COMMONWEALTH OF MASSACHUSETTS

Appeals Court

NO. 2017-P-1485

SUFFOLK COUNTY

EVEREST NATIONAL INSURANCE COMPANY,
PLAINTIFF,

v.

BERKELEY PLACE RESTAURANT LIMITED PARTNERSHIP;
AMERICAN FOOD MANAGEMENT LIMITED PARTNERSHIP AND
KH-CH CORPORATION,
DEFENDANTS-APPELLANTS,

v.

ULTIMATE PARKING, LLC,
DEFENDANT-APPELLEE.

ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT

BRIEF FOR THE DEFENDANTS-APPELLANTS, BERKELEY PLACE RESTAURANT LIMITED PARTNERSHIP; AMERICAN FOOD MANAGEMENT LIMITED PARTNERSHIP AND KH-CH CORPORATION

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CORPORATE DISCLOSURE STATEMENT

Berkeley Place Restaurant Limited Partnership does business as Grill 23 Restaurant and Bar, located at 161 Berkeley Street in Boston, Massachusetts. Berkeley Place Restaurant Limited Partnership is owned by American Food Management Limited Partnership as the General Partner, as well as approximately forty other limited partners. American Food Management Limited Partnership is in turn owned by Himmel Hospitality Group, Inc. (formerly KH-CH Corp.), as the General Partner, as well as the Janet A. Himmel Delta Trust, the Brian G. Sommers Revocable Trust, and Timothy J. Lynch. No publicly traded entity owns more than 10% of the outstanding shares of Himmel Hospitality Group, Inc.

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2. Did the trial court err in finding that Ultimate Parking did not assume a duty to prevent its patrons from driving while intoxicated?

3. Does the Settlement Agreement between the underlying plaintiffs and defendants prevent Grill 23 from pursuing a contribution claim against Ultimate Parking in this action where neither Grill 23 nor Ultimate Parking were parties to the Settlement Agreement?

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STATEMENT OF THE CASE

This appeal arises from a contribution case filed pursuant to G.L. c. 231B. See Appendix at 6, 19-24. The Plaintiff, Everest National Insurance Company ("Everest"), is the subrogee of its insureds, Timothy Barletta, Barletta Engineering Corporation, and Osprey Equipment Corporation. Id. at 21. On the evening of September 27, 2008, a motor vehicle operated by Timothy Barletta struck a parked Massachusetts State Police cruiser on the Massachusetts Turnpike in Newton,

Massachusetts causing injuries to Trooper Christopher Martin. Id. at 161-163. Trooper Martin sued Timothy Barletta, Barletta Engineering Corporation, and Osprey Equipment Corporation (collectively, "the Barletta Defendants"), based on Timothy Barletta's alleged intoxication at the time of the accident.[1] Id. at 20-21. The parties reached a $3.75 million dollar settlement that was paid by the Barletta defendants' auto insurer, Travelers, and the Barletta defendants' excess insurer, Everest. Id. at 164-165.

Everest subsequently brought this subrogation action against the Appellants, Berkeley Place Restaurant Limited Partnership, which does business as Grill 23 Restaurant and Bar, American Food Management Limited Partnership, and KH-CH Corp. (collectively, "Grill 23"). Id. at 6, 19-20. Barletta attended a party thrown by his brother at Grill 23 prior to the accident. Id. at 19-20. Everest alleged that pursuant to Mass. Gen. Law c. 231B, that Grill 23 owes pro rata contribution for the amount Everest paid to settle the underlying case with Trooper Martin. Id. at 20-21.

[1] The Martin lawsuit was docketed in the Suffolk Superior Court as Christopher J. Martin and Joan Martin v. Barletta Engineering Corporation, Osprey Equipment Corporation, and Timothy J. Barletta, C.A. No. 09-3674.

Grill 23 contracted with the Appellee, Ultimate Parking, LLC ("Ultimate Parking"), which agreed to provide valet services at the restaurant. Id. at 152. On the night of the incident, Barletta used the valet service when he arrived, was given a VIP parking space, and was provided the keys to his vehicle after leaving the restaurant. Id. at 152, 158, and 169.

Grill 23 filed a Third-Party Complaint against Ultimate Parking for contribution and indemnification. Id. at 7, 25-27. Everest subsequently amended its complaint to add Ultimate Parking as a direct defendant. Id. at 7.

After extensive discovery including the depositions of multiple employees and valets of Ultimate Parking, Ultimate Parking filed a Motion for Summary Judgment against Grill 23 and Everest. Id. at 10, 34-56. The trial court allowed Ultimate Parking's summary judgment motion, finding that Ultimate Parking did not owe a duty or assume a duty to prevent its patrons from driving while intoxicated. Id. at 10, 503-513. In so finding, the trial court did not reach Ultimate Parking's arguments that it neither knew nor should have known that Barletta was intoxicated; that the parties could not seek contribution from Ultimate Parking because it

had not been discharged from common liability under the Settlement Agreement; and, that Grill 23 did not have grounds for an indemnification claim against Ultimate Parking. Id. at 503-513.

Grill 23 now appeals the trial court's issuance of summary judgment in favor of Ultimate Parking, including its finding that Ultimate Parking did not owe or assume a duty of care with regard to intoxicated patrons.

STATEMENT OF FACTS

A. The Incident

On the evening of September 27, 2008, Timothy Barletta attended a surprise 40th birthday party at Grill 23 for his sister-in-law, Laura Barletta, hosted by his brother, Vincent Barletta. Id. at 151, 214-215, 217. Timothy Barletta testified that he arrived at Grill 23 between 6:00 p.m. and 7:00 p.m., and that he utilized Ultimate Parking's valet service. Id. at 151-152. He testified that he provided his keys to the vehicle he was operating, which was owned by Barletta Engineering, to a valet and received a ticket in return. Id. at 152. Ultimate Parking provided valet services to Grill 23's guests pursuant to a Valet Parking Agreement between Grill 23 and Ultimate Parking. Id.

Barletta remained at the birthday party until approximately 9:00 p.m. Id. at 155. There is no direct evidence that Grill 23 served Barletta alcohol while he was exhibiting visible signs of intoxication. There is testimony, however, that Barletta was exhibiting outward signs of impairment or unusual behavior that was observed both by other guests of the function and Grill 23's general manager. Id. at 154-155. Grill 23's general manager instructed a server to not serve any further alcohol to Barletta, and there is no evidence that Grill 23 employees served Barletta any alcohol after this instruction. Id. at 155.

Barletta testified that when leaving Grill 23, he brought his valet ticket to the front of the restaurant and handed it to an Ultimate Parking valet. Id. at 158. At that time, Barletta observed that his vehicle was across the street from Grill 23, and he proceeded to obtain the keys from the valet and walk across the street to his vehicle. Id.

After leaving Grill 23, Barletta drove his vehicle westbound on the Massachusetts Turnpike. Id. at 161-162. Between five and ten minutes after he left Grill 23, Barletta collided with a Massachusetts State Police cruiser that was on the left side of the westbound

highway with emergency lights activated. Id. at 162-163. Trooper Martin was occupying the cruiser that Barletta struck, and he sustained personal injuries. Id. at 163. In the immediate aftermath of the subject incident, a responding police officer observed that Barletta smelled strongly of alcohol and presented with bloodshot, watery eyes, slurred speech, and difficulty comprehending his questions. Id. at 168-169. Barletta later pleaded guilty to operating a motor vehicle under the influence of alcohol. Id. at 163.

B. Grill 23 and Ultimate Parking Relationship

Under the Valet Parking Agreement between Ultimate Parking and Grill 23, Ultimate Parking agreed to "indemnify, defend, and hold [Grill 23] harmless from any and all claims . . . incurred by or asserted against [Grill 23] by reason of, or arising out of, any Services provided under this Agreement and any negligence or breach of duty related thereto by Ultimate or any of its employees." Id. at 235.

According to Ultimate Parking's website, it enjoys close working relationships with restaurant clients such as Grill 23:

> We consider the clients we serve to be our partners. Our goal is to work with you to make your property the best it can be. We achieve

> our success by building long-term relationships that work for both of us.
>
> When we provide our services, we become an extension of your own staff. In essence, our staff becomes your staff, ready and willing to respond to your needs. Our managers will attend your team meetings to ensure we are always working in lockstep with all of your personnel. Our managers are not only accountable to us, but they are also accountable to you, solidifying our partnership.

Id. at 465.

On the night of the incident, four Ultimate Parking valets were working: Paul Reniere, Dan Clark, Jose Martinez, and Matthew Gray. Id. at 160. According to Reniere, Grill 23 had a system in place where it designated certain Grill 23 patrons as "VIPs" for purposes of valet parking. Id. at 169. Ultimate Parking would permit Grill 23's VIPs to leave their vehicles either in front of the restaurant or across the street to ensure easy access for them. Id. Typically, when a VIP would leave Grill 23, Ultimate Parking valets would either walk the VIP to his or her motor vehicle, move the car from across the street and into the valet zone, or allow the VIP to walk across the street to pick up his or her vehicle. Id. at 169-170. Reniere testified that there would be an interaction between the valets

and VIPs, and the valets would have an opportunity to observe the VIP when crossing the street. Id. at 169.

All four of the valets testified that they understood that if they encountered a Grill 23 patron showing visible signs of intoxication, they should immediately notify Grill 23 management. Id. at 160, 171-173. The valets would then await further instruction from Grill 23 management after a manager had had an opportunity to assess the condition of the guest. Id. at 172-173. Reniere and Clark each testified that on multiple occasions, they had reported to Grill 23 management that they observed an intoxicated guest and awaited instruction from the Grill 23 manager. Id. at 171-172. Clark estimated that he had notified Grill 23 management of an intoxicated guest on between five and ten occasions. Id. at 172.

In September 2008, Josh Lemay was Ultimate Parking's director of operations. Id. at 176-177. Lemay testified that while he was director of operations, he expected a valet to notify a restaurant manager when a guest showing signs of intoxication was attempting to obtain his or her car keys. Id. at 177. Christian Straub, Ultimate Parking's managing director, likewise testified that an Ultimate Parking valet would immediately notify

a restaurant if the valet observed a guest exhibiting signs of intoxication. Id. at 176-177.

In discovery, Ultimate Parking produced a series of PowerPoint presentation slides that it uses in training sessions for its valet drivers. Id. at 472-475. According to Ultimate Parking's human resources manager, Amanda Cuddy, she would utilize the PowerPoint presentation slides during training sessions for new valet drivers. Id. at 175. One such slide, entitled "Ultimate Hospitality's[2] Standard Operating Procedures," includes a bullet-point list of signs of visible intoxication that includes:

- Slurred speech
- Swaying
- Staggering or stumbling
- Lack of focus and eye contact
- Slow response to questions or comments
- Falling down
- Overtly friendly to guests/employees; and
- Extreme or sudden change of behavior.

Id. at 175-176, 473. The next slide, subtitled "Handling Intoxicated Customers," advises valets to get help from an Ultimate Parking manager or restaurant manager, to be courteous but firm with the intoxicated guest, and to

[2] Grill 23 understands that Ultimate Parking, LLC now has a different corporate name, and it is currently referred to as Ultimate Hospitality.

potentially find alternate transportation for the intoxicated customer in the interest of safety. Id. at 176, 474.

At some time in 2011, the City of Boston sent correspondence to Ultimate Parking requesting information on how it trains its valets to handle intoxicated guests attempting to obtain car keys. Id. at 178. Ultimate Parking sent correspondence to the City of Boston Transportation Department dated June 18, 2013, enclosing its policy for handling intoxicated drivers, pursuant to a request from the City of Boston. Id. at 178-179, 493. The purpose of the policy, Standard Operating Policy ("SOP") Number 803 (effective date October 6, 2008) is: "equip[ing] our associates with information to properly handle intoxicated customers." Id. at 494. According to SOP Number 803, Ultimate Parking believes that it has "a moral obligation to get involved when a customer is intoxicated." Id. at 494. SOP Number 803 identifies signs of visible intoxication and recommendations for handling intoxicated customers that are consistent with the above PowerPoint slides. Id. at 472-475, 494.

C. The Underlying Lawsuit

In 2009, Trooper Martin and his wife filed suit against the Barletta defendants. Id. at 163-164. In May 2010, the parties entered into a Settlement Agreement. Id. at 164, 449-457. The Martin plaintiffs released the Barletta defendants from liability in consideration for $3,750,000.00, of which Everest paid $2,787,000.00. Id. at 164-165. Neither Grill 23 nor Ultimate Parking were parties to the lawsuit and neither participated in the settlement. Id. at 449-457. Under the terms of the Settlement Agreement and Release, the Martin plaintiffs agreed to release the following parties from liability in connection with the subject motor vehicle accident:

> Plaintiffs, on behalf of themselves, their heirs and assigns, hereby completely release and forever discharge Defendants, Insurers, Grill 23 & Bar, Himmel Hospitality Group, the Restaurant, and all their past, present and future officers, owners, directors, stockholders, attorneys, attorneys-in-fact, agents, servants, representatives, employees, subsidiaries, parent companies, member companies, partners, predecessors and successors in interest, and assigns and all other persons, firms or corporations with whom any of the former have been, are now, or may hereafter be affiliated (hereinafter "Releasees") from any and all past, present or future claims, demands, obligations, punitive damages, actions causes of action, wrongful death claims, causes of action under G. L. c. 93A and c. 176D, rights, damages, costs, losses of services, expenses and compensation

> of any nature whatsoever, whether based on a tort, contract or other theory of recovery, which the Plaintiffs now have, or which may hereafter accrue or otherwise be acquired, on account of, or in any way growing out of the Occurrence, or which are the subject of the Complaint (and all related pleadings) . . .

Id. at 449-450. Everest subsequently filed this contribution suit against Grill 23 pursuant to G.L. c. 231B. Id. at 6, 19-21. In turn, Grill 23 filed a Third-Party Complaint against Ultimate Parking for contribution and indemnification. Id. at 7, 25-27. Everest then amended its complaint to add Ultimate Parking as a direct defendant. Id. at 7.

SUMMARY OF ARGUMENT

Ultimate Parking owed a common law duty of care to Trooper Martin and to all those using the roads to exercise reasonable care in preventing its patrons from driving while intoxicated. While Massachusetts has not yet ruled on whether valets owe a duty of care to those injured by intoxicated customers, traditional principles of tort law and Massachusetts' own approach to the hazards of drunk driving dictate that such a duty exists. Drunk drivers pose an unreasonable risk of harm that is reasonably foreseeable, and because valets may exert a degree of control over the customer's vehicle and are often the last line of defense against an intoxicated

customer poised to get behind the wheel, valets are in a unique position to take some action—any action—to prevent that customer from driving. (pp. 23-29).

Ultimate Parking also assumed a duty to take reasonable steps to prevent an intoxicated customer from driving. Ultimate Parking's undertaking of this duty is demonstrated in detail by its written policies and procedures, and the testimony of its employees, who understood duties of their position which included identifying intoxicated patrons and finding them alternative transportation. (pp. 30-32).

Everest presented evidence that Grill 23 and Ultimate Parking knew or should have known that Barletta was intoxicated when he left the restaurant and Ultimate Parking returned his keys to him. Accordingly, there is a genuine issue of material fact for the jury whether Ultimate Parking breached its duty of care by failing to take any action to prevent a visibly intoxicated Barletta from driving, or to notify Grill 23 management that Barletta was attempting to drive while intoxicated, in derogation of Ultimate Parking's own operating procedures. (pp. 32-34).

Grill 23 has a right to contribution from Ultimate Parking for its negligence, regardless of the Settlement

Agreement entered into between the Martin plaintiffs and the Barletta defendants. G.L. c. 231B, § 3(d) restricts only the rights of *settling defendants* to subsequently pursue a joint tortfeasor for contribution, and Grill 23 was not a settling defendant. Indeed, neither Grill 23 nor Ultimate Parking had any part in the negotiation or execution of the Settlement Agreement, and Grill 23 is not bound by its terms. (pp. 35-39).

Furthermore, even if G.L. c. 231B, § 3(d) could affect Grill 23's rights, it would still be permitted to pursue Ultimate Parking for contribution where Ultimate Parking is a "partner" and "affiliate" of Grill 23. Pursuant to the Settlement Agreement, "partners" and "affiliates" of Grill 23 were released from liability to the Martin plaintiffs, and therefore are open to contribution actions by joint tortfeasors. By the plain meaning of the Settlement Agreement, as well as Ultimate Parking's own representations, it is clearly a partner and affiliate of Grill 23 and thereby subject to a contribution action. (pp. 39-42).

Finally, the Valet Parking Agreement between Grill 23 and Ultimate Parking is subject to an indemnification provision running in Grill 23's favor, which renders Ultimate Parking's summary judgment argument regarding

common law indemnity principles irrelevant. Based on a valid and enforceable contractual indemnity provision in Grill 23's favor, Grill 23 clearly has a cognizable indemnification claim against Ultimate Parking. (pp. 42-44).

STANDARD OF REVIEW

The Appeals Court reviews summary judgment rulings de novo. See Boazova v. Safety Ins. Co., 462 Mass. 346, 350 (2012). A party is entitled to summary judgment only "if the pleadings, depositions, answers to interrogatories, and responses to requests for admission under [Mass. R. Civ. P.] 36, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Mass. R. Civ. P. 56(c). The moving party has the burden of demonstrating that no genuine issue exists, and the evidence will be considered in the light most favorable to the non-moving party. Augat, Inc. v. Liberty Mut. Ins. Co., 410 Mass. 117, 120 (1991). Summary judgment is only appropriate where the party opposing it has no reasonable expectation of proving an essential element of its case based on the evidence in the light most favorable to it, along with all reasonable inferences.

See, e.g., Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991).

ARGUMENT

I. THE TRIAL COURT ERRED IN FINDING THAT ULTIMATE PARKING CANNOT BE A JOINT TORTFEASOR WITH GRILL 23

A. The Trial Court Erred in Finding that Ultimate Parking Did Not Owe a Duty of Care to Prevent Its Patrons from Driving While Intoxicated

A valet's duty of care when returning keys to an intoxicated customer is a matter of first impression in Massachusetts. However, the imposition of a duty is a question of law for the Court to decide, and here the Court should conclude that Ultimate Parking, as a valet company, and based on the facts, owed a duty of care to Trooper Martin to prevent its patrons from driving while intoxicated.

Whether a duty exists is a question of law, to be determined by "reference to existing social values and customs and appropriate social policy." Cremins v. Clancy, 415 Mass. 289, 292 (1993). As a general principle of tort law, every actor has a duty to exercise reasonable care to avoid physical harm to others. Remy v. MacDonald, 440 Mass. 675, 677 (2004) citing RESTATEMENT (SECOND) TORTS § 302, comment (a) (1965). A precondition to this duty is, of course, that the risk of harm to

another be recognizable or foreseeable to the actor. Jupin v. Kask, 447 Mass. 141, 147 (2006). Consequently, with some exceptions, "a defendant owes a duty of care to all persons who are foreseeably endangered by his conduct, with respect to all risks which make the conduct unreasonably dangerous." Jupin, 447 Mass. at 147, quoting Tarasoff v. Regents of the Univ. of Cal., 17 Cal.3d 425, 434–435 (1976).

In assessing whether to impose a duty, the Court must analyze social values, customs and appropriate social policy. See O'Sullivan v. Shaw, 431 Mass. 201, 203 (2000). As will be discussed in detail below, social values, policy, and customs all lead to the inevitable conclusion that Ultimate Parking should, and did, owe a duty to take steps to identify intoxicated guests and prevent them from driving, if possible. The existence of this objective duty is buttressed by Ultimate Parking's subjective belief that it had a "moral obligation" (i.e., a duty) to prevent intoxicated guests from getting behind the wheel.

The Massachusetts legislature and courts have each expressed a distinct favor in recent years for taking steps to prevent driving under the influence of alcohol. As the Supreme Judicial Court articulated, "[s]ociety,

for some time, has been gravely concerned with the tragic consequences of drunk driving. The concern has been manifested over the years in both legislation and case law." Commerce Ins. Co. v. Ultimate Livery Service, Inc., 452 Mass. 639, 649 (2008).

While there is no statutory duty to protect others from the criminal and/or wrongful acts of a third-party, see Jupin, 447 Mass. at 148, entities that are in a position to stop drunk driving owe a duty to the public to do so. See, e.g., McGuiggan v. New England Tel. & Tel. Co., 398 Mass. 152 (1986). In social host and dram shop cases, the courts have imposed liability for harm to an innocent third-party with the reasoning that: "as between the social host and the public in general, the social host is in a far better position than third parties to prevent harm to others resulting from a guest's intoxication." Manning v. Nobile, 411 Mass. 382, 392 (1991); see also G.L. c. 231, § 85T. Here, Barletta, the intoxicated guest, caused injury to a third-party through his operation of a vehicle under the influence of alcohol. The facts of this case establish that no entity was in a better position than Ultimate Parking to prevent Barletta from getting behind the wheel.

In light of the social policy and custom favoring the imposition of a duty, the case law that Ultimate Parking relied on its summary judgment motion is readily distinguishable. Specifically, the case that Ultimate Parking asserts is "controlling" in this matter, O'Gorman v. Antonio Rubinaccio & Sons, Inc., 408 Mass. 758 (1990), has no bearing on circumstances at bar. In O'Gorman, a guest arrived to a commercial establishment visibly intoxicated. See id. The establishment did not serve the guest any alcoholic beverages and allowed him to leave after attempting to sober him up. See id. at 759-760. In affirming summary judgment on behalf of the defendant establishment, the Supreme Judicial Court noted that the *only* manner that a commercial establishment could incur liability for the acts of an intoxicated customer would be if it furnished alcohol to the customer. See id. at 760-761. Since the establishment "furnished no alcohol to [the guest] no liability can arise." Id. at 761. The Court also rejected all arguments that the establishment had assumed a duty by attempting to sober him up. See id. at 762. Ultimate Parking, conversely, had control over Barletta's keys and an opportunity to stop him from driving by notifying Grill 23. Ultimate Parking represents itself as an extension of the restaurant staff

and believes that it has a "moral obligation to get involved when a customer is intoxicated." See Appendix at 494. The encounter it had with Barletta was a commercial transaction whereby Ultimate Parking received compensation to park his car and retain his keys, and it was aware that he may be consuming alcohol at the function. These factors are all distinguishable from the facts alleged in O'Gorman.

Ultimate Parking's reliance on case law outside of Massachusetts likewise has no bearing on these indisputable facts.[3] The foreign case law involving valets is distinguishable because of the specific facts developed in this case. Here, it is undisputed that the valets knew, and their superior expected them, to notify restaurant management if they encountered an intoxicated guest as of September 2008. Ultimate Parking represents its valets as an extension of the restaurant staff and bases the strength of its relationship with restaurants like Grill 23 on the basis of these representations. In addition, Ultimate Parking relies on cases involving tow truck companies, auto dealerships, and auto body shops to argue that no duty was owed. Of course, the nature of

[3] Grill 23 did not advance a negligent entrustment theory against Ultimate Parking.

their business is distinctly different from a valet company. A valet company working outside a commercial establishment like Grill 23 would reasonably expect its customers to consume alcohol and that its valets may encounter intoxicated guests. Courts will define "the scope of a duty of care based on the reasonable foreseeability of harm." Whittaker v. Saraceno, 418 Mass. 196, 199 (1994). Here, the facts compel the conclusion that Ultimate Parking knew of the need "to get involved when a customer is intoxicated," See Appendix at 494, and therefore had a duty to take steps to prevent Barletta from obtaining his keys if he showed visible signs of intoxication as alleged by Everest.

Taking the facts in the light most favorable to Grill 23 leads to the reasonable conclusion that Ultimate Parking was in a better position than Grill 23 to prevent Barletta from driving. There is no evidence that Grill 23 served him an alcoholic drink while he was exhibiting visible signs of intoxication. See Cimino v. Milford Keg, Inc., 385 Mass. 323, 330-331 n.9 (1982) (listing necessary elements of dram shop action). Conversely, the cumulative testimony establishes that Barletta was likely exhibiting signs of intoxication when he left the restaurant and was given his car keys by an Ultimate

Parking valet. This is true based on the testimony of other guests and the testimony of a Massachusetts State Police officer who observed Barletta in the moments after the subject motor vehicle accident, which Barletta testified occurred within five or ten minutes after he left the restaurant. See Appendix at 154, 168-169. According to the police officer, Barletta reeked of alcohol and had glassy, bloodshot eyes, slurred speech, and difficulty comprehending questions. See id. at 168-169. For purposes of summary judgment, Grill 23 must be given the reasonable inference that minutes before these observations were made, Barletta was in the same or a similar condition when he interacted with valets, obtained his keys, and walked across the street to his vehicle. See Douillard v. LMR, Inc., 433 Mass. 162, 165-166 (2001) (finding subsequent intoxication can support claim of earlier, visible intoxication). Under these facts, Ultimate Parking — not Grill 23 — was in the best position to prevent Barletta from getting behind the wheel. Therefore, sound public policy dictates that Ultimate Parking, in possession of Barletta's keys, owed a duty—at the very least—to notify Grill 23 management to take steps to protect against an intoxicated driver getting behind the wheel.

B. The Trial Court Erred in Finding that Ultimate Parking Did Not Assume a Duty of Care to Prevent Its Patrons from Driving While Intoxicated

It is well established that "[i]f a person voluntarily assumes a duty or undertakes to render services to another that should have been seen as necessary for her protection, that person may be liable for harm caused because of the negligent performance of his undertaking." Cottam v. CVS Pharmacy, 436 Mass. 316, 323-324 (2002). Where a defendant only assumes a specific duty, he will only be charged to perform that specific duty with due care. See Davis v. Westwood Group, 420 Mass. 739, 746-747 (1995). "Defining the scope of the duty assumed is a fact-specific inquiry." Cottam, 436 Mass. at 324.

The facts establish that Ultimate Parking voluntarily assumed a duty of care to prevent its patrons from driving while intoxicated. This duty was not a general goal to promote safe driving, but a specific undertaking by the company that was delineated through written procedures, training, and employee expectations. The testimony of all Ultimate Parking personnel, from the valets up through the senior management, made clear that valets were expected to notify restaurant management if

they encountered an intoxicated guest attempting to obtain his or her keys. Paul Reniere and Dan Clark, two of the four valets working that night, each testified that on several occasions while working as valets at Grill 23 they had notified restaurant management that a guest was showing signs of intoxication and awaited further instruction from the manager after he had an opportunity to observe the guest. See Appendix at 171-172. This included finding other means of transportation for the intoxicated guest or finding accommodations to prevent him or her from driving. This directly contradicts Ultimate Parking's assertion in its summary judgment motion that the valets believed they had a legal obligation to return keys to patrons they believed to be intoxicated. If this were true, then Ultimate Parking's clearly-delineated policy of notifying restaurant management would be pointless.

SOP Number 803 demonstrates that Ultimate Parking knowingly undertook a duty by custom to "get involved when a customer is intoxicated." See id. at 494. The "purpose" of SOP Number 803 is "[t]o equip our associates with information to properly handle intoxicated customers." Id.

Based on the testimony of all valets and Ultimate Parking's management level employees, it is indisputable that as of September 2008, there was a general custom that the valets would notify restaurant management if they had reason to believe that a customer attempting to obtain his or her keys was intoxicated. Ultimate Parking's custom, as established through its standard operating procedures and the testimony of its employees, dictates that Ultimate Parking undertook a specific duty of care to take steps to protect against intoxicated guests getting behind the wheel of a car, and that the duty includes notifying Grill 23 restaurant management about a guest's potential intoxication. All of these facts lead to the conclusion that Ultimate Parking assumed a specific duty of care and therefore had to discharge that duty reasonably.

C. There Is Evidence That Ultimate Parking Breached Its Duty Of Care By Giving Car Keys To Timothy Barletta While He Was Visibly Intoxicated

Ultimate Parking argued in its summary judgment motion that there is no evidence that it "knew or should have known that Mr. Barletta was intoxicated." At the outset, direct evidence of intoxication is not required to survive summary judgment. See Douillard, 433 Mass. at

165. Regardless, Ultimate Parking's conclusory claim goes against the weight of the evidence, which must be taken in the light most favorable to Grill 23 and would easily permit a jury to conclude that Ultimate Parking knew or should have known that Barletta was intoxicated.

First, other guests at the function testified that they observed Barletta to be visibly intoxicated. Second, within several minutes of the accident, Barletta was observed to smell of alcohol, with glassy, bloodshot eyes and slurred speech.

Third, the evidence suggests that the valets had a full opportunity to interact with Barletta and observe his state prior to him getting into his vehicle. Barletta testified that his car was parked across the street, suggesting that he was parked as a "VIP" vehicle. As valet Paul Reniere testified, valets will have a full opportunity to interact with and observe a "VIP" guest who is attempting to obtain his car by crossing the street.

Where a question of fact exists that would form the basis for a breach of duty, then the negligence of a party should be determined by a jury and summary judgment must be denied. See, e.g., Goulart v. Canton Hous. Auth., 57 Mass. App. Ct. 440, 441 (2003). The facts recited above,

taken in the light most favorable to Grill 23, create a question of fact as to whether Ultimate Parking knew or should have known that Barletta was intoxicated when they provided him with keys to the vehicle. Accordingly, summary judgment cannot lie in favor of Ultimate Parking.

II. GRILL 23 CAN PURSUE ULTIMATE PARKING FOR CONTRIBUTION AS A MATTER OF LAW

According to Ultimate Parking's summary judgment motion, the failure of Everest to expressly name it as a released party on the Settlement Agreement and Release precludes Grill 23, a party which had no involvement in the resolution of the underlying matter, from seeking contribution. This argument is fatally flawed in two respects. First, G.L. c. 231B does not preclude a non-settling tortfeasor from seeking contribution from another joint tortfeasor, as Ultimate Parking claims. Second, it ignores language in the Settlement Agreement and Release that demonstrates that Ultimate Parking was a released party, or at the very least creates a genuine dispute of fact pertaining to whether Ultimate Parking was named. Any other outcome would be unfair, prejudicial to Grill 23, and inconsistent with the purposes of G.L. c. 231B.

A. The Underlying Settlement Agreement Has No Impact On Grill 23's Right To Seek Contribution From Ultimate Parking Because Neither Grill 23 Nor Ultimate Parking Were A Party to the Agreement Or Involved In Its Negotiation

Under G.L. c. 231B, Grill 23 is entitled to seek contribution from Ultimate Parking regardless of whether Ultimate Parking was named on the Settlement Agreement and Release executed between the underlying plaintiffs and the Barletta defendants. Ultimate Parking curiously cites to G.L. c. 231B, § 3(d) for the conclusion that Grill 23 cannot seek contribution from it. Section 3(d) provides, in relevant part: "[i]f there is no judgment for the injury against the tortfeasor seeking contribution, his right of contribution shall be barred unless he has either (1) discharged by payment the common liability within the statute of limitations period . . . or (2) agreed while action is pending against him to discharge the common liability . . ." Plainly, neither of these two options applies to Grill 23 because it was not part of the litigation or settlement process between Trooper Martin and the Barletta defendants.

Instead, the operative statute relative to a contribution action between Grill 23 and Ultimate Parking is G.L. c. 231B, § 1(b), which provides that

contribution rights "shall exist only in favor of a joint tortfeasor . . . who has paid more than his pro rata share of the common liability, and his total recovery shall be limited to the amount paid by him in excess of his pro rata share." As an alleged joint tortfeasor that will potentially pay more than its pro rata share of damages arising from Trooper Martin's accident, Grill 23 has the right to avail itself of Section 1(b)'s protections.

Ultimate Parking supports its incorrect application of G.L. c. 231B, § 3(d) with trial court and unpublished appellate decisions that are not non-binding, but completely irrelevant to analyzing Grill 23's contribution claim. In each of these cases the contribution action was dismissed because the plaintiff *settling tortfeasor* did not name the defendant joint tortfeasor on the operative settlement release. By settling the action, the settling tortfeasor in each case was bound by G.L. c. 231B, § 3(d) to "discharge the common liability" with the joint tortfeasor in order to chase that joint tortfeasor for contribution. The failure to do so barred the settling tortfeasor from seeking contribution.

Unlike the parties seeking contribution in the cases Ultimate Parking relies upon, Grill 23 has not negotiated a settlement and cannot therefore fall under the restrictions of G.L. c. 231B, § 3(d). Indeed, while they are not binding, the cases relied upon by Ultimate Parking actually confirm this position, in that they explicitly apply § 3(d) to "settling tortfeasors", which certainly would not include Grill 23. See Spinnato v. Goldman, 2014 WL 7236343 at *8 ("the settlement agreement must expressly discharge the liability against all tortfeasors from whom the *settling tortfeasor* will seek contribution") (emphasis added). See Appendix at 89-97. Barrios v. Viking Seafood, Inc., 1996 WL 751535, at *3 (Mass. Super. Dec. 23, 1996)("[§ 3(d)] supports the position that a *settling tortfeasor* against whom judgment has not been rendered is entitled to contribution only if, *when it made the payment to the plaintiff*, […] the claim of the plaintiff no longer remained outstanding") (emphasis added). See Appendix at 59-62. Taylor v. Riley, 1999 WL 1318971, at *6 (Mass. Super. Apr. 2, 1999)("Where a joint tortfeasor […] settles an action while it is pending, that settlement must "discharge the common liability" in order for the *settling tortfeasor* to pursue a contribution claim

against another joint tortfeasor") (emphasis added). See Appendix at 98-103.

Grill 23 is a party to an action and has filed a third-party complaint against Ultimate Parking. To the extent that they are both found to be joint tortfeasors, Grill 23 is entitled to recoup all monies it pays in excess of its pro rata share from Ultimate Parking. This is a right that exists under G.L. c. 231B, and § 3(d) has no bearing on Grill 23's right to seek contribution.

Moreover, Ultimate Parking's argument that Grill 23 is deprived of an opportunity for contribution due to the failure of another party with whom Grill 23 had no agency relationship with or control over to name it on a release is in violation of Grill 23's constitutional right to due process. The Fourteenth Amendment provides, in relevant part, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. art. XIV, § 1. Here, Ultimate Parking argued that Grill 23 should be deprived of its right to contribution (i.e., monetary rights that are recognized as a property interest) by the application of G.L. c. 231B without due process to

Grill 23. See, e.g., Keniston v. Board of Assessors of Boston, 380 Mass. 888, 903-905 (1980) (holding statute as applied retroactively relating to tax revenue violated Due Process Clause of the Fourteenth Amendment).

Ultimate Parking's argument insists that because the Settlement Agreement purportedly fails to name it as a released party—a Settlement Agreement that Grill 23 had neither notice of nor a role in drafting—Grill 23 is now foreclosed from seeking contribution. The application of G.L. c. 231B in such a manner would constitute a deprivation of Grill 23's property rights guaranteed by the Fourteenth Amendment. For these reasons, Ultimate Parking's argument that it is entitled to summary judgment against Grill 23 because of a release executed by third parties must fail.

B. Based upon Ultimate Parking's Own Representations It Is "Affiliated" With Grill 23 For The Purposes Of Discharging Common Liability Under The Settlement Agreement

Ultimate Parking's summary judgment argument is simply incorrect that the Settlement Agreement "makes no mention whatsoever – either direct or indirect – of Ultimate" is illusionary. The released parties under the Settlement Agreement and Release include, but are not

limited to, "partners" and "all other persons, firms or corporations with whom any of the former have been, are now, or may hereafter be affiliated [with Grill 23]." See Appendix at 449-450.

A release, like any contract, is interpreted according to its plain meaning, where terms are given their usual and ordinary meaning. See Southern Union Co. v. Department of Pub. Util., 458 Mass. 812, 820 (2011). A contract with ambiguous or uncertain terms requires further factual inquiry that precludes summary judgment. Seaco Ins. Co. v. Barbosa, 435 Mass. 772, 779 (2002). "Contract language is ambiguous 'where the phraseology can support reasonable difference of opinion as to the meaning of the words employed and the obligations undertaken.'" President & Fellows of Harvard College v. PECO Energy Co., 57 Mass. App. Ct. 888, 896 (2003) quoting Suffolk Constr. Co. v. Lanco Scaffolding Co., 47 Mass. App. Ct. 726, 729 (1999). Ambiguities involving the interpretation of language of a contract are resolved by the factfinder and are inappropriate for disposition. Browning-Ferris Indus., Inc. v. Casella Waste Mgmt. of Mass., Inc., 79 Mass. App. Ct. 300, 307 (2011).

The facts taken in the light most favorable to Grill 23 establish that Ultimate Parking is a corporation that is a "partner" or "affiliated" with Grill 23 and is therefore a released party for the purposes of G.L. c. 231B. As its own website makes apparent, Ultimate Parking considers itself "partners" with restaurants that it contracts with and enjoys building long-term relationships with the restaurant. See Appendix at 465. Further, Ultimate Parking presents its employees as "an extension" of the restaurant's employees, and it represents that "[i]n essence, our staff becomes your staff, ready and willing to respond to your needs. Our managers will attend your team meetings to ensure we are always working in lockstep with all of your personnel. Our managers are not only accountable to us, but they are also accountable to you, solidifying our partnership." Id. Grill 23 is also entitled to the reasonable inference that the average guest of Grill 23 would believe that the valets encountered are "affiliated" with Grill 23. Based on this reality and how Ultimate Parking advertises to its clients and the public at large, it is difficult to believe that for purposes of summary judgment Ultimate Parking can either ignore or simply disregard the inevitable likelihood

that it is named on the release as a corporation that is affiliated with Grill 23. It is clear that Ultimate Parking is "affiliated" with Grill 23 and is therefore a released party under G.L. c. 231B.

Even if the Court is disinclined to find that Ultimate Parking is "affiliated" with Grill 23, at the very least the ambiguity of this term precludes summary judgment. The definition of an "affiliate" is a company with "shared resources, interests, or business dealings." Black's Law Dictionary, 2d ed. Taking the facts in the light most favorable to Grill 23, whether Ultimate Parking shares resources, interests, or business dealings to the extent that it is an affiliate with Grill 23 is at the very least a question of fact. For the purposes of summary judgment then, where the facts must be taken in the light most favorable to Grill 23, Ultimate Parking's status as a released party is a question for the jury and its arguments to the contrary must be summarily rejected by the Court.

III. GRILL 23 CAN SEEK INDEMNITY FROM ULTIMATE PARKING BASED ON A VALID AND ENFORCEABLE CONTRACTUAL INDEMNIFICATION PROVISION IN GRILL 23'S FAVOR

Ultimate Parking argues in its summary judgment motion that Grill 23 cannot sustain an indemnification claim based on common law principles of indemnification.

This argument is misplaced. Grill 23 need not rely on common law indemnification because the Valet Parking Agreement between Grill 23 and Ultimate Parking contain explicit mutual indemnification clauses, thereby creating a basis for contractual indemnity in favor of Grill 23. The Valet Parking Agreement provides, in relevant part, that Ultimate Parking agrees to "indemnify, defend, and hold [Grill 23] harmless from any and all claims . . . incurred by or asserted against [Grill 23] by reason of, or arising out of, any Services provided under this Agreement and any negligence or breach of duty related thereto by Ultimate or any of its employees." See Appendix at 235. The Valet Parking Agreement contains an identical provision running in favor of Ultimate Parking and against Grill 23. Giving the indemnity clause its ordinary and usual meaning, see, e.g., Southern Union Co., 458 Mass. at 820, Grill 23 has a cognizable indemnity claim against Ultimate Parking.

Mutual indemnification clauses, like those in the Valet Parking Agreement, impose mutual and enforceable indemnification obligations. Joseph Francese, Inc. v. DOS Concrete Services, Inc., 47 Mass. App. Ct. 367, 369-369 (1999). Based on the mutual indemnification clauses, to

the extent that Ultimate Parking is found negligent, then it would owe defense and indemnity to Grill 23 for that negligence, under the plain terms of the Valet Parking Agreement. Ultimate Parking appears to assert in its summary judgment motion that Grill 23 can only avail itself of the indemnification obligation where it is entirely free of negligence, though it offers no legal support for this claim. While Grill 23 strongly denies that it breached any duty with regard to Trooper Martin, any negligence on the part of Grill 23 would not affect its right to indemnification for Ultimate's negligence. A contrary outcome would violate the clear intention of the mutual obligations that each party will be indemnified to the extent of the other's negligence. Therefore, because Ultimate Parking is bound by a clear and enforceable contractual indemnification obligation in favor of Grill 23, summary judgment for Ultimate Parking on Grill's 23's indemnification claim cannot lie.

CONCLUSION

Based on the arguments set forth above, the Appellants, Berkeley Place Restaurant Limited Partnership, American Food Management Limited Partnership, and KH-CH Corp., request that this Court reverse the Trial Court's allowance of Ultimate Parking's

Motion for summary judgment in its entirety, and remand this case to the Trial Court for trial.

Respectfully submitted,

/s/ Mark W. Shaughnessy
/s/ Aaron R. White
/s/ Emily P. Crowley

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Dated: December 27, 2017

ADDENDUM

ADDENDUM TABLE OF CONTENTS

Massachusetts General Laws Annotated
Part III. Courts, Judicial Officers and Proceedings in Civil Cases (Ch. 211-262)
Title II. Actions and Proceedings Therein (Ch. 223-236)
Chapter 231. Pleading and Practice (Refs & Annos)

M.G.L.A. 231 § 85T

§ 85T. Negligence action for serving alcohol to intoxicated person prohibited; exceptions

Currentness

In any action for personal injuries, property damage or consequential damages caused by or arising out of the negligent serving of alcohol to an intoxicated person by a licensee properly licensed under chapter one hundred and thirty-eight or by a person or entity serving alcohol as an incident of its business but for which no license is required, no such intoxicated person who causes injuries to himself, may maintain an action against the said licensee or person or entity in the absence of wilful, wanton, or reckless conduct on the part of the licensee or such person or entity.

Credits

Added by St.1985, c. 223, § 18. Renumbered by St.1986, c. 557, § 175.

Notes of Decisions (8)

M.G.L.A. 231 § 85T, MA ST 231 § 85T
Current through Chapter 140 of the 2017 1st Annual Session

End of Document

Massachusetts General Laws Annotated
Part III. Courts, Judicial Officers and Proceedings in Civil Cases (Ch. 211-262)
Title II. Actions and Proceedings Therein (Ch. 223-236)
Chapter 231B. Contribution Among Joint Tortfeasors (Refs & Annos)

M.G.L.A. 231B § 1

§ 1. Right of contribution; subrogation

Currentness

(*a*) Except as otherwise provided in this chapter, where two or more persons become jointly liable in tort for the same injury to person or property, there shall be a right of contribution among them even though judgment has not been recovered against all or any of them.

(*b*) The right of contribution shall exist only in favor of a joint tortfeasor, hereinafter called tortfeasor, who has paid more than his pro rata share of the common liability, and his total recovery shall be limited to the amount paid by him in excess of his pro rata share. No tortfeasor shall be compelled to make contribution beyond his own pro rata share of the entire liability.

(*c*) A tortfeasor who enters into a settlement with a claimant shall not be entitled to recover contribution from another tortfeasor in respect to any amount paid in a settlement which is in excess of what was reasonable.

(*d*) A liability insurer, who by payment has discharged in full or in part the liability of a tortfeasor and has thereby discharged in full its obligation as insurer, shall be subrogated to the tortfeasor's right of contribution to the extent of the amount it has paid in excess of the tortfeasor's pro rata share of the common liability. This provision shall not limit or impair any right of subrogation arising from any other relationship.

(*e*) This chapter shall not impair any right of indemnity under existing law. Where one tortfeasor is entitled to indemnity from another, the right of the indemnity obligee shall be for indemnity and not contribution, and the indemnity obligor shall not be entitled to contribution from the obligee for any portion of his indemnity obligation.

Credits
Added by St.1962, c. 730, § 1.

Notes of Decisions (96)

M.G.L.A. 231B § 1, MA ST 231B § 1
Current through Chapter 140 of the 2017 1st Annual Session

End of Document

Massachusetts General Laws Annotated
Part III. Courts, Judicial Officers and Proceedings in Civil Cases (Ch. 211-262)
Title II. Actions and Proceedings Therein (Ch. 223-236)
Chapter 231B. Contribution Among Joint Tortfeasors (Refs & Annos)

M.G.L.A. 231B § 3

§ 3. Enforcement of contribution; limitation; effect of judgment against one tortfeasor; judgment determining liability

Currentness

(*a*) Whether or not judgment has been entered in an action against two or more tortfeasors for the same injury, contribution may be enforced by separate action.

(*b*) Where a judgment has been entered in an action against two or more tortfeasors for the same injury, contribution may be enforced in that action by judgment in favor of one against other judgment defendants by motion upon notice to all parties to the action.

(*c*) If there is a judgment for the injury against the tortfeasor seeking contribution, any separate action by him to enforce contribution must be commenced within one year after the judgment has become final by lapse of time for appeal or after appellate review.

(*d*) If there is no judgment for the injury against the tortfeasor seeking contribution, his right of contribution shall be barred unless he has either (1) discharged by payment the common liability within the statute of limitations period applicable to claimant's right of action against him and has commenced his action for contribution within one year after payment, or (2) agreed while action is pending against him to discharge the common liability and has within one year after the agreement paid the liability and commenced his action for contribution.

(*e*) The recovery of a judgment for an injury against one tortfeasor shall not of itself discharge the other tortfeasors from liability for the injury unless the judgment is satisfied. The satisfaction of the judgment shall not impair any right of contribution.

(*f*) The judgment of the court in determining the liability of the several defendants to the claimant for an injury shall be binding as among such defendants in determining their right to contribution.

Credits
Added by St.1962, c. 730, § 1.

Notes of Decisions (38)

M.G.L.A. 231B § 3, MA ST 231B § 3

Massachusetts General Laws Annotated
Massachusetts Rules of Civil Procedure
VII. Judgment

Massachusetts Rules of Civil Procedure (Mass.R.Civ.P.), Rule 56

Rule 56. Summary Judgment

Currentness

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and responses to requests for admission under Rule 36, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. Summary judgment, when appropriate, may be rendered against the moving party.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Credits

Amended March 7, 2002, effective May 1, 2002.

Editors' Notes

REPORTER'S NOTES--1973

Except in a narrow class of cases, Massachusetts has up to now lacked any procedural device for terminating litigation in the interim between close of pleadings and trial. Under G.L. c. 231, §§ 59 and 59B, only certain contract actions could be disposed of prior to trial. In all other types of litigation, no matter how little factual dispute involved, resolution had to await trial.

Rule 56, which, with a small addition, tracks Federal Rule 56 exactly, responds to the need which the statutes left unanswered. It proceeds on the principle that trials are necessary only to resolve issues of fact; if at any time the court is made aware of the total absence of such issues, it should on motion promptly adjudicate the legal questions which remain, and thus terminate the case.

The statutes, so far as they went, embodied this philosophy. They aimed "to avoid delay and expense of trials in cases where there is no genuine issue of fact." Albre Marble & Tile Co., Inc. v. John Bowen Co., Inc., 338 Mass. 394, 397, 155 N.E.2d 437, 439 (1959). Rule 56 will extend this principle beyond contract cases. Thus in tort actions where the facts are not disputed, summary judgment for one party will be appropriate. Should the facts concerning liability be undisputed, but damages controverted, Rule 56(c) authorizes partial summary judgment: the court may determine the liability issue, leaving for trial only the question of damages.

The important thing to realize about summary judgment under Rule 56 is that it can be granted if and only if there is "no genuine issue as to any material fact." If any such issue appears, summary judgment *must* be denied. So-called "trial by affidavits" has no place under Rule 56. Affidavits (or pleadings, depositions, answers to interrogatories, or admissions) are merely devices for demonstrating the absence of any genuine issue of material fact. Introduction of material controverting the moving party's assertions of fact raises such an issue and precludes summary judgment.

On the other hand, because Rule 56 recognizes only "genuine" material issues of fact, Rule 56(e) requires the opponent of any summary judgment motion to do something more than simply deny the proponent's allegations. Faced with a summary judgment motion supported by affidavits or the like, an opponent may not rely solely upon the allegations of his pleadings. He bears the burden of introducing enough countervailing data to demonstrate the existence of a genuine material factual issue.

If, however, the opponent is convinced that even on the movant's undisputed affidavits, the court should not grant summary judgment, he may decline to introduce his own materials and may instead fight the motion on entirely legal (as opposed to factual) grounds. Indeed, the final sentence of Rule 56(c) makes clear that in appropriate cases, summary judgment may be entered *against* the moving party. This is eminently logical. Because by definition the moving party is *always* asserting that the case contains no factual issues, the court should have the power, no matter who initiates the motion, to award judgment to the party legally entitled to prevail on the undisputed facts.

REPORTER'S NOTES TO RULE 56(C)--2002

The 2002 amendment to Rule 56(c) deletes the phrase "on file" from the third sentence, in recognition of the fact that discovery documents are generally no longer separately filed with the court. See Rule 5(d)(2) and Superior Court Administrative Directive No. 90-2. The previous reference to admissions has also been replaced by a reference to "responses to requests for admission under Rule 36." The amendment is merely of the housekeeping variety and no change in practice is intended.

Notes of Decisions (852)

Rules Civ. Proc., Rule 56, MA ST RCP Rule 56
Current with amendments received through November 1, 2017.

Notify

8/18

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2011-1470-A

EVEREST NATIONAL INSURANCE COMPANY,[1]

Plaintiff,

vs.

BERKELEY PLACE RESTAURANT LIMITED PARTNERSHIP & others,[2]

Defendants/Third-Party Plaintiffs,

vs.

ULTIMATE PARKING, LLC,

Third-Party Defendant/Fourth-Party Plaintiff,

vs.

AMERICAN FOOD MANAGEMENT LIMITED PARTNERSHIP & another,[3]

Fourth-Party Defendants.

MEMORANDUM OF DECISION AND ORDER ON ULTIMATE PARKING, LLC'S MOTION FOR SUMMARY JUDGMENT

Factual and Procedural Background

This case presents the relatively novel question of whether a commercial parking valet service can be held legally responsible, on the theories of negligence and/or social host liability, for allowing an inebriated restaurant patron to retrieve his motor vehicle and drive

[1] As subrogee of Barletta Engineering Corporation, Osprey Equipment Corporation and Timothy J. Barletta.

[2] American Food Management and KH-CH Corporation.

[3] KH-CH Corporation.

Notice Sent 8.18.15

away. On the evening of September 27, 2008, non-party Timothy J. Barletta ("Mr. Barletta") was just such a patron. Mr. Barletta attended a private event at the Grill 23 restaurant in Boston, Massachusetts ("Grill 23" or the "Restaurant") that night and reportedly drank to excess. Upon leaving the event, Mr. Barletta retrieved his 2007 Jeep Grand Cherokee from the parking valet situated immediately outside the Restaurant and drove away. The valet who assisted Mr. Barletta was not an employee of Grill 23, but rather was employed by Ultimate Parking, LLC ("Ultimate"), an independent company that provides valet parking services at Grill 23 under an agreement with the Restaurant. Apparently none of the witnesses recalls Mr. Barletta's interaction, if any, with the valet, but all agree that it was brief at best. Shortly after Mr. Barletta departed in his vehicle, he struck and seriously injured Massachusetts State Trooper Christopher Martin ("Trooper Martin") on Interstate Route 90 in Newton while Trooper Martin was attempting to assist the driver of a disabled automobile.

Trooper Martin and his spouse, Joan Martin (the "Martins"), subsequently commenced a personal injury action against Mr. Barletta, the owner of Mr. Barletta's vehicle, Barletta Engineering Corporation, and Osprey Equipment Corporation (collectively the "Martin Defendants") in Middlesex Superior Court. In May 2010, the Martins settled their claims against the Martin Defendants for the total sum of $3,750,000.00.[4] The Martin Defendants' primary insurer, Travelers Insurance Company, agreed to pay $963,000.00 of the settlement amount. The Martin Defendants' excess insurer, plaintiff Everest National Insurance Company ("Everest"), paid the remaining $2,787,000.00.

[4] This amount represents the fair net present value of the Martins' entire settlement, which included certain non-cash components.

Approximately eleven months later, Everest, as the Martin Defendants' subrogee, filed this new action against Grill 23 and Ultimate seeking contribution toward the multi-million dollar settlement paid to the Martins.[5] Everest claims that Ultimate's valet was negligent in permitting Mr. Barletta to retrieve his vehicle and drive off in an intoxicated state. Grill 23, in turn, has asserted cross-claims against Ultimate for indemnification and contribution on essentially the same theory.[6]

The matter came before the Court on Ultimate's motion for summary judgment on Everest's contribution claim and Grille 23's contribution and indemnification claims. The Court conducted a lengthy hearing on Ultimate's motion on June 11, 2015. Upon consideration of the written submissions of the parties and the oral arguments of counsel, Ultimate's motion will be **ALLOWED** for the reasons stated on the record at the hearing and summarized herein.

Discussion

I. THE STANDARD OF REVIEW.

Summary judgment will be granted where, "viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established, and the moving party is entitled to judgment as a matter of law." *Cabot Corp.* v. *AVX Corp.*, 448 Mass. 629,

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[5] Defendants Berkeley Place Restaurant Limited Partnership, American Food Management and KH-CH Corporation are the owners and/or operators of Grill 23.

[6] Section 5(a) of Ultimate's "Valet Parking Agreement" with Grill 23 (Joint Appendix, Exhibit C) requires Ultimate, in part, to "indemnify, defend, and hold [Grill 23] ... harmless ... from any and all claims ... arising out of, any Services provided under this Agreement *and* any negligence or breach of duty related thereto by Ultimate or any of its employees" (emphasis added). Thus, Ultimate's obligation to indemnify Grill 23, like its obligation to contribute to the personal injury settlement with the Martins, requires a finding that Ultimate was negligent or otherwise committed a breach of some legal duty. *See, e.g., N. American Site Developers, Inc. v. MRP Site Development, Inc.*, 63 Mass. App. Ct. 529, 532-533 (2005) ("contracts of indemnity are to be fairly and reasonably construed in order to ascertain the intention of the parties and to effectuate the purpose sought to be accomplished") (internal quotations and citations omitted).

636–637 (2007). When the moving party does not bear the burden of proof at trial, as is the case here, it is entitled to summary judgment either by submitting affirmative evidence that negates an essential element of the opposing party's case or by demonstrating that the opposing party has no reasonable expectation of proving an essential element of its case. *Kourouvacilis* v. *General Motors Corp.*, 410 Mass. 706, 716 (1991). In cases alleging negligence, "whether a defendant owes a duty of care is a question of law" and, thus, "an appropriate subject of summary judgment." *Judge v. Carrai*, 77 Mass. App. Ct. 803, 805 (2010) (internal quotation marks and citation omitted).

II. THE QUESTION OF ULTIMATE'S DUTY.

Although it includes assaults on multiple fronts, Ultimate's motion for summary judgment on Everest's claims and Grill 23's cross-claims effectively boils down to the question of whether Ultimate had a duty, in the circumstances of this case, to prevent Mr. Barletta from driving drunk.[7] No reported Massachusetts case is directly on point. Accordingly, it is this Court's task to divine the applicable law to the best of its abilities from general legal principles and the few arguably relevant appellate guideposts that are available.

Ultimate's liability, if any, turns on whether its conduct in dealing with Mr. Barletta was negligent. Proof of negligence requires a plaintiff to demonstrate: "(1) a legal duty owed by defendant to plaintiff; (2) a breach of that duty; (3) proximate or legal cause; and (4) actual damage or injury." *Nelson v. Mass. Port Auth.*, 55 Mass. App. Ct. 433, 435 (2002) (internal quotation marks and citation omitted). Thus, if Ultimate had no legal duty to intervene or

[7] For example, Ultimate also argues in its summary judgment motion that it cannot be found negligent as a matter of law because "there is no evidence that it knew or should have known Mr. Barletta was intoxicated." Memorandum in Support of Third-Party Defendant Ultimate Parking, LLC's Motion for Summary Judgment, dated April 17, 2015, p. 18. The Court does not reach Ultimate's fact-based arguments, however, in light of its ruling herein that Ultimate had no legal duty that can support a viable negligence claim against Ultimate based on Mr. Barletta's conduct.

prevent Mr. Barletta from driving his motor vehicle on the night in question, it cannot be found negligent and its motion for summary judgment must be granted.

Massachusetts law recognizes three types of common law duties that potentially are applicable to this case. The first arises in the "dram shop" and "social host" settings. The Supreme Judicial Court has held on multiple occasions that there is a "duty owed by a defendant to the driving public resulting from a defendant's act of selling or serving alcoholic beverages to someone who the defendant knew, or reasonably should have known, was intoxicated or underage." *O'Gorman* v. *Antonio Rubinaccio & Sons, Inc.*, 408 Mass. 758, 760-761 (1990). *See also Nunez v. Carrabba's Italian Grill, Inc.*, 448 Mass. 170, 174-176 (2007) (recognizing separate and distinct duties owed by drinking establishments to minors versus intoxicated persons); *McGuiggan v. New England Tel. & Tel. Co.*, 398 Mass. 152, 162 (1986) (recognizing liability of social host); *Michnik-Zilberman v. Gordon's Liquor, Inc.*, 390 Mass. 6, 10-12 (1983) (recognizing liability of package store that sold liquor to a minor). Dram shop or social host liability, however, is limited to instances in which the defendant "provided or served [the intoxicated or underage person] with the alcohol that he consumed." *Commerce Ins. Co. v. Ultimate Livery Service, Inc.*, 452 Mass. 639, 646 (2008). Where, as here, there is no evidence that the defendant supplied alcohol to anyone, no duty to the driving public arises and the defendant is entitled to summary judgment in its favor on any claim alleging social host liability. *Id.* at 646.

Second, the law recognizes a common law duty not to knowingly entrust a motor vehicle to an incompetent or unfit person. *See, e.g., Nunez v. A & M Rentals, Inc.*, 63 Mass. App. Ct. 20, 22 (2005). The parties have not identified, however, nor has this Court been

able to locate a reported Massachusetts decision (or a decision from any other jurisdiction, for that matter) in which a defendant was held liable for negligent entrustment based on the defendant's conduct in permitting an incompetent or unfit driver to operate *the driver's own vehicle*. To the contrary, the Massachusetts Supreme Judicial Court ("SJC") has held that,

> [i]n order to prevail on a claim of negligent entrustment of an automobile, it is necessary for the plaintiff to show, among other things, that the defendant owned or controlled the motor vehicle concerned, and that the defendant gave the driver permission to operate the vehicle.

Alioto v. Marnell, 402 Mass. 36, 40 (1988) (internal quotation marks and citation omitted).

In this case, Ultimate certainly did not "own" or give Mr. Barletta "permission" to operate the motor vehicle with which Mr. Barletta subsequently struck Trooper Martin, and to the extent that Ultimate had temporary "control" over Mr. Barletta's vehicle in its capacity as bailee, that control was subject to the concurrent legal obligation to give the vehicle back to Mr. Barletta upon his demand. *See Commonwealth v. Doherty*, 127 Mass. 20, 21-22 (1879) (property that is placed in custody of bailee for safe keeping must be "delivered back to the owner when demanded"). Thus, Ultimate cannot be held liable for Trooper Martin's injuries on a theory of negligent entrustment as a matter of law. *See Alioto*, 402 Mass. at 40.

The third potentially applicable duty is the duty of reasonable care that underlies all common law negligence actions. Everest argues (and Grill 23 agrees) that Ultimate had a common law duty "to do *something* to prevent an intoxicated patron" such as Mr. Barletta "from getting into [their] car." Memorandum in Support of Everest National Insurance Company's Opposition to Ultimate Parking, LLC's Motion for Summary Judgment, dated May 4, 2015 ("Everest Opp."), p. 5 (emphasis in original). *See also* The Defendants/Third-

Party Plaintiffs' Memorandum of Law in Opposition to the Third-Party Defendant's, Ultimate Parking, LLC, Motion for Summary Judgment, dated May 11, 2015 ("Grill 23 Opp."), p. 15 ("Ultimate Parking owed the general public a duty of care to take steps to protect against intoxicated guests getting behind the wheel of a car...."). In promoting this argument, Everest relies heavily on the SJC's decision in *Commerce Ins. Co.*, *supra*, which involved a claim against a private livery service for failing to prevent an intoxicated passenger from driving himself home and becoming involved in a fatal accident after a long night of drinking. 452 Mass. at 650. While the livery van driver in *Commerce* did not actually serve the intoxicated passenger any alcohol, he did shuttle the passenger and his five bachelor party friends between bars in Massachusetts and Rhode Island over a period of several hours while they all consumed copious amounts of beer, "woo-woos" and other alcoholic beverages. *Id.* at 642-643. The livery van driver also drove the passenger and his friends to a liquor store, where he observed the group purchase at least one thirty-can case of beer, which they also consumed, in whole or in part, while riding in the driver's van. *Id.* at 643. Early the following morning, the driver deposited the passenger "at a location where he likely would drive and pose an extreme danger to the public." *Id.* at 644, 650. One person was killed and several people were seriously injured in the ensuing automobile accident caused by the intoxicated passenger as he drove away. *Id.* at 640, 644-645.

Based on the unique facts presented in *Commerce*, the SJC held that the private livery service could be held liable for common law negligence because the livery driver "knew, or should have known, that [the passenger] was intoxicated, yet he allowed [the patron] to make his own judgment about driving, failing to take any reasonable precautions to prevent him from

doing so." *Id.* at 649-650. In explaining its decision in *Commerce*, however, the SJC waived a large warning flag concerning the limited precedential value of its ruling. It said,

> [w]e emphasize that our finding of possible liability in this case is limited to the facts described ... and our holding that a duty exists on these facts does not signal that liability may be found in cases involving other private carriers for hire with dissimilar facts.

Id. at 650.

The SJC's general reluctance to expand the common law duty of third parties to intervene or prevent drunk drivers from operating a motor vehicle is further illustrated by the Court's decision in *O'Gorman* v. *Antonio Rubinaccio & Sons, Inc.*, 408 Mass. 758 (1990). In *O'Gorman*, the SJC held that a restaurant and lounge did not owe a duty to the general public to prevent intoxicated people from driving, so long as the bar did not contribute to the person's intoxication. 408 Mass. at 759, 762. The errant drive in *O'Gorman* ("Greenleaf") already was intoxicated when he arrived at the restaurant. *Id.* at 759. The restaurant's bartender refused to serve him, and the restaurant's owner took physical possession of Greenleaf's car keys and gave him some food in an effort to sober him up. *Id.* at 760. When Greenleaf decided to leave the restaurant about two hours later, the owner offered to arrange a ride home, but Greenleaf demanded, and was given, his keys. *Id.* Shortly thereafter, Greenleaf drove his car across the center line of Route 2 and struck another vehicle head-on, killing the driver of the other vehicle and severely injuring the passenger. *Id.*

The SJC unanimously affirmed the entry of summary judgment in favor of the restaurant in the ensuing wrongful death action, notwithstanding the fact that the restaurant owner had taken away, and then returned, Greenleaf's car keys while Greenleaf still was visibly intoxicated. It said that the restaurant owner,

> had nothing to do with Greenleaf's intoxication, assumed no duty with respect to Greenleaf, and had no right to control Greenleaf's conduct or the use of his motor vehicle. [The restaurant owner], therefore, owed no duty to intervene on behalf of anyone at risk because of Greenleaf's actions, because he did not create or contribute to the danger.

Id. at 762.

The facts presented in this case involving Ultimate are much closer to the facts of *O'Gorman* than the facts of *Commerce*. Ultimate had nothing to do with Mr. Barletta's intoxication, did not assist or profit from it, assumed no duty with respect to Mr. Barletta, and had no right to control his conduct or the use of his motor vehicle, which vehicle, in fact, Ultimate was legally obligated to return to Mr. Barletta upon his demand.[8] *Doherty*, 127 Mass. at 21. In such circumstances, Massachusetts law holds that Ultimate "owed no duty to intervene on behalf of anyone at risk" because of Mr. Barletta's actions, because Ultimate "did not create or contribute to the danger." *O'Gorman*, 408 Mass. at 762. Accordingly, Ultimate is entitled to the entry of summary judgment in its favor on Everest's contribution claim and on Grill 23's contribution and indemnification cross-claims. *See, e.g., Kavanagh v. Trustees of Boston Univ.*, 440 Mass. 195, 204 (2003) (affirming entry of summary judgment in favor of defendant where the defendant had no duty to protect plaintiff from the harm complained of as a matter of law).

[8] Exhibit Z to the parties' Joint Appendix is a written policy adopted by Ultimate in the aftermath of the accident involving Mr. Barletta and Trooper Martin, which states, in relevant part, that Ultimate parking valets have a "moral obligation to get involved when a customer is intoxicated." Exhibit Z, p. 1. Grill 23 relies upon this policy as purported proof that Ultimate "voluntarily assumed a duty of care to notify [Grill 23] of an intoxicated guest to allow the restaurant management to take measures to protect against drunk driving." Grill 23 Opp., p. 17. The Court disagrees. Putting aside the obvious timing issue, Grill 23's assumption argument improperly conflates "moral" obligations with "legal" obligations. As the SJC long has held, a breach of a moral duty does not necessarily translate into a breach of a legal duty. *Griswold v. Boston & Maine R.R.*, 183 Mass. 434, 437 (1903). *See also LeBlanc v. Commonwealth*, 457 Mass. 94, 101 (2010) (same, citing *Griswold*). Rather, the SJC's decisions in *Commerce* and *O'Gorman* indicate that, moral considerations aside, Ultimate had no legal duty to prevent Mr. Barletta from retrieving his motor vehicle and driving himself home on the night at issue.

The result reached in this case not only is consistent with the SJC's decisions in *Commerce* and *O'Gorman*, it also is practical and just. Many, if not most, interactions between parking valets and departing restaurant patrons are fleeting events that take place on sidewalks or street corners.[9] Requiring valets to accurately assess a patron's fitness to drive based on such casual, momentary encounters would subject the valets to an unrealistic and unfair burden. It also frequently would place parking valets and their employers between the proverbial "rock and a hard place" by requiring them to choose, on a moment's notice, between the legal exposure that could result from allowing a departing patron to drive away drunk and the legal exposure that could result from refusing to return rightful possession of a motor vehicle to the vehicle's owner, or perhaps from mistakenly interpreting a patron's physical disability for intoxication. Lastly, it avoids a "slippery slope" that could expose parking lot attendants, tow truck operators and anyone else having the practical ability to deny a visibly intoxicated person access to a motor vehicle or the public roadways to substantial liability based on the subsequent negligent conduct of that person. This Court will not start down that slope.

[9] While the precise duration of Mr. Barletta's encounter with an Ultimate parking valet on the night in question cannot be determined from the evidence, counsel for Everest acknowledged during oral argument that the encounter likely lasted no more than a minute or two.

Order

For the foregoing reasons, defendant Ultimate Parking, LLC's Motion for Summary Judgment (Docket No. 63.0) is **ALLOWED**. Everest and Grill 23's claims against Ultimate for contribution and/or indemnification are hereby dismissed, with prejudice.

Brian A. Davis,
Associate Justice of the Superior Court

Date: August 12, 2015

CERTIFICATE OF SERVICE

I hereby certify that on this twenty-seventh day of December 2017, I have served a copy of the Brief and Appendix through the Massachusetts Court Efile System, Odyssey File & Serve upon:

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CERTIFICATE OF COMPLIANCE PURSUANT TO RULE 16(K) OF THE MASSACHUSETTS RULES OF APPELLATE PROCEDURE

The undersigned counsel hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to:

Mass. R.A.P. 16(a)(6) (pertinent findings or memorandum of decision);

Mass. R.A.P. 16(e) (references to the record);

Mass. R.A.P. 16(f) (reproduction of statutes, rules, regulations);

Mass. R.A.P. 16(h) (length of briefs);

Mass. R.A.P. 18 (appendix to the briefs); and

Mass. R.A.P. 20 (form of briefs, appendices, and other papers).

Respectfully submitted,

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