

industry related businesses. [My Curriculum Vitae is attached to this Affidavit marked Exhibit "A"].

3. In addition to my on-site inspection of the premises, the materials which I have reviewed to date for the purpose of evaluating the actions and/or inactions of the Defendants in this case are as follows:

[See attached Exhibit "B"].

4. I was asked to provide my opinion, based upon my review and analysis of the materials provided to me, on the following questions:

a. Was it reasonably foreseeable to the Defendants, prior to the time Mr. Sells suffered his fatal beating in the Outlaw Saloon, that such an attack on one of its patrons would occur?

b. Did the Defendants fail to reasonably protect Mr. Sells from a foreseeable assault by Payne, Cooper and Nath?

c. Whether Defendants knew or should have known of a developing assault on Mr. Sells by Payne, Cooper and Don Nath?

d. Whether the Defendants could have prevented further injuries to Mr. Sells after the initial assault by Payne and Cooper?

e. Whether the Defendants could have prevented the fatal injuries inflicted upon Mr. Sells?

f. Whether the level of security provided by the Defendants was reasonable and adequate?

g. Whether the Defendants' methodologies and principles were consistent with those that would have been employed by a reasonable operator given the same totality of circumstances?

h. Whether the employment of armed, uniformed law enforcement officers contributed to the negligent operational practices and outrageous conduct of the Defendants?

5. After I received the materials set forth in Paragraph 3, I identified some, although not necessarily all, facts which I believe are of significance in rendering opinions in this case.

6. The discovery in this case is only beginning. The Defendants have not provided any significant information in their responses to Plaintiff's written discovery

requests. [See attached Exhibit "C"]. For this reason, I reserve the right to supplement and amend my opinions. Nevertheless, I have identified the following significant facts.

7. Based upon my review and analysis, the following are uncontroverted facts for the purpose of providing a general overview of the events of the evening and is not intended as an exhaustive, detailed rendition of all the facts regarding the incident:

a. The Outlaw Saloon has an extensive history and reputation as a "fight bar" and condones argumentative and assaultive behavior by their patrons. For example, there have been numerous violent fights, stabbings, and assaults at the Outlaw Saloon. One of the incidents involved a person who was beaten so severely with a pipe that he was placed in ICU. This assault occurred in the parking lot of the Outlaw Saloon near the front door in full view of the bouncers of the Bar while two undercover members of the Cheyenne Police Department watched and failed to intercede. [See statement of Gary Krause and Barb Searce, attached as Exhibit "D"]. Another assault occurred when a man was ejected from the bar and the bouncers either administered a beating or watched while others beat him and broke his ankle. This person also ended up in the hospital for several days and was unable to work for approximately three months. [See statement of Ed Hayward and hospital records of Ed Hayward, attached as Exhibit "E"]. Another patron was stabbed inside the bar during Frontier Days of the year 2004. [See statement of Jessie White, attached as Exhibit "F"]. There was a dispute inside the bar among two or three women and a beer bottle was broken and threatened to be used as a weapon, as it was in this case. In spite of repeated requests for police assistance by the victim, the bartender refused to call the police and permitted the assault to continue. [See statements of Kathy Williamson, Jody Stinsgard, attached as Exhibit "G"]. It is my understanding that releases have been provided to and reports of these incidents requested from the Cheyenne Police Department but these reports have not been provided to Plaintiff's Counsel as of the time of my affidavit;

b. Jay Payne is a regular patron of the Outlaw Saloon. Payne is routinely ejected from the Bar for abusive, belligerent and violent conduct. [See Police Report, Exhibit "H", CPD-60; Transcript of Steve Nath Video-Taped Interview at Police Department, Exhibit "I", pp. 3]. According to Steve Nath, it would not be unexpected for Jay Payne to violently attack people with a beer bottle. [See, Exhibit "H", p. CPD-60]. On the night of the incident giving rise to this suit, Payne ,although obviously intoxicated, was permitted into the bar and served alcohol. Payne was permitted to stalk, harass and provoke Sells throughout the bar while the owner of the bar, Defendant Hein, watched the fight develop. [See, Statements of Colt Price, Exhibit "H", CPD-3, CPD-32 through 36; statement of Colt Price, dated 7/22/05 to Karen Mitchell, 5 pages, attached as Exhibit "J"; statement of Colt Price, dated 8/1/05 to Karen Mitchell, 5 pages, attached as Exhibit "K"; and, Supplemental Report of Investigation dated 8/2/05, attached as Exhibit "L", pp. 2, 4, 5; Statement of Shilo Kilber, CPD-12; Statement of Nathan Hiett, CPD-9,10; Sworn Statement of Lt. Korber contained within Sgt.

Weese sworn statement, attached hereto as Exhibit "M", dated 9/27/05, pp. 81 through 86, 88 through 107];

c. Joshua Cooper, who also assaulted Mr. Sells, was in the Outlaw Saloon on the night giving rise to this suit, consuming alcohol. Defendants violated Wyoming's liquor laws by permitting Cooper into the bar although he was under the legal drinking age. [See, Exhibit "L", p. 2, Exhibit "H". p. CPD-10; See, *also*, Abstract of Court Record, Laramie Circuit County Court, Exhibit "N"];

d. On April 23, 2005, Mr. Sells and his associate, Mr. Price were patrons of the Outlaw Saloon. At approximately 1 a.m. Dwayne Sells was verbally assaulted and provoked near the bar closest to the front by an obviously intoxicated Jay Payne. This verbal assault and provocation continued throughout premises, and was in full view of Defendant Hein, who was standing on the raised disc jockey platform with one of the three security persons working that evening. [See Exhibit "I" and Exhibit "P"]. After being verbally assaulted and provoked and in fear for his safety, Dwayne Sells hit Payne with Sells' drink glass. Mr. Payne, in conformity with conduct known by Defendants agents and employees, struck Sells violently in the head with a beer bottle. The physical assault occurred on or near the side of the dance floor closest to the rest rooms. [See, Statements of Colt Price, Exhibit "H", CPD-3, CPD-32 through 36; statement of Colt Price, dated 7/22/05 to Karen Mitchell, 5 pages, attached as Exhibit "J"; statement of Colt Price, dated 8/1/05 to Karen Mitchell, 5 pages, attached as Exhibit "K"; and, Supplemental Report of Investigation dated 8/2/05, attached as Exhibit "L", pp. 2, 4, 5; Statement of Shilo Kilber, CPD-12; Statement of Nathan Hiatt, CPD-9,10; Exhibit H, P. CPD-60];

e. Before Sells attempted to protect himself, the verbal altercation lasted for several minutes and was observed by Defendant Hein on the DJ platform overseeing the crowd. [See, Sworn Statement of Lt. Korber contained within Sgt. Weese sworn statement, attached hereto as Exhibit "M", dated 9/27/05, pp. 81 through 86, 88 through 107]. No owner or employee of the Outlaw Saloon intervened during the time Payne was stalking Sells. Defendant Hein should have observed the foreseeable fight develop as Sells and Price moved across the bar towards the dance floor. Defendant Hein should have observed, from the raised platform, Payne assaulting Sells by bumping his chest into Sells and Payne continue his verbal assault and provocation for at least one and one half minutes before the physical fight erupted. [See, Exhibit "H", CPD-12]. No owner or employee of the Outlaw Saloon intervened;

f. On or near the dance floor, Jay Payne hit Sells over the head with a beer bottle knocking Sells to the floor. Mr. Sells suffered a non-displaced skull fracture in the left occipital region with a laceration over the top of it, suffered a fracture of the right temporal bone, as well as the basal skull fracture discussed in the autopsy report. Dr. Cook discussed his opinions as to the causes of these fractures in his statement and his opinion that the fractures were caused by at

least two insults to the head. Dr. Cook did not believe these injuries were consistent with one fall to the floor. [See, Sworn Statement of Judson Cook, M.D., attached as Exhibit "O", taken 8/15/05, pp. 21-28]. No owner or employee of the Outlaw Saloon intervened;

g. An underage Joshua Cooper assisted Payne in the assault against Sells. Because Sells was unable to protect himself, and with no security in the immediate vicinity, Sells' friend, Colt Price, attempted to come to Sells' assistance. Still, no owner or employee of the Outlaw Saloon intervened. [See, Statements of Colt Price, Exhibit "H", CPD-3, CPD-32 through 36; statement of Colt Price, dated 7/22/05 to Karen Mitchell, 5 pages, attached as Exhibit "J"; statement of Colt Price, dated 8/1/05 to Karen Mitchell, 5 pages, attached as Exhibit "K];

h. Defendant Don Nath and his brother, Steve Nath, along with Nathan Hiett and Anthony Leichtweis, were leaving the restroom when they saw the altercation between Sells and Payne. [See, Exhibit "I", transcript of video statement of Steve Nath, Exhibit "P", transcript of video statement of Don Nath, Exhibit "Q", transcript of video statement of Tony Leichtweis; and, Exhibit "H", pp. CPD-9, 10, 11, 29, 30, 60, 63, 64, 65; and Exhibit "L", p. 1, 2] Leichtweis pulled Colt Price off of Jay Payne, and acting as an agent of the bar, physically took him outside and instructed him not to return. [Exhibit "Q" and Exhibit "H", CPD-29] Once outside, Price was taken to the ground and handcuffed by a Cheyenne police officer, thereby restrained Price from further assisting Sells. [See Exhibit "R", Sworn Statement of Elizabeth Anderson, dated 10/03/05, p. 11]. The police later refused to take a statement from Colt Price about the incident. Even at his point in time, there was still no intervention by the owner or employees of the Outlaw Saloon;

i. Steve Nath put Payne in a "full nelson" and pulled and rolled Payne to get Payne off of Sells, who was lying prone on the dance floor. As Steve Nath pulled Payne off Sells, Sells, who was still being held by Payne, was rolled from his back to his stomach, before Payne disengaged from his grip on Sells. [See, Exhibit "I", Exhibit "P"]. At that point Sells had his head on the dance floor. Sells was bleeding profusely, while on his hands and knees, and with his head on the dance floor. Even at this point in time, there was no intervention by the owners or employees of the Outlaw Saloon. Defendant Donald Nath then stood behind Sells and spent two minutes trying to get Sells up from the floor. Still, no owner or employee of the Outlaw Saloon intervened. [See, statement of Dawn Hoffman, Exhibit "H", p. CPD-26];

j. Defendant Nath then put Sells in a headlock/chokehold and began to drag him backwards, forty feet, toward the front door. At no time did Sells resist Don Nath. At this time, Sells was bleeding profusely from the gash from the beer bottle cut on the side of his head, from his nose and mouth. [See, statement of Dawn Hoffman, Exhibit "H", p. CPD-26; as well as statements of

other witnesses, CPD-6; CPD-8; CPD-10; CPD-14; CPD-16; CPD-18; CPD-20-25; CPD-27; CPD-32-36; CPD-37-38; CPD-39; CPD-50; and, Statements of Paul Ulrich to Karen Mitchell, Exhibit "S"]. Even at this point in time, no owner or employee of the Outlaw Saloon intervened;

k. Joshua Cooper ran out of the bar. Jay Payne was escorted outside by Steve Nath [See, Exhibit "I"] and then Payne left the premises with Cooper;

l. After lifting Sells to his feet and half-carrying him, Defendant Donald Nath, in compliance with training he received when working as a bouncer for the Outlaw, placed Dwayne Sells in a headlock/chokehold designed to put people to sleep and then pushed Sells backwards with excessive force from the dance floor toward the door. [See, Exhibit "P", Exhibit "T" transcript of Coroner's Inquest, dated 8/23/05, pp, 45, 105-107; Exhibit "H", pp. CPD-5, CPD-8, CPD-13, CPD-18, CPD-27, CPD-65; See, Statements of Colt Price, Exhibit "H", CPD-3, CPD-32 through 36; statement of Colt Price, dated 7/22/05 to Karen Mitchell, 5 pages, attached as Exhibit "J"]. No owner or employee of the Outlaw Saloon intervened;

m. The method used by Don Nath to remove Mr. Sells was condoned by the owners of the Outlaw Saloon, although Sells was already brutally beaten, severely injured and obviously incapacitated, Defendants permitted Nath to handle and move Sells in this dangerous manner. While being ejected backwards in a headlock/chokehold, Sells fell backwards onto the tile floor. [See, Exhibit "I", Exhibit "P", Exhibit "H" - CPD-67; [See, Statements of Colt Price, Exhibit "H", CPD-3, CPD-32 through 36; statement of Colt Price, dated 7/22/05 to Karen Mitchell, 5 pages, attached as Exhibit "J"; Statements of Carl Holaday, dated 8/17/06 and 8/22/05, attached as Exhibit "U"]. Even at this point in time, no owner or employee of the Outlaw Saloon intervened;

n. This was no simple slip and fall case. [Exhibit "H", pp. CPD-5, CPD-20-25, and Statements of Paul Ulrich to Karen Mitchell, Exhibit "S"]. All witnesses who saw Sells fall backward make it clear that at this point in time, Sells made no effort to break his fall in any fashion. It was clear that Sells was entirely incapable of protecting himself in any fashion from the fall, as a result of the blows sustained on the dance floor, the failure to render medical aid to Sells while he was incapacitated on the dance floor, the use of excessive force on him in ejecting him and the use of the chokehold designed to put Sells to sleep;

o. According to the treating physician, Dr. Judson Cook, the beating administered on the dance floor and the subsequent fall at the front door resulted in at least two insults to the head that resulted in two separate and distinct skull fractures. These injuries require the application of huge amounts of force, such as the force involved in high speed automobile accidents or falling from a roof. Based upon my experience in similar cases, the injuries Sells sustained are consistent with injuries sustained by patrons in violent, brutal, prolonged physical

beatings by more than one person. [See, Sworn Statement of Judson Cook, M.D., attached as Exhibit "O", taken 8/15/05, pp. 21-28];

p. These events and Sells death are the direct result of the policy of the Defendants which require that fights involving more than two patrons be allowed to proceed until the combatants voluntarily stop on their own accord. [See, Exhibit "H", CPD-67];

q. Defendants allowed Payne to violently attack Sells and during this entire altercation and beating, there was no intervention by bar employees, security personnel, or owners; and,

r. Defendants' policy of retaining armed and uniformed police officers such that Defendants' conduct was condoned and ignored by law enforcement and allowed Defendants to continue to operate the bar in a negligent and dangerous fashion. [See, testimony of Lt. Korber, Exhibit "M", pp. 89-105, , Exhibit "V", Statement of Michael Sutton, dated 10/12/05, pp. 21, 22; Statement of John Basile, Exhibit "W", dated 10/3/05, pp. 4-10; Statement of Heber Edwards, Exhibit "X", dated 10/12/05, p. 25, 26].

8. The foreseeability of assaults in establishments such as the Outlaw Saloon is determined by a variety of factors, including, but not limited to:

- a. The atmosphere and environment created by the licensee;
- b. the clientele solicited by the licensee;
- c. the level of training provided to security personnel by the Defendant Hein, HEJE and Jedlicki;
- d. the level of supervision and monitoring by management;
- e. prior similar occurrences at the licensee's premises;
- f. known violent propensities of certain patrons;
- g. the implementation of surveillance equipment, the implementation of bouncers, the use of armed uniformed police officers as a deterrent to violence;
- h. the prior experience and criminal history of the licensees; and,
- i. the provision of communication devices provided to security and management.

9. The injuries and violent beating inflicted upon Mr. Sells was foreseeable because:

a. Defendants had notice and were aware of a potential problem between Mr. Sells and Mr. Payne prior to Payne hitting Sells over the head with a beer bottle initiating the violent beating. [See, Statements of Colt Price, Exhibit "H", CPD-3, CPD-32 through 36; statement of Colt Price, dated 7/22/05 to Karen Mitchell, 5 pages, attached as Exhibit "J"; statement of Colt Price, dated 8/1/05 to Karen Mitchell, 5 pages, attached as Exhibit "K"; and, Supplemental Report of Investigation dated 8/2/05, attached as Exhibit "L", pp. 2, 4, 5; Statement of Shilo Kilber, CPD-12; Statement of Nathan Hiatt, Exhibit "H", CPD-9,10];

b. Defendant Hein watched the fight develop, failed to notify security and failed to take any steps whatsoever to prevent the assault. [Sworn Statement of Lt. Korber contained within Sgt. Weese sworn statement, attached hereto as Exhibit "M", dated 9/27/05, pp. 81 through 86, 88 through 107, Exhibits I, P, Q, statement of Nathan Hiatt, Exhibit "H", pp. CPD-9-10];

c. Defendants failed to provide communication devices to security that would give bouncers notice of potential problems they needed to address;

d. Defendants failed to prevent Payne from entering the establishment although he was known to have argumentative, assaultive and abusive propensities;

e. Defendants failed to monitor Payne when he was already known for his propensity to assault other patrons with a beer bottle and had a reputation for that. [Exhibit "H", p. CPD-60];

f. Defendants failed to prevent Payne from entering the establishment although he had been previously ejected from the bar on several occasions for assaultive and combative behavior;

g. Defendants' failure to comply with the State's liquor statutes by allowing intoxicated, Payne, and underage, Cooper, to patronize the premises.

h. Defendants failed to provide security by the dance floor, which is an area more prone to argumentative and assaultive behavior than other areas;

i. Defendants failed to comply with industry standards by establishing a willful, wanton and reckless policy in which any fight involving more than two people would be allowed to run its course with no intervention. [Exhibit "H", p. CPD-60];

j. Defendants failed to recognize that Sells was seriously injured as a result of Payne's assault and failed to provide adequate medical care at the time of that assault;

k. Defendants failed to properly train security to respond when a patron is seriously injured or in need of immediate medical attention;

l. Defendants failed to enact protocol that would prevent alleged patrons from intervening in a fight instead of having Defendants' own staff or employees intervene; and,

m. The area in which the fight between Sells and Payne occurred is the most likely area in the bar in which a bar fight would erupt. Defendants failed to have bouncers or any security personnel in that vicinity. [See, Exhibit "I" and Exhibit "P"].

10. The following circumstances reflect that Defendants intentionally acted in reckless disregard of the consequences of their actions; and under these circumstances a reasonable person would have, or should have known that their conduct would, in a high degree of probability, result in harm to another:

a. the failure to address all of the prior bad acts that had occurred with no preventative measures or corrective action;

b. permitting Payne in the bar again after ejecting him on several previous occasions for belligerent conduct and knowing of Payne's propensity for combative and assaultive behavior;

c. Permitting Payne to enter the premises while intoxicated and serving him alcohol;

d. Permitting underage drinkers to frequent the bar and serving underage patrons in violation of the liquor laws, such as Cooper who became an assailant;

e. The policy of allowing 3 or more people to fight unabated. [Exhibit "H", p. CPD-68];

f. Not having a sufficient number of bouncers in areas of the bar to deter fights;

g. Not having any security in that part of the bar which is the most likely area for a fight to erupt, which is where Sells was beaten;

h. Failure to have employees and agents trained in basic first aid such that they could recognize a medical emergency and provide appropriate first response attention;

i. Failure to intervene or respond at all to this violently and deadly assault;

j. Developing and implementing the use of a headlock/chokehold as opposed to the standard method of ejection; and

k. By retaining armed and uniformed police officers the Defendants' reckless and irresponsible conduct was condoned and ignored by law enforcement and allowed Defendants to continue to operate the bar in a negligent and dangerous fashion.

11. It is understood that a business, such as the Outlaw Saloon, is not an insurer or guarantor for the safety of patrons. Their duty is only to provide reasonable care. Reasonable care is determined on whether the operator developed and implemented a standard of care that would create a safe and secure environment. In order to develop a reasonable standard of care, owners have to determine the individual needs of their particular business by taking into consideration the following:

- a. To comply with local, federal and state laws, codes, and statutes;
- b. To establish areas where to provide security for patrons inside and outside the premises;
- c. To provide adequate management;
- d. To provide adequate supervision;
- e. To provide adequate monitoring;
- f. To provide adequate policies and procedures;
- g. To provide adequate training;
- h. To provide an adequate amount of employees;
- i. To provide a safe and secure environment;
- j. To protect patrons from what is reasonably foreseeable;
- k. To protect patrons from what can be reasonably anticipated; and,
- l. To be proactive when there is notice of a dangerous condition.

None of the above was considered or implemented by the owners, operators, and management of the Outlaw Saloon and, but for this irresponsible and reckless conduct, Dwayne Sells would not have died that evening.

Further affiant sayeth naught.

DATED this 18th day of February, 2006.

Fred Del Marva, PI, PPO

The foregoing affidavit was acknowledged before me by Fred Del Marva, PI, PPO, on the 18th day of February, 2006.

WITNESS my hand and seal.

Notary Public
My commission expires:
