

To: Jude X. Lawyer, Attorney at Law

From: Christian W. Putt

Re: *James Pleasant and Cindy Pleasant v Happy Times Bar and Richard Miller*

Date: February 14, 2012

MEMORANDUM OF LAW

Statement of Facts: On November 26, 2011 Plaintiff James Pleasant (referred to hereafter in this section as “James”) and his wife Cindy Pleasant (referred to hereafter in this section as “Cindy”) were patrons at the Happy Times Bar (the named Defendant). At one point during the evening, Defendant Richard Miller approached Cindy from behind and attempted to engage her in a conversation. Cindy advised Miller that she “wasn’t interested”, but Miller persisted with his actions, and only ceased to do so when James directed him to “leave her alone”. According to the facts on record, it was apparent that Miller had been drinking.

Shortly thereafter, Miller made another attempt to have a conversation with Cindy while Plaintiffs were playing a game of pool. Miller was again asked by James to leave them alone. After this exchange, Miller went to the bar and ordered a drink; he was served by Joan Essex, an employee of Happy Times Bar. Essex, among other patrons, was told by Miller that he “was going to get that guy [James] at the pool table”. Miller then walked over to James, and struck him from the back. This prompted the Plaintiffs to leave the Happy Times Bar, as James did not want to have a full-fledged altercation.

However, Miller followed the Plaintiffs outside and assaulted James in the parking lot, near the entrance. Essex observed Miller’s offending actions firsthand but did not contact the police until Cindy returned inside the establishment and asked for help. James sustained serious injuries as a result of the attack by Miller.

Question Presented: Whether Defendant Happy Times Bar owed a duty to Plaintiff James Pleasant to protect him from the criminal attack by Defendant Richard Miller.

Brief Answer: Probably. Michigan courts have ruled that businesses have a duty to exercise reasonable care in order to protect their patrons from foreseeable criminal acts of other patrons. The court would likely find that Happy Times Bar breached this duty, and the breach of this duty may be proximate cause for the damages that Plaintiff Jim Pleasant sustained.

Discussion: The issue in this case is whether Happy Times Bar was negligent when (a) they failed to evict Rick Miller when he indicated that he “was going to get [James Pleasant]” and (b) when employee Joan Essex failed to summon police (until asked) when the second attack occurred, even though she witnessed the events firsthand. A business, or premises possessor, will be found negligent if its employees or authorized agents breached the duty of taking reasonable measures to an ongoing situation that is occurring on the premises and poses a risk of foreseeable harm to an identifiable invitee or class of invitees. *Bailey v Schaff, 2011 Mich App Lexis 1502 (Mich Ct App Aug 18 2011)*.

In *Bailey*, security guards employed by the defendant (an apartment complex owner) were notified of an individual waving a gun and threatening to shoot guests. Instead of notifying the police, the guards drove an intoxicated resident back to his apartment; ten to fifteen minutes later, the guards heard two gunshots and found the plaintiff with two gunshot wounds in his back. The *Bailey* court stated that “a premises possessor has a duty to take reasonable measures to an ongoing situation that is occurring on the premises and poses a risk of foreseeable harm to an identifiable invitee or class of invitees.”

The *Bailey* court decided that ‘reasonable measures’ included calling the police and that the defendant’s employees (the security guards) breached this duty. This is analogous to the

matter before us in that the employee of Happy Times Bar (Joan Essex) was aware that there was a risk of foreseeable harm to James Pleasant, yet failed to take reasonable measures (ex. eject Miller from the premises and/or call the police) to prevent it from occurring. Therefore, Happy Times Bar is likely to be found liable for the injuries Pleasant sustained.

The first element to consider is whether Happy Times Bar owed a duty of reasonable care to James Pleasant. Merchants have a duty to respond reasonably (expediting the involvement of the police) to situations occurring on the premises that pose a risk of imminent and foreseeable harm to identifiable invitees. *Mason v Royal Dequindre, Inc*, 455 Mich 391; 566 NW2d 199 (1997). In *Mason*, the plaintiff was among three other friends in an establishment owned by the defendant, when one of the friends was approached by a third party and an argument arose between the two. This resulted in a physical altercation, with security separating the two persons and taking plaintiff's friend to a locker room until the third party left. Plaintiff then exited the establishment, waited for his friend, and was approached by the same third party. In this instance, another argument arose, and the third party assaulted the plaintiff. The *Mason* court ruled that the defendant was not negligent, because the assault was not foreseeable.

This is distinguishable from the instant case because Rick Miller advised Joan Essex and other patrons he intended to harm James Pleasant; this qualifies as imminent and foreseeable. Because Pleasant meets the definition of identifiable invitee, Happy Times Bar owed a duty to Pleasant – before, and definitely after the first assault – to expedite the involvement of the police because there was a situation occurring on the premises that posed a risk of imminent and foreseeable harm to him.

Next, it must be determined if Happy Times Bar breached its duty of reasonable care to James Pleasant. A business will be found to have breached its duty of reasonable care if a

criminal threat to an identifiable class of invitees is identified, and its agents fail to involve the police on behalf of the Defendant. *Bailey, 2011 Mich App LEXIS 1502 at 39.*

Because Rick Miller's statement that he "was going to get [Pleasant]" can be interpreted as a criminal threat, and that employee Joan Essex heard this statement and failed to involve the police, Happy Times Bar breached its duty of reasonable care.

Proximate cause still must be established – that is, James Pleasant's injuries were a result of Happy Times Bar breaching its duty. Although Defendant Rick Miller's actions are sufficient enough to establish that his assault on Pleasant is a proximate cause of the injuries sustained by Pleasant, there may be more than one proximate cause of an injury, and a defendant cannot escape liability for its negligent conduct merely because the negligence of others may have contributed to the harm caused. *Mills v White Castle System, Inc, 167 Mich App 202; 421 NW2d 631.* In *Mills*, the plaintiffs were attacked by "unruly" persons loitering in the parking lot of a restaurant owned by the defendant. When asked by one of the plaintiffs' companions to summon the police, the manager of the restaurant refused, and also refused to allow plaintiffs' companion to do so. The plaintiffs asserted that the defendant's refusal to eject the unruly patrons or to summon the police was a proximate cause of plaintiffs' injuries. The *Mills* court, applying the reasonable person's standard, held that "[w]e are unable to say that reasonable men would agree that defendant's employees' failure to eject the unruly persons or to notify the police... was not the proximate cause of the plaintiffs' injuries."

This is similar to the matter before us in that Happy Times Bar failed to eject Miller (whose actions can be viewed as "unruly") and that Essex failed to notify the police until asked by Cindy Pleasant.

Finally, it must be established that James Pleasant suffered injuries. Although specific details are still being ascertained as to extent and severity, the facts on record show that James Pleasant suffered serious injuries from the beating.

Conclusion: The court would probably find that the Defendant Happy Times Bar owed a duty to protect Plaintiff Jim Pleasant from the foreseeable criminal acts of a third party while on Defendant Happy Times Bar's premises and that it was breached when Happy Times Bar failed to eject Rick Miller or summon the police. The court will probably find that this breach of duty is a proximate cause for the injuries that Plaintiff Jim Pleasant sustained; this satisfies all the elements of a negligence claim.

As discussed, this case is similar to both *Bailey v Schaff* and also *Mills v White Castle System, Inc* in that (1) the criminal acts of a third party were foreseeable, (2) the defendant's employees failed to eject the offending third party from the premises before the criminal act occurred, and (3) the defendants' employees failed to summon the police when the criminal act was occurring.