COMMONWEALTH OF MASSACHUSETTS
HAMPDEN, SS.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
CIVIL ACTION NO. 91-0837

MARY C. ROMAN, Plaintiff )
)
v. )
)
POLISH AMERICAN CITIZENS )
CLUB, INC., a/k/a PULASKI )
CLUB, BENJAMIN KOWALSKI, )
PRESIDENT OF THE POLISH )
AMERICAN CITIZENS CLUB, INC., )
and ARTHUR DRAINVILLE, )
Defendants )

MOTION FOR SUMMARY JUDGMENT OF THE DEFENDANTS, POLISH AMERICAN CITIZENS CLUB, INC. AND BENJAMIN KOWALSKI ON COUNT I OF PLAINTIFF'S COMPLAINT

Now come the Defendants, Polish American Citizen's Club, Inc. and Benjamin Kowalski, and move the Court for summary judgment on Count I of Plaintiff's complaint.

As grounds, the Defendants file a supporting memorandum substantiating their position that Plaintiff has no reasonable expectation of sustaining her burden of proof on breach of duty and causation.

WHEREFORE, the Defendants, Polish American Citizen's Club, Inc. and Benjamin Kowalski, request the Court to allow their motion for summary judgment.

POLISH AMERICAN CITIZENS CLUB,
INC., and BENJAMIN KOWALSKI,
Defendants

By _____
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MEMORANDUM IN SUPPORT OF DEFENDANTS POLISH AMERICAN CITIZENS CLUB, INC. AND BENJAMIN KOWALSKI'S MOTION FOR SUMMARY JUDGMENT

## I. Statement of the Case

This is a premises liability claim now consisting of a single count of negligence against Defendants Benjamin Kowalski and Polish American Citizens Club, Inc. ("Club").[1/] Plaintiff's negligence claim against the Club and Mr. Kowalski, its president, proceeds on theories of inadequate security and failure to train and supervise its employees. See Plaintiff's complaint, ¶15. Both parties have engaged in discovery and the period within which to take discovery under the tracking order has concluded. Mr. Kowalski and the Club now move for summary judgment.

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1/ On September 10, 1991, Judge Moriarty allowed a motion to dismiss Plaintiff's claims against these defendants sounding in implied warranty and G.L. c. 93A claims, and judgment was entered thereon. See Docket Entry #7.

## II. Undisputed Facts[2]/

The Plaintiff was present at the Club on Sunday, February 19, 1989, doing paperwork in the directors' room downstairs with her son, the treasurer of the Club and its bar manager.[3]/ At some point in the late afternoon, a young man named "Danny" came down to the directors' room from the bar area. He spoke to Plaintiff and her son and said he had just been punched by a man playing pool in the bar.[4]/ Plaintiff's son went up to the bar area, and Plaintiff followed. Her first sight on entering the bar area was that of her son on the floor and one Arthur Drainville punching him. She yelled her son's name twice. Then Mr. Drainville walked closer to her and closer to the exit door and punched her. She did not move away from her son's assailant as he grew closer because she "wasn't in [his] way."[5]/

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[2]/ The Defendants are mindful that all facts must be construed in Plaintiff's favor for the purposes of this motion. But by setting these facts forth, the Defendants do not concede them as true or wish to relieve Plaintiff from proving them at trial.

[3]/ Plaintiff's deposition, at 8, 10; Plaintiff's admissions, nos. 1, 3, 4 (attached as Exhibits A and B, respectively).

[4]/ Plaintiff's deposition, at 40-41.

[5]/ Plaintiff's deposition, at 52-55.

In discovery, Plaintiff conceded she did not know if there was anything the Club could have done to prevent her from being hit by Mr. Drainville.[6] She acknowledged that the bartender did not do anything wrong between the time she came upstairs and the time Mr. Drainville struck her.[7] She stated she had no criticisms with the way the bartender was doing his job. He was not a new employee, he had been there a while, and "he was one of the better ones." She did not know of anything the bartender did wrong which caused Mr. Drainville to strike her.[8]

Plaintiff admits that the Defendant, Mr. Kowalski, was not present at the Club at the time of this incident. She stated that non-members, like herself, were allowed at the Club.[9] She did not know how long Mr. Drainville had been at the Club that afternoon, and makes no allegation that his service of drinks at the Club had anything to do with her assault.[10]

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[6] Plaintiff's deposition, at 70.

[7] Plaintiff's deposition, at 70.

[8] Plaintiff's deposition, at 69-72.

[9] Plaintiff's deposition, at 4, 37. Id., at 62-62 (non-members were always at the club before the assault).

[10] Plaintiff's deposition, at 72; Plaintiff's complaint, generally.

## III. Argument and Authority

### A. THERE IS NO TRIABLE ISSUE OF A BREACH OF DUTY BY THE CLUB OR BENJAMIN KOWALSKI

An owner or occupier of land owes a duty to all lawful visitors to maintain its premises "in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury and the burden of avoiding the risk." Mounsey v. Ellard, 363 Mass. 693, 708 (1973). However, this standard "does not make owners and occupiers insurers of their property nor does it impose unreasonable maintenance burdens." Id. at 709.

This duty obliged the Club to act with reasonable care to prevent harm caused by a third person. Mullins v. Pine Manor College, 389 Mass. 47, 54 (1983). Plaintiff's complaint alleges inadequate security. A duty to protect individuals against attacks by third parties is imposed only where a plaintiff can prove the attack was foreseeable. Foley v. Boston Housing Authority, 407 Mass. 640, 644 (1990) (unanticipated attack; summary judgment granted). There must be proof that "a defendant reasonably could foresee that he would be expected to take affirmative action to protect the plaintiff and could anticipate harm to the plaintiff for the failure to do so." Id., quoting Irwin v. Ware, 392 Mass. 745, 756 (1984).

There is no competent evidence in the record, nor is there a reasonable expectation that Plaintiff could produce any such evidence at trial, Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991), that the Club contemplated it should have greater security or else bystanders would be injured by its failure to do so. What occurred in the Club's barroom on the afternoon in question was nothing more than a spontaneous attack -- one not sparked by the service of intoxicating liquors to the attacker or any precipitous conduct attributable to the club. The Plaintiff conceded as much in her deposition testimony. "There is no duty owed when the risk which results in the plaintiff's injury is one which could not be reasonably anticipated by the defendant." Husband v. Dubose, 26 Mass. App. Ct. 667, 669 (1988) (spontaneous attack; summary judgment granted).

The Club's president, Mr. Kowalski, was not present at the time of Plaintiff's assault. There can be no liability on his part since he did not personally participate in any tortious conduct charged against the Club. LaClair v. Silberline Manufacturing Co., Inc., 379 Mass. 21, 29 (1979). In light of Plaintiff's concessions, it is inconceivable that Mr. Kowalski has any connection with Plaintiff's injury other than his status as president, which is insufficient to maintain a claim against him. Id., at 33-34.

B. THERE IS NO CAUSAL NEXUS BETWEEN ANY ALLEGED TORTIOUS CONDUCT ON THE PART OF THE CLUB AND ITS PRESIDENT AND THE PLAINTIFF'S INJURY

There is no evidence sufficient to raise a triable issue of fact that any conduct of the Club either led to Plaintiff's injury or likely would have prevented it. Construed generously, Plaintiff's claim is that the Club was required to have had a bartender and two directors present in the bar area to control what was going on.[11]/ However, there is no evidence of previous repeated criminal acts in the bar area necessitating such an armada of Club employees. It is ludicrous for Plaintiff to pontificate that the presence of an a second director to "supervise" the bartender and the bar manager/director, plaintiff's son, would have saved her from harm.

Plaintiff does not blame her son, the bar manager and a club director, for his handling of the disturbance involving Mr. Drainville. Nor does she blame the bartender. It defies rational explanation how the presence of an additional director to "supervise" these two admittedly non-negligent actors would likely have prevented this assault.

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[11]/ Plaintiff's deposition, at 13-15, 17.

It is the Plaintiff's burden to show that the Club's negligence caused her injury. This is an affirmative burden and cannot be left to surmise, conjecture or imagination. If it is just a reasonable to suppose that the cause is one for which no liability would attach as for one for which the Club is liable, then Plaintiff would fail to make out her case. Bigwood v. Boston and N. St. Ry. Co., 209 Mass. 345, 348 (1911); Corsetti v. Stone Co., 396 Mass. 1, 23-24 (1985).

Without a showing that the Club's conduct would have averted Plaintiff's assault, her claim must fail for the absence of evidence of an essential element of her case, proximate causation. See Husband v. Dubose, 26 Mass. App. Ct. 667, 672 n. 3 (1988).

## IV. Conclusion

For all the foregoing reasons, the Defendants Polish American Citizen's Club, Inc. and Benjamin Kowalski, request the Court to allow their motion for summary judgment.

POLISH AMERICAN CITIZENS CLUB, INC., and BENJAMIN KOWALSKI, Defendants

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