COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS

SUPERIOR COURT
C.A. NO. 06-4293

CHARLES HOFF, Plaintiff, v. MARY ANN MINER, Defendant.	Plaintiff Charles Hoff's Opposition to the Motion of Defendant Mary Miner for Summary Judgment and Memorandum in Support of Opposition and Request for Hearing and Oral Argument

Opposition.

Plaintiff Charles Hoff ("Hoff") opposes the motion of defendant Mary Miner ("Miner") for summary judgment. The grounds for this opposition are set forth in the following memorandum.

Memorandum.

Hoff submits this memorandum of law in support of his opposition to Miner's motion for summary judgment. This case arises from an incident in which Hoff, while a social guest at Miner's condominium, was stabbed and seriously injured by Sammourett (Sam) Manning ("Manning"), a former boyfriend of Miner's. Having observed Manning's behavior during their recently terminated relationship, Miner knew of Manning's violent tendencies and the likelihood that Manning would attack Hoff. Despite this knowledge, and although she believed that Manning was lurking outside her condominium on the night in question, Miner negligently failed to warn Hoff of the danger when he left her condominium to investigate a series of suspicious doorbell rings. In fact, she caused Hoff to leave the condominium to investigate by

misrepresenting to him that she did not know who was ringing the doorbells when she strongly suspected that Manning was responsible.

In support of her motion for summary judgment, Miner asserts that, as a social host, she owed Hoff no duty to protect him from the criminal acts of a third party and that, in any event, the attack was not foreseeable. As set forth below, however, Miner misconstrues the nature of Hoff's claims. Hoff does not argue that, solely by virtue of her status as social host, Miner stood in a special relationship with Hoff imposing on her a duty to protect Hoff from criminal conduct by Manning. Hoff's claim is not based solely on Miner's failure to warn (nonfeasance). Instead, Hoff's position is that the evidence raises at least a genuine issue of material fact as to whether Miner's affirmative conduct (misfeasance) created or contributed to a dangerous situation which ultimately led to the attack on Hoff. She invited Hoff to her condominium after having failed to return four phone calls from Manning, conduct which she knew had in the past prompted Manning to come to her home without notice and uninvited (she failed to return a fifth phone call while Hoff was there). In addition, although she believed that Manning was on the property, and was afraid of him, Miner misrepresented to Hoff that she didn't know who was responsible for the multiple doorbell rings, prompting him to go outside to investigate. These affirmative acts on Miner's part (the invitation and the misrepresentation) helped bring about the dangerous meeting between Hoff and Manning which led to Hoff's injury.

Under such circumstances, established Massachusetts law imposes on Miner a duty to protect Hoff, at least by warning him of the danger. Therefore, summary judgment should be denied.

1. Facts.

The following facts are drawn from the Affidavit of Charles Hoff ("Hoff Affidavit"), filed herewith, the Deposition of Charles Hoff in his civil action against Manning, taken October 17, 2005 ("Hoff Deposition"), excerpts from which are attached hereto as Exhibit "A", the Deposition of Mary Miner in Hoff's civil action against Manning, taken October 17, 2005 ("Miner Deposition"), excerpts from which are attached hereto as Exhibit "B", and a chronology prepared by Miner and provided by her to Hoff ("Chronology") attached hereto as Exhibit "C".

At approximately 11:00 p.m. on Saturday, April 2, 2005, Hoff was visiting Miner at her condominium at 90 Swan Street, Lowell, Massachusetts, at her invitation. Hoff Affidavit ¶3. Miner and Hoff had been friends for many years. Id. Hoff had called Miner between 10:00 p.m. and 11:00 that evening and she had invited him to visit. Miner Deposition, p. 5, ll. 13-14, 19-23; Hoff Deposition, p. 46, l. 12.

Shortly after Hoff arrived at Miner's condominium and while she was showing him around her new condominium, her cell phone rang. Hoff Affidavit ¶4. Miner did not take the call. Id. After the cell phone rang, Hoff asked Miner who had called and she said that it was just "some guy that she had been seeing." Id.

Shortly after the unanswered cell phone call from Manning, the downstairs (ground floor) doorbell of Miner's condominium rang. Id. at ¶6. While she went to answer the downstairs doorbell, the front doorbell (first floor) rang and when she opened the front door there was no one there. Id. Almost immediately, the downstairs doorbell rang again and again there was no one there. Id.

Hoff asked Miner what was going on and if she was expecting somebody. She said that she did not know what was going on. Id. at ¶7; Miner Deposition, p. 8, l. 23, p. 9, ll. 1-2. At the

time, Hoff did not know who had called Miner on her cell phone just before the doorbells started to ring. Hoff Affidavit ¶8. Nor did Hoff know of Tom Manning or of his relationship with Miner. Id.

After the doorbells rang for the third time, Hoff thought that it was kids playing games ringing doorbells. Id. at ¶10. Hoff said to Miner that he would go outside and see what was going on and he went out the front door. Id. Miner did not accompany Hoff and did not say anything to him, but simply watched Hoff go out the front door of her condominium, which was the end unit. Id.

After Hoff left the condominium, he walked around it toward Miner's back door, which was next to her garage on the ground level. Id. at ¶11. When he came around the corner of the building, he saw a man (now known to be Manning) who was just beyond Hoff's car, which he had parked in the parking area just behind and contiguous to Miner's condominium. Id. Hoff did not know the man and several times Hoff asked him what he was doing and who he was. Id. Hoff identified himself and, at that time, Hoff and the man were probably five to ten feet from each other. Id. The man was acting strangely and, after a few minutes, he came toward Hoff and put his hand under Hoff's arm. Id. Hoff felt immediate terrible pain. Id. Although Hoff was stabbed, he never saw the weapon. Id. The man said something to Hoff such as "how did that feel?" and left. Id. Hoff went toward Miner's open garage, saw Miner standing outside of her garage and told her to call 911. Id.

Miner witnessed Hoff's encounter with Manning. Id. When she was inside her garage with the door open and looking out, Miner recognized Manning right away. Id. at ¶13. She did nothing, however, to warn Hoff of the danger posed by Manning.

When, on the night of the attack, Miner received but did not answer a phone call from Manning while Hoff was visiting, and shortly thereafter her door bells rang repeatedly, Miner had reason to know that Manning was on her property. After the attack on Hoff, Miner told Hoff that when the doorbells rang and no one was there she thought it was Manning because he had just called her on her cell phone and because he had come to her condominium unannounced and uninvited on more than one occasion. Id. at ¶9, 13. According to Miner's Chronology, on Sunday, March 27, 2005, just six days before Hoff was attacked, Manning had appeared uninvited at Miner's condominium at 11:30 p.m., after she had failed to return his phone calls. Chronology, p. 4.

She also had reason to know, and in fact believed, that Manning was dangerous. After the incident, Miner told Hoff that she had not accompanied him outside to investigate the doorbell rings because she was afraid it was Manning and was afraid that Manning might do something crazy and dangerous as he had done in the past. Hoff Affidavit ¶13. Miner's also told Hoff that during her stormy relationship with Manning, prior to the attack on Hoff, Manning was possessive of her, could be violent and had "forced himself on her" in the past. Id. at ¶16. She also told Hoff that Manning had previously beaten his former wife's boyfriend with a baseball bat. Id. In her Chronology, Miner states:

> He told me of a situation with his ex-wife's boyfriend that shook me and now I'm in Florida with him and nobody in my immediate family knew where. He told me that when he learned that his wife had cheated on him, he watched the comings and goings of the boyfriend (he called Charlie Taylor). And that upon learning his pattern, disguised himself in old clothes, an overcoat, and big shoes. He stressed the shoes. He rented an older car and muddied the plate and upon coming up to Charlie Taylor beat his legs with a baseball bat. He told me that he was questioned regarding the incident but 'Charlie Taylor' could not identify his attacker. He got away with it and seemed proud that he had done it....

Chronology, p. 1, March 16 entry. According to Mary Miner, she had broken up with Manning prior to his attack on Hoff, but was afraid of Manning and afraid of what he might do. Hoff Affidavit ¶16. In fact, Manning had threatened to "hurt" Miner. Chronology, p. 2, March 22 Entry. Miner's Chronology is replete with further references to her fear of Manning and his potential for violence:

> --"I was home alone and decided to let my dog outside the front door when I saw him ... drive by and turn into my condo entrance. I quickly yanked the dog back in and went to the kitchen window and saw him get out of his car and leave something at my back door. I couldn't see what he left, but now I was afraid. ... I was afraid to check out what he had left but did. Id., p. 2, March 18 entry. (Emphasis added);
> --"I was shaken to the core. I had to tell someone. I was truly afraid now and had to let somebody know what this 'sick little man' had said to me.... I truly believed at this point that he would indeed hurt me and that if I didn't tell someone .... no one would ever suspect him of doing anything bad. He could change so quickly to being so charming and deny doing anything to hurt anybody to a threatening bastard." Id., p. 3, March 22 entry. (Emphasis added);
> --"I was packing up to leave when I had to pass him in the corridor, I didn't even look at him; but my whole body was shaking." Id., p. 3, March 23 entry.

Miner's own conduct caused or substantially contributed to the dangerous situation Hoff found himself in when he encountered Manning outside Miner's condominium. Although on past occasions Miner's failure to return Manning's phone calls had prompted him to come uninvited to her condominium, Miner invited Hoff to visit her after having failed to return four successive phone calls, three earlier that same evening and the last received less than 20 minutes before her invitation to Hoff. Id., p.6, April 1 and April 2 entries. In addition, she received but failed to return a fifth call from Manning shortly after Hoff arrived, making it even more likely that Manning would personally come to the condominium while Hoff was present. Id., p.6, April 2 entry.

Miner also affirmatively created the dangerous situation by misrepresenting to Hoff that she did not know who was ringing the doorbell, thereby prompting him to leave the safety of the

condominium to investigate. When the doorbell first rang, Hoff asked Miner if she was expecting anybody. Hoff Deposition, p. 50, l. 20. In response, Miner said "No." Id., p. 50, l. 22. Miner admits that after the suspicious door bell rings, Hoff asked her "what's going on?" Miner Deposition, p. 9, l. 1. Rather than telling Hoff of her belief that Manning was on the premises, Miner simply replied "I don't know." Id. at p. 9, l. 2. Immediately upon hearing Miner's reply, Hoff went outside to investigate. Id. at p. 9, l. 6.

After the attack, while Hoff was still in the hospital, Miner apologized to Hoff while crying, saying that "it was all my fault" and "I should have warned you." Since Hoff has been out of the hospital, Miner has repeatedly apologized and said that it was her fault. Hoff Affidavit ¶12.

2. Argument.

2.1 The standard for summary judgment.

Summary judgment is proper only if there exists no genuine issue of material fact and, based upon the undisputed facts, the moving party is entitled to judgment as a matter of law. Mass.R.Civ.P. 56(c).[1] "[G]ranting summary judgment is error where the party opposing the motion has alleged facts relating to the transaction on which suit has been brought which raise issues entitling him to trial." Wheatly v. American Telephone and Telegraph Company, 418 Mass. 394, 397 (1994).

The party moving for summary judgment initially has the burden of "affirmatively demonstrating that there is no genuine issue of material fact on every relevant issue, even if he

[1]See, also, Massachusetts Hospital Association, Inc. v. Department of Public Welfare, 419 Mass. 644, 649 (1995); SCA Services, Inc. v. Transportation Insurance Company, 419 Mass. 528, 531 (1995); Marenghi v. Mobil Oil Corp., 416 Mass. 643, 646-47 (1993); Theran v. Rokoff, 413 Mass. 590, 591 (1992); McGuinness v. Cotter, 412 Mass. 617, 620 (1992); Willitts v. Roman Catholic Arch Bishop, 411 Mass. 202, 203 (1991).

would not have the burden on an issue if the case were to go to trial."[2] Only after the moving party has successfully made an initial demonstration that there is no genuine issue of material fact, does the burden shift to the non-moving party to respond by alleging facts which would establish the existence of such a genuine issue.[3] In determining if a genuine issue of material fact exists, a court must view the record in the light most favorable to the non-moving party and must draw all reasonable inferences in favor of that party.[4]

In the present case, summary judgment would not be appropriate because there exist genuine issues of material fact and Miner is not entitled to judgment as a matter of law.

2.2 Miner owed Hoff a duty of care and breached that duty.

2.2.1 Where an actor knows or reasonably should know that her affirmative conduct has created an unreasonable risk of harm to another through the intentional, tortious or criminal conduct of a third party, the actor has a duty to at least warn the other person of the danger so as to prevent the risk she had created from taking effect.

While a person generally has no duty to aid or protect another from harm (Restatement (Second) of Torts, §314), "there are exceptions to this proposition and many situations in which it does not apply." Jupin v. Kask, 447 Mass. 141, 148 (2006). One such exception exists where the defendant's prior, affirmative conduct has created or contributed to the risk which ultimately results in harm to the plaintiff.

In Jupin, the Supreme Judicial Court quoted an applied §302B of the Restatement which states:

> An act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of ... a third person which is intended to cause harm, even though such conduct is criminal.

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[2] SCA Services, 419 Mass. at 531; Pederson v. Time, Inc., 404 Mass. 14, 17 (1989).
[3] SCA Services, 419 Mass. at 531.
[4] SCA Services, 419 Mass. At 531; Kelley v. Rossi, 395 Mass. 659, 661 (1985); Coveny v. President and Trustees of the College of the Holy Cross, 388 Mass. 16, 17 (1983); Attorney General v. Bailey, 386 Mass. 367, 371 (1982).

447 Mass. at 148. The Jupin Court also quoted comment "e" to §302B, noting that a "reasonable person [is] required to anticipate and guard against criminal misconduct 'where the actor's own affirmative act has created or exposed the [victim] to a recognizable high degree of harm through such misconduct, which a reasonable man would take into account.'"[5]

Notably, the duty imposed by §302B does not depend on the existence of a so-called "special relationship" between the actor and either the person harmed or the third party who causes the harm. "It is simply the duty that one person owes to another to act with care when he knows or should know that his action poses an unreasonable risk of harm to the other through the intentional conduct of a third person." McIntyre v. United States, 447 F.Supp.2d 54, 107 (D. Mass. 2006).

Massachusetts law also incorporates §321 of the Restatement, which provides:

> (1) If the actor does an act, and subsequently realizes or should realize that it has created an unreasonable risk of causing physical harm to another, he is under a duty to exercise reasonable care to prevent the risk from taking effect.
>
> (2) The rule stated in Subsection (1) applies even though at the time of the act the actor has no reason to believe that it will involve such a risk.

Comment "a" to §321 explains that,

> [E]ven where he has had no reason to believe, at the time of the act, that it would involve any unreasonable risk of physical harm to another, he is under a duty to exercise reasonable care when, because of a change of circumstances, or further knowledge of the

[5] See also Restatement §314, com. "a" ("The general rule stated in this section should be read together with other sections which follow. Special relations may exist between the actor and the other ... which impose upon the actor a duty to take affirmative precautions.... The actor may have control of a third person, or of land .... The actor's prior conduct, whether tortious or innocent, may have created a situation of peril to the other, as a result of which the actor is under a duty to act to prevent harm, as stated in §§321 and 322.(emphasis added)).

> situation which he has acquired, he realizes or should realize that he has created such a risk.

Illustration "2" to that section imposes liability in a situation, like the present case, where the defendant realizes that his actions have created a risk of injury to the plaintiff, but fails to provide a warning:

> A, reasonably believing his automobile to be in good order, lends it to B to use on the following day. The same night A's chauffeur tells him that the steering gear is in dangerously bad condition. A could readily telephone B and warn him of the defective steering gear but neglects to do so. B drives the car the following day, the steering gear breaks and the car gets out of control, causing a collision with the car of C in which B and C are hurt. A is subject to liability to B and C.

(Emphasis added).

In Commonwealth v. Lovesque, 436 Mass. 443, 449 (2002), the Supreme Judicial Court adopted, in substance, §321:

> The civil law creates a specific duty that we may apply to the situation in this case. The Restatement (Second) of Torts § 321(1) (1965) ....
>
> Although we have yet to recognize explicitly § 321 as a basis for civil negligence ... we have expressed agreement with its underlying principle. It is consistent with society's general understanding that certain acts need to be accompanied by some kind of warning by the actor.... In Onofrio v. Department of Mental Health ... we held that employees of the Department of Mental Health breached a duty owed to the owner of a rooming house by soliciting a client's placement in the house without providing the owner with sufficient information about the client's mental health history.... The owner suffered property damage when the client set fire to the house.... The court concluded that the employees, "by taking action that exposed [the owner] to risk ... were bound, as any other person would be, to act reasonably."... In Onofrio, the act of placing the client in the house was not in itself negligent, but by placing the client, the employees of the Departmental of Mental Health created a risk that resulted in a corresponding duty to warn. We agree with this principle and apply it to this case; where one's actions create a life-threatening risk to another, there is a duty to

> take reasonable steps to alleviate the risk. The reckless failure to fulfil [sic] this duty can result in a charge of manslaughter.

See also Limone v. U.S., ___ F.Supp.2d ___, 2007 WL 2141959, *59 (D. Mass. 7/26/07) (applying §321 in a civil action and stating: "Section 321 was adopted by the Massachusetts Supreme Judicial Court in substance in ... Lovesque ...."); Rakes v. U.S., 352 F.Supp.2d 47, 57-58 (D. Mass. 2005) (applying §321 in a civil action); Estate of Davis v. U.S., 340 F.Supp.2d 79, 90 (D. Mass. 2004) (applying §321 in a civil action, stating that Massachusetts law "has embraced the principal, if not the actual text, of this rule."). See Luoni v. Berube, 431 Mass. 729, 733-34 (2000); Cremins v. Clancy, 415 Mass. 289, 296 (1993) (O'Connor, J., concurring); O'Gorman v. Antonio Rubinaccio & Sons, Inc., 408 Mass. 758 (1990) (all finding no duty because the defendant had not created or contributed to the danger faced by the plaintiff).

The same duty concepts are applied in social host liability cases involving alcohol related harm, where the courts regard as critical the fact that the liquor was provided by the host, thereby contributing to the risk posed to other guests (or the general public) by the intoxicated person, Pollard v. Powers, 50 Mass. App. Ct. 515, 517-18 (2000) ("It is in the furnishing of alcohol to a guest that a host knew or should have known was already intoxicated that liability may attach"), and have been incorporated in the Massachusetts Tort Claims Act, G.L. c. 258, 10(j) (excluding liability for "any claim based on an act or failure to act to prevent or diminish the harmful consequences of a condition or situation, including the violent or tortious conduct of a third person, which is not originally caused by the public employer ...." (Emphasis added)).

2.2.2 In the present case, because Miner's own, affirmative conduct created or contributed to the risk that Hoff would be attacked by Manning, and because that risk was foreseeable, she owned Hoff a duty to warn him of the danger and breached that duty by failing to do so.

A. Miner's own, affirmative conduct created or contributed to the risk that Hoff would be attacked by Manning.

As set forth in the factual section of this memorandum, this is not a case of simple failure to act on Miner's part. To the contrary, the dangerous meeting between Hoff and Manning would not have occurred, and Hoff would not have been attacked, but for Miner's affirmative acts of negligence.

Her affirmative conduct took a number of forms. First, she invited Hoff to her condominium on the evening in question. She invited him even though she knew that Manning was potentially dangerous (he had threatened to "hurt" her and had attacked the boyfriend of his former wife with a deadly weapon (a baseball bat)), even though she also knew that Manning was excessively jealous and should reasonably have known that Manning might irrationally believe Hoff to be Miner's boyfriend if they met, and even though Miner had reason to expect that Manning would come to her condominium that evening (as she had not returned four calls from him and on past occasions her failure to return Manning's phone calls had prompted him to come uninvited to her condominium). She further increased the likelihood that Manning would come to the condominium by failing to return a fifth phone call during Hoff's visit.

Second, Miner helped create the dangerous meeting between Hoff and Manning when she misrepresented to Hoff that she did not know who was ringing the doorbell, thereby prompting him to leave the safety of the condominium to investigate. When the doorbell first rang, Hoff asked Miner if she was expecting anybody. Hoff Deposition, p. 50, l. 20. In response, Miner said "No." Id., p. 50, l. 22. Miner admits that after the suspicious door bell rings, Hoff asked

her "what's going on?" Miner Deposition, p. 9, l. 1. Rather than telling Hoff of her belief that Manning was on the premises, Miner simply replied "I don't know." Id. at p. 9, l. 2. That statement was untrue. After the attack on Hoff, Miner told Hoff that when the doorbells rang and no one was there she thought it was Manning. Hoff Affidavit ¶9, 13.

Miner's misrepresentation caused Hoff to leave the safety of the condominium to investigate the who was ringing the doorbells. This is evident from the fact that immediately upon hearing Miner say she did not know what was "going on," Hoff went outside. Id. at p. 9, l. 6.

B. It was reasonably foreseeable, under the circumstances, that Manning would attack Hoff, even if the particular nature of the attack could not be predicted.

While Miner claims that the she could not have foreseen Manning's attack on Hoff, the facts make clear that the attack was foreseeable. In Pollard, the Court held that there was a genuine issue of material fact, precluding summary judgment, as to whether a social host should reasonably have foreseen a sudden, "sucker punch" attack by an uninvited visitor on her guest. The Court noted that the host knew the uninvited visitor and his companions to be "very drunk" and "loud and obnoxious." 50 Mass. App. Ct. at 519. There also was evidence that the "presence of the [uninvited visitors] made [the host] uneasy" and that one had verbally assaulted the host's sister. Id. On that evidence, the Court held a jury could find that a "reasonable host should have foreseen danger." Id. at 518.

In the present case, the warning signs were even clearer than in Pollard. Miner knew, both from her own personal experience and from what Manning had told her of his attack on his ex-wife's boyfriend, that he was irrationally jealous and hostile toward men who dated (or appeared to date) women with whom Manning had had romantic relationships. Miner admitted

that Manning had threatened her with physical harm and that she believed he would harm her. She also knew that he had, in fact, attacked his ex-wife's boyfriend with a deadly weapon. Further, under the circumstances, she knew or should have known that Manning was likely to be lurking on the premises when Hoff went out to investigate the doorbell rings. The danger was extremely clear.

Moreover, even if the danger were not clear to Miner when Hoff first left the condominium to investigate, it no doubt became clear when Miner saw that Hoff and Manning had confronted one another and that Manning was acting strangely. As provided by §321 of the Restatement, even if Miner did not realize the risk when she invited Hoff to her condominium and when she later misrepresented that she did not know what was going on, when she subsequently realized the risk her earlier acts had created she was then "under a duty to exercise reasonable care to prevent the risk from taking effect." When she saw Hoff and Manning standing only a few feet apart, Miner was obligated to warn Hoff of the imminent danger.

Miner claims that the attack was not foreseeable because: (1) there was no reason to expect Manning to attack Hoff with a "deadly weapon" (Miner Memorandum, p. 7); (2) until she saw Manning, Miner had not suspected that he was on the premises or was responsible for the ringing doorbells. (Miner Memorandum, p. 8); and (3) Miner "perceived Manning and Hoff's encounter for mere seconds before the attack" and hence, presumably, had no time to appreciate or warn of the danger (Miner Memorandum, p. 8). These arguments ignore the evidence.

Miner can hardly claim not to have anticipated that Manning would use a deadly weapon. She know that he had attacked someone with a baseball bat. Nor is it plausible that Miner did not suspect Manning of being responsible for the ringing doorbells. Miner has admitted that when the doorbells rang and no one was there she thought it was Manning. Hoff Affidavit ¶9,

13. It also is not true that Miner saw Manning and Hoff only seconds before the attack. In her deposition, Miner testified that when she first saw Manning and Hoff, the two men were walking toward each other and that they stopped five or six feet apart. Miner Deposition, p. 10, ll. 5-11. They then conversed, with Hoff asking "What's going on? What are you doing?", Manning responding "Who are you?" and Hoff responding "I'm Charlie Hoff. Who are you?" Miner Deposition, p. 10. After that, Manning began to approach Hoff and started "shuffling, dancing around." Miner Deposition, p. 11. Only after that period of shuffling and dancing did Manning attack Hoff. Miner Deposition, p. 12. Clearly, Miner had more than "mere seconds" within which she could have warned Hoff.

C. Courts have held that a social host owes a duty to a social guest in circumstances similar to the present case.

Courts elsewhere have held a defendant host liable for failure to warn a social guest of the danger posed by the former boyfriend of the host or another guest. In Strahin v. Cleavenger, 216 W.Va. 175, 603 S.E.2d 197 (2004), the defendant, who was the current boyfriend the plaintiff's older sister, knew that the sister's former boyfriend was jealous and dangerous, yet invited the plaintiff to assist the defendant and the sister in constructing a house on property which had recently suffered various suspicious acts of vandalism. The plaintiff was shot by the former boyfriend while a passenger in a car on the property with the defendant and the sister. Citing Restatement §302B, the court explained the defendant's liability in terms equally applicable to the present case:

> Appellant knew of Mr. Cleavenger's tendency toward violence, especially when aroused by jealousy, as demonstrated by the story regarding Mr. Cleavenger's ex-wife. While the record relates various versions of the story Mr. Cleavenger told people in the community about being so angry with his first wife leaving him for another man that Mr. Cleavenger took initial steps to shoot the man, the violent nature of Mr. Cleavenger under these

> circumstances was related in all renditions of the story. The record amply demonstrates that Appellant was also aware of Mr. Cleavenger's jealousy about the amount of time Appellant was spending with Ms. Strahin, who was working at the bar Appellant owned and lived in the same house as Appellant. A number of incidents were related through testimony about Mr. Cleavenger following the couple at various hours of the day and night and threatening Appellant, telling Appellant to leave Ms. Strahin alone, starting physical confrontations with Appellant, informing Appellant that he was angry that Ms. Strahin was pregnant with his child but spending time with Appellant and telling Appellant that he was upset that Ms. Strahin was working at Appellant's bar. There is also testimony that Appellant did not try to de-escalate argumentative situations with Mr. Cleavenger and instead provoked Mr. Cleavenger into physical fights. Appellant also knew that acts of vandalism were occurring on his property and that at least one law enforcement officer suggested that the damage caused by gunshots to the physical structure of the house, a vehicle and other personal property at the house without theft of any valuables on the premises gave the appearance that someone did not want anyone to live in the house. Even when the officer suggested that the damage looked like it was the type that an ex-lover would cause, Appellant chose not to give the officer Mr. Cleavenger's name as a possible suspect. The record also shows that Appellant obtained a gun permit during this time and began carrying a concealed weapon because he feared for his life. Despite his personal fear, Appellant nevertheless invited Appellee to his house to help lay block, which placed Appellee in jeopardy. When the shot came through the windshield of the car, Appellant immediately responded by calling out Mr. Cleavenger's name while returning fire.

Id. at 186-87, 603 S.E.2d at 208-09. (Emphasis added).

2.2.3 Miner's reliance on the decisions in Luoni and Husband is misplaced.

In support of her claim that she owned no duty to Hoff, Miner relies heavily on the decisions in Luoni and Husband v. Dubose, 26 Mass. App. Ct. 667 (1988) . Yet those decisions are distinguishable and in fact support Hoff's position in the present case that Miner owed him a duty of care. Both are distinguishable because they involved claims based on the defendant host's failure to act (nonfeasance) rather than affirmative conduct (misfeasance). For example,

the Court in Husband distinguished cases relied upon by the plaintiff in that case on the ground that those cases "involve situations in which the defendant either had control over, created, worsened, or should have anticipated the risk...." 26 Mass. App. Ct. at 672 n.2. Similarly, in Luoni, the plaintiff guest alleged that the defendant social hosts were negligent in failing to stop other guests from using fireworks on the premises. The Luoni Court stressed that the hosts did not "create the situation that caused the danger." 431 Mass. at 733, citing Cremins, 415 Mass. at 296 (no duty to protect another from the harmful consequences of a situation he or she did not create) and O'Gorman, 408 Mass. at 762 (no duty because the defendant had not created or contributed to the danger faced by the plaintiff). In the present case, Miner's affirmative conduct helped create or contributed to the dangerous situation (the meeting between Hoff and Manning) which led to Hoff's injury.

Husband is also distinguishable because the attacking guest's appearance with a knife and threat to kill the defendant host and her other guest was not foreseeable. Here, as set forth above, both Manning's presence on the premises and the attack itself were foreseeable given what Miner knew about Manning's personality and past conduct. In addition, contrary to Miner's assertion, Manning's past use of a baseball bat as a weapon made it foreseeable that he would use a deadly weapon against Hoff.

Also notable is the fact that the defendant host in Husband, unlike Miner here, warned the plaintiff guest to run when the attacking guest appeared with the knife. The Husband Court called this warning an "adequate response" to a situation in which the defendant host was personally at risk. 26 Mass. App. Ct. at 671. In the present case, Miner, who was not personally at risk, should have warned Hoff of the danger.

3. Conclusion.

For all of the foregoing reasons, this Court should deny Miner's motion for summary judgment.

Request for hearing and Oral Argument.

Hoff requests a hearing and oral argument on Miner's motion for summary judgment.

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Dated: August 15, 2007.

CERTIFICATE OF SERVICE

I, Roger T. Manwaring, hereby certify that I have on this date served an original and one copy of the foregoing by mailing a copy first class mail, postage prepaid to Patricia S. Siegel, Esq., The Law Offices of Robert A. Marra, Jr., Cross Point Tower One, 3rd Floor, 900 Chelmsford Street, Lowell, MA 01851.

Roger T. Manwaring

Dated: August 15, 2007.
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