2001

Robert Lee Gray v. Galveston Sonny Scott, Beehive Lodge of Elks #407 : Brief of Respondent

Utah Supreme Court

IN THE SUPREME COURT

OF THE STATE OF UTAH

ROBERT LEE GRAY, the Natural Father of David Allen Gray, aka John Gray, Deceased,

Plaintiff-Appellant,

vs.

GALVESTON SONNY SCOTT, BEEHIVE LODGE OF ELKS #407, I.B.P.O.E.W. et al.,

Defendants-Respondents.

Case No. 14355

RESPONDENT'S BRIEF

Appeal from the Judgment of the District Court
for Salt Lake County
Honorable G. Hal Taylor, Judge

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RESPONDENT'S BRIEF

STATEMENT OF THE NATURE OF THE CASE

This is an action brought by the Plaintiff-Appellant to recover damages for the alleged wrongful death of David Allen Gray, aka John Gray. David Allen Gray and Galveston Sonny Scott were involved in argument and mutual combat over several days in several places. On New Year's Eve, 1973-1974, their final battle occurred at the Beehive Lodge of Elks' New Year's Eve Ball, resulting in the death of David Gray. The Plaintiff-Appellant alleges that the Beehive Lodge of Elks was negligent in failing to protect Gray from this shooting.

DISPOSITION IN THE LOWER COURT

The case was tried to a jury before the Honorable G. Hal Taylor, Third Judicial District Court Judge. The jury returned a verdict in favor of the Beehive Lodge of Elks and against the Plaintiff, "no cause of action."

The same jury returned a verdict against Galveston Sonny Scott, a defendant who is not a party to the appeal, for damages.

RELIEF SOUGHT ON APPEAL

Respondent Beehive Lodge of Elks requests this Court to affirm the judgment and jury verdict of the Trial Court.

STATEMENT OF FACTS

The Appellant's Statement of Facts is not accurate and misrepresents the facts material to this appeal. Therefore, Respondent must submit the following Statement of Facts.

On December 31, 1973, the Beehive Lodge of Elks held its annual New Year's Eve Ball at its Lodge at 248 West South Temple, Salt Lake City, Utah. It was a dress affair, open only to Lodge members who had reservations, and their wives and guests. Most of the people present were members. [R. 522, 880] The Lodge officers knew over 90 per cent of the people present. [R. 884, 901]

As the party was coming to an end and the band playing its last number, [R. 512] one Galveston Sonny Scott barged into the Elks Lodge, without authorization, and without stopping at the reservation desk, and proceeded toward the rear of the Lodge where a shooting occurred between himself and David Gray, also known as "Goofoo."

Also involved in the shooting were Scott's friend, Binky Coleman, and Gray's friend, "Blood." When the shooting was over, Gray was dead. None of the participants in the shooting was a member of the Elks Lodge. [R. 521, 522] The party had been peaceful, without problems of any kind, until this incident. [R. 280, 298-299, 324, 354, 378, 395, 398, 431, 466, 522, 848, 854, 901]

The shooting, itself, culminated an argument between Scott and Gray that had existed for several days. [R. 561-567] This argument had seen earlier shooting between these same two individuals the same evening on West Second South Street [R. 565, 566] and in front of Gray's home, [R. 566, 588, 754, 761] and two days before on South Temple Street. [R. 564] Neither the officers nor members of the Lodge were aware that these two men had been involved in these shooting incidents until after the shooting on New Year's Eve. [R. 363, 397, 422, 849, 889, 919]

The argument between Gray and Scott concerned a woman named Hortensia Williams. [R. 560] Gray claimed Miss Williams had stolen jewelry from him. [R. 780] Miss Williams denied this and claimed Gray had given her the jewelry if she would be his prostitute and work the streets for him. [R. 788-789] She refused to do so, and gave the jewelry to Sonny Scott. [R. 560, 574] Scott sold the rings. [R. 560, 576] Several days before any of the shooting, Gray called by Scott's house, wherein Miss Williams and the jewelry were discussed. [R. 560-561] When Gray left Scott's house, Scott's brother entered and informed him that Gray and Blood were outside with guns. [R. 561] However, apparently no shooting occurred at that time.

On Saturday, December 29, 1973, Miss Williams was at the Elks Lodge where the regular Saturday night dance was in session. Scott was also present. Gray, with two lady friends, arrived and commenced to argue with Miss Williams. [R. 562, 563] Then, Gray struck Miss Williams. [R. 563, 732, 782] Scott intervened, and they exchanged two or three blows. [R. 563] The manager of the Lodge stopped the fight, and told the participants to leave the Lodge. [R. 397] The fight lasted no more than 10 to 15 seconds. [R. 737] Scott testified it was no big thing [R. 579] and only two or three blows were exchanged. [R. 563, 579]

The Lodge manager did not know any of the participants in the fight, nor did he write down their names. [R. 396, 402] He did not consider the fight a serious problem. [R. 400]

After Gray left the Lodge, Scott's sister came in and told Scott that Gray had gone to get a gun. [R. 563] Scott sent a friend out to bring him a gun. [R. 579] Twenty minutes later, Scott's friend brought him a gun. [R. 580] Within two minutes after receiving the gun, Scott left the Elks Lodge by the back door. [R. 563, 580-581] Scott's friend, Middleton, was with him at the time.

Neither the manager, the band leader, nor anyone connected with the Lodge had any knowledge of the foregoing. They had not seen nor heard the talk of guns at any time. [R. 363, 401, 580, 768-769, 777, 786] Even Middleton, Scott's friend, did not know Scott had a gun until they were going out the back door of the Lodge, at which time he saw it for the first time. [R. 738, 746, 768]

By the time Scott and Middleton left the Lodge, the Lodge had closed. It had closed a few minutes early because it had been

a slow night and it was close to closing time. [R. 397-398] The band leader felt the dance closed a little early because of the earlier argument, but he further stated it was close to closing time anyway. [R. 365, 368] In any case, the dance was over and the Lodge closed when Scott left by the rear door. Gray, by this time, had been gone from the Lodge 20 to 30 minutes. [R. 536]

Scott walked around the building to South Temple Street, where his car was parked. He saw Gray and Blood attempting to enter the front door of the Lodge. [R. 564, 581] However, the Lodge door was locked. [R. 564, 581] Then, Gray and Blood went to a nearby alley and started shooting at Scott. [R. 581] Scott returned the fire. They exchanged several shots and departed. [R. 564] Apparently no one was hit by gunfire at that time. This shooting occurred in the street and alley near the Elks Lodge. [R. 564] The alley serves many businesses along South Temple, including the Utah Bar, a nearby cafe, and the Utah State Liquor Store. [R. 403-404]

At the time Gray and Scott were shooting at each other in the street and alley, the Lodge manager was inside the Lodge and did not hear any gunshots. [R. 394, 397] The band leader was also still inside the Lodge, waiting to be paid, and he did not hear any gunshots. [R. 364, 367-368] Hortensia Williams testified that she was in the ladies' restroom and did hear shots. [R. 789-790] She did not, however, know where the shots came from nor who was involved, nor when they occurred in relationship to the earlier argument. [R. 787, 789] The restroom is situated in that part of the Lodge next to the alley where the shooting occurred. [Ex. 1-P]

The band leader did not know about the shooting until after he left the Lodge and was so informed outside. [R. 363] The police were investigating the matter at that time. [R. 364] The band leader did not know who was involved in that shooting incident. [R. 367-368]

The manager of the Lodge did not hear about the shooting until some unknown person entered the Lodge and informed him there had been a shooting out in the alley. [R. 399] This occurred 20 to 30 minutes after Gray and Scott had left. [R. 397, 399] The manager did not investigate the shooting in the alley, and did not know who was involved. [R. 397, 400] The police investigated the said incident. [R. 364]

Two days later, on New Year's Eve, December 31, 1973, Scott and Gray shot at one another again on several occasions. Scott drove down to West Second South Street, in Salt Lake City, and saw Gray and Blood standing on the street. [R. 565, 584] Scott shot three times at them and yelled that they were going to have it out that night. [R. 566, 586] Gray shot back at Scott. [R. 585, 735]

Scott left to obtain more ammunition. Then, with Mr. Middleton, he went to Gray's house. [R. 566] There, Scott and Gray again exchanged gunfire. [R. 566, 587-588, 735]

No one connected with the Elks Lodge was aware that this shooting was going on between Scott and Gray on New Year's Eve. Nor was anyone connected with the Elks Lodge aware that Scott and Gray had shot at each other outside of the Elks Lodge on the previous Saturday. [R. 363, 397, 401, 422, 889, 911-912, 919]

Scott then went to the 13th Floor of the Travelodge, where he spent the rest of the evening celebrating New Year's Eve. [R. 568] Afterward, he and Middleton drove to the Elks Lodge. [R. 568] As they pulled up in front of the Lodge, Scott's sister approached him and told him that Gray was inside. [R. 569] Scott took a pistol from the glove compartment, stuck it in his belt, [R. 595] and told Middleton to park the car across the street. [R. 595, 766]

At this time, the Elks celebration was almost over, and the last dance had been announced. [R. 512, 538, 910-911, 912] The band was playing the last tune. [R. 512, 538] People had been leaving for some time. [R. 538, 901, 912-913] Until this time, the Elks Lodge celebration had been peaceful, without incident. Every single witness, including all of plaintiff's witnesses, testified that the Elks' New Year's Eve party had been peaceful, without fights or problems. No one had seen guns or heard the mention of such. No one noticed anything to suggest there would be trouble. [R. 280, 298-299, 324, 354, 378, 395, 398, 431, 466, 522, 848, 854, 901]

Scott then entered the Elks Lodge. He entered without authorization. [R. 535A (page unnumbered in transcript), 538, 553] Scott did not stop at the reservation desk, but, rather, barged past the desk and its attendant, Floyd Atkins. [R. 596] Floyd Atkins saw Scott enter, but could not stop him. [R. 924, 926]

Scott testified that as he entered the Lodge, his gun was in his coat. [R. 603] One of his friends saw him and grabbed him; however, his friend then saw the gun in his coat and let him go. [R. 569] No one else present saw this incident between Scott and

his friend. The band leader, who was situated near the front door on the bandstand, did not see the incident. [R. 354-355, 360-361]

Scott went toward the rear of the Lodge [R. 570] (some witnesses say he ran toward the rear [R. 285]) when he heard gunshots coming from where Gray was standing. He also saw flashes from Gray's hand. [R. 570, 602] Scott testified he took out his own gun and fired back. [R. 570, 602-603] The band leader testified that the first shots were fired from the rear to the front. [R. 340, 357] Some witnesses say Gray fired first. [R. 792, 831] Other witnesses indicated Scott fired first. [R. 460] Scott saw Gray go down, and he and his friend then backed out of the Lodge, firing their guns all the way. [R. 571]

The shooting occurred very quickly and without warning. [R. 466, 848] Sylvester Jones, a member of the Lodge, testified that it all happened so quickly there was nothing anyone could do to prevent it. [R. 466, 472-473] (Jones was, incidentally, a trained security guard employed at the Salt Lake International Airport [R. 469] but not acting as such at the Elks Lodge.) He testified that even if he had been on duty as a security guard, he could not have prevented this shooting. [R. 472-473] Other Lodge officers testified that it all happened so quickly that nothing could be done. [R. 437] The doorman said that Scott did not stop at the desk, but went right into the Lodge, and people started running out. [R. 924] Scott's friend, Middleton, testified that he let Scott out of the car in front of the Lodge, and merely made a U-turn to

park on the other side of the street and had not yet parked, when he heard the shooting. [R. 766]

Two of plaintiff's witnesses testified that there was nothing to indicate that a problem of any kind was going to occur until someone yelled, "My God, he's got a gun," and then the shooting started. [R. 285, 324-325, 380] Even then, one of plaintiff's witnesses thought the shots were New Year's Eve poppers and not gunshots. [R. 324]

Witnesses testified that after the shooting, they saw Blood go through Gray's clothing and remove something from his person. [R. 304, 326, 842-843] Some of the witnesses could not identify what was removed. [R. 304, 326] One witness, however, saw Blood remove a gun from Gray's body. [R. 793]

The police arrived and investigated. The police found 13 live reloaded bullets and two empty bullet casings in Gray's pocket. They also found a Beehive membership card, but could not recall whose name was upon it, if anyone's. [R. 725-727] (The police officer was instructed by the Court to retrieve this card from the police evidence room and return it to Court. [R. 728] However, the officer did not return to Court. Appellant's attorney informed the Court that the officer had advised him that the card was not there. [R. 944])

Until the shooting, the Elks Lodge celebration had been peaceful. Except for a minor argument between two girls ten minutes earlier, [R. 339-340] every single witness, including those witnesses called by the plaintiff, testified that the party was peaceful,

without any trouble of any kind, the entire night. [R. 280, 298-299, 324, 354, 378, 395, 398, 431, 466, 522, 848, 854, 901] The party had commenced at 10:00 p.m., and the shooting occurred at 1:50 a.m., nearly four hours later, at closing time. None of the witnesses, during the course of the evening, had seen any guns. [R. 325-326, 431, 850]

Contrary to the claim of the Appellant in his Statement of Facts, the argument ten minutes earlier, between the two girls, had no connection with the later shooting. [R. 339] That argument was solved by the band leader informing the girls that the party had been very peaceful, and for them to take their problem outside. That was ten minutes before Scott even arrived or the shooting in question occurred. [R. 339-340] All witnesses testified the shooting occurred quickly, without warning. [R. 466, 472-473, 766, 848]

The Elks New Year's Eve party was not open to the public. [R. 539, 855, 882-883, 905-907] Only members with reservations, and their wives and guests, were allowed. [R. 538, 855, 901] Only members of the Lodge could make reservations. [R. 538-539] The public was not allowed. [R. 539] Even members who did not have reservations were not allowed. [R. 539, 907] The Lodge officers knew more than 90 per cent of the people there. [R. 884, 901] A close check was made of reservations. [R. 549, 906] Hands were stamped to allow re-entrance into the Lodge in the event one had to leave. [R. 278, 379, 924, 926] The front reservation desk was

manned during the entire night, including the time when Scott entered the Lodge. [R. 907, 910, 916, 923, 924-925]

The lighting in the Lodge consisted of bright lights and dim lights. The bright lights were off at times, leaving only the dim lights for atmosphere. [R. 281, 304, 336] The switch to the lights was by the band. The band leader had standing instructions to turn the bright lights on if any problem arose. [R. 336, 517] At the time of the shooting, the bright lights were off, but the dim lights were on. [R. 304, 837] The lights were never completely off. [R. 336] One witness who testified that the lights were "off" later testified that she meant the "bright lights were off." [R. 281, 304] At the time of the shooting, while the lights were dim, the band leader was still able to see the entire length of the Lodge and identify those at the other end. [R. 355-356.]

The rear door of the Lodge was not locked. It was in use all evening by the ladies working in the kitchen, where the door was located. The door can always be opened from the inside by merely pushing on the bar. [R. 848, 854]

The only persons in attendance at the Elks Lodge on New Year's Eve who had knowledge of the prior problems between Scott and Gray, as well as the prior shootings, were Gray, himself, and his friend, Blood. [R. 397, 889, 919] Not one person connected with the Lodge had any knowledge of the shooting between Scott and Gray in the alley outside the Elks Lodge on Saturday night, or on West Second South early on New Year's Eve, or in front of Gray's house on New Year's Eve. [R. 299, 363, 397, 422, 889, 911-912, 919]

The Elks Lodge did not hire any armed, uniformed security guards for the New Year's Eve Ball. The officers and members did not feel that security was a problem. [R. 500, 504, 912] The Elks Lodge had never experienced a shooting, knifing, or serious fight at any of its special functions in all of the years of its existence. [R. 481, 524, 846, 853-854, 857-858, 860-862, 886, 890-891, 912] One of plaintiff's witnesses testified she had been going to Elks Lodge functions for over twenty years, and the Elks Lodge was considered one of the better places to go. [R. 298-299] One elderly lady member testified that she was proud that she could feel as safe at the Lodge as she did in her own living room. [R. 846] Nathaniel Johnson, a well-educated chemist and Army Reserve Colonel [R. 556, 902-903] and chairman of the New Year's Eve Ball, said that there was no need for security guards. [R. 543]

All members of the Lodge had responsibility for maintaining peace and order among Lodge members. [R. 413, 503, 515] The Antler Guard, a ceremonial office, also had official responsibility for keeping order and peace among the members at official functions; however, the Antler Guard is not a security guard. [R. 428-430, 547, 554-555, 892] He would not be expected to stop serious fights or gunfights if they were to occur. [R. 408]

The Appellant attempts to make a point that Anderson Pearson was a security guard and was downstairs at the time of the shooting. However, Anderson Pearson was not a security guard, but was the Antler Guard, and, he went downstairs at the end of the party to eat. [R. 413] Anderson Pearson testified that he was supposed to

receive further training following a discussion with James Dooley, the leader of the Lodge. [R. 410] James Dooley testified he recalled no discussion with Pearson as to training as a security guard, but stated there may have been a conversation concerning karate lessons. [R. 885] A karate expert had given a demonstration at the Elks Lodge, and many of the members, including Anderson Pearson, were interested in taking lessons. [R. 885] Pearson never participated in the lessons. In any case, Anderson Pearson testified that in all of his experience with the Elks Lodge, he had never experienced a serious fight, shooting, or knifing at the Elks Lodge. [R. 427-428, 429] He further testified he had never experienced a fight or an argument that he did not feel capable of handling and was not personally able to handle and solve. [R. 429-430]

The Beehive Lodge of Elks is not just another private club. The Elks Lodge has been organized in the Salt Lake Valley for fifty years. [Ex. 28-D] Most of its members are middle aged or older. The oldest member is 73 years of age, and the average age is 54.6 years [Ex. 30-D, Roster of Members] (As of the date of the incident.) Its many committees are organized for the purpose of giving scholarships, helping the needy, special celebrations for Mother's Day, Father's Day, Labor Day, providing family outings, a children's Christmas party, churchgoing activities, as well as the annual New Year's Eve Ball. [R. 860-861, 871-879; Ex. 27-D]

In addition, the Elks Lodge maintains its Lodge open for its members seven days a week, wherein members with guests are welcome for lunch, dinner, dancing, drinks, card playing, and socializing.

[R. 524-525, 880] Whereas the Elks Lodge has never experienced any problems or fights at any of its special functions, [R. 481, 524] it may have an occasional argument or fight during its regular hours. The leader of the Lodge, James Dooley, testified that the Lodge may have five or six fracases a year, but that these fracases are not serious, but more like family arguments, [R. 481, 524] and are solved by the Lodge members without the necessity of outside help. [R. 887] Other officers confirmed that the only problems they had experienced were minor problems that were solved by the Lodge. [R. 891]

The only exception to the foregoing occurred approximately three months prior to the New Year's Eve Ball in question, when, during a weekday card game, one card player shot another in the leg. [R. 486] This occurred during the week and not at any special function of the Lodge. [R. 525] Mr. Dooley was present in the Lodge at that time, but did not see the shooting or the events leading up to it. He merely heard the shots, [R. 525-526] and called the police. [R. 486] The two card players were banned forever from the Lodge, and have never returned. [R. 487, 887, Ex. 30-D, Minute Book.] James Dooley's first knowledge of that shooting was as it occurred and not beforehand, as stated by Appellant's Brief. [R. 485-486]

The official Minute Book of the Elks Lodge [Ex. 30-D] shows no other such incidents, nor any fights of any kind, for the one year period prior to the New Year's Eve in question. [Ex. 30-D]

ARGUMENT

POINT I.

THE TRIAL JUDGE DID NOT ERR IN GIVING INSTRUCTION NO. 36.

The principal question of fact for jury determination was whether or not the Beehive Lodge of Elks exercised reasonable and ordinary care, under the circumstances, in regard to its members and their guests during the New Year's Eve Ball.

The testimony shows that Scott and Gray were involved in argument and mutual combat for several days. They had shot at each other on three different occasions, in three different locations, during the two days prior to the night in question.

The testimony clearly shows that not one single officer or member of the Elks Lodge, nor the band leader, had any knowledge of the prior shooting episodes between these two men. [R. 363, 397, 424, 891, 919] The closest the Lodge ever came to the difficulty between Scott and Gray was on Saturday, two days before, when the two men argued inside the Lodge and exchanged two or three blows. At that time, they were told by the Lodge manager to leave. [R. 397] That fight was not considered serious by either the manager or by Scott. [R. 400, 579] The manager did not know the identity of Scott or Gray, nor did he take down their names. [R. 396, 402] The manager did not see guns nor hear talk of guns. [R. 401] The manager did not hear the shooting which occurred 20 to 30 minutes later, outside of the Lodge in the alley or street. [R. 394, 397] He merely was told by someone else that a shooting had occurred, but

he did not know who was involved in that shooting. [R. 397, 399] The band leader did not hear the shooting outside, but only heard about it later from others. [R. 363, 367-368] He did not know the identity of the persons involved in that shooting. [R. 363] Hortensia Williams was still in the Lodge in the restroom (located next to the alley where the shooting allegedly occurred) and claimed she heard some gunshots, but she also did not know where the shots came from or who was involved in that shooting. [R. 787-789]

There was nothing whatsoever about the Scott-Gray argument on Saturday night to suggest to anyone connected with the Lodge that these same two men would shoot at each other at any other time, and certainly nothing to suggest in any way that at the formal New Year's Eve Ball, attended only by members and guests with reservations, Scott would burst in at the end of the party and shoot Gray, or, for that matter, that any shooting of any kind would occur.

The Elks Club had never in its history experienced a fight, or shooting, or violence of any kind at any special function, such as the New Year's Eve Ball. All prior special functions of the Lodge, including the New Year's Eve Balls in prior years, had always been peaceful. [R. 481, 524, 846, 853-854, 857-858, 860-862, 886, 890-891, 912] The New Year's Eve Ball in question was peaceful, without problems of any kind, until the shooting occurred during the closing band number. [R. 280, 298-299, 324, 354, 378, 395, 398, 431, 466, 522, 848, 854, 901] Fights or arguments occasionally occur at the Lodge at other times, but such have never been serious enough to call the police. The only exception was one shooting three

months earlier between two card players. However, the police were called and those two card players were banned by the Lodge forever and have never been seen since.

The Respondent believes it was entitled to a Dismissal at the end of the plaintiff's case, and certainly to a Directed Verdict at the end of the evidence. Its motions were denied.

In 57 Am. Jur. 2d, Negligence, Sec. 63, it is stated under the general heading "Duty to Anticipate Criminal Acts" as follows:

> No person owes a duty to anyone to anticipate that a crime will be committed by another, and to act upon that belief. It has been held that no one, under ordinary circumstances, is chargeable with damages because he has not anticipated a crime by some third person. However, a duty to afford protection of another from a criminal assault or wilful act of violence of a third person may arise, at least under some circumstances, if that duty is voluntarily assumed, such as by contract.

In Popovich v. Pechkurow, 145 N.E.2d 550 (Ohio, 1956) a patron sued a tavern for injuries sustained when he was shot by another patron. He claimed the tavern owners were negligent in failing to call the police after being warned of the patron's intention to get a rifle. A directed verdict in favor of the tavern owner was affirmed by the Supreme Court of Ohio. In that case, the assaulter left the tavern, informing everyone he was going to get his gun, and come back and shoot everyone in the tavern. In about fifteen minutes, he returned with his gun and, while standing outside the door, fired several shots through the glass panel. The Supreme Court, in affirming the directed verdict, stated:

> The general rule is that when, between negligence and the occurrence of an injury, there intervenes

> a wilful, malicious, and criminal act of a third person which causes the injury but was not intended by the negligent person and could not have been foreseen by him, the causal chain between the negligence and the accident is broken. . .
>
> Wrongful acts of independent third persons, not actually intended by the defendant, are not regarded by the law as natural consequences of his wrong, and he is not bound to anticipate the general probability of such acts, any more than a particular act by this or that individual. This rule applies a fortiori to criminal acts.

In Rosensteil v. Lisdas, 456 P.2d 61 (Ore. 1969) a restaurant patron was shot and injured by persons who had come in from the street to continue their fight. The police testified there had been a previous violent altercation between the same individuals in the same restaurant a year before. They also testified they were called to the restaurant on numerous occasions for different drunks and fights. Also, a waitress testified that during the thirteen days she had worked immediately prior to the night in question, there had been "a few hassles." In finding in favor of the owner of the restaurant, the Oregon Supreme Court stated the following:

> Even if a restaurant owner has the duty under some circumstances to employ personnel who are capable of keeping order and thus protect his patrons from injury resulting from the foreseeable conduct of his patrons, he is not required to employ such personnel for the contingency that outsiders will elect to use the restaurant rather than the street as their battleground. The fact that the Hale brothers had previously been in the restaurant gave defendants' employees no warning that they would stir up trouble and suddenly return to burst into the restaurant. It is the responsibility of the public police to quell such

> disturbances whether they occur on the street or in a restaurant. And even where previously violence has swept in from the streets, we do not think that it should be the duty of a businessman operating a restaurant to risk his own life or employ others to risk theirs in order to protect bystanders who happen to be in the restaurant rather than on the street. That is a function which he should be able to leave to government police.

The Court concluded:

> The fact that previous disturbances had occurred in the restaurant would not impose upon defendants the duty to prepare against disturbances which originated in conflict elsewhere and which result in harm to defendant's patrons simply because the victim without any warning to defendants chose to use defendants' restaurant as a place of refuge.

In Stevenson v. Kansas City, 187 Kan. 705, 360 P.2d 1 (1961) a patron at a wrestling exhibition was assaulted and injured by a man who robbed her on the premises. The plaintiff calimed that the defendants failed to provide her with a safe place to attend the performance and further failed to provide sufficient police or guards.

The Court, in finding in favor of the defendants who were conducting the wrestling match, stated in quoting 65 C.J.S., Negligence, Sec. 111, as follows:

> Defendant's negligence is too remote to constitute the proximate cause where an independent illegal willful, malicious, or criminal act of a third person, which could not reasonably have been foreseen, and without which such injury would not have been sustained, intervenes. A person is not bound to anticipate the malicious, wilful, or criminal acts of others by which damage is inflicted. . .

The Court continued in citing from one of its earlier decisions:

> We all anticipate pocket picking when the circus comes, and housebreaking during fair week, but the circus and the fair are not the causes of such crimes. We know, too, that should a housebreaker be discovered in the act of committing burglary, he might do violence to a person interrupting his depredation. But if, knowing the city to be infested with such characters, we go out for the evening leaving the back door unlocked and leaving a servant in the house, omission to lock the door is not the cause of the burglary, should one occur, or the cause of injury to the servant who tries to intercept commission of the crime. The cause of injury originates with the burglar, whose entrance into the house was not obstructed by a locked door.

The Court continued, at page 6:

> By its own contents and allegations, plaintiff's petition charges defendants with a degree of negligence that would tend to make them her insurers from the time she entered the Memorial Building until she departed therefrom, but no such duty is placed on the defendants when this case is tested by the foregoing authorities in our jurisdiction. To apply such a high degree of vigilance would make a public amusement impossible because of the expense of guards, time for searching customers to discover possible weapons, etc.
>
> To foresee that plaintiff while attending the wrestling matches would be assaulted at the hour of 11:00 p.m. at the particular spot on the particular ramp on the way to the particular rest room in the Memorial Building in Kansas City would indeed require imaginative foresight and such is not tye type of foreseeability required under our law. Only the standard of the reasonable and prudent man, as set out above, is required.

In Strong v. Granite Furniture Co., 77 Utah 292, 294 P. 303 (1930) the plaintiff purchased furniture from the defendant and had it in possession in his home. He failed to make payments. While

he was out of town, the furniture store entered his home and repossessed their furniture. Later, thieves entered the same home and removed the rest of the plaintiff's personal property. Plaintiff sued the furniture store for the loss to the thieves, claiming the furniture store knew the plaintiff was out of town, and yet, left a window unsecured. The Court stated:

> Assuming that upon this evidence the jury was justified in finding that the defendant's agents removed the nails which were driven into the window frame to prevent the window from being raised, and that such nails were not replaced, can it be said that such acts constitute the proximate cause of the plaintiffs' losing their household goods? Generally speaking, "the proximate cause of an injury is the primary moving cause without which it would not have been inflicted, but which, in the natural and probable sequence of events, and without the intervention of any new or independent cause, produces the injury . . ."

The Court in the above case then stated the applicable law as found in Corpus Juris, as follows:

> Defendant's negligence is too remote to constitute the proximate cause where an independent illegal act of a third person, which could not reasonably have been foreseen, and without which such injury would not have been sustained, intervenes. A person is not bound to anticipate the malicious or criminal acts of others by which damage is inflicted, even though they are the acts of children. But where an independent illegal act was of a nature which might have been anticipated, and which it was the defendant's duty to provide against, he will be liable for a breach of such duty, notwithstanding the production of injuries by the intervention of an act of the character described.

The Supreme Court, testing the above rule, stated:

> Tested by the rule of law just quoted, it cannot be said that the leaving of nails out of the window frame in plaintiffs' dwelling was the proximate cause, or a proximate contributing cause, of the loss of plaintiffs' household goods. Obviously, the leaving of the window in plaintiffs' home unfastened did not produce the injury complained of. The proximate cause of plaintiffs' loss was the felonious acts of the unknown person.
>
> It is argued that the negligence of the defendant was the proximate cause or a proximate contributing cause of the loss, because, except for its negligence, plaintiffs' dwelling would not have been invaded. This is pure speculation. Burglars are not necessarily deterred from entering unoccupied houses merely because the windows cannot be raised. There is no evidence which shows, or tends to show, that the unknown person or persons who removed plaintiffs' household goods gained entrance to plaintiffs' dwelling by raising the window, or that the window was unfastened when the unknown person or persons entered, or that they would not have entered if the window had been fastened. The evidence in this case is insufficient to support a finding that any act of the defendant was the proximate cause or a proximate contributing cause of the loss of plaintiffs' household goods.

In Huddleston v. Clark, 186 Kan. 209, 349 P.2d 888 (Kan. 1960) a patron was shot in a public tavern by a neighboring businessman. The businessman had been refused service and had told the waitress he was going to return and shoot her. This same man had made that same statement many times before. He was escorted out of the business and the owner told him to stay out, wherein the man threatened to get a gun and return and "shoot the place up." He did return, and during the shooting injured a patron. The Trial Court sustained defendants' demurrer. The Supreme Court of Kansas affirmed, stating:

> While he sometimes spoke in a loud voice and used profane language toward defendants' employees when they refused to sell him beer, he had never previously harmed anyone in defendants' place of business. It was not shown, under the evidence as presented, that when Donohue was ordered to and did leave defendants' premises earlier in the afternoon of the day in question, either defendants or their employees believed there was a reasonable probability he would return with a gun and would almost immediately upon re-entering the establishment, commit an assault on one or more of the customers by his promiscuous shooting.

Most of the above cases concern the duty of public places of entertainment. But in our case, we have a private lodge. The above cited law would be even more applicable in our case.

While the Court agreed there was no evidence that the Lodge had any reason to anticipate that a shooting would occur on New Year's Eve, the Court felt that a question of fact did exist as to whether or not the Lodge exercised reasonable and ordinary care under the circumstances in regard to its members and their guests at the New Year's Eve Ball. Therefore, the Court submitted the case to the jury. Among the instructions were the following, which we set forth verbatim for the convenience of the Court:

Instruction No. 10

> The terms "ordinary", and "proximate cause", as used in these instructions are defined as follows:
>
> A. "Ordinary care" is that degree of care which a reasonably prudent person would use under the same or similar circumstances. "Ordinary care" implies the exercise of reasonable diligence and such watchfulness, caution and foresight as under all the circumstances of the particular case would be exercised by a reasonably careful, prudent person;

B. By "proximate cause" is meant that cause which in a natural, continuous sequence, unbroken by any new cause, produced the injury and without which the injury would not have occurred. (Emphasis added)

Instruction No. 15

As used in these instructions, the term "negligence" means the failure to do what a reasonable and prudent person would have done under the circumstances involved, or doing what a reasonable and prudent person would not have done under such circumstances. The faulty conduct may lie either in acting or in not acting. The standard of contuct required in any given case is dictated and measured by the immediate requirements of the occasion as determined from the existing facts and circumstances. (Emphasis added)

You will note, that the person whose conduct we set up as a standard is not the extraordinarily cautious individual, nor the exceptionally skillful one, but a person of reasonable and ordinary prudence. While exceptional caution and skill are to be admired and encouraged, the law does not demand them under the general standards of conduct.

Instruction No. 27

The conduct of the defendant Beehive Lodge of Elks and/or the individual defendants who are officers, agents, or trustees of the said Beehive Lodge of Elks need not have been the sole cause of the harm of injury or death sustained by the decedent David Allen Gray. If you find the said defendants are negligence and if you further find that the defendants' negligence is a proximate cause of the injuries and death sustained by the said decedent, the defendants would be liable for the damages which were caused by the wrongful death of the decedent; even though the death was brought about by the concurrent or substantially simultaneously act or operation of the efforts of both of the defendants' negligent conduct and another force or cause such as the conduct of the defendant Galveston Sonny Scott. (Emphasis added)

Instruction No. 28.

There may be more than one proximate cause of an

injury or death; and each of the persons whose conduct did in fact constitute a proximate cause of the injury or death would be liable for the said injuries and/or death. (Emphasis added)

Instruction No. 34

You are instructed that in determining one person's duty to another, foresight, not hindsight, is the standard by which one's duty of care is to be judged. The existence of actionable negligence depends, not upon what actually happened, but upon what reasonably might have been expected to happen. Negligence must be determined upon the facts as they appeared at the time, and not by a judgment from actual consequences which were not then to be apprehended by a prudent and competent man. (Emphasis added)

Instruction No. 35

A person or persons or private club who are exercising due care have a right to assume that others will also perform their duties under the law, and each has a right to rely and act on that assumption unless, in the exercise of reasonable care, one observes or should observe something to warn one to the contrary. In the absence of such warning, it is not negligence for a person to fail to anticipate, injury or death which can result only from a violation of law or duty by another. (Emphasis added)

Instruction No. 36

You are instructed that a private lodge or association, as well as its officers, has no duty to anyone to anticipate that a crime will be committed by another person, and to act upon that belief.

It is submitted that based upon the nature and age of the membership of the Lodge, the Lodge's long trouble-free history, the exclusiveness and nature of the New Year's Eve Ball, the peacefulness of the celebration until the end, and the lack of notice or knowledge of the prior violence between Scott and Gray, the Beehive Lodge of Elks had no reason, nor duty, to anticipate that there would be a

shooting at the Elks Lodge during or at the end of the New Year's Eve Ball.

Therefore, the Court correctly instructed the jury that the Lodge had no duty to anticipate that this crime would occur. The Court correctly instructed the jury that the Lodge had a duty of reasonable and ordinary care under the circumstances in behalf of its members and their guests at the New Year's Eve Ball. Whether or not the Lodge exercised reasonable and ordinary care under the circumstances was a question for the jury, and the jury rendered its verdict.

Appellant cites as authority Industrial Park Businessmen's Club, Inc. v. Buck, 479 S.W.2d 842 (1972) as being "very much in point." However, that case is not in point. The Court stated therein that the "attacker" had made himself obnoxious to everyone present for 6 1/2 hours, and despite his conduct, had continuously been served alcohol, and that the manager of the tavern was drunk and left the tavern early in disgust at what had been going on, and that the owner, as well as the manager, knew persons of bad character were present and around with guns. None of those facts existed in the case presently before the bar. That case has no application.

The only other case cited by Appellant was Samson v. Saginaw Professional Building, Inc., 393 Mich. 393, 224 N.W.2d 843, wherein the Court stated that the only issues on appeal were (1) the issue of a landlord's duty to protect one tenant against the mental patients visiting another tenant, and (2) whether or not probate

records of a defendant should have been admitted into evidence. (P. 846) Furthermore, the evidence was clear that the landlord not only knew of the mental patients visiting one tenant, but the landlord had received specific complaints from tenants over the problem. None of these facts, nor equivalent facts, exist in the case at bar. That case has no application.

The Appellant, in his Brief, listed 23 "findings of fact" which he believes the jury was justified in finding from the evidence. However, most of the 23 findings do not accurately reflect the evidence. For this reason, Respondent is compelled to reply to each of the 23 points as follows:

1. Appellant states there are several fracases or fights on the Elks premises each year. This statement is basically true. However, the testimony was that these were family type arguments that were always solved by the Lodge. [R. 481, 524, 891]

2. Appellant claims that during the shooting three months before New Year's Eve, that all the events leading up to the shooting were done in the presence of James E. Dooley. This is not true. Dooley testified that he was upstairs and heard the shooting which occurred downstairs. This was the first indication he had of any trouble between the card players. [R. 485-486, 525-526] Dooley immediately called the police [R. 486] and banned the participants from the Lodge forever, and they have never returned. [R. 487, 887]

3. Appellant states that the shooting was well known to members of the Lodge. This is basically true. The prior shooting was known to members of the Lodge inasmuch as the two card players

were banned forever from the Lodge. [R. 887, Ex. 30-D, Minutes]

4. Appellant claims that Dooley asked Pearson, a member of the Antler Guard--"the Lodge's internal security division, to go for more training to be able to better perform his duties during the New Year's Eve celebration." This is not true. While Pearson did believe he was supposed to receive more training at the request of Mr. Dolley, Dooley stated that he did not have such a conversation, but that they may have discussed Pearson's taking karate lessons, which many of the members were interested in, following a demonstration at the Lodge. [R. 885] Furthermore, there was never any testimony by Pearson or anyone else in regard to the necessity of security training for "the New Year's Eve celebration." Furthermore, the Antler Guard is not the "Lodge's internal security division." [R. 428-430, 547, 554-555, 892]

5. Appellant claims Pearson had no training to deal with the "shootings and knifings," and for this reason he was being sent for special training. This is not true. There was never any discussion concerning "shootings or knifings" between Pearson and Dooley. The testimony cited by Appellant does not say what he claims it said.

6. Appellant states there was a fight less than 48 hours prior to the New Year's Eve celebration, inside the Beehive Lodge, involving Scott, Gray, and Blood. This is basically true, but it should be pointed out that the manager did not know the identities of these three individuals involved in the fight. [R. 396, 402] Furthermore, he did not know who was involved in the shooting which occurred outside on the street 20 to 30 minutes later. [R. 397]

7. Appellant claims that when Scott left the Elks Lodge Saturday night he had a gun "which everyone saw." This is totally false, and a misrepresentation of the evidence. The testimony was to the exact opposite. The manager did not see any guns, the band leader did not see any guns, Hortensia Williams did not see any guns at any time. Middleton, Scott's companion, did not see any guns until Scott was going out the back door. [R. 363, 401, 500, 768-769, 777, 786]

8. The Appellant states that Scott and Gray returned fire out on the street for "several minutes." This is not accurate. The evidence was that Scott and Gray shot at each other, but the time involved is not known. Scott testified that after he was shot at, he returned the fire within 3 second, and then he ran. [R. 564]

9. The Appellant states that "several persons inside the Lodge heard the shooting within two minutes after Scott left." This is not true. The manager and the band leader never did hear the shooting, but were informed by other persons that there had been a shooting, after it occurred. [R. 364, 367-368, 394, 397] The one witness who stated the shooting had occurred within two minutes later corrected her testimony to state she did not know how long it had occurred after Scott left. [R. 787, 789]

10. Appellant states that "within a very few minutes after the shooting" several people ran in to tell Exie Gray that the shooting had occurred. Actually, Exie Gray, the manager, testified he did not hear about the shooting for 15, 20, or 30 minutes after it had occurred. [R. 399]

11. Appellant claims that after the Saturday night shootout, many of the members who left the dance had guns in their belts. This is totally incorrect and a misrepresentation of the facts. No members were seen with guns on Saturday night. [R. 768, 769] The testimony cited by Appellant was that of Scott's companion, Middleton, who testified he saw three or four people out in the street with guns in their hands. [R. 744] He didn't know them. [R. 744] He never identified them as members of the Lodge as claimed by Appellant. [R. 744]

12. Appellant claims the Saturday night dance stopped early because of "this fight." This is not accurate. The manager of the Lodge stated he closed the dance a little early because it was slow, and anyway, it was close to closing. [R. 397-398] The dance band leader stated he thought the dance closed early because of the earlier fight, but that, in any case, it was close to closing. [R. 365, 368]

13. The Appellant claims that Exie Gray, the manager, informed Jim Dooley and Anderson Pearson about the fight. Actually, Dooley and Pearson didn't hear about the minor fight until after New Year's Eve. [R. 488, 889] None of them had knowledge of the later shooting out on the street. [R. 424, 889]

14. Appellant's statement is basically correct.

15. Appellant cites the testimony of Nathaniel Johnson as to what he would have done had he known about the earlier fight on Saturday. However, Appellant failed to mention that this testimony was objected to as being speculative, and that this testimony was stricken by the trial court. [R. 921]

16. Appellant claims that a fight is a crime. This may or may not be true. A family argument of words is not a crime.

17. Basically true.

18. Appellant claims that James Dooley and Shelly Smith and other members of the Lodge knew that Gray and Scott were on the premises during both the Saturday night fight and the New Year's Eve celebration. This is not true, but a misrepresentation of the facts. Scott was not in attendance at the New Year's Eve celebration. He barged in at the end of the celebration, while the last dance number was being played. [R. 535 A, 538, 553, 596, 924, 926] Dooley did not know Gray, but was introduced to him earlier in the evening. Dooley did not know that Gray or Scott had been at the Lodge on Saturday night until he was so informed by the manager, after the New Year's Eve celebration. [R. 889]

19. Appellant claims that the New Year's Eve committee knew that Galveston Sonny Scott was on the premises during the New Year's Eve celebration. This is not true and a misrepresentation of the facts. Galveston Sonny Scott was not present during the New Year's Eve celebration. He barged into the Lodge at the end of the New Year's Eve celebration, while the last number was being played. [R. 535 A, 538, 553, 596, 924, 926]

20. Basically correct.

21. Appellant claims that most members of the Beehive Lodge of Elks knew Scott. This is not quite accurate. Most of the members knew who Scott was, but most did not know Scott personally [R. 535]

22. Basically correct.

23. Appellant claims that David Gray had a membership card on his person at the time of the shooting. This statement is somewhat misleading. The police found a membership card in his pocket following the shooting, but the police officer stated that they did not know who the card belonged to or whose name was upon it. [R. 726-727] The records of the Lodge show that Gray was not a member. [Ex. 30-D] The testimony of the leaders of the Lodge indicate he was not a member. [R. 521]

It is respectfully submitted that the Court correctly instructed the jury that the Lodge had no duty to anticipate that this crime would occur. The Court correctly instructed the jury that the Lodge had a duty of reasonable and ordinary care under the circumstances in behalf of its members and their guests at the New Year's Eve Ball. Whether or not the Lodge exercised reasonable and ordinary care under the circumstances was a question for the jury, and the jury rendered its verdict.

POINT II.

THE TRIAL JUDGE DID NOT ERR IN REFUSING THE TESTIMONY OF PLAINTIFF'S EXPERT WITNESS, WILLIAM GATELY.

Appellant called as an expert witness William Gately. His testimony was given by proffer of proof, which was rightfully refused by the Court for reasons hereinafter given.

Gately testified that he moved to Salt Lake City after the incident at the Elks Lodge [R. 612, 630] and had been licensed as a private detective in Utah 1 1/2 years after the New Year's Eve

in question. [R. 612, 630, 631] He admitted he had never done any work in private clubs in Salt Lake City. [R. 614] He admitted that his only security experience had been in the large cities of the West Coast--namely Portland and Los Angeles, [R. 631] and that he was not familiar with private clubs in Salt Lake City. [R. 631]

Gately further admitted that his only experience in Portland, Oregon, and Los Angeles, had been with those private clubs which "had reputations of problems arising and situations getting out of hand" [R. 623] and where the patrons were between the ages of 21 and 40. [R. 623] (Note that the members of the Beehive Lodge of Elks had an average age of 54.6 years at the time of this incident, the oldest being 73 years of age, and out of 71 members, only nine were under the age of 40. [Ex. 30-D, Roster of Members])

Gately also admitted that he was not at the Beehive Elks Lodge on New Year's Eve, nor even in Salt Lake City at that time, but on the West Coast, and had never before been in Salt Lake City on New Year's Eve. [R. 631] Also, he admitted that he does not know any member of the Elks Lodge. [R. 631]

Gately further admitted that he is not familiar with the private clubs in Salt Lake City, and further admitted that he had never done any work in any clubs in Salt Lake City. [R. 614, 631] Gately claimed that some private clubs had availed themselves of security services, but he could not name any. [R. 614]

Gately further admitted that he did not know the name of any private club presently hiring security guards in Salt Lake City. [R. 614]

Gately further admitted that for the few months that he had been in Salt Lake City, his primary security account had been the First Security Bank. [R. 616] He also admitted that in giving his opinion, he was not aware that the Elks Lodge had never had, at an official function, a fight, knifing, or shooting. He stated that he had thought otherwise. [R. 631]

Gately further admitted that his expert testimony was clearly speculative and that he could not state one way or another that the shooting would not have occurred had his services been available. His testimony was: [R. 635]

> Q Even if there had been security guards there, there is no way you can say whether or not a shooting would have occurred, can you?
>
> A No.
>
> Q In fact Robert Kennedy was shot in a hotel lobby in Los Angeles surrounded by Secret Service, the FBI and Los Angeles Police Department, wasn't he?
>
> A That's right.
>
> Q And President Ford was shot at in front of a hotel lined with uniformed policemen up and down the street surrounded by the Secret Service and the FBI by a woman across the street; is that right?
>
> A That's right.
>
> Q So it's all speculation, isn't it, as to whether a shooting would have occurred even if guards had been there?
>
> A That's right. [R. 635]

Gately later claimed that if he had five to six armed security guards there, the shooting wouldn't have happened. [R. 636]

Based upon the above testimony of Gately, the Court refused

plaintiff's proffer of proof for lack of foundation and because the security arrangements which he described (mace, handcuffs, nightstick, five uniformed guards, etc.) went beyond the reasonable and ordinary care required, and further, that it called for a conclusion from him on the very issue that should have gone to the jury. [R. 637-638]

The Appellant claims that Gately's testimony, at least as to what was available in security devices, should have been allowed. However, the Court rightfully refused the same, since the security devices described went beyond the duty this private lodge owed to its private members and their guests. There had been no problems in the history of the Lodge functions requiring security guards, mace, handcuffs, or night sticks. The testimony was that the Lodge members had always been able to handle the minor arguments that had occurred in the past. This was true in regard to the Saturday night argument between Scott and Gray inside the Lodge, wherein the manager broke it up and informed the participants to leave, which they did. Any trouble between Gray and Scott left the Lodge and occurred elsewhere.

The fact that mace, guns, nightsticks, or handcuffs were available is immaterial. There was no duty on the part of the Elks Lodge to provide any of these items. And, the posting of five security guards, armed with mace, nightsticks and handcuffs, at the Elks Lodge party, who would search every person who entered, certainly would go far beyond reasonable and ordinary care, and would not be expected of the leadership of this Lodge.

Appellant further claims that since Sylvester Jones, a member of the Lodge who was present at the time of the shooting and sitting near the participants of the shooting, was allowed to testify, that Gately should have also been allowed to testify. However, Sylvester Jones was not testifying as a security guard, but was testifying as an eye witness, present at the time of the shooting in question. Furthermore, Appellant never objected to Sylvester Jones' testimony in regard to what he could and could not have done during the shooting.

Gately's testimony was mere speculation, by his own admission. Whether or not mace, guns, nightsticks, or handcuffs were available, or armed guards or uniformed guards had been present, and whether such could have prevented any shooting, is all pure speculation. All of the same devices, as well as uniformed police, the Secret Service, the the FBI, did not prevent the shooting of Robert Kennedy in Los Angeles, or the attempted shooting of President Ford in Sacramento, California.

The Court rightfully excluded the testimony of William Gately.

POINT III.

THE TRIAL COURT DID NOT ERR IN ADMITTING THE TESTIMONY OF SALT LAKE CITY POLICE OFFICER JAMES BURNS.

Officer Burns testified that he was a vice officer employed by the Salt Lake City Police Department, and had been employed as a policeman for eight years. [R. 934] He testified that he was familiar with the customs and practices of the private clubs and private lodges in Salt Lake City. [R. 935]

He further testified that he had been in all of the private clubs and lodges in the Salt Lake City area and knew the customs and practices of the lodges and clubs as to security. [R. 935] He stated that he knew the customs and practices from his own experience and observations. [R. 935]

He also testified that his official duties included the contacting of the management of the private lodges and clubs and being familiar with their operation. [R. 936] He further testified that he was not aware of any instance where a private club or lodge hired a security guard. [R. 938]

He further testified, by questions put to him by the Appellant, that it was a common practice for bartenders to handle such situations that might arise, and that in the case of fights, it was common practice for the bartender to call the police. [R. 939]

The Utah Rules of Evidence provide the following:

> Rule 49. HABIT OR CUSTOM TO PROVE SPECIFIC BEHAVIOR.
> Evidence of habit or custom is relevant to an issue of behavior on a specified occasion, but is admissible on that issue only as tending to prove that the behavior on such occasion conformed to the habit or custom.
>
> Rule 50. OPINION AND SPECIFIC INSTANCES OF BEHAVIOR TO PROVE HABIT OR CUSTOM.
> Testimony in the form of opinion is admissible on the issue of habit or custom. Evidence of specific instances of behavior is admissible to prove habit or custom if the evidence is of a sufficient number of such instances to warrant a finding of such habit or custom.
>
> Rule 56. TESTIMONY IN FORM OF OPINION.
> (1) If the witness is not testifying as an expert his testimony in the form of opinions or inferences is limited to such opinions or inferences as the judge finds (a) may be rationally based on the perception of the witness and (b) are helpful to a clear

understanding of his testimony or to the determination of the fact in issue.

(2) If the witness is testifying as an expert, testimony of the witness in the form of opinions or inferences is limited to such opinions as the judge finds are (a) based on facts or data perceived by or personally known or made known to the witness at the hearing and (b) within the scope of the special knowledge, skill, experience or training possessed by the witness.

(3) Unless the judge excludes the testimony he shall be deemed to have made the finding requisite to its admission.

(4) * * * *

Officer Burns gave testimony as to custom and practice, as allowed by the Utah Rules of Evidence. His knowledge was based upon his own personal observations and experience and familiarity with each and every private lodge or club in Salt Lake City. Rule 50, cited above, allows such testimony where the "evidence is of a sufficient number of such instances to warrant a finding of such habit or custom." How could there be better evidence of custom and practice than the testimony of the police officer whose very duty was to deal with such private clubs and lodges, and who expressly stated he was personally familiar with the customs and practices of such lodges and clubs in regard to security measures.

Appellant claims that Respondent did not offer Burns' testimony as that of an expert. This is incorrect. Respondent stated that Officer Burns' expert testimony was offered as to custom and practice. [R. 686, 687] He did not, however, testify as an expert beyond that.

As for the plaintiff's expert, William Gately, he could not give such testimony because he admitted he was a stranger to Salt Lake City, that he had no experience with the private clubs in Salt

Lake City, that his only experience had been with three private clubs in Portland, which had reputations for "getting out of hand" and which catered to young persons between the ages of 20 and 40. Furthermore, he could not name any lodges or clubs in Salt Lake City which utilized security guards. Such testimony could not possibly establish the customs and practices of private clubs and lodges in the Salt Lake Valley.

The Appellant argues that since Officer Burns was allowed to testify, that William Gately should have been allowed to testify. However, that proposition does not legally nor logically follow. Each witness must qualify to testify. There was no foundation laid for the testimony of Gately in this case, hence his testimony was rightfully excluded.

The Appellant further argues that the Court did not give a cautionary instruction in regard to Officer Burns' testimony. However, the Appellant never requested such an instruction, nor did the Appellant, at any time, object that such an instruction was not given.

The Utah Rules of Civil Procedure, Rule 51, provide:

> . . . No party may assign as error the giving or the failure to give an instruction unless he objects thereto . . .

In McGinn v. Utah Power & Light Co., 529 P.2d 423 (Utah 1974) where one party failed to object to the failure of the trial court to give a certain instruction, the Utah Supreme Court held that such failure to object results in a waiver. The Court stated:

> Besides, plaintiff's failure to object to the court's not giving the instruction mentioned

in 2) above was a waiver thereof under Rule 51, Utah Rules of Civil Procedure.

The said Utah rule and the Utah Supreme Court's interpretation of the same are consistent with the rule of law in the surrounding states. See Nelson v. C & C Plywood Corp., 465 P.2d 314 (Mont. 1970); Bohlender v. Oster, 439 P.2d 999 (Colo. 1968); City of Scottsdale v. Kokaska, 17 Ariz. App. 120, 495 P.2d 1327 (Ariz. 1972); Frame v. Grisewood, 399 P.2d 450 (Nev. 1965); Missouri-Kansas-Texas Railroad Co. v. French, 368 P.2d 652 (Okl. 1962); Fulton Insurance Co. v. White Motor Corp., 493 P.2d 138 (Ore. 1972); O'Brien v. Artz, 445 P.2d 632 (Wash. 1968); Texas Gulf Sulphur Co. v. Robles, 511 P.2d 963 (Wyo. 1973).

In any case, the Trial Court's Instruction No. 2 informed the jury that they were the exclusive judges of the credibility of the witnesses and the weight of the evidence, and that they, the jury, had the right to judge the weight of the testimony and the credibility of the witnesses and the reasonableness of their statements

It is respectfully submitted that the testimony of James Burns was admissible under the Utah Rules of Evidence.

POINT IV.

APPELLANT'S CLAIM THAT THE TRIAL JUDGE COMMITTED PREJUDICIAL ERROR IN REFUSING TO ASK CERTAIN QUESTIONS REQUESTED OF PROSPECTIVE JURORS ON VOIR DIRE EXAMINATION IS NOT WELL TAKEN.

Appellant claims the Trial Judge committed prejudicial error in refusing to ask certain questions of prospective jurors during voir dire examination as requested by the plaintiff. However, the Appellant did not designate in his Designation of Record on

Appeal that portion of the transcript covering the selection of the jury. It would be impossible to consider such question in this appeal.

The Appellant apparently bases his objection upon a written word "No" which appears in the margin of Appellant's original voir dire request filed with the Court. There are no initials appearing by the word "No" and it is unknown who wrote such word upon the said request.

Furthermore, it is Respondent's recollection that the Trial Court very fairly and thoroughly inquired of the jury as to all proper matters which enlightened all parties in order that any challenges could be made. It is also the Respondent's recollection that the Trial Court did inquire generally in the areas complained of by the Appellant.

In the case cited by the Appellant, Kiernan v. Vanschaik, 347 F.2d 775 (1965), the U. S. Court of Appeals for the Third Circuit stated:

> The federal rules, which are substantially identical in civil and criminal cases, leave it to the discretion of the court whether the voir dire shall be entrusted to counsel or conducted by the court, and provide that in the latter event the court must permit such supplementary examination by counsel as it deems proper or shall itself submit such additional questions to the prospective jurors. Here in the manner in which the voir dire is conducted, the widest discretion necessarily is reposed in the trial judge.

In our case, the questions may or may not have been put forth exactly in the wording requested by the Appellant, but it

is this Respondent's recollection that such questions were substantially given by the general inquiry made by the Court of the jury panel.

The other case cited by Appellant, Crawford v. Manning, 524 P.2d 1091 (Utah 1975) has no application here. In that case, the Trial Judge made a statement to the jury panel whereupon one of the jurymen indicated that she had strong feelings regarding the matter, the Trial Judge refused to excuse her for cause, and was reversed by the Supreme Court. That case has no applicability here.

Furthermore, the Appellant never objected at any time in regard to the manner in which the jury was selected.

In any case, the Appellant has not shown any prejudice in the manner in which the jury panel was chosen.

It is submitted that this issue, raised by the Appellant at this time for the first time, is not well taken.

POINT V.

THE TRIAL JUDGE DID NOT COMMIT PREJUDICIAL ERROR IN GIVING INSTRUCTIONS NO. 18, 32, 33, 34, 35, AND 36, OR BY REFUSING TO GIVE PLAINTIFF'S REQUESTS NO. 14, 15, 23, AND 26.

Appellant claims the Trial Court committed prejudicial error in giving its Instructions No. 18, 32, 33, 34, 35, and 36. However, a review of those instructions indicates otherwise.

Court Instruction No. 18 dealt with the question of damages, and since the jury did not reach the question of damages as to Respondent, that instruction is immaterial to this appeal.

Court Instruction No. 32 is a correct statement of the law.

The claims of the plaintiffs are dependent upon the acts of the deceased and any defenses thereto.

Court Instruction No. 33 had application only to defendant Galveston Sonny Scott and not to the Respondent. Therefore, that instruction is immaterial in this appeal.

Court Instruction No. 34 is a correct statement of the law. The reasonable, prudent man is judged not by hindsight, but by foresight.

Court Instruction No. 35 is a correct statement of the law. One person who performs duties under the law has a right to assume that other persons will also perform their duties, unless warned to the contrary.

Court Instruction No. 36 has already been discussed at length in Point I of both Briefs.

Appellant further argues that the Court committed prejudicial error in failing to give Requested Instructions No. 14, 15, 23, and 26. However, a review of those instructions indicates otherwise.

The Plaintiff's Requested Instruction No. 14 was essentially given by the Court in other instruction. Defendant's duty was to be reasonably diligent and to exercise such watchfulness and caution as circumstances required. Court Instruction No. 10 covered this. Furthermore, the said requested instruction, as drafted, contained words concerning the duties of those doing dangerous acts. There is no evidence that the Respondents did any dangerous acts. Such instruction would have been improper.

Plaintiff's Requested Instruction No. 15 was given in substance by the Trial Court's Instructions No. 10, No. 15, No. 34, and No. 35. Furthermore, the said instruction requested by the plaintiff to the effect that "a person is liable for all of the natural and probable consequences of his act" is incorrect. A person is liable only for his acts which are negligent, and then only if the proximate cause of an accident. It would have been prejudicial error to give this instruction.

Plaintiff's Requested Instruction No. 23 was given in substance. Court Instruction No. 30 stated that although the Lodge was a non-profit, charitable, and benevolent association, it could still be held liable for its negligent acts, like any other private person or corporation. Furthermore, Court Instruction No. 17 stated the Lodge to be responsible for the acts or omissions of its officers, trustees, and members of the New Year's Eve committee.

Plaintiff's Requested Instruction No. 26 was given by the Court in its Instructions No. 10, No 15, and No. 34.

It is respectfully submitted that the Appellant's claim that the Court committed prejudicial error in regard to the instructions as stated above is not well taken.

CONCLUSION

It is respectfully submitted that the Trial Court did not commit any prejudicial error as claimed by the Appellant, but that the testimony was fairly and rightfully admitted into or

excluded from evidence, and that the jury was properly instructed by the Court, and that after due deliberation, the jury returned a just unanimous verdict, which should be affirmed.

DATED this 7th day of June, 1976.

Respectfully submitted,

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I hereby certify that I mailed two (2) copies of the foregoing Respondent's Brief to James A. McIntosh, James A. McIntosh & Associates, Attorneys for Appellant, 525 South 300 East, Salt Lake City, Utah 84111, and to Ron Eubanks, Attorney for Defendant, Galveston Sonny Scott, 250 East Third South, Salt Lake City, Utah 84111, this 7th day of June, 1976.

Lee Anna Cole