

# 2005 Wisconsin High School Mock Trial Tournament Case Materials

*The 2005 Wisconsin High School Mock Trial case materials are intended for educational purposes only and not for profit.*

## **Cort Amour vs. Lee Nash, et al.**

(Reflects changes made in case after January 5, 2005.)

### **PLAINTIFF WITNESSES**

Cort Amour  
Cary Prefect  
Jamie Jones

### **DEFENSE WITNESSES**

Lee Nash  
Pat Malben  
Frances O'Shaughnessy

### **DISCLAIMER**

All names used in the 2005 mock trial case are fictitious and were created to be gender-neutral, and any similarity to the name of an actual person is strictly coincidental.

## INTRODUCTION

This year's case is a civil trial. The plaintiff, Cort Amour, was allegedly injured by a bartender, Lee Nash, at Michelle's Place. The plaintiff has sued for damages as a result of injuries suffered in the fight. The plaintiff's claim against Nash is for intentional conduct. The claim against Michelle's Place is for vicarious liability, in other words as Nash's employer, the bar is responsible for Nash's actions. The plaintiff also has a claim for negligent hiring, training, and supervision by Michelle's Place of Nash. This last claim allows the plaintiff to sue Michelle's insurance company, because insurance usually does not cover intentional conduct (the allegation against Nash), but does usually cover claims of negligence.

Normally a trial like this would involve many more witnesses, including doctors to talk about the plaintiff's injuries, more witnesses to the fight, and perhaps an economist to quantify the plaintiff's damages. You will not be offering evidence on the dollar amount of damages of the plaintiff. To fit into the format for the Mock Trial (three witnesses on each side), we have chosen to have one witness to the fight on each side: Jamie Jones for the plaintiff and Frances O'Shaughnessy for the defense; the plaintiff Cort Amour and defendant Lee Nash; and an expert on managing a bar for each side: Cary Prefect for the plaintiff and Pat Malben for the defense. Although the owner, Michelle, would be expected to testify, she was not on duty that night and therefore did not witness the incident. Thus, she is not a witness. We hope you enjoy this year's case.

## STIPULATIONS

1. The authenticity of all affidavits, court documents, pleadings and other exhibits is stipulated.
2. Cary Prefect and Pat Malben are experts in bar management.
3. Prefect and Malben have reviewed all affidavits prior to trial.
4. The admissibility as well as the authenticity of the map is stipulated.
5. The map was drawn by a police officer called to the Bar immediately following the dispute.
6. Cort Amour was treated in the Clearwater emergency room after the fight, kept overnight for observation, his/her jaw was wired and was released the next day.
7. Lee Nash had his/her probation officer's written permission to be in, and working at, Michelle's Place.
8. Lee Nash had two prior convictions; battery and fourth degree assault.

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## Rules of Evidence

### 901.04 Preliminary questions.

(1) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the judge, subject to sub. (2) and ss. 971.31 (11) and 972.11 (2). In making the determination the judge is bound by the rules of evidence only with respect to privileges and as provided in s. 901.05.

*[For 2004-2005, Rule 906.09 of the Wisconsin Statutes will replace Rule 609 in the Federal Rules of Evidence outlined in the handbook. Please use 906.09 in place of Rule 609.]*

### 906.09

#### **Impeachment by evidence of conviction of crime or adjudication of delinquency.**

**(1) General rule.** For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime or adjudicated delinquent is admissible. The party cross-examining the witness is not concluded by the witness's answer.

**(2) Exclusion.** Evidence of a conviction of a crime or an adjudication of delinquency may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.

**(3) Admissibility of conviction or adjudication.** No question inquiring with respect to a conviction of a crime or an adjudication of delinquency, nor introduction of evidence with respect thereto, shall be permitted until the judge determines pursuant to s. 901.04 whether the evidence should be excluded.

**(5) Pendency of appeal.** The pendency of an appeal therefrom does not render evidence of a conviction or a delinquency adjudication inadmissible. Evidence of the pendency of an appeal is admissible.

## Wisconsin Statutes

### 125.04 General licensing requirements.

**(1) License or permit; when required.** No person may sell, manufacture, rectify, brew or engage in any other activity for which this chapter provides a license, permit, or other type of authorization without holding the appropriate license, permit or authorization issued under this chapter.

**(2) Licenses or permits issued in violation of chapter.** No license or permit may be issued to any person except as provided in this chapter. Any license or permit issued in violation of this chapter is void.

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**(5) Qualifications for licenses and permits.** (a) *Natural persons.* Licenses and permits related to alcohol beverages, issued to natural persons under this chapter, may be issued only to persons who fulfill all of the following requirements:

1. Do not have an arrest or conviction record, subject to ss. 111.321, 111.322, 111.335 and 125.12 (1) (b).
2. Have been residents of this state continuously for at least 90 days prior to the date of application.
3. Have attained the legal drinking age.
5. Have successfully completed within the 2 years prior to the date of application a responsible beverage server training course at any location that is offered by a technical college district and that conforms to curriculum guidelines specified by the technical college system board or a comparable training course that is approved by the department or the educational approval board. This subdivision does not apply to an applicant who held, or who was an agent appointed and approved under sub. (6) of a corporation or limited liability company that held, within the past 2 years, a Class "A", "Class A" or "Class C" license or a Class "B" or "Class B" license or permit or a manager's or operator's license.

(b) *Criminal offenders.* No license or permit related to alcohol beverages may, subject to ss. 111.321, 111.322 and 111.335, be issued under this chapter to any person who has habitually been a law offender or has been convicted of a felony unless the person has been duly pardoned.

## **125.12 Revocations, suspensions, refusals to issue or renew.**

### **(1) Revocation, suspension, nonissuance or nonrenewal of license.**

(a) Except as provided in this subsection, any municipality or the department may revoke, suspend or refuse to renew any license or permit under this chapter, as provided in this section.

(b) 1. In this paragraph, "violation" means a violation of s. 125.07 (1) (a), or a local ordinance that strictly conforms to s. 125.07 (1) (a).

2. No violation may be considered under this section or s. 125.04 (5) (a) 1. unless the licensee or permittee has committed another violation within one year preceding the violation. If a licensee or permittee has committed 2 or more violations within one year, all violations committed within one year of a previous violation may be considered under this section or s. 125.04 (5) (a) 1.

(c) Neither a municipality nor the department may consider an arrest or conviction for a violation punishable under s. 945.03 (2m), 945.04 (2m) or 945.05 (1m) in any action to revoke, suspend or refuse to renew a Class "B" or "Class B" license or permit.

#### **125.17 Issuance of operators' licenses.**

**(1) Authorization.** Every municipal governing body shall issue an operator's license to any applicant who is qualified under s. 125.04 (5). Operators' licenses may not be required other than for the purpose of complying with ss. 125.32 (2) and 125.68 (2). Operators' licenses may be issued only upon written application.

#### **6) Training course.**

(a) Except as provided in par. (b), no municipal governing body may issue an operator's license unless the applicant has successfully completed a responsible beverage server training course at any location that is offered by a technical college district and that conforms to curriculum guidelines specified by the technical college system board or a comparable training course, which may include computer-based training and testing, that is approved by the department or the educational approval board, or unless the applicant fulfills one of the following requirements:

1. The person is renewing an operator's license.
2. Within the past 2 years, the person held a Class "A", "Class A" or "Class C" license or a Class "B" or "Class B" license or permit or a manager's or operator's license.
3. Within the past 2 years, the person has completed such a training course.

(b) A municipal governing body shall issue a provisional operator's license to a person who is enrolled in a training course under par. (a) and who meets the standards established by the municipality by ordinance, if any. The municipal governing body shall revoke that license if the applicant fails successfully to complete the course in which he or she enrolls.

(c) No municipal governing body may require that applicants for operators' licenses undergo training in addition to that under par. (a) but may require applicants to purchase at cost materials that deal with relevant local subjects not covered in the course under par. (a).

**111.321 Prohibited bases of discrimination.** Subject to ss. 111.33 to 111.36, no employer, labor organization, employment agency, licensing agency or other person may engage in any act of employment discrimination as specified in s. 111.322 against any individual on the basis of age, race, creed, color, disability, marital status, sex, national origin, ancestry, arrest record, conviction record, membership in the national guard, state defense force or any reserve component of the military forces of the United States or this state or use or nonuse of lawful products off the employer's premises during nonworking hours.

**111.322 Employment Relations**

**Discriminatory actions prohibited.** Subject to ss. 111.33 to 111.36, it is an act of employment discrimination to do any of the following:

(1) To refuse to hire, employ, admit or license any individual, to bar or terminate from employment or labor organization membership any individual, or to discriminate against any individual in promotion, compensation or in terms, conditions or privileges of

employment or labor organization membership because of any basis enumerated in s. 111.321.

(2) To print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for employment or to make any inquiry in connection with prospective employment, which implies or expresses any limitation, specification or discrimination with respect to an individual or any intent to make such limitation, specification or discrimination because of any basis enumerated in s. 111.321.

**111.335 Arrest or conviction record; exceptions and special cases.** (1)(a) Employment discrimination because of arrest record includes, but is not limited to, requesting an applicant, employee, member, licensee or any other individual, on an application form or otherwise, to supply information regarding any arrest record of the individual except a record of a pending charge, except that it is not employment discrimination to request such information when employment depends on the bondability of the individual under a standard fidelity bond or when an equivalent bond is required by state or federal law, administrative regulation or established business practice of the employer and the individual may not be bondable due to an arrest record.

(b) Notwithstanding s. 111.322, it is not employment discrimination because of arrest record to refuse to employ or license, or to suspend from employment or licensing, any individual who is subject to a pending criminal charge if the circumstances of the charge substantially relate to the circumstances of the particular job or licensed activity.

(c) Notwithstanding s. 111.322, it is not employment discrimination because of conviction record to refuse to employ or license, or to bar or terminate from employment

or licensing, any individual who:

1. Has been convicted of any felony, misdemeanor or other offense the circumstances of which substantially relate to the circumstances of the particular job or licensed activity; or
2. Is not bondable under a standard fidelity bond or an equivalent bond where such bondability is required by state or federal law, administrative regulation or established business practice of the employer.

(cg) 1. Notwithstanding s. 111.322, it is not employment discrimination because of conviction record to deny or refuse to renew a license or permit under s. 440.26 to a person who has been convicted of a felony and has not been pardoned for that felony.

2. Notwithstanding s. 111.322, it is not employment discrimination because of conviction record to revoke a license or permit under s. 440.26 (6) (b) if the person holding the license or permit has been convicted of a felony and has not been pardoned for that felony.

## **Mock Trial Jury Instructions**

### **200 BURDEN OF PROOF: ORDINARY**

Certain questions in the verdict ask that you answer the questions “yes” or “no”. The party who wants you to answer the questions “yes” has the burden of proof as to those questions. This burden is to satisfy you by the greater weight of the credible evidence, to a reasonable certainty that “yes” should be your answer to the verdict questions.

The greater weight of the credible evidence means that the evidence in favor of a “yes” answer has more convincing power than the evidence opposed to it. Credible evidence means evidence you believe in light of reason and common sense. “Reasonable certainty” means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof.

### **205 BURDEN OF PROOF: MIDDLE**

The burden of proof, on question 1, rests upon the party contending that the answer to the question should be “yes.” This burden is to convince you by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that “yes” should be the answer to (that) (those) question(s).

Clear, satisfactory, and convincing evidence is evidence which when weighed against evidence opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you that "yes" should be the answer because of its greater weight and clear convincing power.

This burden of proof is known as the "middle burden." The evidence required to meet this burden of proof must be more convincing than merely the greater weight of the credible evidence but less than beyond a reasonable doubt.

If you have to guess what the answer should be after discussing all evidence which relates to a particular question, or if you conclude that the evidence is less than clear, satisfactory, and convincing, then the party having the burden of proof as to that question has not met the required burden.



**825 PRIVILEGE: DEFENSE OF OTHERS: FORCE LESS THAN THAT LIKELY TO CAUSE DEATH OR GREAT BODILY HARM – § 939.48(4)**

Defense of others is an issue in this case. The law of defense of others allows a person to threaten or intentionally use force to defend another under certain circumstances.

The law allows the defendant to act in defense of others only if the defendant believed that there was an actual or imminent unlawful interference with the person of (name of third person), believed that (name of third person) was entitled to use or to threaten to use force in self-defense, and believed that the amount of force used or threatened by the defendant was necessary for the protection of (name of third person).

(Defendant), who alleges that (he) (she) acted in defense of others, has the burden of proof to satisfy you by the greater weight of the credible evidence, to a reasonable certainty, that (he) (she) reasonably believed that the exercise of some force was necessary to prevent injury and also that the amount of force used was reasonable under the circumstances.

In addition, the defendant's beliefs must have been reasonable. A belief may be reasonable even though mistaken. In determining whether the defendant's beliefs were reasonable, the standard is what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offense. The reasonableness of the defendant's beliefs must be determined from the standpoint of the defendant at the time of his acts and not from the viewpoint of the jury now.

**835 PRIVILEGE: DEFENSE OF OTHERS: EFFECT OF PROVOCATION BY PERSON**

Generally, a person who engages in unlawful conduct of a type likely to provoke others to attack, and who does provoke an attack, is not allowed to use or threaten force in self-defense against that attack.

However, even if (name of third person) had provoked the attack, the defendant would still be allowed to act in defense of (name of third person) if the defendant actually and reasonably believed that (name of third person) was entitled to act in his or her own defense.

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**1005 NEGLIGENCE: DEFINED**

A person is negligent when he or she fails to exercise ordinary care. Ordinary care is the degree of care which the great mass of mankind exercises under the same or similar circumstances. A person fails to exercise ordinary care, when, without intending to do any harm, he or she does something or fails to do something under circumstances in which a reasonable person would foresee that by his or her action or failure to act, he or she will subject a person or property to an unreasonable risk of injury or damage.

In addition to this general definition of negligence, there are other safety statutes enacted by the legislature, a violation of which is negligence as that term is used in the verdict and these instructions.

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**1007 CONTRIBUTORY NEGLIGENCE: DEFINED**

Every person in all situations has a duty to exercise ordinary care for his or her own safety. This does not mean that a person is required at all hazards to avoid injury; a person must, however, exercise ordinary care to take precautions to avoid injury to himself or herself.

To be free of negligence, a person must exercise ordinary care in choosing his or her course of conduct and in the pursuit of that choice. A person is not guilty of negligence in making a choice of conduct if the person has no knowledge that one course of conduct carries a greater hazard than another, provided that such lack of knowledge is not the result of the person's failure to exercise ordinary care.

**1383 EMPLOYER NEGLIGENCE: NEGLIGENT HIRING, TRAINING, OR SUPERVISION**

In this case, Cort Amour claims Michelle's Place's employee, Lee Nash, engaged in conduct that injured Amour. Amour further claims that Michelle's Place was negligent in the hiring, training, and supervision of Lee Nash.

Question 1 asks you to determine whether Lee Nash committed a battery in attacking Cort Amour. Whether an act is a battery is defined in Jury Instruction 2005.

Question 2 asks whether the conduct of Lee Nash was a cause of the injury to Cort Amour. If you are required to answer this question, you must consider whether there was a causal connection between the conduct of Lee Nash and the injury to Cort Amour. Before you find that the injury was caused by Lee Nash's conduct, you must find that this conduct was a substantial factor in producing the injury to Cort Amour.

Question 3 asks whether Michelle's Place was negligent in hiring, training, and supervising Lee Nash. An employer is required to use ordinary care in hiring, training, and supervising its employees. Ordinary care is the care which a reasonable person

would use in similar circumstances. An employer is not using ordinary care and is negligent, if the employer, without intending to do harm, does something (or fails to do something) with respect to the hiring, training, and supervision of an employee that a reasonable person would recognize as creating an unreasonable risk of injury or damage to a person or property from the employee's conduct.

Question 4 asks whether the negligence of Michelle's Place was a cause of the conduct of Lee Nash. If you are required to answer this question, you must consider whether there was a causal connection between Michelle's Place's negligence and the conduct of Lee Nash which in turn was a cause of the injury to Cort Amour. Before you find that Michelle's Place's negligence was a cause of Lee Nash's conduct, you must find that the negligence was a substantial factor in producing the injury to Cort Amour.

**COMMENT:**

Wrongful Act by Employee. The Committee has substituted "conduct" for "wrongful act" out of concern that a jury might be inclined to make its own determination of what "conduct" is "wrongful." The *Miller* court has defined this term as follows:

*. . . While we stop short of requiring an underlying tort, we do conclude that there must be an underlying wrongful act committed by the employee as an element of the tort of negligent hiring, training or supervision. A wrongful act may well be a tort, but not necessarily.*

*Miller v. Wal-Mart Stores, Inc.*, 219 Wis.2d 250, 263, 580 N.W.2d 233 (1998). Whether employee "conduct" occurred is a question of fact for the jury. Thus, where the evidence indicates the employee may have committed a tort, the elements of the tort should be submitted for jury determination.

However, if the evidence raises a question of violation of "fundamental and well-defined public policy as evidenced by existing statutory law," there may be a threshold question of law presented for court determination: what is the fundamental and well-defined public policy in the statute? After the court has decided this question, the jury may be asked whether the employee did or failed to do what was required by the public policy.

Negligent Hiring, Training, or Supervision Distinguished from Respondeat Superior. ". . . (W)ith a vicarious liability claim, an employer is alleged to be vicariously liable for a negligent act or omission committed by its employee in the scope of employment. See *Shannon v. City of Milwaukee*, 94 Wis.2d 364, 370, 289 N.W.2d 564 (1980). . . . (V)icarious liability is based solely on the agency relationship of a master and servant. In contrast, with a negligent supervision claim, an employer is alleged to be liable for a negligent act or omission it has committed in supervising its employee. Therefore, liability does not result solely because of the relationship of the employer and employee but instead because of the independent negligence of the employer." (Emphasis in original.) *L.L.N. v. Clauder*, 209 Wis.2d 674, 698-99 n.21, 563 N.W.2d 434 (1997). Also see *Doyle v. Engelke*, 219 Wis.2d 277, 291 n. 6, 580 N.W.2d 245 (1998).

Causation. "With respect to a cause of action for negligent hiring, training, or supervision, we determine that the causal question is whether the failure of the employer to exercise due care was a cause-in-fact of the wrongful act of the employee that in turn caused the plaintiff's injury. In other words, there must be a nexus between the negligent hiring, training, or supervision and the act of the employee. This requires two questions with respect to causation. The first is whether the wrongful act of the employee was a cause-in-fact of the plaintiff's injury. The second question is whether the negligence of the employer was a cause-in-fact of the wrongful act of the employee." *Miller v. Wal-Mart Stores*, *supra* at 262.

If the jury finds employee negligence in question 1, there may be situations where the evidence raises a jury question as to whether the negligent conduct of others (including the plaintiff) may also be a cause of plaintiff's injuries. In such cases, the bracketed section in the third and fifth paragraphs may be appropriate. The jury would determine whether the negligence was causal and if so, answer a comparison question.

Negligence Comparison. Where the jury finds causal negligence on the part of the employee, current case law allows recovery from "any of several parties whose negligence combined to cause the injury and also permits the operation of comparative-negligence principles for the allocation of negligence between joint tortfeasors". *Mulder v. Acme-Cleveland Corp.*, 95 Wis.2d 173, 178, 290 N.W.2d 276 (1980), *citing Bielski v. Schulze*, 16 Wis.2d 1, 114 N.W.2d 105 (1962). The Committee believes that the causal negligence, if any, of the plaintiff, employer, and employee should be compared under Wis. Stat. § 895.045. The parties should be treated as concurrent rather than successive tortfeasors.

There is a potential for juror confusion in comparing the causal negligence of the plaintiff, the employee, and the defendant employer. The jury is being asked to compare negligence which was a cause of the accident or injury to the plaintiff with negligence which was a cause of the employee's conduct (which was a cause of the accident or injury to the plaintiff). However, the language of the *Miller* court cited above clearly indicates this approach is to be followed.

Where the jury finds that employee's wrongful act is an intentional tort and further finds employer negligent, both would be jointly liable to the plaintiff. However, negligence-comparison principles would not allow their conduct to be compared. *Crest Chevrolet-Oldsmobile-Cadillac, Inc. v. Willemsen*, 129 Wis.2d 129, 151, 384 N.W.2d 692 (1986), *Schulze v. Kleeber*, 10 Wis.2d 540, 545, 103 N.W.2d 560 (1960).

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## 1500 CAUSE

The cause questions ask whether there was a causal connection between the negligence of any person and the injury. These questions do not ask about "the cause" but rather "a cause." The reason for this is that there may be more than one cause of an injury. The negligence of one person may cause an injury, or the combined

negligence of two or more persons may cause it. Before you find that any person's negligence was a cause of the injury, you must find that the negligence was a substantial factor in producing the injury.

**1501 CAUSE: NORMAL RESPONSE**

If a person's negligence creates a situation that triggers an act by another person which is a normal response to the situation created by the negligence, you may find that any injuries that result from the responsive act were caused by the original negligence. You must decide whether an act causing any of Amour's injuries was a normal response to the situation created by the original negligence and, whether injuries, therefore, should be attributed to that negligence.

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**1580 COMPARATIVE NEGLIGENCE**

You are to answer this question only if you have found that more than one party were causally negligent. If, by your previous answers, you are required to answer this question, you will answer the question's subdivisions, assigning to each party such percentage, or part of 100%, which you find is attributable to each party. You will determine how much and to what extent each party is to blame for the accident and whether the conduct of one made a larger, equal, or smaller contribution than the other. You will fix the percentage attributable to each party in proportion to the fault that each party contributed to cause the accident.

The burden of proof on these subdivisions is on the one who asserts the percentage of causal negligence attributable to the other, and this party must satisfy you by the greater weight of the credible evidence, to a reasonable certainty, what your answer should be.

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**2005 BATTERY (PHYSICAL HARM)**

Question 1 asks whether Lee Nash committed a battery upon Cort Amour. Before you may find that Lee Nash committed a battery, Cort Amour must prove to a reasonable certainty by evidence that is clear, satisfactory, and convincing that Lee Nash intentionally caused bodily harm to Cort Amour and that Cort Amour did not consent to the harm.

The requirement that Lee Nash caused bodily harm to Cort Amour means that the defendant's act was a substantial factor in producing the bodily harm. "Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.

The requirement that intended to cause bodily harm means that Lee Nash had the mental purpose to cause bodily harm to Cort Amour (or another person) or was

aware that his or her conduct was practically certain to cause bodily harm to Cort Amour (or another person).

You may determine intent directly or indirectly from all the facts in evidence. You may also consider any of Lee Nash's statements or conduct which indicate state of mind.

The requirement that Lee Nash caused bodily harm without the consent of Cort Amour means there was no permission in any manner by Cort Amour.

**8045 DUTY OF A PROPRIETOR OF A PLACE OF BUSINESS TO PROTECT A PATRON FROM INJURY CAUSED BY ACT OF THIRD PERSON**

As the proprietor of a tavern who opens it to the public for his or her business purposes, Michelle's Place had a duty to use ordinary care to protect members of the public while on the premises from harm caused to them by the accidental, negligent, or intentional acts of third persons if by using ordinary care, he or she could have discovered that the acts were being done or were about to be done, and he or she could have protected Cort Amour by controlling the conduct of the third person or by giving a warning adequate to enable them Cort Amour to avoid harm. However, Michelle's Place is not required to guarantee the safety of patrons against injuries inflicted by other patrons on the premises.

If the nature of the particular business is such that the proprietor should expect a risk of harm to patrons by third persons, then he or she is under a duty to employ a reasonably sufficient number of employees to afford a reasonable protection. A person who assembles a number of people upon his or her property for financial gain to himself or herself must use ordinary care to protect the individuals from injury from causes reasonably to be anticipated. This duty requires that the proprietor furnish a sufficient number of guards or attendants and take other necessary precautions to control the actions of the crowd.

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CORT AMOUR,

Plaintiff,

v.

**SPECIAL VERDICT**

LEE NASH, MICHELLE'S PLACE, INC.  
AND CLEARWATER MUTUAL INSURANCE  
COMPANY,

Defendants.

We, the Jury, answer the Questions of the Special Verdict as follows:

- 1. During the incident on October 16<sup>th</sup>, 2004, did Lee Nash intentionally batter Cort Amour?

ANSWER:

Yes: \_\_\_\_\_ No: \_\_\_\_\_

- 2. If you answered Question Number 1 "yes", then answer this question: Did the battery cause Cort Amour's injuries?

ANSWER:

Yes: \_\_\_\_\_ No: \_\_\_\_\_

- 3. At the time of the October 16<sup>th</sup>, 2004, incident or prior thereto, was Michelle's Place, Inc. negligent in the hiring, training or supervision of Lee Nash?

ANSWER:

Yes: \_\_\_\_\_ No: \_\_\_\_\_

- 4. If you answered Question Number 3 "yes", then answer this question: Was the negligence of Michelle's Place, Inc. a cause of Cort Amour's injuries?

ANSWER:

Yes: \_\_\_\_\_ No: \_\_\_\_\_

5. At and immediately prior to the incident on October 16<sup>th</sup>, 2004, was Cort Amour negligent with respect to his/her own safety?

ANSWER:

Yes: \_\_\_\_\_ No: \_\_\_\_\_

6. If you answered Question Number 5 "yes", then answer this question: Was such negligence a cause of Cort Amour's injuries?

ANSWER:

Yes: \_\_\_\_\_ No: \_\_\_\_\_

7. If you answered two or more of Questions Numbers 2, 4 and 6 "yes", then and only then answer this question: Assuming the entire causal negligence for the injuries to Cort Amour to be 100 percent, what percent do you attribute to:

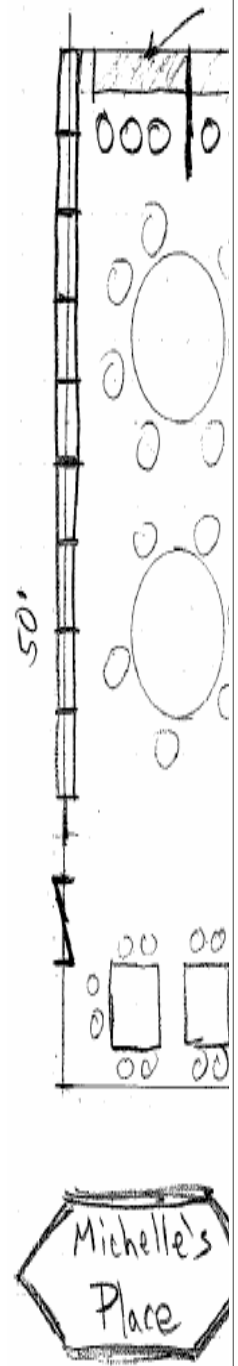
- A. Lee Nash: \_\_\_\_\_%
- B. Michelle's Place, Inc.: \_\_\_\_\_%
- C. Cort Amour: \_\_\_\_\_%

TOTAL: \_\_\_\_\_ 100%

\*This form of verdict is simplified for Mock Trial purposes and is intended for educational value only. The case writers realize that in the "real world" there might well be a cause of action alleging intentional conduct, and facts presented at trial supporting a finding of intentional conduct. Under the law, intentional and negligent conduct cannot be compared in a comparison of negligence verdict question. We overlook this distinction here, however, and invite a comparison, under the label of negligence, of all causal behavior of a party. To avoid intricate legal issues that in real practice would not be resolved until after all evidence is in, we have not set forth alternative verdicts on the comparison issue that normally would be required because intentional conduct is not compared with negligence.



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**CORT AMOUR**

714 Paradise Drive, Apt. 13  
Clearwater, WI 55555

Plaintiff,

vs.

Case No: CV 2016

**LEE NASH**

403 Roosevelt Drive  
Clearwater, WI 55555

and

**Michelle's Place, Inc.**

125 Brown Way  
Clearwater, WI 55555

and

**Clearwater Mutual Insurance Company**

#10 First Clearwater National Building  
123 South Main Street  
Clearwater, WI 55555

Defendants.

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**PLAINTIFF'S COMPLAINT**

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NOW COMES Plaintiff Cort Amour, by the undersigned counsel, and for his/her complaint against Defendants Lee Nash, Michelle's Place, Inc., and Clearwater Mutual Insurance Company alleges as follows.

**BACKGROUND FACTUAL ALLEGATIONS**

1. Plaintiff Cort Amour is an adult residing at 714 Paradise Drive, Apt. 13, Clearwater, WI.
2. Defendant Lee Nash is an adult residing at 403 Roosevelt Drive, Clearwater, WI. At all times material hereto, Nash was employed, and acting within the scope of that employment, by defendant Michelle's Place, Inc.

3. Defendant Michelle's Place, Inc., is a corporation organized under the laws of the State of Wisconsin, with its principal place of business at 125 Brown Way, Clearwater, WI.
4. Defendant Michelle's Place is in the business of operating a retail establishment for the sale of beer, liquor, and other food and drinks, to customers, to be consumed on its premises.
5. Defendant Clearwater Mutual Insurance Company is a corporation organized and existing under the laws of the State of Wisconsin, with its principal place of business at #10 First Clearwater National Building, 123 South Main Street, Clearwater, WI. Upon information and belief, Clearwater Mutual has issued to Defendant Michelle's Place insurance policies that provide coverage for the incident and damages described in this complaint.
6. On October 16, 2004, at approximately 7:00 p.m., plaintiff Cort Amour, along with Tristan Manchanda, entered Michelle's Place for the purpose of purchasing glasses of beer and socializing.
7. At and during the time period that plaintiff was present at Michelle's Place, defendant Lee Nash was working as a bartender.
8. At approximately 9:00 p.m. on the date in question, Shelby Withers entered Michelle's place. Shelby Withers immediately came over to plaintiff's table and began yelling, screaming, and acting in a threatening manner towards Tristan Manchanda.
9. In order to maintain the peace and quiet, plaintiff intervened between Shelby Withers and Tristan Manchanda, leading Shelby Withers away from the table. At this point Withers began screaming even louder and acting erratically.
10. Defendant Lee Nash, without warning, leaped over the bar with a police baton in his/her right hand. Instead of restraining Withers, Nash immediately and without warning or provocation attacked plaintiff.
11. Defendant Nash kicked, punched, and hit plaintiff, and continued to do so even when plaintiff was on the ground, causing plaintiff great bodily harm and emotional distress.

**COUNT I (Against Defendant Nash for Intentional Conduct)**

12. Plaintiff realleges and incorporates as if fully set forth herein, paragraphs 1-11 above.
13. Defendant Nash intentionally attacked, assaulted, and battered plaintiff.

14. Defendant Nash acted without reason or provocation in attacking plaintiff.
15. As a result of Defendant Nash's actions, plaintiff suffered substantial damages, including without limitation, past and future pain and suffering, past and future lost wages, medical expenses, and emotional distress.

**COUNT II (Against Michelle's For Vicarious Liability)**

16. Plaintiff realleges and incorporates as if fully set forth herein, paragraphs 1-15 above.
17. At all times material to the incident in question, Defendant Nash was employed by and acting within the scope of his/her employment.
18. Michelle's Place is vicariously liable for the acts and omissions of Defendant Nash during the scope of his/her employment.
19. As a consequence, Michelle's Place is responsible and liable for damages suffered by plaintiff as set forth above.

**COUNT III (Against Michelle's for Negligent Hiring, Training, and Supervision)**

20. Plaintiff realleges and incorporates as if fully set forth herein, paragraphs 1-19 above.
21. Defendant Michelle's Place owed a duty of care to plaintiff and other customers.
22. Defendant Michelle's Place breached its duty of care to plaintiff in that it was negligent in hiring Defendant Nash who Michelle's Place knew or should have known had a history of violence and was a danger to its customers.
23. Defendant Michelle's Place breached its duty of care to plaintiff in that it was negligent in the training and supervision of Defendant Nash.
24. Defendant Michelle's Place's negligence was the proximate cause of the damages suffered by plaintiff as set forth above.

**COUNT IV (Punitive Damages against Michelle's)**

25. Plaintiff realleges and incorporates as if fully set forth herein, paragraphs 1-24 above.
26. Defendant Nash was a known violent offender with a history of injuring other persons.

27. As a bartender, Defendant Nash would of a necessity interact with numerous people and it was reasonably foreseeable that s/he would be confronted with tense and potentially aggravating situations.
28. In hiring Defendant Nash, Michelle's Place acted in intentional disregard of the rights of plaintiff and other customers.
29. In order to punish Michelle's Place and deter such egregious conduct in the future by Michelle's Place and other similarly situated businesses, Michelle's place should be liable to plaintiff for punitive damages.

WHEREFORE, plaintiff Cort Amour demands judgment in his/her favor, awarding his/her damages for past and future pain and suffering, past and future lost wages, past and future medical expenses, emotional distress, punitive damages, attorney's fees, costs, and such other relief as this Court may deem just and equitable.

**PLAINTIFF DEMANDS A JURY OF 12**

**STAWSKI & ROSENBERG, S.C.**  
Attorneys for Plaintiff

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Christopher J. Stawski

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Michael D. Rosenberg  
11 St. Stephen Way  
Suite L25  
Clearwater, WI

## AFFIDAVIT OF CORT AMOUR

1. My name is Cort Amour. I've lived in lots of places—always moving—but I've been in Clearwater now for the last few years. I'm 23 years old. I'm hoping to get out of this place as soon as possible. Go to the big city and be a star.
2. On October 16, 2004, I went to Michelle's Place with my best friend, Tristan Manchanda. We both play in a band, "Crowley's Crew." We had just finished practicing and just wanted to hang out and have a few drinks. Naturally, we had a couple of beers during practice, but we weren't drunk or nothing. We had a big gig coming up the next weekend at the Death Metal Mania battle of the bands. We wanted to impress the record people there so that we could get a contract and get out of Clearwater, so we worked really hard. So, anyhow, after several hours of practice, we headed to Michelle's for a break. After Michelle's, we were going home to work on our hair and clothes for the show. We were going for a Goth/Metal look—black nail polish, mascara, and leather. Sort of a cross between Rob Halford and Wednesday Addams.
3. We always liked Michelle's Place, because usually the bartenders are cool and will serve you no matter how stoned you are and they didn't bother you about being different or how you looked. That night tho' there was a new bartender working, Lee Nash. Michelle must have been pretty hard up to hire this lunatic. S/He has this really scary look in his/her eyes, like someone who pulls the wings off of flies when they are a kid. I heard afterwards that Nash had a long history of problems — vandalism, arson, mayhem, assaults, and even some suspicious death when s/he was a kid.
4. We'd been sitting at a table for a couple of hours, having knocked back a few shots and beers, when in walks Shelby Withers. Shelby took one look at Tristan and came over and immediately started yelling at Tristan and waving what looked like a small knife. Apparently, before I moved to this dead water town, Shelby and Tristan had a bit of a fight in school where Shelby cut Tristan. Tristan still has a little scar on his/her face. I didn't know the details, only that Tristan blamed Shelby for still being stuck in Clearwater. Despite this, Tristan didn't say anything, just looked at Shelby. Anyway, Shelby came charging over and started yelling at Tristan calling him/her a big loser and laughing.
5. Tristan was trying to stay calm—s/he had been busted before for a couple of minor matters that the cops blew out of proportion and didn't want any further trouble. Shelby kept getting in his/her face trying to provoke Tristan. When Shelby started poking and pushing Tristan, I had enough of this little weirdo. I got up and told Shelby to buzz off and get out of our space. Since Shelby was loud and pushy, I gave him/her a little push—not hard enough to hurt him/her, but just enough to get the creep away from us.

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6. After I pushed Shelby, s/he really started screaming. It was then that Nash came flying over the bar waving what looked like a police stick thingy. I thought Nash would go after Shelby since Shelby started the whole thing and was like being a total ass, but all of a sudden Nash comes flying at me, yelling that we don't like your kind in here, grabbing me by the hair and hitting me in the head, back, and face. I fell to the ground and Nash and Shelby kept kicking me in the kidneys and head until Tristan was able to pull me out of there while some others held Nash back. Withers and Nash must have had something going—what a gross picture. Why else would Nash attack me?
7. Somebody must have called the cops, because they showed up shortly—I don't know how long, I lost track of time. They cited me, of all persons, for battery, reckless endangerment, and disorderly conduct—what a crock, I'm a peaceful person. Shelby only got a ticket for creating a disturbance, and Nash got nothing. That freak yanked my hair so hard my head hurt for three days, broke my jaw, gave me a concussion, and broke a couple of ribs and a nail and Nash gets nothing? What a pile of crap. I think Michelle has friends in high places and pulled a few strings to clear Nash and cover her rear at the same time.
8. I was really pissed off after nearly being killed by Nash. So I got a lawyer to defend me against the bogus charges and to file this lawsuit against Nash and Michelle's. I worked out a deal with the State to plead no contest to being disorderly and enter some bogus rehab. I wasn't really drunk, just a few beers and shots, but that took care of the criminal charge—except they expected me to show up in court and on time. If only they wouldn't have court in the morning. Like, I'm supposed to be somewhere at 10:00 in the morning? Get real. Anyway, now its Michelle's and Nash's turn to pay. They are to blame for all of my trouble.
9. No way should Michelle ever have hired Nash. That was totally whacked. That Nash is a walking time bomb. How many people does Nash have to kill or injure before they get him/her off the streets? I know I can't lock him/her up, but maybe this will stop Nash and any other losers Michelle's might hire. Nash intentionally tried to hurt me by kicking and beating me. Nash never would have had the chance if Michelle's hadn't hired that moron. That's like an intentional disregard of my rights. I should be able to go into a bar and have a quiet drink with friends without worrying that the owner has hired a dangerous lunatic as a bartender. I want to make sure that neither of them ever work in a bar again. They are a menace to society and should be made to pay.
10. After the beating, we couldn't play in the Death Metal Jam and missed our opportunity. I don't know if we'll ever make it now. Tristan is like totally freaked now and won't go out in public anymore. The rest of the band, Ursus, Pinhead, and Gator are talking about splitting. I don't need them; I'll go out on my own and crawl out of this hole without them.

11. Michelle's should pay for all of my loss. I just now can start singing and playing again. We would have been stars if not for Michelle's and that malicious Nash. I'm out millions and my hair hasn't been the same since.

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Cort Amour

Subscribed and sworn to before me  
this 2nd day of November, 2004.

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Notary Public, Clearwater County, Wisconsin  
My commission: \_\_\_\_\_



## AFFIDAVIT OF CARY PREFECT

1. I am an adult resident of Clearwater Wisconsin, residing at 200 Terminal Drive in Clearwater. I am 42 years old. I am married and have two adult children. My spouse supplements the household income by selling books on E-Bay. S/He does very well at it, but it does take a lot of time. It seems like we are always going to rummage sales, auctions, and garage sales...I never get a morning to myself any more.
2. I grew up in Clearwater, and successfully graduated from Clearwater High School in 1980. I sure wasn't at the top of the class, but I did manage to have a good time and stay out of serious trouble. In high school, I was the kind of person who usually organized the gatherings. I was friends with everyone, from the whiz kids to the jocks.
3. After high school I worked as an over the road driver for four years, the hours were long and the money was good. I worked hard and saved all I could. I lived out of my truck those four years. It was a good way to see some of the country, but knew I could not handle being on the road for the next 30 years.
4. I met Pat Malben through a mutual friend in about 1983. When Pat decided to sell the Yardbird, s/he gave me a chance to buy it on contract. Had to sell a lot of taps to make the payments, but it all worked out for the best.
5. I have owned the Y-Not (formerly the Yardbird) since 1984; it is a thriving eating and drinking establishment located just off Campus Drive and Main Street in downtown Clearwater.
6. When I wasn't bartending, cooking or cleaning, I went to school part-time at Clearwater College. I got my Bachelors degree in 1990 in Social Work. I figured I had heard enough stories behind the bar, might just as well figure out what some of them meant. In 1996, I got my Masters Degree from Clearwater College as well. Thought I could always go to work for the Clearwater Department of Social Services if I ever sold the bar, I already knew some of their clients pretty well.
7. On a busy night, we may have upwards of 200 patrons pass through our doors. We are kind of a tourist attraction. You see, we have the largest collection of Wisconsin beer bottles anywhere in the state, can't find too many of them old Pabst or Fox Head bottles anymore! It is in my Will, when I die, the whole collection gets packed up and sent off to the Wisconsin Historical Society.
8. I have a staff of six regular bartenders and another half dozen part-time bartenders. I have very little turnover, most of my employees have worked for me for at least two years.

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9. Whenever a new bartender applies for a license in Clearwater, the police department does a background check on the individual. The owner is given a copy of that information.
10. I routinely ask all my new employees if they have ever been convicted of a crime and follow up with my own check of CCAP records.
11. If any of the applicants have ever been convicted of a serious crime, such as theft, I won't hire them. I don't need to take the risk.
12. It is a requirement that all my bartenders go through the tech school course in serving alcoholic beverages.
13. I am also pretty demanding about what I expect from my bartenders when they are working. They are to keep a clean and orderly establishment. This includes not serving anyone who is already intoxicated or causing trouble.
14. I have reviewed the statements in this case and believe the bartender, Lee Nash, should have intervened sooner. This would have avoided or prevented the altercation that occurred.
15. Management at Michelle's Bar should have had clearer expectations for their employees and the employees should have been better trained. For example, did Michelle instruct Lee Nash to intervene whenever there is an altercation between patrons? She could have directed her bartenders to call 911 and keep other patrons out of harms way. This may not have prevented the injuries to Mr./Ms. Amour, but it is less likely she and Lee Nash would have ended up in court. Michelle could have required her bartenders to take a training course in bartending that showed more than how to flip a bottle. Useful training courses can assist Michelle and her employees in recognizing potential problems and how to act proactively. Michelle could have used the tavern league's bartender's instruction materials for training her new employees.
16. I believe the bartender could have defused the situation without resorting to physical intervention right away. In the first place, the bartender should have tried to separate Cort Amour and Shelby Withers. Second, the bartender should have been taught the art of verbal confrontation. Third, the bartender should not have charged into the middle of a confrontation ready to start swinging him/herself! Finally, the bartender did not properly apply the minimum force necessary, and instead broke the plaintiff's jaw and a couple of ribs.
17. Ownership should have seen that hiring someone with a background like this bartender's was just a problem waiting to happen. Nash was captain of their soccer team. Talk about maniacs! Most troubling of all, Nash was arrested for a battery just a few months before s/he was hired. Clearly the behaviors were escalating.

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18. I understand Michelle's doesn't even have a written policy for its employees. This is ridiculous; it is as much for the benefit of the employees as it is for the patrons. Written policies should spell out what is expected of an employee if a patron is obviously drunk, obnoxious, creating a disturbance, a danger to self or others, or appears to be under age. This gives the employee some guidance as to how to handle these situations.
19. In my experience an establishment earns a reputation. If it is well run, seldom will there ever be a disturbance. On the other hand, if the management allows the patrons to be out of control, it is asking for constant problems.
20. Now I understand even the best management cannot prevent all problems from happening all the time, even the best employees can't protect people from themselves, but here Michelle's didn't even try. There was no training. The owner wasn't even present during the busiest time of the busiest night of the week. There was no attempt by the bartender to defuse the situation; instead, Nash waded into the fight just like any other patron ready to fight it out.
21. In my 20 years of running the Y-Not, I don't think we have had one fight a year. If we do have a heated argument, my bartenders know to separate the parties and cut off the fuel to the fire. I encourage them to send one, if not both of the contestants home. We don't need that kind of aggravation, something could get broke.
22. Oh, and one other thing. I've been a member of the Clearwater Tavern League for 20 years. We do a lot of good for the community. We try to educate our members and provide public services. We want all our patrons to drink responsibly and to come back to visit us often.
23. I am on a committee of the tavern league that has been trying to develop a standard bartender's handbook for the past five years. We hope to improve the quality of all the bartenders in Clearwater County. If Michelle would come to a meeting once in a while s/he would have learned about our committee and seen our working materials.

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\_\_\_\_\_  
Cary B. Prefect

Subscribed and sworn to before me  
this 16th day of November, 2004.

\_\_\_\_\_  
Notary Public, Clearwater County, Wisconsin  
My commission: \_\_\_\_\_

**Cary B. Prefect  
200 Terminal Drive  
Clearwater, Wisconsin**

Education:

1996                    Masters Degree in Social Work  
Clearwater College

Masters Thesis: *"Defusing the Drunk, Suggestions for Conflict Avoidance"*

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1990                    Bachelor of Arts degree in Social Work  
Clearwater College

1980                    Graduate of Clearwater High School

Employment:

1984-present        Owner and Operator of Y-Not, a well known nightclub  
Clearwater, Wisconsin

1980-1984           Long haul Semi Driver  
Chuttie's Freight and Bait Company

Civic Involvement:

2000-present        Clearwater Shelter Board of Directors

1998-present        Employee Policy Committee, Clearwater County Tavern League

1998-2000           President, Clearwater County Tavern League

1996-present        Clearwater Big Brothers/Big Sisters Board of Directors

1984-present        Clearwater County Tavern League

1984-present        Clearwater Volunteer Fire Department

## AFFIDAVIT OF JAMIE JONES

1. I am 20 years old and attend Clearwater University. My friends and I like to hang out at Michelle's Place to de-stress from our school work.
2. On October 16, 2004 we went there again. I have been there about 10 times before. No, I didn't get carded. It's not my fault. They will let anyone inside that bar! Well, okay, I showed them a fake id. I got it from Tristan. I paid \$20 for it. So what, everyone does it!
3. There was a bartender working that night who I have seen once or twice before — Lee Nash. I hear s/he is a real jerk. Nash likes to interfere in other people's business and doesn't mind roughing people up — I think s/he enjoys it. Nash thinks s/he doesn't have to obey the law because s/he helps run the place.
4. That night, my friends and I were just having a few drinks, minding our own business. I had three beers and one shot. We heard a commotion over near the bar and I saw Shelby Withers yelling at Tristan Manchanda. I know both of these yahoos from high school, but wasn't friends with either of them. I was in the more popular crowd; both of them were known as kind of trouble makers, especially Shelby. I didn't really pay attention to what they were saying, the music was too loud. I saw Shelby really get in Tristan's face and push Tristan. I never saw Tristan touch Shelby, or even really yell at him/her. It was mostly Shelby causing the commotion. But Tristan's friend, I think his/her name is Cort — they play in a band together — pushed Shelby and Shelby started yelling.
5. Then Nash hopped over the bar and broke up the fight. Nash really concentrated on Cort though and hit Cort in the face and back. Cort fell and Nash kept after Cort — it looked like Nash was kicking Cort. I never saw Cort hit Nash, it just looked like Cort was trying to defend him/herself but I never saw Cort throw a punch or anything.
6. It was pretty crowded when this was happening. We were by the dart board which was about, I don't know, 20-30 feet away. There were about 30 people between us and them. I am 5'7" and could see around most of the people.
7. Some people finally broke it up and the police were called. My friend Jane said she thought Cort punched Nash too and thought Nash had some injuries, but she was wasted and has no idea what she saw. And she doesn't know these people at all, it was her first time at the bar.
8. We tried to get out of there because I didn't want to get in trouble, being only 20 and all. But the police wanted to talk to all of us. Yes, I lied to the police about my age, but not about anything else. I just can't afford a \$250.00 underage

drinking ticket – I wouldn't be able to buy my food.

9. I heard that Nash has a criminal record and likes to get a little too involved in fights. Who would hire such an idiot? Bad move for that place. It never was a rough place to hang out, but now I probably won't go back.
10. When the bar owner found out we were underage she banned us from going there, even when I do turn 21! That is unfair. What else is there to do in this town to have fun except hang out at Michelle's Place?! They have the cheapest beer and best music! I have way outgrown those dumb house parties. I may just have to transfer schools.

\_\_\_\_\_  
Jamie Jones

Subscribed and sworn to before me  
this 9<sup>th</sup> day of November, 2004.

\_\_\_\_\_  
Notary Public, Clearwater County, Wisconsin  
My commission: \_\_\_\_\_

## AFFIDAVIT OF LEE NASH

1. My name is Lee Nash. I am 22 years old and was born on May 28th, 1982. I am employed as a bartender at Michelle's Place in Clearwater since July 4, 2004. I went to college on a soccer scholarship. I guess I was really blown away when they offered me money right out of high school to play soccer. The truth is, I wasn't that great at either soccer or college. I didn't do very well, and after my freshman year I, as they say, "wasn't invited back."
2. My life kind of began a downward spiral at that point. I started drinking and smoking weed. There was a period of six months in 2003 that I don't really remember. During that time, I picked up an underage drinking ticket, a fourth-degree sexual assault (grabbing this kid's butt—can you believe it?) and a battery. I'd never gotten into any trouble before that six-month period. Well, with the exception of when I was 12 years old and I accidentally burned down a garage.
3. After the battery conviction, I kind of bottomed out. That was probably the best thing that could have happened to me. I did 90 days for busting a pool cue over this guy's head. Geez, I can't believe I did that. It seems like ancient history now—and it really is. I mean, I changed completely after that 90 days in the slam. One of the best things that happened to me was I was granted work release privileges, and was hired by Michelle. At first, I stocked the coolers and checked ID's. Michelle herself trained me on checking ID's and I have always done a good job of that and have received many compliments from my employer. While I was in the slammer, Michelle had me working 60 hours a week, the maximum under the work release law. When I got out of jail, she even paid my tuition for this on-line bartending/mixology class. There were 14 interactive lessons. My favorite was the one on bottle tricks. They teach you that part of bartending is showmanship, and that every good bartender should know a few tricks. Man, I spent hours perfecting this one trick that was seen in the movie, *Cocktail*, with Tom Cruise.
4. Michelle didn't have enough licensed bartenders, so I decided to surprise her and get a license myself. On the application form for my bartender's license where it said, "Have you ever been convicted of a crime?" I admit I checked, "No." I figured if I told the truth, I wouldn't get the license. Michelle didn't know anything about that, though. She was just so happy when I showed her that I had the license, that she paid my membership at a fitness center, where I traded in the six-pack I used to drink for a real six-pack. I mean, I am in better shape now than I was when I played soccer!

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5. But let me tell you what happened that night. On the evening of October 16th, 2004, I was a bartender on duty at Michelle's. It was a typical Saturday night. I have a very good memory of October 16th because I was not drinking or doing any drugs. As I said, I'm done with that stuff. I drank my share already. Anyway, one of the reasons I remember that evening is because a very nice older man/woman came in. Believe me; Michelle's doesn't cater to the geriatric crowd. This person wanted to talk. I kind of felt sorry for him/her. Maybe s/he was just lonely or something. I chatted with him/her for a time, and found him/her to be very interesting. Young people can really learn a lot from older people if they just take the time. Anyway, my attention was drawn away from the man/woman because of the arrival of a pair of younger customers. They approached the bar, and I took their drink orders. We started chatting, and within 15 minutes one of them, Shelby Withers, the one who was drinking Southern Comfort old fashions and devouring cheese curds, wanted to know if I could come over after closing and watch some reruns of *Sex and the City*. I get offers like that all the time.
6. I didn't remember when they'd come in, but a couple I'd seen in the bar many times before, Cort Amour and Tristen Manchanda, were sitting in a booth near the jukebox. They were really slammin' the drinks down. I know because I was filling the drink orders for their waitress. Anyway, about three months ago when Amour was in the bar one of the waitresses overheard him/her telling another customer that I'd narced on a drug-dealing friend of his/hers in exchange for the 90-day sentence I got for battery. That's complete b.s. I never narced on anybody!
7. But getting back to the incident, after I served Shelby Withers his/her second drink at the bar, s/he started across the room toward the restroom, which is located near the pinball machines. As I followed Withers with my eyes, I heard Tristen Manchanda holler something at Shelby. I didn't hear exactly what it was because, between the Badger game on the TV, and the music playing on the jukebox, it was pretty loud. I do know Shelby hollered something back as s/he approached the booth. The next thing I know, Cort was on his/her feet pushing Shelby!
8. That was enough for me. I flew into action. I pounced like a cat, had Amour in the old headlock, and—bam—I tripped him/her and Amour was on the floor before s/he knew what happened. I mean, I had that sucker neutralized in about a half a second. (I learned how to do all that; by the way, in a self-defense class I took the first week before I left for college. Can't be too careful with all the freaks and whackos running around the campuses of this country these days.)
9. I did hear a slight crack when I put Cort in the headlock, but other than a stiff neck, I didn't hurt the creep. I certainly did not kick Cort when s/he was down. I was the one who was holding Cort down. How could I possibly have kicked him/her? If Cort was kicked by anyone, it must have been by another customer.

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10. Now I'm being sued! Can you believe it? I was trying to defend Shelby and keep order in the bar, just like I was taught in my Internet bartending course. If I was lax at all, it was for allowing that jerk Amour into the place to begin with. I know his/her reputation for having a short fuse, especially when drinking. And it wasn't just for screaming at people. I mean, I heard that last summer at the Death Metal Fest, Amour stabbed a kid with his guitar pick.

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Lee Nash

Subscribed and sworn to before me  
this 8<sup>th</sup> day of November, 2004.

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Notary Public, Clearwater County, Wisconsin  
My commission: \_\_\_\_\_

State of Wisconsin vs. Lee Nash

Clearwater County Case Number 2004 CM 0001

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<b>Filing Date</b> 01-02-2004	<b>Case Type</b> Criminal	<b>Case Status</b> Closed
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<b>Defendant Date of Birth</b> 5-28-1982	<b>Address:</b> 403 Roosevelt Dr. Clearwater, WI 55555
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<b>Branch Id</b> 1	<b>DA Case Number</b> 20040N000004
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Count No.	Statute	Charge(s) Description	Severity	Disposition
1	940.19(1)	Battery	Misd. A	Guilty/No Contest

<b>Responsible Official</b> Hon. A. McVey	<b>Prosecuting Agency</b> District Attorney	<b>Prosecuting Attorney</b> Dehn, Patrick F.
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**Defense Attorney**  
Coker, Robert E.

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Defendant Name	Date of Birth	Sex	Race
Lee Nash	05-1982	Male/Female	

<b>Address</b> 403 Roosevelt Dr. Clearwater, WI 55555	<b>Address Updated On</b> 01-02-2004
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<b>JUSTIS ID</b>	<b>Finger Print ID</b>
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**Charge(s)/Sentence(s)**  
The Defendant was charged with the following offense:

Count No.	Statute Cite	Description	Severity	Offense Date
1	940.19(1)	Battery	Misd. A	12-31-2003

**Plea**  
Guilty 1/26/04

**Charge Modifiers(s)  
Statute Cite**

**Description**

On 01-26-2004 there was a finding of:  
**Action** Court Official  
 Guilty/No Contest Hon. A. McVey

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 . . . . Domestic Abuse

**On 01.26.2004 the following was ordered:**

Sentence	Time	Begin Date	Notes
Withheld, probation	(12 months)		

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Condition	Time	Notes
Costs		

Prohibitions		No intoxicants
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Alcohol treatment		Undergo AODA and follow through with recommendations
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Other		
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Supervision fees  
 90 days county jail with work release  
 privileges if Defendant obtains employment  
 Undergo Anger Management and any  
 counseling deemed appropriate by PO  
 Court would not object to release after 6  
 months if all conditions are met and is  
 recommended by PO

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Court Assessments	Total Receivables		Balance Due to Court
	Paid to the Court	Probation Amount	
\$127.00	\$77.00	\$50.00	\$0.00

- 1 The designation listed in the Race field is subjective. It is provided to the court by the agency that filed the case.
- 2 Non-Court activities do not require personal court appearances- For questions regarding which court type activities require court appearances, please contact the Clerk of Circuit Court in the county where the case originated.
- 3 Includes the original amount assessed minus any adjustments- Contact the circuit court of jurisdiction for details.
- 4 Some amounts assessed by the courts are collected by the Department of Corrections (DOC). This column is rarely updated by the courts and may be less than the actual amount owed to DOC.
- 5 The defendant may owe more money than is displayed in this column. Contact the circuit court of jurisdiction for details
- 6 For cases with multiple assessments, the due date represents the assessment with the latest date.

State of Wisconsin vs. Lee Nash

Clearwater County Case Number 2003 CM O501

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<b>Filing Date</b> 10-22-2003	<b>Case Type</b> Criminal	<b>Case Status</b> Closed
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<b>Defendant Date of Birth</b> 5-28-1982	<b>Address:</b> 403 Roosevelt Dr. Clearwater, WI 55555
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<b>Branch Id</b> 1	<b>DA Case Number</b> 20030NOOO516
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Count No.	Statute	Charge(s) Description	Severity	Disposition
1	940.225(3m)	4 <sup>th</sup> degree sexual assault	Misd. A	Guilty/No Contest

Defendant Owes the Court: \$0.00

<b>Responsible Official</b> Hon. D. Huffman	<b>Prosecuting Agency</b> District Attorney	<b>Prosecuting Attorney</b> Dehn, Patrick F.
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**Defense Attorney**  
Coker, Robert E.

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Defendant Name	Date of Birth	Sex	Race
Lee Nash	05-1982	Male/Female	

<b>Address</b> 403 Roosevelt Dr. Clearwater, WI 55555	<b>Address Updated On</b> 10-22-2003
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<b>JUSTIS ID</b>	<b>Finger Print ID</b>
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**Charge(s)/Sentence(s)**  
The Defendant was charged with the following offense:

Count No.	Statute Cite	Description	Severity	Offense Date
1	940.225(3m)	4 <sup>th</sup> degree Assault	Misd. A	08-27-2003

**Plea**  
No contest 11-25-03

On 11-25-2003 there was a finding of:

<b>Action</b>	<b>Court Official</b>
Guilty/No Contest	Hon. D. Huffman

**On 11-25-2003 the following was ordered:**

<b>Sentence</b>	<b>Time</b>	<b>Begin Date</b>	<b>Notes</b>
Probation, Sent Withheld	14 months		

<b>Condition</b>	<b>Time</b>	<b>Notes</b>
Costs		
Other		
Alcohol Treatment		Supervision fees Undergo AODA & recovery as recommended
Prohibitions		No intoxicants, no taverns unless permission by PO in writing No contact with S. B. Sharp

<b>Total Receivables</b>			
<b>Court Assessments</b>	<b>Paid to the Court</b>	<b>Probation Amount</b>	<b>Balance Due to Court</b>
\$77.00	\$27.00	\$50.00	\$0.00

- 1 The designation listed in the Race field is subjective. It is provided to the court by the agency that filed the case.
- 2 Non-Court activities do not require personal court appearances- For questions regarding which court type activities require court appearances, please contact the Clerk of Circuit Court in the county where the case originated.
- 3 Includes the original amount assessed minus any adjustments- Contact the circuit court of jurisdiction for details.
- 4 Some amounts assessed by the courts are collected by the Department of Corrections (DOC). This column is rarely updated by the courts and may be less than the actual amount owed to DOC.
- 5 The defendant may owe more money than is displayed in this column. Contact the circuit court of jurisdiction for details
- 6 For cases with multiple assessments, the due date represents the assessment with the latest date.

**State of Wisconsin vs. Lee Nash  
Clearwater County Case Number 2000 FO 0585**

<b>Filing Date</b>	<b>Case Type</b>	<b>Case Status</b>
6-12-2002	Non-Traffic Ordinance Violation	Closed

Deleted: 3

<b>Defendant Date of Birth</b>	<b>Address:</b>
5-28-1982	403 Roosevelt Dr. Clearwater, WI 55555

<b>Branch Id</b>	<b>DA Case Number</b>
1	

Count No.	Statute	Charge(s) Description	Severity	Disposition
1	125.07(4)(b)	Underage drinking Possess – 17-20(1 <sup>st</sup> )	Forfeiture U	Guilty/No Contest

Defendant Owes the Court: \$0.00

<b>Responsible Official</b>	<b>Prosecuting Agency</b>	<b>Prosecuting Attorney</b>
Hon. P. Jones	District Attorney	Dehn, Patrick F.

**Defense Attorney**  
Coker, Robert E.

Defendant			
Defendant Name	Date of Birth	Sex	Race
Lee Nash	05-1982	Male/Female	

<b>Address</b>	<b>Address Updated On</b>
403 Roosevelt Dr. Clearwater, WI 55555	6-12-2002

Deleted: 3

<b>JUSTIS ID</b>	<b>Finger Print ID</b>

Charge(s)/Sentence(s)				
The Defendant was charged with the following offense:				
Count No.	Statute Cite	Description	Severity	Offense Date
1	125.07(4)	Underage drinking Possess-17-20(1 <sup>st</sup> )	Forf. U	5-31-2002

<b>Plea</b>
No Con. 6-30-02

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On 6-30-2002 there was a finding of:

<b>Action</b>	<b>Court Official</b>
Guilty/No Contest	Huffman, Doris

Deleted: 3

On 6-30-2002 the following was ordered:

Sentence	Time	Begin Date	Notes
Forfeiture/Fine	90 days		

Deleted: 3

## AFFIDAVIT OF PAT MALBEN

Pat Malben, being first duly sworn, on oath, deposes and states as follows:

1. I am 68 years of age, a resident of Clearwater, Wisconsin and reside at 714 Hamilton Street in Clearwater.
2. Between 1954 and 1984, I owned a tavern just off of Campus Drive and Main Street in downtown Clearwater. The tavern was called the Yardbird Café when I owned it.
3. In 1984, I sold the Yardbird Café to its current owner, Cary Prefect. The tavern is now called The Y-Not.
4. When I owned the Yardbird Café, it had a patio that allowed us to accommodate up to 500 people on a busy night. Because of the current owner's repeated violations for serving alcohol to minors, the patio was closed in 1994. Today, the Y-Not is only allowed to have 200 persons on its premises at any one time.
5. Since 1984, I have acted as president of the State of Wisconsin's Tavern League. Its membership consists of all of the local tavern leagues throughout the State, including the Clearwater Tavern League.
6. During the period of time that I owned the Yardbird Café, I employed a staff of 16 regular bartenders and 25 part-time bartenders. When I sold the tavern, most of my employees had worked for me for more than ten years.
7. During the 30 years that I operated the Yardbird Café and during my 20 years as President of the Wisconsin Tavern League, I have become very familiar with the laws of the State of Wisconsin as they relate to taverns, bartenders and the licensing of bartenders. In fact, I served on a committee appointed by the Governor last year to review the laws of Wisconsin and make recommendations for changes that may be required.
8. At the time of this incident, there was no requirement in Wisconsin law that a bartender undergo a background check before being hired at a tavern. Most of the tavern owners in Wisconsin did not perform background checks on prospective bartenders when this incident occurred.
9. At the time of this incident, Wisconsin law did not prevent persons with criminal records from being employed as bartenders. Depending upon one's criminal record, that person may have been able to work as a bartender in this state when this incident occurred.

10. At the time of this incident, Wisconsin law did not require unlicensed bartenders to go through any schooling before becoming employed as a bartender. I am aware of a number of schools in this state that purport to train bartenders. Some of those schools are good; some aren't. I know that the school that the Y-Not sends its bartenders to for training is called The Bob Huggins Academy. The school recently lost its accreditation because of its poor curriculum.
11. As part of my work in this case, I have reviewed all of the affidavits. Based on my review of these affidavits, I have concluded that there was nothing that Michelle's Place management could have done to prevent the injuries that occurred to the plaintiff in this case.
12. Based upon my review of the affidavits submitted in this case, it was not negligent for Michelle's Place to hire Nash as a bartender.
13. At the time of this incident, there was no requirement in Wisconsin law which mandated the use of written policies for employees. In that regard, taverns are treated like all other businesses in Wisconsin.
14. As far as the actions of Nash are concerned, given the situation that Nash was confronted with, his/her actions were reasonable under the circumstances and did not fall below the applicable standard of care.
15. It was reasonable and appropriate for Nash to watch Amour very closely on the night of October 16, 2004 as described in Nash's affidavit.
16. It was also reasonable and appropriate for Nash to keep track of the number of drinks Amour had consumed on October 16, given Amour's history of behaving obnoxiously and aggressively after drinking.
17. It was reasonable and appropriate for Nash to intervene in the verbal squabble taking place between Amour and Shelby Withers, given Nash's knowledge and observations at the time.
18. It was reasonable and appropriate under the circumstances for Nash to leave the bar area to intervene in a dispute that Nash reasonably believed was going to become violent. It was not inappropriate for Nash to place Amour in a headlock on the floor.
19. If Nash kicked Amour, such action may or may not be appropriate, depending upon the circumstances. Nash has an obligation as a bartender to try to insure the safety of all of the patrons at the bar. If someone like Amour is behaving improperly, Nash has the right to use whatever force s/he believes is reasonably necessary to quell the disturbance and protect other patrons.



\_\_\_\_\_  
PAT MALBEN

Subscribed and sworn to before me  
this 17<sup>th</sup> day of November, 2004.

\_\_\_\_\_  
Notary Public, Clearwater County, Wisconsin  
My commission: \_\_\_\_\_

**PAT MALBEN**  
**714 Hamilton Street**  
**Clearwater, WI**

Education:

1954 Graduate of Biderbecke High School – Davenport, IA.

Employment:

1984-Present President – State of Wisconsin’s Tavern League

1954-1984 Owner – Operator  
Yardbird Café, Clearwater, WI.

Civic Involvement:

2004 Founder – Clearwater Residents Against President Bush’s  
Status

1998-Present Clearwater Democratic Party Liaison to Governor’s Office

1984-Present Clearwater Free Jazz Society

1971–Present Founding Member – Clearwater Chapter of Friends of  
Bill W. – Present Member of Board of Directors

1960 – 1971 President-Clearwater County Tavern League

1956 -1984 Clearwater County Tavern League Board of Directors

## AFFIDAVIT OF FRANCES O'SHAUGHNESSY

1. My name is Frances O'Shaughnessy. I am 51 years old. I was visiting my daughter Mary in Clearwater for my granddaughter Christina's third birthday. I didn't want to miss it. I have missed a number of these kinds of events in the past few years while my husband/wife was ill. Now that s/he's passed on, God rest his/her soul, it's easier for me to travel.
2. On the night of the "incident," we had had dinner at Mary's house with the whole family, kids, grandkids, nieces, nephews, cousins. Years ago at these family get-togethers my brother John who was a Jesuit would say a Mass for the family. All the kids used to love it because it would satisfy their obligation for Mass for the weekend, and all the adults used to love it because having a priest at the family parties would keep the kids under control. After Mass, John and I would sit in the den – this is at my old house before I moved into my condo – and drink Martinis and talk about the old neighborhood. Now that John has moved away we don't have family Masses anymore, and I have to drink Martinis alone. Nowadays our family parties just seem wild to me. The kids are yelling and screaming and playing their darn computer games. Can't they read a book or play outside or something?
3. By nine o'clock or so the family party had frankly worn me out. Sometimes when there are a lot of people talking at once it gives me a headache. I wanted to get off by myself, so I went for a walk. Mary doesn't like me walking at night, but I've always liked the nighttime. I've always felt pretty comfortable out at night in the darkness and the silence; maybe that comes from the walks I used to take late at night with my spouse when we were living on the East Coast. I really miss our walks together! Walking helps to clear the mind!
4. Anyway, while I was walking, I decided to drop in at Michelle's Place. I'd been there before a few years ago, and I always liked it because one of my granddaughter's is named Michelle.
5. I thought I'd have a nightcap. I had already had a couple Martinis so I just wanted to have a little something different like a Scotch.
6. There was one bartender on duty, or at least I didn't see anyone else working that night. I asked him/her for some Famous Grouse. That's a kind of Scotch all of us used to drink in the old days. S/He said they didn't have it; I could tell s/he didn't know what I was talking about, although you'd think a bartender would know the types of booze. Michelle's used to be a nicer place. S/He set me up with some other Scotch s/he kept calling "single malt." Charged me \$7.50 for one drink too! That made me a little mad, but the bartender seemed OK to me otherwise. Young and sassy, you know the type, always flirting with the girls/boys at the bar. Anyway, we talked a little when s/he brought me a second Scotch and s/he told me about playing soccer in high school and how s/he was

on a new exercise kick.

7. I was sitting there minding my own business. The place was too loud – apparently it's turned into a kids' place – and there was some of what I call "head banging music" playing on the juke box. I've never understood rock-and-roll music and now this rap music I really don't like, but, well, that's another story! But I just concentrated on my drink and watched the sports news on the TV above the bar. The Badgers were playing the Golphers – and I wanted to get the score. I like how nowadays they have the scores scrolling at the bottom of the screen.
8. All of a sudden the bartender – Nash, although I didn't know his/her name at the time because none of these young people ever introduce themselves – jumps over the bar right next to me and runs to break up a fight between two young people. People in my day didn't fight in bars like that, I can tell you, and none of my grandchildren would act that way, I'm sure of it. Catholic school, you know, all the way through. I noticed that one of the girls/boys was one of the girls/boys the bartender seemed like s/he liked a little when the girl/boy came up to the bar before.
9. Anyway, I saw this other boy/girl, a real hippy-type with long stringy hair and a black t-shirt, s/he comes in and pushes one of the girls/boys, and then s/he and the bartender were yelling something at each other – I couldn't hear what they said over the damn music – and the next thing I know they're fighting. Not like boxing or anything – in my day people learned how to box down at the YMCA – but wrestling around and doing these silly little karate kicks that wouldn't hurt anybody. Neither of them would have lasted ten seconds against anyone from the old neighborhood.
10. After a minute or so of them wrestling around, the bartender finally got the hippy down and seemed like s/he had him/her under control. The bartender had one arm around the hippy's neck and I guess he/she might have given the hippy the business a little with the other hand while s/he was on the ground; the hippy certainly looked like s/he had been a few rounds in the gym afterwards. I guess s/he had it coming to him.
11. A few minutes later the police showed up. We all had to wait around to give them statements and I was pretty mad when they finally got to me. Then the police officers I spoke to started treating me like a senile old fool, acting like they thought I wouldn't remember anything, so I had to set them straight. I made sure they wrote down everything I told them about what I had seen.

12. I don't like this whole lawsuit business. In my day you took your lumps and didn't try blaming your problems on someone else. You took responsibility for your own actions!

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Frances O'Shaughnessy

Subscribed and sworn to before me  
this 10<sup>th</sup> day of November, 2004.

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Notary Public, Clearwater County, Wisconsin  
My commission: \_\_\_\_\_