IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

RANDY STINE and TAMARA STINE, Individually and as husband and wife	)	
Plaintiffs,	)	
vs.	)	Case Number: CJ-2011-6753
BILL VEAZEY'S PARTY STORE, INC., AN OKLAHOMA CORPORATION, and TONY HERIFORD,	)	
Defendants.	)	

POST-TRIAL BRIEF OF DEFENDANT BILL VEAZEY'S PARTY STORE, INC.

Tim N. Cheek
D. Todd Riddles
Gregory D. Winningham
Tyler J. Coble
CHEEK LAW FIRM, P.L.L.C.
311 North Harvey Avenue
Oklahoma City, Oklahoma 73102
Telephone: (405) 272-0621
Facsimile: (405) 232-1707
ATTORNEYS FOR DEFENDANT
BILL VEAZEY'S PARTY STORE, INC.,
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COMES NOW Defendant Bill Veazey's Party Store, Inc. ("Bill Veazey's"), by and through the undersigned, and at the Court's request, submits this post-trial brief addressing certain issues of fact and law that arose during trial of this matter. As shown herein, the facts revealed at trial when applied to applicable law show that Plaintiffs have failed to carry their burden of proof, warranting judgment in Bill Veazey's favor.

INTRODUCTION

In August 2010, the Firelake Grand Casino ("Firelake" or "the casino") contacted Bill Veazey's and rented a collection of decorations to host a luau-themed party for its V.I.P. members. Among the decorations rented were two "Mayan" or "Tiki" displays, each of which consisted of two upright columns upon which an arch – a Mayan god's head – sat. Bill Veazey's delivered the decorations to the casino on the day of the luau, August 21, 2010. The casino intended to use the Tiki displays as arched entryways leading into the luau, so the two displays were set up as the beginning and end of an entrance corridor. The "beginning" Tiki was set up near the entrance of the casino's event center (where the party was taking place); the "end" Tiki was set up inside the event center at the end of the corridor, leading to the event's registration table. Notwithstanding a Bill Veazey's employee's warnings to the contrary, the Tikis' supporting columns had been placed on plastic milk crates, elevating the displays.

Plaintiffs Randy and Tamara Stine attended the August 21 luau at Firelake. As the Plaintiffs were walking into the event center toward the registration table, another casino patron – former party to this action Tony Heriford – drunkenly came upon the Tiki display at the end of the entrance corridor. In his intoxicated state, Mr. Heriford found the Tiki to be "interesting" and "curious." To satiate that interest and curiosity, Mr. Heriford intentionally shook one of the

Tiki's columns, causing the Tiki's arch to fall on Mr. Stine. Mr. Stine suffered personal injuries as a result of this incident, leading to the present negligence action.

While there are a few factual and legal moving parts to this case, those parts combine to form only one supported conclusion: Plaintiffs have failed to prove every required element of their negligence claim against Bill Veazey's; that is, Plaintiffs have not proven (1) that Bill Veazey's owed Plaintiffs a duty of care, (2) if a duty was owed, that Bill Veazey's breached that duty, and (3) that Bill Veazey's breach of duty was the direct and proximate cause of Plaintiffs' injuries. Plaintiffs bore the burden of proving each of these elements at trial by the greater weight of the evidence, but Plaintiffs have proven none of them. Accordingly, judgment should be entered in favor of Defendant Bill Veazey's.

SUMMARY OF FACTS

Except for a couple critical, disputed issues, the facts in this case are relatively undisputed. As to those disputed facts, the weight and credibility of the evidence favors Bill Veazey's' defense.

A. The rental agreement between Firelake and Bill Veazey's.

On August 21, 2010, Firelake hosted a luau-themed "high-roller" or "V.I.P." party at its event center.[1] Two of Firelake's employees were primarily involved in coordinating the event: Ms. Michelle O'Bright, Firelake's events manager, and to a lesser extent Ms. Debbie Cook, Firelake's executive host who oversaw the casino's V.I.P. guest services.[2] Ms. O'Bright contacted Bill Veazey's to select the decorations the casino would use for the luau; Ms. O'Bright selected the decorations by reviewing pictures Bill Veazey's had e-mailed her.[3] Among the

[1] (Trial Tr. vol. I, 7:5-24 (Oct. 28, 2013), attached hereto as "Exhibit '1'".)
[2] (*Id.* at 6:9-7:13; Trial Tr. vol. II, 214:16-215:16 (Oct. 29, 2013), attached hereto as "Exhibit '2'".)
[3] (Trial Tr. vol. I [Ex. 1] at 9:16-10:11.)

decorations chosen were two separate Tiki displays – substantially similar in appearance with only minor differences – and one of which would ultimately be involved in this case.[4]

When Ms. O'Bright made Firelake's reservations, Bill Veazey's' staff inquired as to the purpose of the decorations, but at that time Ms. O'Bright did not yet know how the casino would be using the decorations or where they would be placed, including the Tiki at issue in this case.[5] Importantly, there was never any discussion regarding set-up during the rental booking – Ms. O'Bright simply assumed Bill Veazey's would set-up the decorations as part of the job.[6]

In truth, Firelake never contracted for Bill Veazey's to set up the rented decorations, only to deliver them.[7] Tellingly, Bill Veazey's treats set-up as a separate service that carries its own fee; had such arrangements been made, Firelake's invoice would have shown a set-up charge, which it does not.[8] Moreover, had Bill Veazey's been told they would need to set up the displays, additional personnel and paperwork would have been used; in particular, Bill Veazey's would have sent an additional "set-up" employee to oversee the displays' assembly, and instructions regarding display and prop placement would have been provided.[9] While such additional steps are not necessarily taken if delivery personnel are asked on-site to set up something routine like tables and chairs – the majority of Bill Veazey's' deliveries – set-up for a full-blown event using props (such as the Tiki displays here) is different, thus necessitating the additional instructions or diagrams, the set-up charges, and the additional personnel.[10] Accordingly, because Firelake only contracted for delivery of the rented decorations and never

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[4] (*Id.* at 10:12-11:10.)
[5] (*Id.* at 132:16-133:15; 144:13-20.)
[6] (*Id.* at 37:10-25.)
[7] (*Id.* at 145:9-15.)
[8] (*Id.* at 145:16-147:3; Invoice & Route Sheets [Def.'s Trial Ex. 1].) Ms. O'Bright conceded that the delivery invoice was the only paperwork she had regarding Firelake's rental agreement with Bill Veazey's. (Trial Tr. vol. I [Ex. 1] at 12:9-13.)
[9] (Trial Tr. vol. I [Ex. 1] at 146:21-148:2.)
[10] (*Id.* at 148:3-149:7.)

advised Bill Veazey's that set-up would be required, Bill Veazey's did not take its usual extra set-up-related steps.

B. The delivery and disputed set-up of the Tiki display at issue in this case.

At approximately 10:00 a.m. on August 21, 2010, two of Bill Veazey's' delivery employees, Mr. Steve Houston and Mr. John Brooks, arrived at Firelake to deliver the decorations Ms. O'Bright had ordered.[11] Once the deliverymen arrived, though, they realized that one of the ordered decorations – a Tiki bar – had not been loaded onto the truck.[12] Mr. Houston left the casino at approximately 10:30 a.m. to retrieve the Tiki bar from Bill Veazey's location in Oklahoma City, but before he left, he and Mr. Brooks unloaded the decorations they already had into the main casino area, placing them just inside the doors.[13] Mr. Houston returned about an hour and ten minutes later.[14] After the Tiki bar was taken inside and assembled, Mr. Houston went to the entrance of the event center to help set up the first of the two Tiki displays.[15]

At this point in the narrative, the evidence diverges. Of the different witnesses who presented testimony, only Ms. O'Bright and Mr. Houston actually witnessed the assembly of the two Tiki displays. Ms. Mary Jane Veazey, Bill Veazey's' manager, was not on-site during the Tiki displays' set-up and thus did not witness what happened.[16] Likewise, Ms. Deborah Cook,

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[11] (Houston Dep. 37:15-38:21; 72:1-5 (Jan. 22, 2013), attached as "Exhibit '3'".) The Court will recall that efforts to have Mr. Houston appear and testify at trial failed, so Mr. Houston's video deposition was admitted into the record in full as Plaintiffs' Trial Exhibit No. 27. (*See* Trial Tr. vol. III, 5:2-6:19; 7:15-22 (Nov. 1, 2013), attached as "Exhibit '4'".)

[12] (Houston Dep. [Ex. 3] at 71:15-22.)

[13] (*Id.* at 72:16-73:16; Trial Tr. vol. I [Ex. 1] at 13:9-14:11.)

[14] (Houston Dep. [Ex. 3] at 73:17-24.)

[15] (*Id.*)

[16] (Trial Tr. vol. I [Ex. 1] at 120:5-8; 124:24-125:17.) Some time at trial was devoted to counsel disputing whether Ms. Veazey stated Bill Veazey's' employees set up the Tikis at the casino. Contrary to Plaintiffs' assertions, Ms. Veazey was only asked if she disagreed with Ms. O'Bright's testimony saying Bill Veazey's' employees set up the Tikis. (Trial Tr. vol. I [Ex. 1] at 121:18-122:11; 125:12-17.) Ms. Veazey truthfully responded that she did not have any personal knowledge to the contrary, stating in particular that she did not have any reason to doubt Ms. O'Bright's testimony "**unless someone else has**

the casino's executive host for the luau, denied seeing any of the decorations being set up.[17] As is detailed below, Mr. Houston testified that Bill Veazey's' employees did not set up the Tiki display at issue in this case, only the first Tiki display that did not fall; by contrast, Ms. O'Bright testified that Bill Veazey's' employees set up both Tikis. Accordingly, this Court must make a finding of fact as to whether Bill Veazey's set up the Tiki display at issue. For the reasons stated below, this Court should find that Mr. Houston's testimony is more believable.

1. Mr. Houston: Bill Veazey's only helped set up the first Tiki display outside the event center, and it was set on milk crates per the casino's instructions despite warnings to the contrary.

When presented with a picture of the second Tiki display involved in this case – the Tiki that fell – Mr. Houston stated that he did not set up that Tiki display; rather, he only helped set up the Tiki display at the entrance to the event center (the "beginning" of the corridor) and few other items.[18] Mr. Houston verified that the entryway Tiki display was similar to the other Tiki display involved in this case, and he described how he **and** Firelake's employees put together the decorations.[19] Once that first entryway Tiki was assembled, which was up against the event center's door frame, Mr. Houston noticed that the event center's doors were taller than the Tiki's "legs", i.e., the columns supporting the arch.[20] Mr. Houston informed "the contact person at the casino" of the doors-related issue; the contact then called in some casino employees who

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something else." (*Id.* (emphasis supplied).) In this case, someone else **did** have something else – Mr. Houston, the other eyewitness to the Tiki displays' set-up, disputed Ms. O'Bright's testimony.

[17] (Trial Tr. vol. II [Ex. 2] at 215:20-216:15.)

[18] (Houston Dep. [Ex. 3] at 40:24-42:23.)

[19] (*Id.* at 43:4-44:21.) On this point, Mr. Houston's testimony is undisputed. O'Bright testified that employees with the casino's maintenance crew were setting up decorations, too. (Trial Tr. vol. I [Ex. 1] at 38:11-23.)

[20] (Houston Dep. [Ex. 3] at 44:22-45:6; 46:16-24.)

provided milk crates upon which the columns could sit, elevating the Tiki so the event center's doors could open.[21]

When the milk crates were brought out, Mr. Houston voiced his concerns about using them; in particular, he was concerned that the doors could swing open and hit one of the crates under the display's columns, essentially knocking the leg out from under the archway.[22] In other words, Mr. Houston expressed a concern that putting the Tiki display up on milk crates would make it unstable.[23] Mr. Houston suggested that the casino could open the doors at about a 90 degree angle and set the legs in front up against them (thus not needing the crates at all), but the casino's contact did not want to do that – she wanted to be able to keep the doors to the event center closed off from the main casino.[24]

As to the second Tiki display – the one at issue in this case – Mr. Houston stated that he did not set it up, nor did he witness it being set up.[25] Mr. Houston stated that the second display was taken into the event center but then placed off to the side against a wall; he denied that it was assembled as depicted in the picture presented to him (i.e., Plaintiffs' Trial Exhibit 16, page 1), saying it was not set up at all when Bill Veazey's left.[26] While Mr. Houston had a sense that the second display was going to be used as an entryway somewhere at the event center (he did not know where it would be set up for sure), he did not know it was going to be set up on crates.[27]

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[21] (*Id.* at 44:22-45:6; 46:6-24.) During deposition, Mr. Houston identifies his contact at the casino as "Debbie", which presumably would mean Ms. Deborah Cook. More likely than not, Mr. Houston was actually referring to Ms. O'Bright, thinking she was "Debbie" because that was the contact person identified on Mr. Houston's route sheet. (Invoice & Route Sheets [Def.'s Trial Ex. 1] ("CALL DEBBIE PRIOR TO DEL ...").) This is supported by Ms. Cook's testimony, wherein Ms. Cook denied being part of the set-up process but identified Ms. O'Bright as the person directing set-up. (Trial Tr. vol. II [Ex. 2] at 215:20-216:15.)

[22] (Houston Dep. [Ex. 3] at 47:15-48:2.)

[23] (*Id.* at 83:4-12.)

[24] (*Id.* at 47:15-48:17; 49:3-8.)

[25] (*Id.* at 40:24-41:12; 49:13-18; 84:7-85:5.)

[26] (*Id.* at 49:13-18; 50:15-24.)

[27] (*Id.* at 59:12-60:3.)

2. *Ms. O'Bright: Bill Veazey's set up the second Tiki display, including – contrary to prior deposition testimony – setting the Tiki on milk crates.*

As to the first Tiki display – the Tiki that Mr. Houston helped set up – Ms. O'Bright's testimony is consistent with Mr. Houston's; she confirmed that there was a concern that the Tiki was not tall enough to clear the event center's doors so she directed the display be lifted onto milk crates.[28] However, as to the Tiki at issue in this case – the Tiki depicted in Plaintiff's Trial Exhibit 16, Page 1 – Ms. O'Bright testified that she and Ms. Cook ("Debbie") decided where the Tiki would be set up and that Bill Veazey's and casino employees set up the Tiki, as directed, on the skirted milk crates depicted in the picture.[29] Ms. O'Bright further testified that she was concerned about the stability of the Tiki display's arch – the Mayan god's head – and that she expressed that concern to Bill Veazey's' employees.[30] But, according to Ms. O'Bright, steps were taken to allay her concerns: the casino provided "wire" for Bill Veazey's to connect the arch to the supporting columns.[31] Indeed, Ms. O'Bright testified that she did not have any concerns with the Tiki once Bill Veazey's' employees left and that she was satisfied with the stability of the displays.[32] In fact, if she had deemed the displays unstable, Ms. O'Bright confirmed that she had the authority to take them down and that she would have done so if necessary.[33]

With respect to this set-up scenario, Ms. O'Bright's testimony on some things was inconsistent with either her prior deposition testimony or with the testimony of Ms. Deborah "Debbie" Cook, the other casino employee witness at trial. Most importantly, Ms. O'Bright testified in deposition that, when Bill Veazey's' employees left the casino, the Tiki display at

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[28] (Trial Tr. vol. I [Ex. 1] at 42:17-43:8.)
[29] (*Id.* at 16:9-17:12; 38:11-23.)
[30] (*Id.* at 20:7-22.)
[31] (*Id.* at 24:8-25:14.)
[32] (*Id.* at 43:9-15.)
[33] (*Id.* at 43:16-21.)

issue in this case was sitting **on the carpet, not on milk crates** – contrary to the image depicted in Plaintiff's Trial Exhibit 16, Page 1 – and that the milk crates and burlap skirting were placed **after Bill Veazey's' employees left.**[34] Likewise, with respect to making the Tiki display more stable, Ms. O'Bright had originally testified in deposition that dowels were used to connect the Tiki's archway to the columns, not the wires described at trial.[35] Finally, even though Ms. O'Bright testified at trial that both she and Ms. Cook worked on directing set-up and placement of decorations, Ms. Cook denied being part of it, saying she was not present for anything other than seeing workers carry things in and out and move things around – Ms. Cook expressly stated she was not there for anything involving set-up and that Ms. O'Bright would have been that contact.[36]

C. Plaintiffs' arrival and Tony Heriford's acts that caused the Tiki display to fall.

By the time the luau began, all of the decorations were set up. The Plaintiffs, Mr. and Mrs. Stine, arrived at the casino around 6:00 p.m., played on some slot machines, then got in line to enter the event center for dinner.[37] As the Plaintiffs entered and proceeded through the entrance corridor (i.e. through the first Tiki display), Mr. Stine heard someone either behind or to the side of him talking loudly and using vulgar language, talking about the "idol that was outside of the event, and how neat it was...."[38] As the Plaintiffs approached the second Tiki at the end of the corridor, someone offered to take their picture, which Plaintiffs declined.[39] Plaintiffs slowly worked through the corridor, which took a while because of a line-backup at the

[34] (*Id.* at 41:6-42:15.)
[35] (*Id.* at 24:20-25:10.)
[36] (Trial Tr. vol. II [Ex. 2] at 215:20-216:15.)
[37] (*Id.* at 77:3-78:6.)
[38] (*Id.* at 78:7-79:21.)
[39] (*Id.* at 79:25-81:3.)

registration table. While standing near the second Tiki display, Mr. Stine felt something hit him.[40] The second Tiki – in particular, the arch – had fallen on Mr. Stine.[41]

It is undisputed that the Tiki display fell because of the actions of another individual, Mr. Tony Heriford. However, the evidence is conflicting as to what those actions were. The majority of the credible evidence at trial indicates that Mr. Heriford, who was intoxicated, was intrigued by the Tiki and shook one of the columns upon realizing it was not a real Tiki statue; the shaking, in turn, caused the arch to fall. Mr. Heriford, however, testified that he merely bumped into the column, causing the arch to fall. This Court must make a finding of fact as to whether Mr. Heriford intentionally shook or merely bumped into the column, causing the fall.

1. According to all eyewitnesses (except for Mr. Heriford himself) Mr. Heriford intentionally shook the Tiki, causing it to fall.

Ms. O'Bright was present at the time of the accident and standing just off to the side from the Tiki display.[42] At the time of incident, Ms. O'Bright heard and then turned to see a man who was "obviously intoxicated [and] being loud and obnoxious."[43] When presented with a picture, Ms. O'Bright confirmed that the intoxicated man she saw was Mr. Tony Heriford.[44] Ms. O'Bright described how Mr. Heriford grabbed one of the Tiki columns with both hands and started shaking it, exclaiming how it "isn't real wood, it's fake, it's lighter than what it looks."[45] Ms. O'Bright testified that she believed Mr. Heriford intentionally shook the Tiki display, that Mr. Heriford was responsible for the Tiki display falling over, that the Tiki would not have fallen but for Mr. Heriford shaking it, and that she did not expect someone to come up and shake it.[46]

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[40] (*Id.*)
[41] (Trial Tr. vol. I [Ex. 1] at 29:19-23.)
[42] (*Id.* at 27:19-28:14.)
[43] (*Id.* at 29:24-30:7.)
[44] (*Id.* at 44:18-45:9.)
[45] (*Id.* at 29:24-30:07.)
[46] (*Id.* at 34:6-22; 36:13-15; 44:7-17.)

Immediately after the accident, Ms. O'Bright contacted one of the casino's security officers to check on Mr. Stine and prepare an incident report per casino procedure.[47] The report describes two witness statements taken from a Mr. Henry Hensley and a Mr. Thomas Hibben, who stated they saw "a patron shake the [Tiki] totem that caused it to fall on Mr. Stine."[48] When the security officer asked Mr. Hibben who shook the Tiki, Mr. Hibben pointed out an individual that the officer later identified as Mr. Heriford.[49]

Mr. Hibben also testified at trial regarding the incident. Mr. Hibben, an independent photographer, had been hired by the casino to take pictures at the luau and had even taken the picture of the Tiki used throughout this case's trial.[50] Mr. Hibben was stationed to the side of the second Tiki and was offering to take patrons' pictures in front of it as they approached.[51] Near the time of incident, Mr. Hibben described seeing a loud man and that had "obviously maybe had too much to drink."[52] The man brushed up against one of the Tiki's columns, at which point he "seemed like he realized maybe it wasn't wood[,]" so he put both hands on it and "gave it a wiggle or a shake."[53] When the man moved the column, the top piece (the arch) tumbled off.[54] Mr. Hibben described the intoxicated man's actions as "purposeful," noting in particular that the man put both of his hands on the Tiki; he further believed that, if the man had not put his hands on it and moved it, the arch would not have fallen.[55] Mr. Hibben explained his reasoning, stating

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[47] (*Id.* at 33:16-20.)
[48] (Incident Report [Def.'s Trial Ex. 2].)
[49] (*Id.*) The Incident Report actually spells Mr. Heriford's last name as "Heciford." During his testimony, Mr. Heriford confirmed that this was merely a spelling error and that the report was referring to him. (Trial Tr. vol. II [Ex. 2] at 59:6-60:2.)
[50] (Trial Tr. vol. I [Ex. 1] at 50:22-51:15; 52:4-53:5.)
[51] (*Id.* at 53:14-54:4.)
[52] (*Id.* at 54:5-18.)
[53] (*Id.*)
[54] (*Id.* at 54:24-55:5.)
[55] (*Id.* at 56:9-25.)

that **when the man merely bumped into the column right before he purposefully moved it, it did not fall over.**[56]

2. ***Mr. Heriford testified that he only bumped into the Tiki, but he was also admittedly intoxicated and had been drinking alcohol for over six hours before attending the luau.***

Mr. Heriford testified that his girlfriend had received an invitation for the luau and invited him to attend as her guest.[57] He testified that, before going to the casino, he thought he had been "working on something" and that he had people at his home; he conceded that he was drinking beer at the time but he did not remember how many.[58] However, when confronted with his prior deposition testimony, Mr. Heriford confirmed that he had been drinking beer with some friends in his shop for about **six to seven hours** prior to going to the casino.[59] **Mr. Heriford admitted that he was intoxicated around the time of the accident in this case.**[60]

As to the event, Mr. Heriford described seeing a group of people in line to enter the party in the event center, confirming that a hallway had been set up where he walked toward the second Tiki display at the end.[61] He described himself as being "just kind of excited about the whole situation."[62] As Mr. Heriford neared the end of the corridor he had his picture taken.[63] Around this time, Mr. Heriford became "curious" of the Tiki display, describing it as "pretty interesting" and the "first one [he'd] ever seen."[64] Mr. Heriford testified that he then touched the Tiki display and it did not fall down.[65] Soon thereafter, and according to Mr. Heriford, the area

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[56] (*Id.*)
[57] (Trial Tr. vol. II [Ex. 2] at 46:18-47:11.)
[58] (*Id.* at 47:12-48:10.)
[59] (*Id.* at 56:3-57:8.)
[60] (*Id.* at 60:9-20.)
[61] (*Id.* at 48:20-49:17.)
[62] (*Id.* at 50:6-8.)
[63] (*Id.* at 49:22-50:12.)
[64] (*Id.* at 53:1-12; 57:20-25.)
[65] (*Id.* at 53:1-24.)

started to crowd with people, so Mr. Heriford started backing away, at which point he bumped into the Tiki display. He did not see it fall, nor did he even know it fell until someone told him about it later.[66]

Mr. Stine was injured when Mr. Heriford caused the Tiki to fall. Ms. Mary Jane Veazey testified that she had never had any problems with the Tiki falling over before the accident, nor had Bill Veazey's ever had an incident where someone was injured by one of their rented decorations.[67] Ms. Veazey also testified that she did not expect that some intoxicated patron would walk up to the Tiki display and shake it, causing it to fall over and hurt someone; indeed, she did not think it would be reasonable for anyone to expect that.[68] Similarly, Ms. O'Bright testified that she did not expect someone to walk up and shake the Tiki display,[69] nor did she expect for someone in Bill Veazey's' position to have foreseen an intoxicated person going up to the display and shaking it.[70] Indeed, by the close of all the evidence, **not a single person at trial testified that it was foreseeable that an intoxicated casino patron would walk up, shake the Tiki display, and cause it to fall and injure someone.**

ARGUMENTS AND AUTHORITIES

Plaintiffs bore the burden to prove their negligence action against Bill Veazey's; that is, Plaintiffs had to show that Bill Veazey's failed to exercise ordinary care and that such failure, in turn, proximately caused Mr. Stine's injuries. As set forth below, the disputed evidence favors Bill Veazey's' defense, and the Plaintiffs have completely failed to prove the required elements of negligence. Bill Veazey's is therefore entitled to judgment in their favor.

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[66] (*Id.* at 52:3-22; 53:21-54:9; 58:3-8.)
[67] (Trial Tr. vol. II [Ex. 2] at 17:1-20.)
[68] (*Id.* at 10:17-25; 12:1-14.)
[69] This point is important given that Ms. O'Bright, as the casino's events manager, also had the knowledge to foresee that people would be drinking at the luau. (Trial Tr. vol. I [Ex. 1] at 34:24-35:1.)
[70] (Trial Tr. vol. I [Ex. 1] at 36:3-12.)

BURDEN OF PROOF

As the parties seeking to recover against Bill Veazey's, Plaintiffs bear the burden to prove every element of their claim by the greater weight of the evidence presented at trial.[71] In other words, when considering all of the evidence presented, the fact-finder must believe that every element of Plaintiffs' claim is more probably true than not.[72] Because Plaintiffs' claim against Bill Veazey's is for negligence, Plaintiffs must prove each of the following elements by the greater weight of the evidence: (1) that Bill Veazey's owed a duty to Plaintiffs to protect them from injury; (2) that Bill Veazey's failed to perform that duty; and (3) that Bill Veazey's' failure to perform that duty caused Plaintiffs' injury.[73]

STANDARD OF REVIEW

The decision of a judge after a bench trial is the functional equivalent of a jury verdict; its findings of fact are afforded the greatest level of deference and can only be disturbed if "manifestly wrong."[74] This deference necessarily includes determining the credibility of witnesses and weighing the evidence presented at trial, which are tasks left to the fact-finding trial court.[75]

I. THE DISPUTED FACTS REGARDING THE TIKI DISPLAY'S ASSEMBLY AND MR. HERIFORD'S INTERACTION WITH IT RESOLVE IN BILL VEAZEY'S FAVOR.

As noted previously, this Court must assess witness credibility, weigh the evidence, and resolve two questions of fact: (1) whether Bill Veazey's assisted with the assembly of the Tiki at issue in this case (or, whether Bill Veazey's or Firelake placed the Tiki on milk crates); and (2)

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[71] Okla. Unif. Jury Instr. – Civ. § 3.1.
[72] *Id.*
[73] *Jones v. Mercy Health Ctr., Inc.*, 2006 OK 83, ¶ 12, 155 P.3d 9, 13 (reciting negligence elements).
[74] *Sides v. John Cordes, Inc.*, 1999 OK 36, ¶ 17, 981 P.2d 301, 307-08.
[75] *State ex rel. Edmondson v. Grand River Enters. Six Nations, Ltd.*, 2013 OK CIV APP 58, ¶ 17, 308 P.3d 1057, 1063 (citation omitted).

whether Mr. Tony Heriford intentionally shook the Tiki. The credible evidence on both issues favors Bill Veazey's position.

A. Bill Veazey's did not assemble the Tiki at issue in this case.

The Court should find that Mr. Steve Houston's testimony regarding the second Tiki's assembly is more credible than Ms. Michelle O'Bright's. As described above, Mr. Houston testified that, when Bill Veazey's' employees left the casino, the second Tiki had been placed along a nearby wall and had not been set up yet. This placement makes sense; even after Bill Veazey's left, casino employees were still setting up decorations throughout the event center. The second Tiki, which was actually set up inside the event center, would have been in the casino employees' way as they finished bringing things into the center and decorating. Moreover, Mr. Houston has no motive to conceal or alter the truth; at the time his testimony was given, he was no longer an employee of Bill Veazey's.[76] Indeed, Mr. Houston testified he had been improperly fired from Bill Veazey's; if Mr. Houston had any kind of motive to alter the truth, it certainly would not have been in a way favorable to Bill Veazey's' defense.[77]

Ms. O'Bright, on the other hand, testified that Bill Veazey's assembled the second Tiki, but her testimony on this point is not credible. First and foremost, is contradicts her deposition testimony, which was given closer in time to the accident and is therefore more reliable.[78] While Ms. O'Bright testified at trial that Bill Veazey's' employees had placed the second Tiki on milk crates before they left, her deposition testimony was the exact opposite – Ms. O'Bright testified in deposition, in no uncertain terms, that the Tiki was sitting **on the ground** when Bill Veazey's' employees left, thus the casino employees would have had to disassemble the Tiki, place the

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[76] (Houston Dep. [Ex. 3] at 35:18-37:7.)
[77] (*Id.*)
[78] *See Stouffer v. State*, 2006 OK CR 46, ¶ 117, 147 P.3d 245, 269 ("The [statement] was closer in time to the crime than the trial testimony, thereby, making it more reliable than the testimony had after the passage of time.").

milk crates, then assemble the Tiki again. Ms. O'Bright's explanation that she looked at the picture of the Tiki again and refreshed her memory is not credible because the very picture she referred to was used during her deposition.[79] Additionally, Ms. O'Bright had originally said in deposition that dowels had been used to stabilize the second Tiki after she expressed her concerns about stability; when testifying at trial, Ms. O'Bright stated wires were used. Finally, Ms. O'Bright consistently testified at trial that she and Ms. Deborah "Debbie" Cook were on-site directing placement and set up of the decorations and displays, but Ms. Cook denied she had that role. Instead, Ms. Cook recounted seeing people carry decorations in and out of the event center, but she was never party to any of the decorations' set-up.

The inconsistencies in Ms. O'Bright's testimony are compounded by her position in this case and the other litigation concerning this incident commenced against the casino in the Citizen Potawatomi Nation tribal court.[80] While Ms. Cook provided some testimony in this case, Ms. O'Bright was the main voice speaking for the eyes and ears of the casino. It is not unreasonable to assume that Ms. O'Bright's sworn testimony in this case could surface in that tribal proceeding at some point. Obviously, if Ms. O'Bright stated that the casino, and not Bill Veazey's, assembled the Tiki at issue, the casino – Ms. O'Bright's employer – would have a much greater risk of incurring liability in that separate proceeding. The Court should consider this bias behind Ms. O'Bright's testimony, in addition to the inconsistency of her trial and deposition testimonies as to the second Tiki's assembly, and enter a finding of fact consistent with Mr. Houston's deposition testimony, i.e., that Bill Veazey's did not assemble the Tiki at issue in this case.

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[79] (Trial Tr. vol. I [Ex. 1] at 46:25-47:9.)

[80] Mr. Stine admitted that he had sued the casino in "a separate court", i.e., the tribal court for the Citizen Potawatomi Nation. (Trial Tr. vol. II [Ex. 2] at 140:16-143:24.)

B. Mr. Tony Heriford intentionally shook the Tiki, causing it to fall.

The Court should find that the only credible evidence proves that Mr. Heriford, in his intoxicated state, was intrigued by the Tiki display and therefore intentionally moved it to satiate his interest. Ms. O'Bright testified that Mr. Heriford was drunk, loud and obnoxious, and that he was very vocal about his interest in the Tiki. Ms. O'Bright then described how Mr. Heriford shook the Tiki with both hands, causing the Tiki's arch to fall on Mr. Stine. Mr. Thomas Hibben, who has no dog in this trial's fight, corroborated Ms. O'Bright's testimony. Mr. Hibben described how Mr. Heriford had initially bumped into the Tiki with no disastrous consequences, but that in doing so Mr. Heriford became curious as to what the Tiki was made of, leading to him "purposefully" shake or "wiggle" the Tiki with both hands. The shake, in turn, caused the arch to fall on Mr. Stine. Finally, the casino's Incident Report contains a third witness who again confirmed the same story: a drunk Mr. Heriford shook the Tiki.

By contrast, while Mr. Heriford confirmed that he was interested in the Tiki, he denied that he intentionally moved it, saying he only bumped into it. At the same time, though, Mr. Heriford also admitted – after confronted with his prior deposition testimony – that he was intoxicated at the time, having been drinking beer with friends for six to seven hours before even going to the casino. On this point, Ms. O'Bright's and Mr. Hibben's testimony is more credible and reliable when compared to Mr. Heriford's self-serving, unreliable testimony. The Court should enter a finding of fact consistent with Ms. O'Bright's and Mr. Hibben's testimonies, finding that Mr. Heriford intentionally shook the Tiki, causing it to fall and injure Mr. Stine.

II. BILL VEAZEY'S' ACTIONS OR OMISSIONS WERE NOT THE DIRECT AND PROXIMATE CAUSE OF MR. STINE'S INJURIES.

As the Court is aware, whether Bill Veazey's actually caused Mr. Stine's injuries – regardless of any negligent act or omission alleged – is the central issue disputed in this case. As

a general rule, causation is a question for the fact-finder.[81] If this Court determines, as it should, that Bill Veazey's was not the proximate cause of Mr. Stine's injuries, Plaintiffs' claim fails.[82] Notably, since this case was tried to this Court without a jury, this Court can make its causation finding knowing that its decision will receive the utmost deference in higher courts.[83]

"Causation" within a negligence action is defined as "a cause which, in a natural and continuous sequence, produces injury and without which the injury would not have happened."[84] Put differently, **"[t]he proximate cause of an injury is the efficient cause, i.e. the agency which produces the effect. It must be the cause which sets in motion the chain of circumstances leading to the injury."**[85] While a plaintiff need not prove causation with absolute certainty, the "mere possibility of causation is insufficient."[86] Thus, when causation is a matter of "pure speculation or conjecture" the verdict must be entered for the defendant.[87]

The above notwithstanding, a negligent actor's liability can be severed by an intervening or "supervening" cause, defined as a cause that "interrupts or breaks the connection between the defendant's act ... and a plaintiff's injury."[88] In such a case, "any original negligence is deemed a remote cause or mere condition[,]" and the intervening event – not the original negligence – is deemed the "proximate cause" of the injury.[89] Importantly, intervening/supervening cause is not

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[81] *See Lefthand v. City of Okmulgee*, 1998 OK 97, ¶ 7, 968 P.2d 1224, 1226 (question for "jury").
[82] *Id.* ¶ 5, 968 P.2d at 1225-26 (failure to establish defendant's negligence was proximate cause of harm "is fatal to the plaintiff's claim.").
[83] *See K & H Well Serv., Inc. v. Tcina, Inc.*, 2002 OK 62, ¶ 9, 51 P.3d 1219, 1223 (findings of a trial court will be affirmed so long as they are supported by "any competent evidence").
[84] Okla. Unif. Jury Instr. – Civ. § 9.6.
[85] *Akin v. Mo. Pacific R.R. Co.*, 1998 OK 102, ¶ 38, 977 P.2d 1040, 1054 (emphasis supplied).
[86] *Hardy v. Sw. Bell Tel. Co.*, 1996 OK 4, 910 P.2d 1024, 1027.
[87] *Id.* ("[A] party will not be permitted to recover from another whose acts, however wrongful, are not the proximate cause of the injury suffered.").
[88] Okla. Unif. Jury Instr. – Civ. § 9.8.
[89] *Lefthand*, 1998 OK 97 at ¶¶ 8, 10, 968 P.2d at 1226; *Akin*, 1998 OK 102 at ¶ 38, 977 P.2d at 1054 (supervening cause is "new, independent and efficient cause" of injury neither anticipated nor reasonably foreseeable).

an affirmative defense the defendant must prove; rather, facts showing an intervening cause simply operate to disprove the "causation" element of plaintiff's claim.[90]

In this case, Mr. Heriford's intentional act of moving the Tiki's column was the supervening, proximate cause of Mr. Stine's injury, and Plaintiffs' arguments that Bill Veazey's caused Mr. Stine's injury rest on nothing more than "pure speculation or conjecture." A true supervening cause exists when three prongs are met: (1) the intervening act is independent of the original act, (2) the intervening act is "adequate of itself to bring about the result," and (3) the intervening act was not reasonably foreseeable by the defendant.[91] When an intervening act meets all of these prongs, "the original negligence may be said to undergo a legal metamorphosis into a remote cause or mere condition."[92] Moreover, a general rule overlays this entire supervening cause analysis: "**[a] person is not generally deemed liable at common law for a third party's deliberate act.**"[93]

Oklahoma precedent is replete with examples of supervening causes. In *Akin v. Missouri Pacific Railroad Company*, *supra*, the plaintiff brought a wrongful death action against a railroad company, alleging the company's negligent failure to install automatic gates at its railroad crossing caused the death of her husband, who had ignored the railroad crossing lights and was struck by a train while crossing the tracks.[94] The jury returned a verdict in favor of the railroad company and the Oklahoma Supreme Court affirmed that decision, finding that plaintiff had failed to establish any causative link between the company's failure to provide automatic gates

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[90] *Long v. Ponca City Hosp., Inc.*, 1979 OK 32, 593 P.2d 1081, 1087.
[91] *Thompson v. Presbyterian Hosp., Inc.*, 1982 OK 87, 652 P.2d 260, 264.
[92] *Id.* (internal quotations omitted).
[93] *Lockhart v. Loosen*, 1997 OK 103, ¶ 12, 943 P.2d 1074, 1080 (*quoting Graham v. Keuchel*, 1993 OK 6, 847 P.2d 342, 350-01) (emphasis supplied).
[94] 1998 OK 102 at ¶¶ 2-3, 36, 977 P.2d at 1042, 1054.

and the husband's accident.[95] The Court determined that the husband's trying to cross the tracks constituted a supervening act of negligence, rejecting any invitation to "indulge in speculating whether [husband's] behavior would have been different had he been confronted by an automatic gate instead of flashing lights."[96] Notably, about fifteen years later, in a recently-released opinion, the Oklahoma Court of Civil Appeals upheld *Akin*'s reasoning in *Short v. Union Pacific Railroad Company*, again finding that a driver's negligent failure to observe an oncoming train was the proximate, supervening cause of the victims' injuries, insulating the railroad company from liability.[97]

The Oklahoma Court of Civil Appeals had previously found that a victim's own actions could constitute a supervening cause in *Prince v. B.F. Ascher Company, Inc.*, wherein a drug addict had misused medication within a nasal inhaler, disassembling the inhaler and injecting the active ingredient intravenously, causing a fatal overdose.[98] Bringing suit against the manufacturers of the medication and the inhaler, and also the pharmacy that sold the inhaler to the addict, the addict's survivor argued that a wealth of medical literature and a host of direct complaints put the defendants on notice that the product was addictive, subject to abuse, and that the inhaler was easily dismantled by hand.[99] Reviewing the trial court's entry of summary judgment for all defendants, the Oklahoma Supreme Court affirmed, finding the addict's disassembly and injection of the medication was the supervening cause of his death, absolving

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[95] *Id.* ¶ 39, 977 P.2d at 1055.
[96] *Id.* ¶ 45 (footnote omitted).
[97] 2013 OK CIV APP 110, ¶¶ 19-21 & n.8, ___ P.3d ___, *reh'g denied*, No. 110700 (Okla. Civ. App. filed May 20, 2013), *cert. denied*, No. 110700 (Okla. filed Sept. 23, 2013) (citing *Akin*, finding alleged negligent acts of railroad merely afforded opportunity for injury, but the "opportunity" for injury is not the "proximate cause" of the injury; rather, plaintiff's independent act actually caused the injury).
[98] 2004 OK CIV APP 39, ¶ 1, 90 P.3d 1020, 1023-24, *cert. denied*, No. 99,221 (Okla. filed Apr. 14, 2004).
[99] *Id.* ¶ 2.

the defendants of liability.[100] The *Prince* court initially noted the general rule that a defendant is not expected to anticipate and prevent third parties' intentional acts, finding there is usually "much less reason to anticipate intentional misconduct than ... to anticipate negligence[.]"[101] The court then summarily applied the three prongs of the supervening cause test, finding that the addict's action of injecting the medication was independent of all of the defendants' conduct, and it was "unquestionably sufficient in and of itself to bring about [his] death."[102] Finally, the court determined the defendants were not required to anticipate the addict's intentional, criminal acts, making the addict's actions the proximate cause of his own death.[103]

Most other Oklahoma proximate/supervening cause cases involve the actions of a third party. For example, in *Johnson v. Mid-South Sports, Inc.*, the plaintiff was a handicapped man sitting near an access ramp at a wrestling event.[104] During the event, a group of nearby spectators became rowdy, spilling beer on the nearby ramp and causing patron complaints.[105] After the event concluded, the plaintiff waited for other attendees to leave before he tried to exit, during which time an unknown patron came at him "like a freight train," knocking him into the air and sending him sliding down the beer-soaked access ramp until his handicapped arm struck the floor, fracturing it in several places.[106] The plaintiff contended that his injury was caused by the defendant's failure to exercise ordinary care in maintaining the access ramp and controlling the crowd.[107] The trial court granted summary judgment for the defendant, and the Oklahoma Supreme Court affirmed, finding that the unknown patron's actions – not the defendant's – were

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[100] *Id.* ¶¶ 20-24, 90 P.3d at 1028-29.
[101] *Id.* ¶ 20, 90 P.3d at 1028.
[102] *Id.* at ¶¶ 23-24, 90 P.3d at 1029.
[103] *Id.* ¶ 24.
[104] 1991 OK 17, 806 P.2d 1107, 1108.
[105] *Id.*
[106] *Id.*
[107] *Id.*

the proximate cause of plaintiff's injuries, noting specifically, "Were it not for the actions of the unknown spectator, the injuries would not have occurred."[108] The Court found that the defendant's allowing the ramp to become slippery "merely furnished a condition" under which the patron caused the plaintiff's injuries; the defendant's actions were "not a proximate cause...."[109]

Similarly, in *Franks v. Union City Public Schools*, a parent, on behalf of his son, sued a public school alleging the school failed to supervise its students; as a result of that failure to supervise, the parent argued, his son was punched in the face by another student.[110] The Oklahoma Supreme Court, affirming summary judgment for the school, held that the other student's punch was a supervening cause independent of the school's failure to supervise.[111] In reaching that decision, the Court applied the three prongs of the supervening cause test, summarily disposing of the first two as "obviously met," and finding that the third "foreseeability" prong did not have any evidentiary support.[112]

The Oklahoma Supreme Court addressed a third-party's negligence in the intervening cause context in *Booth v. Warehouse Market*, wherein the Court affirmed a trial court's demurrer to the plaintiff's evidence.[113] In that case, a negligent driver hit a nine-year-old girl with her vehicle in a store parking lot; the girl's parents sued the store, arguing that the store was negligent in the way it maintained its lot.[114] In particular, the plaintiffs tendered proof at trial that the store once had traffic markings in their parking lot but they had worn off over time, that the store had previously employed an attendant to direct traffic but did not have one at the time

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[108] *Id.* at 1109.
[109] *Id.*
[110] 1997 OK 105, ¶ 2, 943 P.2d 611, 612.
[111] *Id.* ¶ 9, 943 P.2d at 614.
[112] *Id.*
[113] 1955 OK 215, 286 P.2d 721.
[114] *Id.* at 722-23.

of accident, and that, generally speaking, the store's lack of care made the lot a hazard for pedestrians.[115] While the trial court sustained an objection to this evidence, the Oklahoma Supreme Court determined that it did not matter – the store's negligence in maintaining its parking lot and controlling the traffic in it, notwithstanding plaintiff's proffered evidence, was not the proximate cause of the girl's injury; rather, the Court determined, the store's actions only furnished a condition by which the injury was possible and "a subsequent independent act caused the injury."[116]

Finally, two cases from two different jurisdictions are particularly applicable here, wherein the drunken, intentional acts of a third party brought about others' injuries. First, a Texas appellate court addressed intervening cause in *Hendricks v. Todora*, wherein plaintiffs sued a restaurant for negligence when a car, driven by an intoxicated driver leaving a nearby club, crashed through the restaurant's entryway, injuring them.[117] The plaintiffs provided evidence tending to show that the restaurant shared a parking lot with several clubs, bars, and other stores that provided alcoholic beverages; that the lot was small and often "highly congested;" and that, at any given time, drivers of the cars in the lot had likely been drinking in the nearby clubs.[118] The plaintiffs' evidence was accompanied by an area security guard's opinion that the lot was dangerous and that the erection of barricades in front of the restaurant would make it safer.[119] However, the evidence failed to show that any similar circumstance had ever happened in the area.[120] As a result, the trial and appellate courts concluded there was no way the restaurant could have foreseen the intoxicated driver colliding with its entryway, going

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[115] *Id.* at 723.
[116] *Id.* at 724.
[117] 722 S.W.2d 458 (Tex. App. 1986).
[118] *Id.* at 460.
[119] *Id.*
[120] *Id.*

so far as to say that, even if they had been able to foresee it, "the risk of such an occurrence was so slight and this unprecedented occurrence was so extraordinary that a reasonable person would disregard it."[121]

Second, in *Brown v. Mobley*, a Georgia appellate court heard the case of an automobile passenger who was injured in an accident involving a highly intoxicated co-passenger.[122] In that case, the victim/passenger, Bloodworth, was riding in a vehicle driven by Sharon Mobley and owned by Colson.[123] Colson had loaned her vehicle to Sharon Mobley so she could drive a grossly-inebriated Tony Mobley home, along with Bloodworth and some other passengers.[124] At the time of accident, Tony Mobley, who was in the front passenger seat, and who was irate because the other passengers would not give him more liquor, grabbed the car's steering wheel, pulling the vehicle off-road and causing it to flip and hit a tree. The accident injured Bloodworth and killed one other passenger.[125] Bloodworth contended that Colson and Sharon Mobley were negligent in allowing the obviously-drunk, aggressive Tony Mobley in the front seat of the vehicle and in not stopping the vehicle as Tony Mobley's aggressions escalated.[126] The Georgia appellate court disagreed and affirmed the defendants' summary judgment, finding Tony Mobley's actions were an intervening cause, and further noting that Tony Mobley's drunk and ill-tempered manner provided "no basis" for a jury to think the defendants should have expected his intervening behavior.[127] Notably, a concurring judge also commented that Bloodworth should not recover for another reason: if Tony Mobley's drunken state should have made his

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[121] *Id.* at 462.
[122] 488 S.E.2d 710 (Ga. Ct. App. 1997).
[123] *Id.* at 711.
[124] *Id.*
[125] *Id.*
[126] *Id.* at 711-12.
[127] *Id.* at 712.

behavior foreseeable, Bloodworth had just as much knowledge as Colson and Sharon Mobley to avoid his own injury, yet chose to ride along anyway.[128]

In this case, the facts show that Mr. Heriford's acts proximately caused Mr. Stine's injury; any negligence on Bill Veazey's' part merely furnished an opportunity for injury, i.e., it was a "remote cause" or "mere condition." First, as a threshold matter, regardless of whether the Court finds Mr. Heriford's acts were intentional or just negligent, the facts simply do not show that Bill Veazey's did or did not do anything that **actually caused** Mr. Stine's injury. As stated above, "causation" means the "efficient cause" – the cause that sets in motion the events leading to injury. At worst, Bill Veazey's role in this situation is similar to that of the defendants in *Akin*, *Short*, *Johnson* and *Booth*, where, while those defendants could have better maintained their respective railroad crossings, access ramp, and parking lot, that lack of maintenance was not the proximate cause of the respective plaintiffs' injuries; rather, someone else's intervening negligent act was the "efficient cause" of the injury. In this case, the factual record shows, similar to *Johnson*, that were it not for Mr. Heriford's actions, the Tiki would not have fallen and Mr. Stine would not have been injured.[129] Both Ms. O'Bright and Mr. Hibben confirmed this fact. Moreover, like in *Akin*, the record is "devoid of evidence to support the existence of an efficient causal link" between the negligence alleged against Bill Veazey's and Mr. Stine's injuries.[130] To correct this deficiency, Plaintiffs have offered this Court speculation that Bill Veazey's could have done **something** different to prevent the injury, but, like the *Akin* and *Short* courts, this Court must refuse to indulge in such speculation. Simply put, the factual record fails to show that Bill Veazey's was a proximate cause of Mr. Stine's injury.

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[128] *Id.* at 713 (Smith, J., concurring).
[129] 1991 OK 17, 806 P.2d at 1109 ("Were it not for the actions of the unknown spectator, the injuries would not have occurred.").
[130] 1998 OK 102 at ¶ 39, 977 P.2d at 1055.

The above notwithstanding, when applying the three-pronged supervening cause analysis to Mr. Heriford's clearly intentional acts, the record further shows how Bill Veazey's is not the proximate cause of Mr. Stine's injuries. Like the *Franks* and *Prince* courts found, the first two prongs merit little discussion: Mr. Heriford's actions were certainly independent of anything Bill Veazey's did, and his actions were adequate in themselves to bring about their result, i.e., the Tiki falling. Indeed, similar to the addict in *Prince* who intentionally used the defendants' product when injecting himself, Mr. Heriford intentionally "used" (i.e. shook) Bill Veazey's' Tiki, resulting in Mr. Stine's injury.

Finally, Mr. Heriford's actions were unforeseeable to Bill Veazey's. Importantly, **not a single witness** at trial testified that they thought Mr. Heriford's intentionally moving the Tiki was foreseeable, **including** Ms. O'Bright, who of all witnesses should have been the most familiar with the actions of intoxicated casino patrons. Moreover, Ms. O'Bright testified that she would not expect Bill Veazey's to expect such an occurrence. Likewise, Ms. Mary Jane Veazey testified that her business had never had any kind of injury-related incident with the Tikis, nor had they ever had any kind of injury-related problems with any of their decorations. There is simply no evidence that anyone – let alone Bill Veazey's – should have expected Mr. Heriford to intentionally move the Tiki. Without that expectation, and without any evidence on record indicating Bill Veazey's should have had that expectation, Plaintiffs have not shown how Mr. Heriford's actions were foreseeable.

To get around this lack of evidence, Plaintiffs contend that Mr. Heriford's actions should have been foreseeable because the presence of alcohol and, consequently, intoxicated people means unpredictable things happen.[131] Admittedly, Ms. Veazey conceded that intoxicated people may do unpredictable things, but to suggest that this concession means Bill Veazey's

[131] (Trial Tr. vol. III [Ex. 4] at 31:1-25.)

should have foreseen Mr. Heriford's drunken, intentional acts waters down the principles behind proximate and supervening cause, imposing liability on a multitude of defendants who would otherwise be far remote from the causal chain. Indeed, Plaintiffs' assertion in this regard would mean that **anything** an intoxicated person did would be deemed "foreseeable" because, according to Plaintiffs, intoxicated people are known to be unpredictable. **This argument would literally hold defendants liable for not predicting events that are, by their very definition, not predictable**. Indeed, if this argument were given any weight, the Georgia Court of Appeals' decision in *Brown, supra,* would have been in error – according to Plaintiffs' argument, Colson and Sharon Mobley should have foreseen that Tony Mobley would reach for the steering wheel and cause a fatal car accident solely because he was drunk and, therefore, unpredictable. Such a conclusion is simply untenable and improper under the law.

In this case, Bill Veazey's stands in the same shoes as the railroad companies in *Akin* and *Short*, the wrestling event center in *Johnson*, the school in *Franks*, the store in *Booth*, the manufacturers in *Prince*, the restaurant in *Hendricks*, and Colson and Sharon Mobley in *Brown*. In each of those cases, the plaintiffs crafted a theory revolving around something their respective defendants could have done, but did not do, to prevent injury, e.g., the railroad should have had automatic gates, the school should have supervised better, the store should have controlled their parking lot better, the restaurant should have put up barricades, etc. But, as noted above, proximate cause cannot rest on mere speculation or conjecture – the Plaintiffs cannot guess that Bill Veazey's could have done something "better" to keep the Tiki from falling when Mr. Heriford shook it. Simply put, Bill Veazey's did not cause Mr. Stine's injuries –Tony Heriford did. Accordingly, the greater weight of the evidence shows that Plaintiffs have not carried their burden as to causation, warranting judgment in Bill Veazey's favor.

III. BILL VEAZEY'S DID NOT DEVIATE FROM ANY APPLICABLE STANDARD OF CARE.

While the lack of causation is dispositive, Plaintiffs also have not shown that Bill Veazey's breached any duty of care, i.e., that Bill Veazey's was "negligent." Negligence in this regard is defined as a failure to exercise "ordinary care," which itself is defined as that care which a "reasonably careful person would use under the same or similar circumstances."[132] In other words, if the evidence shows that a defendant "failed to do something which a reasonably careful person would do, or did something which a reasonably careful person would not do," the defendant has breached their duty and is "negligent."[133] Accordingly, if the defendant **did** do what a reasonably careful person in defendant's circumstances would do, then this "negligence" element is not met.

Oklahoma courts have held that showing negligence requires a plaintiff to prove "not only that a wrong has been committed against him, but that the defendant committed the wrong or is responsible for it."[134] Because this is its own element of a negligence claim, it follows that "**[t]he fact of injury, standing alone, does not create a presumption of negligence.**"[135] Instead, negligence must be shown by something "more tangible" than "speculation on possibilities" or "mere inference or conjecture[;]" it must depend on "facts and reasonable inferences arising immediately out of facts."[136] **"[I]t is not sufficient to introduce evidence of**

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[132] Okla. Unif. Jury Instr. – Civ. § 9.2.
[133] *Id.*
[134] *McClure v. Sunshine Furniture*, 2012 OK CIV APP 67, ¶ 27, 283 P.3d 323, 329 (citations and quotations omitted).
[135] *Id.* ¶ 28 (*citing Lyons v. Valley View Hosp.*, 1959 OK 126, 341 P.2d 261, Syl. 1) (footnote omitted; emphasis supplied).
[136] *McConnell v. Okla. Gas & Elec. Co.*, 1977 OK 65, 563 P.2d 632, 633-34 (affirming demurrer to plaintiff's evidence at trial).

a state of facts simply consistent with or indicating a mere possibility, or which suggests with equal force ... an inference of the nonexistence of negligence."[137]

The Oklahoma Supreme Court applied the above principles in *Gillham v. Lake Country Raceway.*[138] In that case, the plaintiff, a father acting for his minor son, brought an action grounded in negligence against a racetrack, alleging that the racetrack had failed to maintain the grass surrounding a trench next to the track's railing; that failure, in turn, allegedly caused the plaintiff's son to slip in the trench when trying to climb over the railing, breaking his leg.[139] The case went to a jury trial, whereupon the son was cross-examined and admitted that he did not know how he slipped.[140] After the plaintiff rested, the racetrack demurred and moved for directed verdict, which the trial court initially denied, then changed its mind, directing a verdict for the racetrack and finding that the evidence would not allow a jury to enter a favorable verdict without speculating.[141] The Oklahoma Supreme Court upheld the demurrer, relying on the tenets above, noting in particular that an injury does not give rise to a presumption of negligence and that "the burden is on the plaintiff to show the existence of negligence."[142] The Court held the plaintiff's evidence presented no reason as to why the son fell, thus there was no case to send to the jury.[143] In making that decision, the Court noted:

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[137] *Greyhound Corp. v. Gonzalez De Aviles*, 1963 OK 223, 391 P.2d 273, 277 (internal citation and quotation omitted; emphasis supplied).
[138] 2001 OK 41, 24 P.3d 858.
[139] *Id.* ¶¶ 2-4, 24 P.3d 858, 859-60.
[140] *Id.* ¶ 3.
[141] *Id.* ¶¶ 4-5, 24 P.3d at 860.
[142] *Id.* ¶ 7.
[143] The Court also noted that the Court of Civil Appeals below had placed "undue significance" on the fact that the trial court had previously overruled defendant's demurrer, saying that "the denial of a demurrer to the evidence is not a barrier to a subsequent grant of a motion for directed verdict. Plaintiff cannot successfully complain as to the trial court's correction of an error previously made in the evaluation of plaintiff's lawsuit." *Gillham*, 2001 OK 41 at ¶ 12, 24 P.3d at 861. Accordingly, Plaintiffs' assertion that this Court's denying Bill Veazey's prior demurrer is an indisputable "finding under the law" that Plaintiffs proved their case is incorrect. (Trial Tr. vol. III [Ex. 4] at 86:16-87:21.)

> Where one conclusion would be as sound as another, the evidence may then be said to leave the matter wholly within the realm of mere conjecture, and any conclusion would be the result of a common speculation. A prima facie case is not established in such circumstances, and a demurrer to the evidence or motion for directed verdict would be in order.[144]

To draw the analogy to *Gillham*, Plaintiffs in this case are arguing that Mr. Stine "slipped in the grass" because Bill Veazey's failed to maintain it, but there is no evidence actually showing a failure to maintain. First, if this Court determines under **Part I**, *supra*, that Mr. Steve Houston's testimony is credible and that Bill Veazey's did not assemble the Tiki at issue, then, obviously, this prong is not met – Plaintiffs cannot argue that Bill Veazey's negligently assembled the Tiki if the evidence does not show they assembled the Tiki at all. However, if the Court follows Ms. Michelle O'Bright's testimony and determines Bill Veazey's did assemble the Tiki, the record is devoid of any evidence that Bill Veazey's did not act as a reasonably careful person would in the same or similar circumstances. Indeed, Ms. O'Bright's testimony actually **confirms** that Bill Veazey's employees responded to concerns regarding the stability of the Tiki by placing wires on the Tiki to make it more stable. Ms. O'Bright's testimony also confirmed that she had no safety concerns with the Tiki when Bill Veazey's' employees left the casino and that, if she did have such concerns, she would have taken the Tiki down. In light of that testimony, there is nothing in the record showing that Bill Veazey's did not exercise ordinary care.

Instead, Plaintiffs contend that Bill Veazey's could have done something better to make the Tiki display safer, e.g., put it in a different place, implement better training, issue better warnings, but all of these assertions are mere speculation and conjecture when considering the Tiki did not fall on its own accord – Mr. Heriford had to come along first. Indeed, it is just as

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[144] *Gillham*, 2001 OK 41 at ¶ 8, 24 P.3d at 860 (*quoting Safeway Stores v. Fuller*, 1941 OK 357, 118 P.2d 649, 651).

reasonable to infer that Bill Veazey's **did** exercise ordinary care, and thus was not negligent, but that such care was not enough to overcome Mr. Heriford's unexpected actions. Given the ample evidence showing that Bill Veazey's has **never** had any kind of accident involving their decorations, including the Tiki displays, that inference is more likely – a reasonably careful person in such circumstances would not think they would need to assemble their Tiki display to withstand the intentional meddlings of intoxicated people. Likewise, Plaintiffs cannot infer that Bill Veazey's is in the wrong solely because Mr. Stine was injured, **especially** considering Mr. Heriford's involvement. At best for Plaintiffs, the evidence suggests with "equal force" that Bill Veazey's was **not** negligent, despite Mr. Stine's injury. But "equal force" is not enough – Plaintiffs had to prove, by the **greater** weight of the evidence, that Bill Veazey's deviated from ordinary care in some way. Plaintiffs failed to do so, thus their negligence claim fails.

IV. IF THE COURT FINDS BILL VEAZEY'S DID NOT ASSEMBLE THE TIKI DISPLAY, PER MR. HOUSTON'S TESTIMONY, BILL VEAZEY'S DID NOT OWE A DUTY TO INSTRUCT FIRELAKE ON ITS ASSEMBLY; BUT, EVEN IF IT DID, THERE IS NO SHOWING THAT A FAILURE TO INSTRUCT CAUSED MR. STINE'S INJURIES.

Finally, if the Court determines Bill Veazey's did not assemble the Tiki display at issue, Plaintiffs contend that Bill Veazey's still had a duty to properly instruct the casino on how to assemble the Tiki display in a safe fashion or otherwise warn them how the proposed set-up would be unsafe.[145] However, there does not appear to be any Oklahoma law that directly supports Plaintiffs' proposition. Rather, the only authorities close to on-point are cases more in line with products liability, wherein, under certain circumstances, the law imposes a duty upon a manufacturer or seller to instruct or warn of safe product usage.[146]

While Plaintiffs' action is for negligence and not strict products liability, the U.S. District Court for the Northern District of Oklahoma has noted that the "law concerning the adequacy of

[145] (Trial Tr. vol. III [Ex. 4] at 21:11-24:9.)
[146] *E.g., Duane v. Okla. Gas & Elec. Co.*, 1992 OK 97, 833 P.2d 284, 286-87 (discussing duty to warn).

a product warning is similar."[147] Generally speaking, a product supplier has a duty to warn of any inherent or latent dangers arising from all foreseeable uses of a product; **but, "[a] manufacturer has no duty to warn users of an obvious danger or risk which an ordinary user would expect from any foreseeable use of a product."**[148]

In this case, Bill Veazey's had no duty to instruct or warn Firelake regarding the Tiki display's assembly because the risks complained of in this case were not latent or hidden. The Court has seen the Tiki display; it sat outside the courtroom during trial and was admitted as Plaintiffs' Trial Exhibit 18. It is composed of only three pieces, one of which sits atop the other two. The fact that the top piece of the Tiki display could fall off if one of the columns was intentionally moved is not surprising and requires no special knowledge or instruction to discover.[149] Moreover, the casino's employees had the opportunity to assemble one of the Tiki displays with Mr. Houston, during which time Mr. Houston warned against placing the Tiki's columns on milk crates. According to Mr. Houston, the casino's staff disregarded the warning. Thus, not only is there no duty to instruct because the assembly does not contain hidden defects or require special knowledge, but if there was such a duty, that duty was met – Mr. Houston warned of the risks of placing the columns on the milk crates.

Lack of duty notwithstanding, if Plaintiffs truly seek to hold Bill Veazey's liable under this theory, Plaintiffs' action fails because they then must show that Bill Veazey's breached that duty and, most importantly, that **that specific breach** caused Mr. Stine's damages.[150] In other words, under this theory, Plaintiffs must somehow show that Bill Veazey's failure to instruct

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[147] *Torres v. Cintas Corp.*, 672 F. Supp. 2d 1197, 1215 (N.D. Okla. 2009) (citation omitted).
[148] *Id.* (citations omitted; emphasis supplied).
[149] Indeed, if Ms. O'Bright's testimony on this issue is believed, she was able to recognize what she felt was an unstable assembly, voiced concerns, and assisted in stabilizing the Tiki to her satisfaction.
[150] *E.g., Lockhart v. Loosen*, 1997 OK 103, ¶ 9, 943 P.2d 1074, 1079 ("act complained of [must] be the direct cause of the harm for which liability is sought to be imposed").

caused the Tiki display to fall. There is no evidence in the record showing that giving such a warning would have prevented injury given Mr. Heriford's intervening acts and the evidence showing the casino disregarded Mr. Houston's warnings as to the milk crates. Additionally, considering the casino's intent to build a corridor with the Tiki displays, it is unlikely the casino would have set the second Tiki against a doorframe or other surface. Instead, and like before, Plaintiffs are merely speculating as to the breach and causation elements of their negligence claim; they are asking this Court to presume that, because the Tiki fell, Bill Veazey's did something wrong. But there is simply no evidence of that assertion. That lack of evidence is fatal to Plaintiffs' claims.

CONCLUSION AND PRAYER FOR RELIEF

As the parties seeking relief, Plaintiffs bore the burden to prove that, more likely than not, Bill Veazey's did or did not do something that proximately caused Mr. Stine's injury. However, the evidence presented at trial does not show how that burden was met. The evidence shows that, but for Mr. Heriford's actions, the Tiki display would not have fallen, making Mr. Heriford the supervening, efficient, and proximate cause of Mr. Stine's injury. The other elements of Plaintiffs' negligence claim are equally unsupported by the evidence and require this Court to speculate as to what Bill Veazey's allegedly did or did not do to deviate from the applicable standard of care. Simply put, Plaintiffs have not proven their case by the greater weight of the evidence, and because of that, judgment should be entered for the Defendant, Bill Veazey's.

WHEREFORE, the Defendant, Bill Veazey's Party Store, Inc., respectfully requests this Court enter its Judgment on the merits in favor of the Defendant, finding that Plaintiffs shall not recover from Defendant, and finding that Defendant, as prevailing party, my recover its awardable costs and attorney's fees as may be allowed by law.

Respectfully submitted,

BILL VEAZEY'S PARTY STORE, INC., AN OKLAHOMA CORPORATION,
— Defendant

By: _____

Tim N. Cheek – OBA #11257
tcheek@cheeklaw.com
D. Todd Riddles – OBA #15143
triddles@cheeklaw.com
Gregory D. Winningham – OBA #22773
gwinningham@cheeklaw.com
Tyler J. Coble – OBA #30526
tcoble@cheeklaw.com
CHEEK LAW FIRM, P.L.L.C.
311 North Harvey Avenue
Oklahoma City, Oklahoma 73102
Telephone: (405) 272-0621
Facsimile: (405) 232-1707
ATTORNEYS FOR DEFENDANT

CERTIFICATE OF MAILING

This is to certify that I have this 28th day of January, 2014, hand-delivered a true and correct copy of the above and foregoing document to:

Bryce Johnson
Emily J. Biscone
BRYCE JOHNSON & ASSOCIATES
105 North Hudson, Suite 100
Oklahoma City, OK 73102
-and-
Philip O. Watts
Beverly Q. Watts
WATTS & WATTS
119 North Robinson, Suite 420
Oklahoma City, OK 73102
ATTORNEYS FOR PLAINTIFFS

_____

Tim N. Cheek/D. Todd Riddles/
Gregory D. Winningham/Tyler J. Coble