

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF WASHINGTON

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5 NICOLE LOGAN, et al.,
6 Plaintiffs,
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8 v.
9 CITY OF PULLMAN POLICE
10 DEPARTMENT, et al.,
11 Defendants.

No. CV-04-214-FVS

ORDER GRANTING PLAINTIFFS'
MOTION FOR SUMMARY JUDGMENT
RE: DEFENDANTS' AFFIRMATIVE
DEFENSE ALLEGING COMPARATIVE
FAULT AGAINST OTHERS

12 **BEFORE THE COURT** is Plaintiffs' Motion for Summary Judgment Re:
13 Defendants' Affirmative Defense Alleging Comparative Fault Against
14 Others (Ct. Rec. 198). Plaintiffs are represented by Darrell Cochran
15 and Thaddeus Martin. Defendants are represented by Andrew Cooley,
16 Stewart Estes, Kim Waldbaum and Richard Jolley. After reviewing the
17 submitted materials and considering the cited authority, the Court is
18 fully informed.

19 **I. BACKGROUND**

20 This is a class action arising from the response of the City of
21 Pullman Police Department to an altercation at the Top of China
22 Restaurant and Attic Nightclub on September 8, 2002. The facts in
23 this case were set forth in detail in the Court's Order Granting in
24 Part and Denying in Part Defendants' Motion for Summary Judgment Re:
25 Qualified Immunity (Ct. Rec. 240). Plaintiffs' remaining causes of
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1 action against the individual Defendant Officers include claims under
2 42 U.S.C. § 1983, as well as claims under Washington state law for
3 assault (Complaint, ¶ 6.2), intentional infliction of emotional
4 distress (Complaint, ¶ 6.3), and negligence (Complaint, ¶ 6.4).
5 Plaintiffs' remaining cause of action against the Defendant City
6 includes a claim for negligence under a theory of respondeat superior
7 (Complaint, ¶ 6.4). In their Answer to Plaintiffs' Complaint,
8 Defendants assert the affirmative defense of comparative fault of
9 others pursuant to RCW 4.22.070 (Answer, ¶ 14). Plaintiffs move for
10 summary judgment dismissal of this affirmative defense.

11 **II. SUMMARY JUDGMENT STANDARD**

12 A moving party is entitled to summary judgment when there are no
13 genuine issues of material fact in dispute and the moving party is
14 entitled to judgment as a matter of law. Fed.R.Civ.P. 56; *Celotex*
15 *Corp. v. Catrett*, 477 U.S. 316, 323, 106 S.Ct. 2548, 2552 (1986). "A
16 material issue of fact is one that affects the outcome of the
17 litigation and requires a trial to resolve the parties' differing
18 versions of the truth." *S.E.C. v. Seaboard Corp.*, 677 F.2d 1301, 1306
19 (9th Cir. 1982). Inferences drawn from facts are to be viewed in the
20 light most favorable to the non-moving party, but that party must do
21 more than show that there is some "metaphysical doubt" as to the
22 material facts. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S.
23 572, 586-87, 106 S.Ct. 1348, 1356 (1986). There is no issue for trial
24 "unless there is sufficient evidence favoring the non-moving party for
25 a jury to return a verdict for that party." *Anderson v. Liberty*

1 *Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 2511 (1986). A mere
2 "scintilla of evidence" in support of the non-moving party's position
3 is insufficient to defeat a motion for summary judgment. *Id.* at 252,
4 106 S.Ct. at 2512. The non-moving party cannot rely on conclusory
5 allegations alone to create an issue of material fact. *Hansen v.*
6 *United States*, 7 F.3d 137, 138 (9th Cir. 1993). Rather, the non-
7 moving party must present admissible evidence showing there is a
8 genuine issue for trial. Fed.R.Civ.P. 56(e); *Brinson v. Linda Rose*
9 *Joint Venture*, 53 f.3d 1044, 1049 (9th Cir. 1995). An issue of fact
10 is genuine if the evidence is such that a reasonable jury could return
11 a verdict for the nonmoving party. *Anderson*, 477 U.S. at 248, 106
12 S.Ct. at 2510. "If the evidence is merely colorable...or is not
13 significantly probative,...summary judgment may be granted." *Id.* at
14 249-50, 106 S.Ct. at 2511 (citations omitted).

15 **III. DISCUSSION**

16 Washington's Tort Reform Act of 1981, codified at RCW 4.22 RCW,
17 allows the fact finder to compare the respective fault of the claimant
18 and the defendant. Contributive fault does not bar recovery, but it
19 diminishes proportionally the amount of damages awarded. RCW 4.22.005.
20 RCW 4.22.070(1) states that in "all actions involving fault of more
21 than one entity, the trier of fact shall determine the percentage of
22 the total fault which is attributable to every entity which caused the
23 claimant's damages...." "'Fault,' under chapter 4.22 RCW does not
24 include intentional acts or omissions." *Tegman v. Accidental &*
25 *Medical Investigations, Inc.*, 150 Wash.2d 102, 109, 75 F.3d 497, 500
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1 (2003). Thus, Washington's comparative fault statute does not apply
2 to intentional torts. *Id.* (citations omitted).

3 **A. Plaintiffs' Assault Claims**

4 Assault is an intentional tort. *Honegger v. Yoke's Wash. Foods,*
5 *Inc.*, 83 Wash.App. 293, 297, 921 P.2d 1080 (Div. 3, 1996). Because
6 comparative fault is inapplicable in the context of an intentional
7 tort, *Morgan v. Johnson*, 137 Wash.2d 887, 896, 976 P.2d 619 (1999),
8 Defendants cannot assert comparative fault as an affirmative defense
9 to Plaintiffs' claims for assault.

10 **B. Plaintiffs' § 1983 Claims**

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12 An analysis of whether the Officers' use of force was excessive
13 will necessarily entail a consideration of the extent to which the
14 Plaintiffs may have made such force necessary by their conduct because
15 to determine whether the Officers' used excessive force the jury will
16 have to determine whether the Officers' use of O.C. spray was
17 "reasonable" in light of the circumstances. However, this does not
18 mean comparative fault is applicable to Section 1983 claims. Although
19 the United States Supreme Court has never directly ruled on the
20 question, it is generally accepted that a cause of action under
21 Section 1983 for use of excessive force in violation of the Fourth
22 Amendment must be based on something more than mere negligence. This
23 view is supported by the Supreme Court's view in *Baker v. McCollan*,
24 443 U.S. 137, 146, 99 S.Ct. 2689, 2695 (1979) ("Section 1983 imposes
25 liability for violations of rights protected by the Constitution, not
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1 for violations of duties of care arising out of tort law"), and by its
2 statement in *Daniels v. Williams*, 474 U.S. 327, 333, 106 S.Ct. 662,
3 666 (1986) ("injuries inflicted by governmental negligence are not
4 addressed by the United States Constitution").¹ Furthermore, in the
5 Ninth Circuit, liability under Section 1983 requires proof "the acts
6 or omissions of the defendant were intentional[.]" Manual of Model
7 Civil Jury Instructions (9th Cir. 2004 ed.), Section 11.1,
8 www.ce9.uscourts.gov. Thus, because comparative fault is inapplicable
9 in the context of an intentional tort, *Morgan*, 137 Wash.2d at 896, 976
10 P.2d at 623, the Court concludes Defendants' affirmative defense of
11 comparative fault is inapplicable to Plaintiffs' Section 1983 claims.

12 **C. Plaintiffs' Negligence Claims**

13 Although Washington's comparative fault statute is not applicable
14 to Plaintiffs' assault claims or Plaintiffs' claims under Section
15 1983, it is applicable to Plaintiffs' negligence claims. Under
16 Washington's comparative fault statute, Plaintiffs' damages are
17 diminished in proportion to the percentage of negligence attributable
18 to them or to other third parties. RCW 4.22.005. Contributory
19 negligence is negligence on the part of the person claiming injury
20 that is a proximate cause of the injury claimed. Washington Pattern
21 Jury Instructions, 11.01. The essential elements in an action for
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24 ¹ In *Zinermon v. Burch*, 494 U.S. 113, 129 n. 14, 110 S.Ct.
25 975, 985 (1990), the Supreme Court described *Daniels v. Williams*
26 as ruling "that a negligent act by a state official does not give
rise to § 1983 liability."

1 negligence include: (1) the existence of a duty owed to the
2 complaining party, (2) breach of that duty; (3) resulting injury, and
3 (4) proximate cause between the breach and the injury. *Christen v.*
4 *Lee*, 113 Wash.2d 479, 488, 780 P.2d 1307 (1989). Thus, the threshold
5 issue is whether there was duty owed. *Taylor v. Stevens County*, 111
6 Wash.2d 159, 164, 759 P.2d 447 (1988). The existence of duty is a
7 question of law. *Hutchins v. 1001 Fourth Ave. Assocs.*, 116 Wash.2d
8 217, 220, 802 P.2d 1360 (1991). However, once the initial
9 determination of duty has been made by the Court, the trier of fact
10 determines the scope of liability associated with that duty. *Bernethy*
11 *v. Walt Failor's Inc.*, 97 Wash.2d 929, 933, 653 P.2d 280 (1982). In
12 carrying out this responsibility, the trier of fact must determine
13 whether the harm sustained was foreseeable. *Christen*, 113 Wash.2d at
14 492, 780 P.2d 1307 ("The concept of foreseeability limits the scope of
15 duty owed.").

16 Here, Defendants allege the following individuals and entities
17 are at fault for the Plaintiffs' injuries: Top of China, The Attic,
18 its agents or employees, the Omega Psi Phi Fraternity, and Ira Davis,
19 Alvin Tolliver, Fred Shavies, Reggie Robinson, Johnny Jones, Damon
20 Arnold, Quincy Jones, Quantavian Wilson, Aaron Morris, Derrick Lang,
21 and Corey. Answer, ¶ 14. Plaintiffs argue that none of the facts
22 support a finding of "fault" with respect to any of these individuals
23 or non-party entities.

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Owners of Top of China and The Attic

As a general rule, there is no duty to prevent third persons from physically harming others. *Taggart v. Sandau*, 118 Wash.2d 195, 218, 822 P.2d 25 (1992). An exception to this general rule arises when

(a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or

(b) a special relation exists between the actor and the other which gives to the other a right to protection.

Id. (quoting Restatement (Second) of Torts § 315 (1965)). A special relationship exists between a business and its invitee that gives rise to a duty of the business to protect the invitee against harmful conduct by third persons. *Nivens v. 7-11 Hoagy's Corner*, 133 Wash.2d 192, 202, 943 P.2d 286 (1997). Here, the Top of China and The Attic is a business and Plaintiffs, as patrons, are invitees. Thus, the Top of China and The Attic ("Owners") owed the Plaintiffs a duty of reasonable care to protect them from harmful conduct of others. *Christen*, 113 Wash.2d at 504, 780 P.2d 1307. The owner of a tavern also has a statutory duty to refrain from furnishing alcohol to minors and to an obviously intoxicated person. *Schooley v. Pinch's Deli Market, Inc.*, 134 Wash.2d 468, 480, 951 P.2d 749, 755-56 (1998); *Estate of Kelly*, 127 Wash.2d 31, 37, 896 P.2d 1245, 1247 (1995); *Christen*, 113 Wash.2d at 491, 780 P.2d 1307.

The duty of the Owners to prevent third party injuries to Plaintiffs as a business-invitee is not absolute. It is limited by the concept of foreseeability. *Christen*, 113 Wash.2d at 492, 780 P.2d

1 1307; *Nivens*, 133 Wash.2d at 202; 943 P.2d 286. Specifically, the
2 Owners' duty to prevent third party injuries extends only to those
3 injuries "reasonably perceived as being within the general field of
4 danger covered by" the business-invitee duty. *Christen*, 113 Wash.2d
5 at 492, 780 P.2d 1307. Here, the injuries Plaintiffs complain of were
6 not caused by a direct act or omission by the Owners, but by an
7 intervening third party. In some circumstances, an intervening act by
8 a third party may be foreseeable. *McLeod v. Grant County. Sch. Dist.*
9 *No. 128*, 42 Wash.2d 316, 329, 255 P.2d 360 (1953). However, the
10 Washington Supreme Court has stated that "an intervening act is not
11 foreseeable if it is so highly extraordinary or improbable as to be
12 wholly beyond the range of expectability." *Christen*, 113 Wash.2d at
13 492, 780 P.2d 1307 (citation and internal quotations omitted). Thus,
14 it is not...the unusualness of the act that resulted in injury to
15 plaintiff that is the test of foreseeability, but whether the result
16 of the act is within the ambit of the hazards covered by the duty
17 imposed upon" the Owners by the business-invitee relationship.
18 *Rikstad v. Holmberg*, 76 Wash.2d 265, 269, 456 P.2d 355 (1969).

19 Here, Defendants argue Plaintiffs' injuries were foreseeable
20 because the Owners (1) illegally over-packed a small club; (2) failed
21 to provide adequate security; and (4) failed to remove intoxicated
22 persons from the club (i.e. Alvin Tolliver). Defendants rely on
23 *Miller v. Staton*, 354 P.2d 891, 892 (1960), wherein the Washington
24 Supreme Court held that the duty of a tavern keeper to protect a
25 patron from injury by another arises only when one or more of the
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1 following circumstances exist: (1) the "tavern keeper failed to stop a
2 fight as soon as possible after it started"; (2) the "tavern keeper
3 failed to provide a staff adequate to police the premises"; and (3)
4 the "tavern keeper tolerated disorderly conditions." 354 P.2d 891,
5 892 (1960). Here, the record shows the existence of material issues
6 of fact with respect to these conditions. However, in *Miller*, the
7 plaintiff, a patron of the defendant's bar, was injured by another
8 patron in a bar fight. Here, Plaintiffs were injured by an
9 intervening, third party. Thus, *Miller* does not control the
10 foreseeability question in this case.

11 Although foreseeability is normally an issue for the jury, it
12 will be decided as a matter of law where reasonable minds cannot
13 differ. *Christen*, 113 Wash.2d at 492, 780 P.2d 1307. Here, the Court
14 concludes that the Officers' use of O.C. spray was "so highly
15 extraordinary or improbable as to be wholly beyond the range of
16 expectability." *Id.* The Court concurs with the Plaintiffs and finds
17 as a matter of law that the injuries sustained by Plaintiffs because
18 of the Officers' use of O.C. were so unexpected they could not have
19 been reasonably foreseen by the Owners. Reasonable minds would agree
20 the Officers' use of O.C. spray was outside the "general field of
21 danger" from which the Owners, as a business, had a duty to protect
22 its invites, the Plaintiffs.

23 Defendants also argue the Plaintiffs' injuries were foreseeable
24 because the Owners over-served drunk individuals and served alcohol to
25 minors. The serving of alcohol to any Plaintiffs who were minors or
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1 who were "obviously intoxicated" is a breach of the Owners' duty.
2 *Schooley v. Pinch's Deli Market, Inc.*, 134 Wash.2d 468, 480, 951 P.2d
3 749, 755-56 (1998); *Estate of Kelly*, 127 Wash.2d 31, 37, 896 P.2d
4 1245, 1247 (1995); *Christen*, 113 Wash.2d at 491, 780 P.2d 1307.
5 However, before liability can be imposed for that breach, it must also
6 be established that the resulting harm was foreseeable. *Christen*, 113
7 Wash.2d at 491, 780 P.2d 1307. The *Christen* court held that an
8 assault is not a foreseeable result of furnishing intoxicating liquor
9 to an obviously intoxicated person, unless the drinking establishment
10 which furnished the intoxicating liquor had some notice of the
11 possibility of harm from prior actions of the persons causing the
12 injury, either on the occasion of the injury, or on previous
13 occasions. 113 Wash.2d at 492, 780 P.2d 1307. Here, even if the
14 Owners did breach their duty by furnishing alcohol to obviously
15 intoxicated persons and/or minors, Plaintiffs' injuries sustained as a
16 consequence of the Officers' use of O.C. spray were not a foreseeable
17 result because there is no evidence that the Owners had any notice
18 that the Officers would arrive and use O.C. spray on a crowd of people
19 inside a building.

20 ***Plaintiffs Arnold and Jones***

21 Defendants contend Plaintiffs Arnold and Jones were hired as
22 security guards and that they therefore assumed a duty to protect the
23 individuals at the social event. However, when the fight broke out,
24 these two faculty advisors were allegedly across the street drinking
25 at another bar. Therefore, Defendants argue Plaintiffs Arnold and
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1 Jones were negligent because they abandoned their duties and
2 responsibilities as chaperones.

3 Washington courts recognize that "liability can arise from the
4 negligent performance of a voluntarily undertaken duty." *Folsom v.*
5 *Burger King*, 135 Wash.2d 658, 676, 958 P.2d 301 (1998). "A person who
6 undertakes, albeit gratuitously, to render aid to or warn a person in
7 danger is required by Washington law to exercise reasonable care in
8 his or her efforts. *Id.* (citing *Brown v. MacPherson's, Inc.*, 86
9 Wash.2d 293, 299, 545 P.2d 13 (1975)). Assuming, without deciding,
10 that Plaintiffs Arnold and Jones did breach their duty, before
11 liability attaches, it must also be established that Plaintiffs'
12 injuries were a foreseeable result of that breach. However, as the
13 Court determined above, Plaintiffs' injuries were not reasonably
14 foreseeable to the Owners because the Officers' use of O.C. were so
15 unexpected. For the same reasons, Plaintiffs' injuries were not a
16 reasonably foreseeable consequence of any duty the "chaperones" may
17 have breached.

18 ***Disc Jockey & Hosts and Planners of the Social Event***

19 Defendants argue Damon Golden, the disc jockey for the social
20 function, is also at fault because he initiated the fight by playing
21 the theme song of one of two fraternities who were on the dance floor.
22 However, Defendants do not specify what duty Damon Golden allegedly
23 breached in playing certain songs in his capacity as the disc jockey.
24 Reasonable minds would agree Damon Golden did not breach his duty to
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1 use "reasonable care" in performing his job as a disc jockey by
2 playing a certain song. Therefore, the Court concludes Defendants
3 cannot apportion fault to the disc jockey solely for his choice of
4 music.

5 Defendants also argue they should be able to apportion fault to
6 the fraternity that hosted the party (Omegas) and those individuals
7 who helped organize the party. However, Defendants have not pointed
8 to any specific duty that these individuals and/or entities allegedly
9 breached and how Plaintiffs' injuries were the foreseeable
10 consequences of that breach. A defendant is not entitled to present
11 an affirmative defense unless it can produce evidence sufficient to
12 prove the defense by a preponderance of the evidence; a mere scintilla
13 of evidence does not satisfy this burden. *Boyle v. Lewis*, 30 Wash.2d
14 665, 676, 193 P.2d 332 (1948). Therefore, the Court concludes the
15 planning of the social function does not, in itself, allow Defendants
16 to apportion fault for the Plaintiffs' injuries to those individuals
17 and/or entities who organized and planned the social event.

18 **IV. CONCLUSION**

19 Neither the facts contained in the record nor the reasonable
20 inferences therefrom create a genuine issue of material fact that the
21 Plaintiffs' injuries sustained from the Officers' use of O.C. spray
22 were reasonably foreseeable to the Owners. Therefore, the Court
23 concludes reasonable minds would agree the Officers' use of O.C. spray
24 was outside the "general field of danger" from which the Owners, as a
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1 business, had a duty to protect its invitees, the Plaintiffs.
2 Therefore, Defendants cannot apportion fault to the Top of China and
3 The Attic. For these same reasons, the Court determines the
4 Defendants cannot apportion fault to the individuals and entities
5 responsible for the planning of the social event, solely for their
6 role in planning and organizing the social event. Further, the Court
7 concludes Defendants cannot apportion fault to the disc jockey solely
8 for his choice of music. Finally, Defendants cannot apportion fault
9 to Plaintiffs Arnold and Jones on the basis that they breached their
10 duty as "chaperones." Accordingly,

11 **IT IS HEREBY ORDERED** that Plaintiffs' Motion for Summary Judgment
12 Re: Defendants' Affirmative Defense Alleging Comparative Fault
13 Against Others, **Ct. Rec. 198**, is **GRANTED** to the extent indicated
14 herein.

15 **IT IS SO ORDERED.** The District Court Executive is hereby
16 directed to enter this Order and furnish copies to counsel.

17 **DATED** this 14th day of April, 2006.

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19 s/ Fred Van Sickle
20 Fred Van Sickle
21 United States District Judge
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