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No. 73305-2-1

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
King County Superior Court No. 11-2-02108-4SEA

JACKSON J. MIKA,

Plaintiff-Appellant,

vs.

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, GEMINI III LP 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.

Defendants-Appellees.

PLAINTIFF'S/APPELLANTS' REPLY BRIEF- HUMPHREYS

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I. INTRODUCTION

The Plaintiff/Appellant Jackson Mika by and through his attorney of record, Howard L. Phillips, hereby replies to Defendant Humphreys Response to his Opening Brief, and reiterates his plea for the relief sought based on Humphreys' role resulting in the devastating personal injury Mika suffered when he was shot by an unknown assailant while an invitee of Jillians Nightclub in Seattle. Washington.

II. REPLY HUMPHREYS STATEMENT OF THE CASE

Humphreys makes a significant misleading misstatement of the fact that he expressly ordered that the promotion of March 20-21, 2010 not go forward.¹

“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.”²

Humphreys also claims that he instructed “Jillians management, including Mr. Knudsen that no promotions were to go forward...³ No promotion was to be held.⁴

With respect to promotions in his absence, Humphreys testified to the following under oath at deposition.

¹ Response Brf. Page 1, 6, 7, 9

² Citing CP 862-863 ¶14

³ Response Brf. Page 7

⁴ Response Brf. Page 7

Q. Okay. Now, that seems to be a pretty hands-on approach to JBC of Seattle. Did you use the same hands-on approach with San Francisco, for instance, to clarify, when you went on vacation, did you inform the San Francisco store not to put on any promotions or events?

A. No, I did not....

Q. It was just the Seattle store?

A. That is correct.

Q. Is there a reason why it was just the Seattle store?

A. Yeah. With the recent departure of the general manager, we had the assistant general manager running the unit. I just wanted to make sure I was backing him up with support in terms of -- for the week that I was gone that they were to stick to the basic operation. I felt that would make it -- I think I felt it would make it better for the whole operation not to have anything come in outside the norm for the one week.

Q. Okay. You were gone for a week?

A. Yes.

Q. And when did you give them that instruction? Do you remember?

A. I don't remember the exact date. I would say probably a week before my departure.

Q. Okay. And how did that happen? Did you call them all into the office or send an e-mail?

A. There is a regularly -- normally we would have 12 manager meetings every single Monday in each of the units, and I believe it was one of those regularly scheduled events.

Q. Okay. And who would have been at that meeting?

A. The managers, and I believe both of the event sales manager were there as well.

Q. Okay. Who were the event sales managers?

A. Katie Benjamin and Stefanie Snyder at that time.

Q. Okay. And Mr. Knudsen would have been there as well?

A. Yes.

Additionally, during his deposition, Mr. Humphreys also testified that

he had no memory of Knudsen being present at the meeting.⁵

Q. Do you have independent memory of him being there?

A. No.⁶

⁵ See CP 645-646

⁶ *Id.*

Mr. Knudsen testified that he was not at the meeting and learned of the prohibition from a third party.

Q. “Okay. And do you remember Mr. Humphries, before leaving on vacation, leaving specific instructions to the management team that there would be no promotion or events without his approval...Did he tell you that personally?”

A. **No. It was brought to my attention.** I believe he said it at a manager meeting two weeks prior to that event taking place as well.”⁷
(EMPHASIS ADDED)

This seemingly innocuous misstatement is important because Humphreys response is replete with the mantra that he specifically told Knudsen NOT to have this specific event, to bolster his argument that he did not fail to supervise Knudsen, and Knudsen was directly insubordinate. The fact that he would skew this minor fact, and rely on the misstatement, so much puts into question any and all of his factual declaratory statements and denials.

III. ARGUMENT

A. HUMPHREYS IS PERSONALLY LIABLE AND HAD A DUTY TO INVITEE MIKA

Humphreys was the person responsible for the day to day operation of Jillians of Seattle as well as Jillians’ compliance with local laws. He is *per se* liable for violating a safety ordinance designed to protect a class of patrons of which Mika is a member. Moreover, he had a duty to invitee

⁷ CP 620

Mika, and that duty was breached when Humphreys failed, by negligently failing to train and/or supervise Michael Knudsen regarding promotions and the use of promoters.

1. Humphreys As A Regional Director Was The Responsible Corporate Officer Per Se Negligent

Humphreys argues that he had no legal duty to comply with the nightclub ordinance because he was not an corporate officer, and that there are no allegations that he was. He also argues that he is not a nightclub operator, and incredulously that Mika⁸ was not among the protected class) citing, *Potter v Wilbur-Ellis Co* 62 Wn. App. 318, 814 P. 2d 670 (1991)⁹

Further Humphreys, unreasonably argues that the reporting requirement applies only to safety protocols. Clearly, when read with the accompanying “best practices” promulgated by the city, the ordinance is to insure that nightclubs have a plan for insuring the safety of its patrons. Humphreys is asking this court to disregard the obvious purpose of having safety plans, that is to provide reasonably “safe” premises for patrons of the Seattle nightclubs. Furthermore, Humphreys’ ignorance to file the mandated plans does not vitiate his negligence. There was no plan, and Knudsen was not trained on even the basic safety procedures such as evacuations of the patrons in case of fire. CP 623

⁸ Clearly a business invitee/patron of Jillians

⁹ Response Brf. Page 25

Humphreys argues in response that he was not a “Nightclub Operator” as defined under the Seattle Municipal Code ordinance that required a safety plan.¹⁰ This flies in the face of his earlier proclamation that he instructed the nightclub managers to have no promotions in his absence.

Moreover, his duties were described by then JBC (Hereinafter JBC) vice-president as those of a “Director of Operations.” Clearly, he was responsible to Jillians operations and, unlike the local managers, falls within the definition of nightclub operator. If not Humphreys, then who would be the responsible party, Knudsen?

Alternatively, it is axiomatic that JBC was a nightclub operator and JBC’s corporate duty to invitees as a nightclub operator imputes to Humphreys as “Director”, who was in fact responsible for the operations of Jillians. For the reasons noted below, Humphreys is directly liable for the torts of JBC Entertainment.

Humphreys claims as fact that “There is no allegation much less proof that Mr. Humphreys was an officer or director of Jillians or JBC Entertainment.

This statement is wholly inconsistent and a direct contradiction with the testimony of his supervisor, JBC vice-president Tyler Warfield, who testified at deposition that Humphreys was JBC’s Regional Director--

¹⁰ Response Brf. Page. 14

Director of Operations”, and that Humphreys reported directly to him.¹¹ Humphreys oversaw the nightclub operations, the hiring, and managed the managers. Humphreys essentially had operational control and oversight over JBC properties including Jillians of Seattle. CP 579

Despite his protestations disavowing such, Humphreys was expected by the JBC corporation to be aware of local ordinances, such as the Seattle ordinance requiring the filing of safety plans. CP 586 Humphreys, as Regional Director was expected be aware of “local peculiarities” that may differ from national guidelines. CP 586

It is clear that Humphreys was not just an employee, as was Knudsen, but he was the corporate officer/director responsible for insuring Jillians’ compliance with Seattle’s nightclub safety ordinance.¹² Consequently, Humphreys is personally liable under the “Responsible Corporate Officer Doctrine” because he violated and/or failed to comply with a public safety ordinance when he failed to act to insure compliance with the Seattle Municipal Safety Ordinance directing that his nightclub file a safety plan.

Respondent Director Humphreys is correct that the moving party, Humphreys, bears the burden of showing the absence of an issue of fact or

¹¹ CP 579

¹² See e.g. RCW 23B.08.300, RCW 18.235.010, RCW 18.145.050, RCW18.44.011, RCW 18.100.065, *In re Spokane Concrete Products, Inc.*, 126 Wn. 2d 269, 279, 892 P.2d 98, 104 (1995)

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) Here, Humphreys cannot claim that there are no indisputable material facts that he was not "Regional Director of Operations" and that he was not the person directly responsible for the failure to file a safety plan with city officials as mandated by city ordinance.

Furthermore, Mika agrees with Humphreys that corporate officers and directors may be found to be personally liable for the torts of the corporation that involve, "knowing and intentionally committed, or blatantly wrong, *Dodson v Exonomy Equip Co.* 188 Wn 340, 343, 62 P. 2d 708 (1936) Mika alleges, supported by the deposition testimony of Humphreys' supervisor, that Humphreys was JBC's Director of Operation, and that he intentionally knew, or should have known that it was blatantly wrong not to file a safety plan which is required to protect nightclub patrons from the very type of danger that Mika was subject to.

Humphreys' response that Dr. Kennedy did not refer to Humphreys being responsible for the safety plan is of no moment because his failure to put into place the most rudimentary security measures, is *per se* negligence, requiring no expert opinion.¹³

¹³ Humphreys' Response Brf. Page 11

2. Foreseeability and Special Relationship Existed Between Humphreys And Mika

Humphreys reiterates his reliance on *Tae Kim v Budget Rent a Car Systems Inc.* 143 Wn 2d 190, 15 P.3d 1283 (2001) to support his argument that he had no duty to Mika.

Kim is clearly distinguished because in *Kim*, the court found that a car dealership owed no duty to prevent a third party from stealing a car and committing vehicular assault after leaving keys in the ignition, an act of omission.

Here, Mika is claiming that Humphreys was not just responsible for merely failing to leave keys in a car, but, for his continuous and long-term failure to implement a safety plan, arguably an act of commission founded on ignorance.

Washington law does support imposition of a duty involving a duty to protect a party from the criminal conduct of another where there is a “special relationship” with the victim. *See, e.g., Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d 192, 199, 943 P.2d 286 (1997) (customer-store owner) *Bernethy v. Walt Failor's, Inc.*, 97 Wn.2d 929, 934, 653 P.2d 280 (1982) (business to business invitee) such as Mika. *See also Kim* at 196. Mika argues that that the special relationship business to business invitee exist

between JBC and Mika that imputes to Regional Director Humphreys because he was responsible for the operations of Jillians of Seattle.

Humphreys argues that a duty will be imposed “only where there is a definite, established and continuing relationship between the defendant and the third person.” This argument relies on the second special relationship derived from the *Restatement (Second) of Torts* § 315 (1965),

This argument fails and is inapposite because Director Humphreys duty does not rest from his relationship with the unknown shooter, but his duty as Director extends to Mika, a business invitee .¹⁴

The Restatement § 344 indicates:

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

- (a) discover that such acts are being done or are likely to be done, or
- (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.

The Court of Appeals in *Passovoy v. Nordstrom, Inc.*, 52 Wn. App. 166, 172-73, 758 P.2d 524 (1988), *review denied*, 112 Wash.2d 1001 (1989), adopted this section for the duty owed by a business (Not just a

¹⁴ See above where Humphreys acknowledges that corporate officer such a directors may be liable to the torts of the corporation.

“possessor of land) to an invitee with respect to criminal conduct. See also *Nivens*, 83 Wn. App. at 46, 920 P.2d 241.

The Washington Supreme court held that the “Restatement (Second) of Torts § 344 is consistent with and a natural extension of Washington law and properly delimits the duty of the business to an invitee.” The court clarified that Comments d and f to that section describe the limit of the duty owed. *Nivens v. 7-11 Hoagy's Corner*, 133 Wn. 2d 192, 193-210, 943 P.2d 286, 287-95 (1997), as amended (Oct. 1, 1997)

A special relationship exists between a business and an invitee because the invitee enters the business premises for the economic benefit of the business. *Nivens*, 133 Wn.2d at 202. A business owes a duty to its invitees to protect them from imminent criminal harm and reasonably foreseeable criminal conduct by third persons. The business owner must take reasonable steps to prevent such harm in order to satisfy the duty, *Id* at 293.

The general rule is that a private person has no duty to protect others from third party criminal acts except where there is a “special relationship”.

[A] “special relationship” exist to the one suffering the harm, or “where the actor’s own affirmative act has created or exposed the other to a recognizable high degree of risk of harm, through such conduct that a reasonable person would take into account.”

Kim at 196, Restatement (Second) of Torts §302B, cmt. e (1965)

Director Humphreys' negligent hiring, supervision, entrustment and nightclub safety ordinance violation created significantly more, and far less attenuated, high degree of risk than leaving the keys in an ignition.

Viewed through the responsible corporate officer lens, here a "special relationship" existed between Mika and Corporate Director Humphreys.

It cannot be reasonably argued that Jillians and JBC owed no duty to the invitee Mika. The remaining question in this regard is whether that duty extends to defendant Humphreys, the Corporate Regional Director. The answer is yes. Furthermore, it was clearly foreseeable, with respect to all the defendants, including Humphreys, that their policy to have a "no security" policy and the long-term and continuing violation of municipal safety ordinance would result in serious injury to a patron at one of their events.

In addition, duty may be predicated on violation of a statute or common law principles of negligence. This case involves a safety ordinance and "at a minimum, reflects a strong public policy nightclub owners take reasonable steps to insure the safety of its patrons to include limiting dangerous weapons such as handguns being introduced into the nightclub atmosphere ." See *c.f. Bernethy v. Walt Failor's, Inc.*, 97 Wash. 2d 929, 932-33, 653 P.2d 280, 282-83 (1982)

In deciding questions of duty, the appellate court evaluates public policy considerations. See *Wells v. Vancouver*, 77 Wn.2d 800, 809–10, 467 P.2d 292 (1970) (Finley, J., concurring), quoted in *Haslund v. Seattle*, 86 Wash.2d 607, 612 n. 2, 547 P.2d 1221 (1976); W. Prosser, *Torts* § 53, at 325–26 (4th ed. 1971). “Once this initial determination of legal duty is made, the jury's function is to decide the foreseeable range of danger thus limiting the scope of that duty.” *Id.* Here, the public policy underpinning Seattle Nightclub Safety Ordinance creates a legal duty and a jury should decide the limiting scope of that duty.

3. Negligent Hiring and Supervision

Humphreys’ claim that he did not hire Knudsen is his weakest attempt to avoid personal liability and justice for Mika for his personal actions as Director Of Operations. It is indisputable that there is material evidence that he did hire Knudsen or at least ratified his hiring and appointment as a manager of Jillians.

Expert opinion was submitted by Mika that Humphreys' decision to hire or ratify the hiring of Knudsen in a management position could be found by a reasonable jury to be negligent.

Dr. Daniel Kennedy Ph.D., opined about JBC Entertainment’s negligent decision, which imputes to Director Humphreys to select Knudsen for a management position.

"[i]t would seem Mr. Knudsen's poor judgment in selecting and supervising promoters was once again displayed by his actions at the scene. These shortcomings may be taken to reflect negligent hiring, retention, training, assignment, entrustment, supervision and failure to direct on the part of JBC Entertainment." ¹⁵

Humphreys cites *Ruchsher v ADT, Seq. Systems, Inc.*, 149 Wn App. 655, 204 P.3d 271 (2006) to support his stance that he is not liable for negligent hiring. Despite his protestations to the contrary, it is clear that Humphreys and the General Manager hired Knudsen, and to reiterate, Knudsen's hiring was at least ratified by Humphreys. This is a disputed material fact on the issue of negligent hiring and therefore Summary Judgment in Humphreys favor on this issue was inappropriate.

Humphreys ratified Knudsen's employment when he conducted a guidance session with him. ¹⁶ It is undisputed that Humphreys was the person who "fired" Knudsen, and this is clear evidence of his direct involvement in Knudsen's employment. Therefore, the jury should be given the opportunity to deliberate whether he is liable for negligent hiring, supervision, entrustment, or not, and to what extent. (See *Ruchsher v ADT, Seq. Systems, Inc.*, at 680) ¹⁷

¹⁵ CP 424

¹⁶ CP 115

¹⁷ In weighing the policy considerations of negligent entrustment, the Washington Supreme Court adopted Restatement (Second) of Torts § 390 (1965)

"One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical

In response to Humphreys argument regarding negligent hiring, citing *Briggs v. Nova Servs.*, 166 Wn. 2d 794, 807, 213 P.3d 910, 916 (2009)¹⁸ and *Niece v. Elmview Group Home*, 131 Wn.2d 39, 51, 929 P.2d 420 (1997)).

The *Niece* court noted that,

“the theory of negligent supervision creates a limited duty to control an employee for the protection of third parties, even where the employee is acting outside the scope of employment.”
EMPHASIS ADDED

Knudsen, as night manager, was acting within the scope of his employment. But, even if he wasn't authorized to put on the event at issue, Humphreys retains a duty to Mika under the *Niece* factors. An employer's duty to prevent an employee from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them exists where,

- (a) the servant
 - (i) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant... and
- (b) the master

harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.” *Bernethy v. Walt Failor's, Inc.*, 97 Wn. 2d 929, 32-33, 653 P.2d 280, 282-83 (1982)

¹⁸ The *Briggs* Court held that Nova did not violate a clear public policy when it fired two employees and accepted the resignation of the other six.

- (i) knows or has reason to know that he has the ability to control his servant, and
- (ii) *knows or should know of the necessity and opportunity for exercising such control.*

(quoting Restatement (Second) of Torts § 317 (1965) (Emphasis Added)).

All of these factors are present in the Humphreys/Knudson Master/Servant relationship.

Washington cases have generally interpreted the knowledge element to require a showing of knowledge of the dangerous tendencies of the particular employee. *Thompson v. Everett Clinic*, 71 Wn. App. 548, 860 P.2d 1054 (1993), *review denied*, 123 Wn. 2d 1027, 877 P.2d 694 (1994), *Peck v. Siau*, 65 Wn. App. 285, 289–90, 827 P.2d 1108, *review denied*, 120 Wn.2d 1005, 838 P.2d 1142 (1992)

First, however, it must be noted that Humphreys knew or should have known that a shooting was possible at Jillians of Seattle and admits that there was another shooting at one of their clubs within his purview, in San Francisco., which occurred prior to the shooting in Seattle.¹⁹ Humphreys knew or should have known that Knudsen was not trained to deal with any sort of security issue.

Moreover, Humphreys claims that he told Knudsen, in particular, and expressly ordered that the promotion of March 20-21 not go forward. The

¹⁹ See Mika Opening Brf.

veracity of this claim is questionable, but, *assuming arguendo* that it is true, consider the following.

The expert opinion of Dr. Kennedy, unlike the generalized expert opinion found in *Niece*, was that Knudsen in particular, presented a risk of harm to others because he was not trained in nightclub patron security or how to prevent injury to patrons when an incident, such as in this instance.

For the reasons stated below, Director Humphreys, due to his failure to train and supervise Knudsen, should have seen the risk of harm to Jillian's patrons, in general, and Mika in particular.²⁰ Mr. Humphreys should have foreseen Knudsen's dangerous youthfulness, and inexperience that resulted in his tendency to allow an unsafe promotion to occur on March 20-21, 2010, even though Knudsen had heard, from a third party, not Humphreys, that no promotion should be held. That is why Humphreys is saying now, post deposition, and mistakenly, that he in fact told Knudsen not to have the promotion. Clearly, his deposition testimony under oath states otherwise.

4. Proximate Cause

Humphreys acknowledges that proximate cause may be based on inference from other proven fact, but that mere conjecture does not support proximate cause.

²⁰ Humphreys Response Brf. Page 29

Here, it cannot be reasonably denied that the gunman entered the club, and that the shooting occurred in the night club. This is an undisputed fact.²¹ It is also a fact that no security measures, such as wandings or purse searches, were in place to prohibit weapons being brought into Jillians.²² It is also a fact that Mika was an invitee standing at the bar and was shot from behind. These facts give rise to the inference that there was proximate cause.

Furthermore, it is more than mildly ludicrous to suggest that the shooter was firing at Mika for any reason. The gunman's motivation is irrelevant to the question of proximate cause for finding Director of Operations Humphreys personally liable for the life changing injury suffered by Mika, an innocent invitee.

////////

²¹ As an officer of the court counsel can attest that it is also a fact that no Jillians employees were found to possess a firearm or suspected of committing the shooting on the night of the promotion.

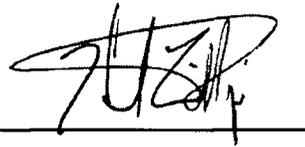
²² Knudsen initially told the police that the shooting occurred outside the club, but recanted this falsehood. CP 602-604

IV. CONCLUSION

Defendant Humphreys', as Responsible Corporate Officer, is *per se* negligent and utterly failed his singular duty to provide a reasonably safe premise. Therefore, the trial court's decision granting Humphreys Summary Judgment Motion should be reversed and this matter should be remanded for trial.

DATED this 18th day of December, 2015.

Respectfully Submitted,
PHILLIPS LAW LLC



By: _____
HOWARD L. PHILLIPS
Attorney for Appellee/Plaintiff
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DECLARATION OF SERVICE

I declare that on this day, I sent via email, with recipient's approval,
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Appellant's Reply Brief

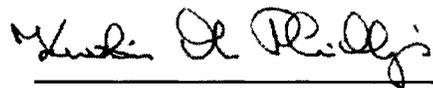
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DATED, Christiansted, St Croix, USVI, this 18th day of December, 2015.



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