Date: October 31st, 2011

To: Lozada- Intro to Research and Writing

Issue: Miss Del's liability for our client's injuries

1) MISS DEL'S CAN BE HELD LIABLE FOR NEGLIGENCE IN HIRING:

The foundation of negligence law in California states in part, "Everyone is responsible...for an injury occasioned to another by his or her want of ordinary care...in the management of his or her property or person...[unless the plaintiff]...brought the injury upon himself or herself."[1] In our case, the security video shows our client did nothing to provoke the attack, so that part of the code holds, and we now need to look at the elements of negligence.

The four elements of negligence are:[2] 1) defendant's legal duty to conform to a standard of conduct to protect the plaintiff; 2) defendant's breach of that duty; 3) defendant's breach of duty was the proximate or legal cause of the resulting injury, and 4) the plaintiff was damaged. In our case, we do have all the elements for negligence in hiring, as I will explain.

MISS DEL'S HAD A DUTY TO OUR CLIENT:

Employers have a common-law duty to do a background check prior to hiring an employee,[3] and may be liable to a third person for negligently hiring or retaining an employee who they should have known is incompetent or unfit.[4] In our case, the corporate office started a FBI background check and the police were told that the employee had to clear the background check to overcome his probationary hiring status. We can therefore infer Miss Del's had a rule against hiring people who had a criminal history. Liability for the employee's violent actions

[1] (Civ. Code §1714 subd. (a); *Rowland v. Christian* (1968) 69 Cal.2d 108, 111-112.)
[2] (*Ladd v. County of San Mateo* (1996) 12 Cal.4th 913, 917.)
[3] (*Evan F. v. Hughson United Methodist Church* (1992) 8 Cal.App.4th 828, 843.)
[4] (*Phillips v. TLC Plumbing, Inc.* (2009) 172 Cal.App.4th 1133, 1139.)

Good Blending of Rules + Facts

was a forseeable issue because when employers have a rule against something, it indicates that A/R there is anticipation of risk.[5] Great Work Very Concise.

C Miss Del's had a duty to our client to look into the criminal background of their employee because putting violent people in a job where they will be working with a high number Good A of patrons, like a greeter position, creates a forseeable situation where patrons will be put at risk, and because it would have been easy for Miss Del's to get the employee's criminal history from C the local court clerk at a low cost.

(2)

MISS DEL'S BREACHED THAT DUTY:

As I stated before, Miss Del's could have easily discovered the employee's criminal background. They would have found out about the violent history of the employee and could have avoided liability by not hiring him for a job which involved dealing with lots of customers. This lack of action on Miss Del's part constitutes the relevant breach of legal duty to their patrons and to our client.

(3)

MISS DEL'S BREACH OF DUTY WAS THE LEGAL CAUSE OF INJURY:

To hold the breach of duty as the legal cause of injury there must be a relationship R between the past actions of the person employed and the present issue[6], and there must be a connection between the employment and the injury to the third person.[7] In our case we have R both of these elements because the past violent offenses of the employee directly correspond to A the violent act resulting in our client's injuries, and the conflict between our client and the Good employee arose during the course of the employee's duties while he was seating them and bringing them water. But for Miss Del's negligence in hiring, our client would not have been injured. Miss Del's hiring of a violent employee was the proximate cause of our client's injuries. C

[5] (*Perez v. Van Groningen & Sons, Inc.* (1986) 41 Cal.3d 962, 970.)
[6] (*Federico v. Superior Court* (1997) 59 Cal.App.4th 1207, 1215.)
[7] (*Mendoza v. City of Los Angeles* (1998) 66 Cal.App.4th 1333, 1341.)

OUR CLIENT WAS DAMAGED:

Your memo dated October 10th stated that our client suffered major injuries and also that the employee has been convicted and is serving time in state prison. I am assuming that the employee was convicted for attacking and injuring our client. If so, the facts of the criminal case can be found in the transcript of the trial and the court's ruling, and we can use that to prove the employee did in fact injure our client. We have a strong case for negligence in hiring.

2) MISS DEL'S MIGHT BE HELD LIABLE FOR PREMISES LIABILITY:

The four elements of negligence theory also apply to a premises liability suit,[8] but we first must establish that Miss Del's controlled the property.[9]

Miss Del's must have had a business license and lease or rental agreement in order to operate a restaurant on the premises, so we can establish that they controlled the property. The assault happened "right outside" the front door and Miss Del's may argue it occurred off the premises. However, "The premises may include such means of ingress and egress as a customer may reasonably be expected to use."[10] If the attack occurred immediately outside the door it can be considered on the premises because that area must be used by customers while entering and exiting the restaurant.

Regarding the duty for premises liability, "...restaurant proprietors have a special-relationship-based duty to undertake relatively simple measures..." to protect or ensure the safety of their patrons.[11] The duty imposed is balanced by the forseeability of the harm against the burden of the duty to be imposed so there must be evidence of prior similar acts on the premises to create a duty to prevent those acts.[12] Miss Del's may argue that an assault outside the front door was an unforeseeable act because that specific problem had never happened there before,

[8] (*Rowland v. Christian* (1968) 69 Cal.2d 108.)
[9] (*Isaacs v. Huntington Memorial Hospital* (1985) 38 Cal.3d 112, 134.)
[10] (*Schwartz v. Helms Bakery Limited* (1967) 67 Cal.2d 232, 239.)
[11] (*Delgado v. Trax Bar and Grill* (2005) 36 Cal.4th 224, 241.)
[12] (*id.* at p. 243.)

and there was not a relatively easy action they could have taken to prevent it. We can argue, as we did for negligence in hiring, that violence from an employee anywhere on the premises was foreseeable, but I think that a stronger argument would incorporate Miss Del's video surveillance system.

In our case, the security video shows that the employee waited inside for our client and then assaulted him outside, where there was no video surveillance. We can argue that because Miss Del's had a video camera inside the restaurant, they knew that violence or other criminal acts were foreseeable. People who know there is camera surveillance may refrain from violence because it will be recorded. We can argue that the employee knew there was video surveillance inside (and if Miss Del's had a policy of informing employees about it, we could probably prove that), and so he did not attack our client inside the restaurant.

Since Miss Del's had a camera inside, we can argue that it would not be an undue burden for them to also install a camera outside the front door. This could have deterred the employee from beating our client in that area. Do we know if there have ever been other violent acts at Miss Del's? If so, we could establish Miss Del's duty for premises liability, and their breach of duty by not installing video surveillance outside the door.

If our argument holds, the last two elements for negligence are met because if Miss Del's put video surveillance outside the door, our client probably would not have been injured there. The breach would be the proximate cause of our client's injuries, and we can prove he was injured. However, in our case, even if there was a camera outside the door, the violent employee might have decided to follow our client out of camera range to assault him anyway.

Also, the manager on duty called 911, stopped the attack, and sat on the employee until the police arrived, so the court may find Miss Del's fulfilled their duty. We may have a claim for premises liability, but I believe that our cause of action for negligent hiring is stronger.

3) MISS DEL'S IS LIABLE FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS:

Plaintiffs can bring negligent infliction of emotional distress actions as "direct victims" when there is negligent breach of a duty arising out of a preexisting relationship,[13] but it is not a cause of action by itself- it is a recovery for damages caused through negligence.[14] Awards which do not account for mental suffering have been found to be inadequate.[15]

In the previous sections I established the duty arising out of the preexisting relationship and the foundation our client's negligence suit. If we have evidence to back up the severe emotional distress of our client, then we have standing to hold Miss Del's liable for the negligent causing of our client's emotional distress due to the employee's assault.

4) MISS DEL'S CAN BE HELD VICARIOUSLY LIABLE:

An employer can be held liable to third persons for wrongful acts committed by their employees[16] even when they are criminal or malicious.[17] There are two elements which must be met for an action under this doctrine, known as respondeat superior: 1) employment of the agent must be established, and 2) the tort must be committed within the scope of the employment.[18]

WE CAN ESTABLISH THE AGENT WAS AN EMPLOYEE:

Employment can be established by representation of the principal to third persons,[19] or the employer's "right of control."[20] The employee did represent Miss Del's by working as the greeter- he was the first face that patrons saw upon entering the restaurant. I am assuming Miss Del's also exercised a right of control by setting the work hours of the employee, etc., and that the he was fired after this incident. We can also establish employment through pay stubs and tax documents. There may be an issue with the fact that he was on a probationary period of

[13] (*Burgess v. Superior Court* (1992) 2 Cal.4th 1064, 1076.)
[14] (*Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc.* (1989) 48 Cal.3d 583, 588.)
[15] (Civ. Code §3333; *Capelouto v. Kaiser Foundation Hosp.* (1972) 7 Cal.3d 889, 893.)
[16] (Civ. Code §2338; *Perez v. Van Groningen & Sons, Inc.* (1986) 41 Cal.3d 962, 967.)
[17] (*Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal.4th 291, 296-297.)
[18] (Civ. Code §2338; *Perez v. Van Groningen & Sons, Inc., supra,* 41 Cal.3d at pg. 967.)
[19] (Civ. Code §2295)
[20] (*Industrial Indem. Exch. v. Industrial Acc. Comm'n* (1945) 26 Cal.2d 130, 135.)

employment, but the police report states the employee "was hired" so this should not be a problem. We can prove that the 'employee' was legally an employee.

THE BATTERY WAS COMMITTED WITHIN THE SCOPE OF EMPLOYMENT:

We need to establish that the incident leading to injury arose out of, or was inherent in, the employment.[21] If the incident started during the course of the employee's duties, it can be considered within the scope of employment.[22]

As the security video shows, the initial conflict between the employee and our client started during the performance of the employee's duties as a greeter at the restaurant, so the incident did arise out of the employment. Also, the physical aggression of the employee was an inherent risk because when work brings people together, there is a risk of disagreements and flare-ups, sometimes resulting in injury.[23]

Incidents which happen after the employee is off work can still be subject to respondeat superior,[24] so it is irrelevant that the battery was committed after the employee was off work because it arose out of the employment, and in addition, the employee never left the premises between the time he got off work and the time he assaulted our client.

Miss Del's may argue that this incident was a personally motivated act, which is not covered by respondeat superior.[25] However, we can prove that because it arose out of the employment, it can be covered by this doctrine. Miss Del's is liable under the doctrine of respondeat superior.

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[21] (*Lisa M. v. Henry Mayo Newhall Memorial Hospital, supra*, 12 Cal.4th 291, 298.)
[22] (*Flores v. Auto Zone West, Inc.* (2008) 161 Cal.App.4th 373, 381.)
[23] (*Id.* at p. 380.)
[24] (*Rodgers v. Kemper Constr. Co.* (1975) 50 Cal.App.3d 608, 619-620.)
[25] (*Farmer's Insurance Group v. County of Santa Clara* (1995) 11 Cal.4th 992, 1005.)