervise Michael Knudsen or was negligent in hiring Mr. Knudsen. There is no proof of either of these allegations, and Mr. Mika offers no citations to the record to support them. This court should ignore any factual contentions that lack supporting citations. *See generally Simmerman v. U-Haul of Inland Northwest*, 57 Wn. App. 682, 685, 789 P.2d 763 (1990).

1. Mr. Humphreys did not hire Mr. Knudsen and would have had no notice whether he was capable of performing the duties of an assistant manager of a restaurant.

To establish a claim for negligent hiring, plaintiff must show that

(1) the **employer** knew or, in exercising ordinary care, should have known of its employee's incompetence when the employee was hired; and (2) that the negligently hired employee caused the plaintiff's injuries. *Rucshner v. ADT, Sec. Systems, Inc.*, 149 Wn. App. 665, 604 P.3d. 271 (2009). First, Mr. Humphreys did not employ or train Mr. Knudsen or any other employee of Jillian's in Seattle. CP 869-70. Moreover, Mr. Knudsen was not hired as a security employee; he was hired as an assistant manager, under the direction of the local manager, Chris Young. *Id.* Nothing in the background of Mr. Knudsen suggests that he was lacked the qualifications to perform those duties. *Id.* Second, Mr. Knudsen's allegedly wrongful act was to go forward with a promotion that allegedly subjected Mr. Mika to harm, despite specific instructions that he not hold the promotion. Nothing in Mr. Knudsen's background suggested that the particular act of insubordination was foreseeable at the time he was hired.

The same is true for the security/host on duty on March 20, 2010, Brock Robinson. *Id.* Mr. Humphreys did not hire him. Mr. Humphreys did not train him. That was the responsibility of local management at Jillian's. No facts exist to show that Mr. Humphreys knew or should have known that Mr. Robinson was incompetent to handle these responsibilities when the Jillian's local manager hired him.

2. There was no negligent supervision.

A claim of negligent supervision requires a showing that (1) an employee acted outside the scope of his employment; (2) the employee presented a risk of harm to others; (3) the employer knew or should have known in the exercise of reasonable care that the employee posed a risk to others; and (4) that the employer's failure to supervise was a proximate cause of injuries to other employees. *Briggs v. Nova Services*, 135 Wn. App. 955, 966-67; 147 P.3d. 616, 622 (2006) *affirmed* 166 Wn.2d 794, 213 P.3d. 910 (2009). *See, also, Niece*, 131 Wn.2d at 51-52. Washington courts have generally interpreted the knowledge element to require a showing of "knowledge of the **dangerous** tendencies of the particular employee". *Id.* at 52 (emphasis added).

Even if Mr. Humphreys owed a legal duty of supervising Mr. Knudsen, it is difficult to understand how Mr. Knudsen presented a risk of harm to others, or how Mr. Humphreys could or should have foreseen such a risk of harm. Mr. Knudsen was insubordinate in going forward with the promotion on March 20, 2010, directly contrary to Mr. Humphreys's instructions. This in no way rises to the level of a sexual assault, as in *Niece*, or some other intentional assault or battery on a vulnerable person. Moreover, the alleged act that contributed to the gun shot was the failure to prevent the assailant from entering Jillian's, a task

apparently delegated to Mr. Robinson. But there is nothing to indicate that Mr. Robinson acted outside the scope of his employment or somehow represented a risk to others when he was employed by the local manager.

G. Mr. Mika cannot show that any alleged breach of duty by Mr. Humphreys was a proximate cause of the shooting.

Mr. Mika must establish that had Jillian's conducted other security procedures that night, it would have prevented the gunshot that wounded him. Proximate cause is made up of both cause in fact and of legal causation. *Christen*, 113 Wn.2d at 507-08. Cause in fact or "but for" causation requires some evidence that the breach of duty in fact caused the injury. Legal causation involves policy considerations of how far the consequences of a defendant's acts should extend. It concerns whether liability should attach as a matter of law given the existence of cause in fact. *Id.* at 508. "Legal cause 'involves a determination of whether liability *should* attach as a matter of law given the existence of cause in fact'; *i.e.*, whether considerations of logic, common sense, justice, policy and precedent favor finding liability." *Medrano v. Schwendeman*, 66 Wn. App. 607, 611, 836 P.2d 833 (1992) (emphasis in original; citation omitted). *See also Tae Kim*, 143 Wn.2d at 202-03.

Though proximate cause may be adduced as an inference from other proven facts, it cannot rest upon mere conjecture:

When causation is based on circumstantial evidence, the factual determination may not rest upon conjecture; and if there is nothing more substantial to proceed upon than two theories, under one of which a defendant would be liable and under the other which there would be no liability, a jury is not permitted to speculate on how the accident occurred.

Nejin v. Seattle, 40 Wn. App. 414, 420, 698 P.2d 615 (1985) (quoting *Sanchez v. Haddix*, 95 Wn.2d. 593, 599, 627 P.2d 1312 (1981)).

In *Nejin*, the City of Seattle had negligently failed to maintain a sewer pipe and a break had resulted in water leakage that had caused a landslide on plaintiff's property. *Id* at 416-20. But landslides also had occurred in the same area in 1921 and 1940. Water had been seen seeping from the ground at that time that had been attributable to natural ground water. *Id* at 416. Given that there were two possibilities as to the causal effect of the broken sewage line, the court found no permissible inference that the landslide had been caused by the negligence of the City. In matters of proof, the existence of facts may not be inferred from mere possibilities. *Id.* at 421 (citing *Wilson v. Northern Pac. Ry.*, 44 Wn.2d 122, 128, 265 P.2d 815 (1954)). It was insufficient that evidence adduced at trial was that water "could have exfiltrated" and "conceivably in some manner or fashion" could have reached Nejin's property. Proximate cause must be proven by evidence, whether direct or circumstantial, not by speculation or conjecture or by inference piled upon inference. *Id.* at 420

(citing *Wilson*, 44 Wn.2d at 130).

Here, there are multiple explanations for the events in question. Mr. Mika cannot prove, but can only speculate, that different security procedures would have averted the outcome. There is no evidence establishing how the gunman got the gun into Jillian's or why Mr. Mika was shot. The fact is the gunman apparently drew and fired a gun, perhaps negligently or intentionally shooting at plaintiff or someone else. The gunman's motivation is unknown, and whether he or she could have been stopped that night can only be guessed.

Moreover, the plaintiff cannot establish "legal causation" even if "but for" causation could be established. Even Mr. Mika's own liability expert does not attest to Mr. Humphreys's role in the subject event. CP 420. Mr. Mika asks this court to impose liability on Mr. Humphreys, who is not an employee of the establishment, did not assume direct management of the establishment or of the employees involved in questions of security, and, in fact, directly instructed that the event in question **not go forward**. Clearly, the gunshot wound that Mr. Mika suffered is far too attenuated for the conduct of Mr. Humphreys to have been a legal cause of injury.

VI. CONCLUSION

Respondent Tony Humphreys requests that this court affirm that October 13, 2014 order of the King County Superior Court granting summary judgment in his favor. Respondent Jackson Mika cannot establish duty, breach or proximate cause under any of his theories of liability. As a Regional Manager for a parent company, Mr. Humphreys personally owed no duties to Mr. Mika, who allegedly sustained a gunshot wound while a patron at JBC Seattle. Mr. Humphreys had no special relationship with Mr. Mika under Washington law that would create any such duty. And even if there were, Mr. Mika presents no evidence that Mr. Humphreys was negligent in the placement of security on the night in question; or that he negligently hired assistant manager Michael Knudsen, who was responsible for the promotion when the incident occurred. Indeed, Mr. Knudsen worked for a separate, discrete company. Mr. Humphreys did not supervise Mr. Knudsen and would not have been on notice that Mr. Knudsen was unqualified to meet the obligations of an assistant general manager of a restaurant. Mr. Humphreys ordered that the event in question not occur; it was only the insubordination of Mr. Knudsen that led to the event occurring at all.

In these circumstances, several independent grounds supported the Superior Court's summary judgment order in Mr. Humphreys's favor. This court should affirm that order.

Respectfully submitted this 18 day of November, 2015.

LEE SMART, P.S., INC.

By: 
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Of Attorneys for Respondent Tony
Humphreys

CERTIFICATE OF SERVICE

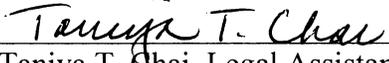
The undersigned certifies under penalty of perjury under the laws of the State of Washington, that on November 18, 2015, I caused service of the foregoing pleading on each and every attorney of record herein:

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