

Westlaw

2005 WL 6047651 (Wyo.Dist.)

Page 1

For Opinion See 2007 WL 4740277 (Trial Order), 2007 WL 4740318 (Trial Order), 2006 WL 5254912 (Trial Order), 2006 WL 5254913 (Trial Order), 2006 WL 5254914 (Trial Order), 2006 WL 5254915 (Trial Order)

District Court of Wyoming,  
First Judicial District,  
Laramie County

Jack D. SELLS, the Personal Representative of the Estate of Dwayne A. Sells, Deceased, Plaintiff,

v.

HEJE, INC., a Wyoming corporation, d/b/a the Outlaw Saloon; Susan M. Hein, individually, and as agent of Heje, Inc.; Mitch Jedlicki, individually, and as agent of Heje, Inc.; and Donald Nath, individually, Defendants.

No. 167-17.

December 12, 2005.

### Complaint for Wrongful Death and Negligence

Respectfully submitted, Jack D. Sells, Personal Representative of the Estate of Dwayne A. Sells, Deceased, John R. Vincent, 301 East Adams, P.O. Box 433, Riverton, WY 82501, (307)857-6005, (307)857-6192 (Telefax), Attorney for Plaintiff.

Thomas G. Kelly, 2120 Carey Avenue, Suite 406K, Cheyenne, WY 82003, (307)635-7766, (307)635-4266 (Telefax), Attorney for Plaintiff.

COME NOW Plaintiff Jack D. Sells [hereinafter referred to as "PR"], in his capacity as Personal Representative of the Estate of Dwayne A. Sells, deceased [hereinafter "Dwayne"] by and through its attorneys, John R. Vincent and Thomas G. Kelly, and for its joint and separate complaint against Defendants HEJE, Inc., a Wyoming Corporation, also d/b/a The Outlaw Saloon, [hereinafter "HEJE"]; Susan M. Hein, individually and as agent of HEJE Inc., Mitch Jedlicki, individually and as agent of HEJE, Inc., and Donald Nath, individually and as agent of HEJE, Inc., state and allege as follows:

#### JURISDICTIONAL FACTS and FACTS COMMON TO ALL COUNTS

1. This Court has jurisdiction over this matter, and venue is proper in this Court, in that the cause of action arose in Laramie County, Wyoming; the PR is appointed to his representative capacity in Laramie County, Wyoming. The amount of damages sustained by each claimant exceeds this Court's minimum jurisdictional amount.
2. At all times material to this Complaint, HEJE was a Wyoming Corporation organized and existing under the laws of Wyoming, owning and operating the "Outlaw Saloon" [hereinafter "the Bar" or "the Outlaw Saloon"], located at 3839 E. Lincolnway, Cheyenne, Laramie County, Wyoming.
3. Defendants Susan M. Hein [hereinafter "Hein"] and Mitch Jedlicki [hereinafter "Jedlicki"] are residents of Cheyenne, Wyoming, and were employed by, agents of, and officers, directors or shareholders of Defendant HEJE at the time and place of the events complained of in this Complaint.
4. With regard to all acts and omissions alleged against them herein, Defendants Hein and Jedlicki were acting

within the scope of their employment and/or agency on behalf of Defendant HEJE.

5. Defendant Donald Nath [hereinafter "Nath"] is a resident of Cheyenne, Wyoming, and was an employee of Defendant HEJE under the supervision of Hein or Jedlicki. Nath claims to have broken up "millions of fights" at the Outlaw Saloon. With regard to all conduct, acts and omissions at said establishment alleged against him herein, said defendant was acting within the scope of his employment and/or agency on behalf of Defendants HEJE, Hein and Jedlicki.

6. Under the legal doctrine of *respondeat superior*, the acts and omissions of Defendants Hein, Jedlicki and Nath are also attributable to and the legal responsibility of Defendant HEJE.

7. By Order entered July 13, 2005, this Court, in probate, appointed Jack D. Sells as personal representative and administrator of the Estate of Dwayne A. Sells, deceased; Letters of Administration were duly issued and Jack D. Sells has been and now is the duly appointed, qualified, and acting Personal Representative of said estate.

8. Under the provisions of Wyoming Statutes § 1-38-102 (2005 Ed.) this action seeks the award to each such person for whom the action may be brought of all such damages as a court or jury may determine is fair and just.

9. Under the provisions of W.S. § 1-38-102 (2005 Ed.), this action is brought on behalf of the following claimants, each of whom will separately and individually prove their respective damages at trial herein:

- a. Ashlyn Sells, daughter of Dwayne A. Sells;
- b. Shaun Sells, sibling of Dwayne A. Sells;
- c. Jack D. Sells, father of Dwayne A. Sells; and
- d. Elizabeth Sells, mother of Dwayne A. Sells.

10. At all times material to this Complaint, Plaintiff was a resident and citizen of Laramie County, Wyoming.

11. As set forth below, prior to the events giving rise to this suit, the Outlaw Saloon had, on several occasions, experienced third-party assaults on its Bar patrons.

12. Defendants had actual notice that verbal and physical attacks on Bar patrons were reasonably likely to occur in the Bar and that the Defendants had a duty to take reasonable steps to protect its patrons, including Dwayne, from these foreseeable attacks; and further, Defendants consciously and knowingly chose to avoid warning the public of the adverse occurrences.

13. On April 23, 2005, at approximately one o'clock a.m., Jedlicki and Hein were operating the Outlaw Saloon and had the charge, management and control of the Outlaw Saloon; at said time and place, at least seven individuals who were bouncers and agents of the Defendants were also present in the Bar.

14. On April 23, 2005, Dwayne entered the Outlaw Saloon with his friend Colt Price. Dwayne was verbally assaulted by Jay Payne, who was accompanied by Josh Cooper. In several separate incidents Cooper and Payne continued to verbally assault and threaten Dwayne with physical violence by obscene gesturing, pointing to his chin, challenging for a fight and physical pushing, shoving and chest bumping.

15. Defendants knew or should have known that Payne was a dangerous individual known to commit verbal and physical assaults, had been previously removed from the Bar for committing verbal assaults on patrons, and had a reputation of hitting people in the head with beer bottles. On April 23, 2005, Defendants knew or should have known that Payne presented a clear and obvious danger to patrons of the Bar because he was drunk, belligerent,

and combative. All of this was apparent to the Bar's patrons and was readily observable by Defendants and their employees and agents.

16. At said time and place, Defendants and their agents also knew or should have known that Josh Cooper was under the legal drinking age.

17. At said time and place, Defendants' failure to protect Dwayne from Payne's aggressive acts of verbal and physical attack put Dwayne in a position where he had no alternative other than to defend himself.

18. At said time and place, Defendant Hein was in a position to observe the verbal and physical assaults directed at Dwayne. Defendant Hein "stood by and watched the fight develop".

19. At said time and place, Defendant Hein had a duty to ensure the safety of the Bar's patrons from attacks by other patrons of the Bar, and to intercede to quell any fight and seek appropriate aid for patrons injured in any physical attack.

20. At said time and place, Defendants failed to take reasonable steps to protect Dwayne from the foreseeable attacks by a person or persons known to be violent.

21. In the absence of intervention by Defendants, Cooper and Payne violently assaulted and battered Dwayne, Payne hit Dwayne in the head with a beer bottle, knocked him down and harmed him as he lay prone on the floor, slamming his head into the floor repeatedly, and repeatedly kicking and hitting Dwayne in the face and head. Defendants' agents and employees did not intervene or attempt to protect Dwayne from this vicious and unprovoked attack due to Defendants' abhorrent policy of allowing altercations involving more than two people to progress until the people involved cease fighting.

22. Defendant Nath became involved in the assault and applied excessive force to Dwayne, using a chokehold on Dwayne, moving him from the dance floor when he was severely injured. Defendants' agents and employees, including one of the bartenders, saw that Dwayne was "not resisting being removed" by Nath. Dwayne was so overcome by the beating that it took Nath at least two minutes to lift him from the dance floor and carry him toward the entry door. Nath allowed Dwayne to fall and strike his head on the floor when he and the other Defendants knew or should have known Dwayne was totally incapable of caring for himself due to the beating. Dwayne was further injured by Nath's negligent removal of him from the dance floor, Nath's use of excessive force to move Dwayne when Dwayne did not and could not resist Nath's improper use of a choke hold, and in Nath's shoving or allowing Dwayne to strike his head during an unprotected fall following the beating. Defendants have ratified Nath's actions.

#### DAMAGES

23. As a direct and proximate result of the negligent, willful and wanton acts of Defendants as alleged herein, Dwayne suffered severe bodily injury on April 23, 2005, including but not limited to head and brain injuries that resulted in a prolonged coma.

24. As a direct and proximate result of the negligent, willful and wanton acts of Defendants as alleged herein, and the resulting injuries, Dwayne died at United Medical Center in Cheyenne, Wyoming, on May 3, 2005.

25. As a direct and proximate result of the negligence and misconduct of the Defendants alleged herein the Estate of Dwayne A. Sells suffered damages for medical expenses, funeral and burial expenses in an amount to be

proved at trial herein.

26. As a direct and proximate result of the negligence and misconduct of the Defendants alleged herein, Ashlyn Sells suffered the loss of Dwayne's companionship, care, comfort, advice, and society for the remainder of Dwayne's life, together with pecuniary loss including loss of Dwayne's support and earnings, all in an amount to be proved at trial herein.

27. As a direct and proximate result of the negligence and misconduct of the Defendants as alleged herein, Elizabeth Sells suffered the loss of Dwayne's companionship, care, comfort, advice, and society for the remainder of her life, together with pecuniary loss including loss of services and earnings, all in an amount to be proved at trial herein.

28. As a direct and proximate result of the negligence and misconduct of the Defendants as alleged herein, Jack D. Sells suffered the loss of Dwayne's companionship, care, comfort, advice, and society for the remainder of his life, together with pecuniary loss of services and earnings, all in an amount to be proved at trial.

29. As a direct and proximate result of the negligence and misconduct of the Defendants alleged herein, Shaun Sells suffered the loss of Dwayne's companionship, care, comfort, advice, and society for the remainder of his life, together with pecuniary loss of services and earnings, all in an amount to be proved at trial.

30. By their misconduct herein alleged, Defendants acted willfully, unlawfully, and with wanton disregard of Dwayne's rights and with wanton disregard of the consequences of their acts, such that the claimants herein, Ashlyn Sells, Shaun Sells, Jack D. Sells, and Elizabeth Sells are each entitled to the award of exemplary and punitive damages in such amount as will deter the Defendants and others similarly situated from similar misconduct in the future.

#### COUNT ONE: NEGLIGENT BREACH OF DUTY OF CARE

31. By this reference, Plaintiff incorporates herein paragraphs 1-30, inclusive, of this Complaint as though they were set forth in their entirety.

32. As the owner of a bar and nightclub providing entertainment and serving alcoholic beverages to the public for profit, Defendants HEJE, Hein and Jedlicki owed Dwayne and other patrons of the establishment a duty of reasonable care.

33. As early as 2003 and continuing through 2005, numerous violent fights, stabbings and assaults had taken place on the Outlaw Saloon premises, in which patrons of the Saloon were either involved or injured; such events included, but are not limited to (a) a violent fight during November 2003, (b) a repeated assault of a patron during the Fall of 2003 about which Defendants' employee refused to intervene or call the police, (c) the stabbing of a patron in the Bar during the 2003 Frontier Days, and (d) a 2005 assault and battery on a Bar patron early 2005 by one of Defendants' employees.

34. From these incidents and others, Defendants knew that when Bar patrons became verbally abusive to other patrons it was reasonably probable that physical attacks on patrons would follow.

35. From these incidents and others, Defendants knew or with the exercise of reasonable care would have known that it was reasonably probable particular individuals would verbally and/or physically assault other Bar patrons.

36. As a result of their knowledge of these incidents and others, and the expectation that it was reasonably probable Bar patrons would become verbally abusive to other patrons and that physical attacks on patrons were reasonably likely to follow, Defendants installed a video surveillance and recording system in the Bar.

37. Despite their knowledge of these incidents and others, Defendants established a policy for dealing with such incidents that was calculated to cause harm to patrons such as Dwayne; said policy adopted by Defendants was to knowingly and intentionally allow fights in the Bar to continue until concluded, and to allow and direct bouncers in the Bar to take actions that with the exercise of reasonable care would have been known to encourage and cause harm to patrons assaulted by other patrons.

38. As a result of their knowledge of these incidents and others, Defendants, including Jedlicki who stands convicted of four felony charges, initiated and established an improper relationship with members of the Cheyenne Police Department.

39. Defendants' relationship with members of the Cheyenne Police Department arose from (a) close relationships with Cheyenne Police Department personnel, including the Chief of Police who knew of and approved the practice of the Defendants making payments in cash to off duty members of the Cheyenne Police Department to supposedly provide security services at the Bar; (b) undisclosed payments in cash to the Supervisor of the Detective Division of the Cheyenne Police Department, the Detective in charge of investigating Dwayne's death, and at least one of the officers initially responding to and investigating Dwayne's assault between the period of time Dwayne's suffered his injuries and death and the date of the Coroner's inquest into the circumstances of Dwayne's death; and, (c) the hiring of off duty Cheyenne Police Department employees, including the Supervisor of the Detective Division and the Detective in charge of this investigation.

40. Defendants' policies and relationships with the Cheyenne Police Department were calculated to cause harm to patrons such as Dwayne in that the improper and illegal relationship was for the express purpose of influencing police department officers, creating illegal conflicts of interest that would lead to an improper investigation of Dwayne's death, including ignoring and disregarding evidence which incriminated the Bar, compromising the investigation of incidents at the Bar, and preventing corrective and preventive actions which would otherwise have been taken by the police; the relationship was further calculated to protect Defendants from liability, and encourage violent patrons of the Bar to feel they could cause harm to other patrons without suffering criminal or civil consequences.

41. The assault on Dwayne and his resulting death, as well as the damages suffered by claimants alleged herein were a direct and proximate result of Defendants' said policy and relationship with the Cheyenne Police Department.

42. In 2005, and specifically on April 23, 2005, HEJE, Hein and Jedlicki owed a duty to protect its patrons from violent assault, battery and injury; a duty to prevent unreasonably hazardous situations that would cause patrons harm; and the duty to maintain reasonable order within the establishment so as not to endanger its patrons.

43. On April 23, 2005, HEJE, Hein and Jedlicki specifically owed these duties of protection to Dwayne as a patron and invitee of the Outlaw Saloon.

44. HEJE, Hein and Jedlicki violated that duty by the following acts and omissions, among others:

a. Failing to maintain adequate security;

- b. Hiring security personnel who had histories and personal characteristics that made them unsuited for a job requiring the exercise of judgment and restraint;
- c. Failing to adequately train its security personnel;
- d. Failing to adequately supervise Defendant Nath and other personnel;
- e. Failing to adopt a reasonable and appropriate security policy;
- f. Failing to maintain operable video surveillance;
- g. Creating and encouraging an environment of violent and aggressive behavior and fighting among patrons in order to increase profits by promoting an image of lawlessness and outlaw behavior which appeals to a violent element of society; and
- h. Engaging in policy and practices which allowed and encouraged the continuation of aggressive behavior, assault and battery among patrons.

45. The negligence and breach of duties by HEJE, Hein and Jedlicki were evidenced by their violation of Wyoming laws prohibiting bribery, compensation for past public behavior, conflict of interest, official misconduct, **neglect** to perform official duties, accessory after the fact, compounding a felony, and interference with a police officer: W.S. §§ 6-5-102, 6-5-103, 6-5-106, 6-5-107, 6-5-115, 6-5-202, 6-5-203, and 6-5-204.

46. As a direct and proximate result of the negligence and violation and breach of said duties by HEJE, Hein and Jedlicki, as described above, a chain of circumstances was set in motion which lead to the injury and resulting death of Dwayne.

47. But for HEJE, Hein and Jedlicki's policy, practices, breach of duties and failure to provide adequate protection to its patrons, the violent assault, injury and death of Dwayne would not have occurred.

48. As a direct and proximate result of the policy, practices, breach of duties and failure to provide adequate protection to its patrons by HEJE, Hein and Jedlicki's as described above, each claimant suffered the damages alleged in paragraphs 25 through 29 of this Complaint.

#### COUNT TWO: NEGLIGENT BREACH OF DUTY OF CARE CREATED BY SPECIAL RELATIONSHIP

49. By this reference, Plaintiff incorporates herein paragraphs 1-48, inclusive, of this Complaint as though they were set forth in their entirety.

50. When Jay Payne and his companion Josh Cooper arrived at the Outlaw Saloon on the evening of April 23, 2005, Defendants HEJE, Hein and Jedlicki had actual and constructive previous knowledge of Payne's propensity for both verbal and physical assaults on other patrons.

51. Shortly after Dwayne and Colt Price arrived at the Outlaw Saloon, Payne verbally assaulted, harassed and threatened Dwayne with physical violence.

52. Payne's behavior at all times he was present at the bar on the evening of April 23, 2005 also put HEJE, Hein and Jedlicki on actual or constructive notice that Payne was both intoxicated and belligerent.

53. Payne's conduct in the bar put HEJE, Hein, Jedlicki and HEJE employees and agents on actual and constructive notice that an assault or battery by Payne was reasonably foreseeable and imminent.
54. As a direct consequence of the knowledge of HEJE, Hein and Jedlicki concerning Payne's reputation, their knowledge and observance of Payne's behavior, and their knowledge and observance of Payne's visible and physical threats directed towards Dwayne on the evening of April 23, 2005, there arose a legal duty, and created in HEJE, Hein and Jedlicki an obligation, to take reasonable and necessary steps to prevent an unreasonably hazardous situation that would cause Dwayne harm; a duty to maintain reasonable order within the establishment so as not to endanger Dwayne; and the duty to protect Dwayne from violent injury or death.
55. Shortly after Payne arrived at the Outlaw Saloon, and continuing throughout Payne's repeated harassment of Dwayne at different locations of the bar, HEJE, Hein and Jedlicki had the opportunity and ability to initiate remedial and protective measures, had the ability to remove Payne and his companion from the establishment, and had the ability to contact law enforcement.
56. Rather than initiate protective measures, Defendants HEJE, Hein and Jedlicki specifically permitted the disturbance to continue and escalate, without making any efforts to quell the same.
57. In failing to initiate protective measures or make any efforts to quell the disturbance, HEJE, Hein and Jedlicki and their agents acted in conformity with Defendants' policy and practice of creating and encouraging an environment of violence among patrons designed to promote the namesake of the establishment, thus appealing to violent patrons.
58. Defendants HEJE, Hein and Jedlicki were negligent by their failure to provide reasonable protection to Dwayne, and their failure to take reasonable and necessary steps to prevent an unreasonably hazardous situation; Defendants' acts and omissions included: (a) allowing Payne and his companion to remain in the bar despite Payne's behavior and despite Payne's removal from the Bar on previous occasions; (b) observing multiple disturbances initiated by Payne and ignoring the same; (c) doing nothing while Payne's harassment of Dwayne escalated into physical violence; (d) standing by and observing Payne and his companion physically assault Dwayne; (e) preventing Colt Price from assisting Dwayne; and (f) consenting to the acts of their agent and/or employee, Donald Nath, in continuing to batter Dwayne after he was assaulted by Payne and his companion.
59. Payne's reputation, behavior and harassment of Dwayne at the Outlaw Saloon was directly related to and the catalyst for Payne's subsequent assault and battery on Dwayne.
60. As a direct and proximate result of Payne and his companion's assault on Dwayne, and HEJE, Hein and Jedlicki's negligence, Dwayne was injured and killed, and each claimant suffered the damages alleged in paragraphs 25 through 29 of this Complaint.

### COUNT THREE: NEGLIGENT BREACH OF DUTY OF CARE AFTER ASSAULT

61. By this reference, Plaintiff incorporates herein paragraphs 1-60, inclusive, of this Complaint as though they were set forth in their entirety.
62. As a patron and invitee of the Outlaw Saloon on the evening of April 23, 2005, HEJE, Hein, Jedlicki and Nath owed Dwayne, a patron to the bar, a duty of reasonable care under all circumstances.
63. HEJE, Hein, Jedlicki and Nath owed Dwayne a duty to exercise reasonable care immediately following the

violent assault perpetrated on Dwayne, which included the duty to prevent a continued assault, the duty to summon help promptly; the duty to provide reasonable emergency medical care and refrain from exacerbating Dwayne's injuries; and the duty to allow third parties to assist Dwayne.

64. After the assault by Payne, Defendants HEJE, Hein, Jedlicki and Nath breached their duty of reasonable care owed to Dwayne by: (a) allowing the assault to proceed; (b) failing to immediately summon emergency personnel to the scene; (c) physically moving Dwayne from the location of the assault to the bar exit despite Dwayne's obvious injuries; (d) subjecting Dwayne to a choke/stranglehold administered by Nath immediately after the assault and despite Dwayne's obvious injuries; (e) Nath's dropping or shoving Dwayne to the floor near the bar exit so as to inflict additional head injuries on Dwayne; (f) restraining and preventing Dwayne's companion Colt Price from rendering aid to Dwayne during and after his assault; and (g) by Hein discouraging concerned bystanders from offering potential assistance to Dwayne by informing them they "should not worry about it," and that the matter will be "taken care of."

65. As a direct and proximate result of the negligent conduct of Defendants HEJE, Hein, Jedlicki and Nath, Dwayne was injured, his other injuries were exacerbated, he was prevented from obtaining immediate and timely medical assistance, and as a consequence thereof he was severely injured and died, and each claimant suffered the damages alleged in paragraphs 25 through 29 of this Complaint.

#### COUNT FOUR: NEGLIGENT BREACH OF DUTY TO EXCLUDE MINORS FROM ENTERING THE BAR

66. By this reference, Plaintiff incorporates herein paragraphs 1-65, inclusive, of this Complaint as though they were set forth in their entirety.

67. As a patron and invitee of the Outlaw Saloon on the evening of April 23, 2005, HEJE, Hein and Jedlicki owed Dwayne and all other patrons of the bar a duty of reasonable care in light of all circumstances.

68. HEJE, Hein and Jedlicki's duty of reasonable care to its patrons and the general public includes their statutory and legal duty to refrain from serving alcoholic beverages to a person under the age of 21, or to allow an individual under the age of 21 from entering the Outlaw Saloon.

69. On April 23, 2005, Jay Payne was accompanied by his companion Joshua Cooper, an individual under the legal drinking age of 21 years on that date.

70. In addition to their actual or constructive knowledge that Payne had been previously removed from the bar for his violent tendencies, HEJE, Hein and Jedlicki had actual or constructive notice that Payne's companion, Joshua Cooper was under the legal drinking age.

71. Even though HEJE, Hein and Jedlicki were prohibited by law from allowing Joshua Cooper into the Outlaw Saloon, or from serving him alcoholic beverages, HEJE, Hein and Jedlicki breached their duties and allowed both violations to take place.

72. Cooper's status as a minor, his association with Payne, and his involvement and participation in the harassment of Dwayne at the Outlaw Saloon put HEJE, Hein, Jedlicki, and HEJE's employees and agents on actual and constructive notice that by allowing Cooper to illegally remain in the bar, and by continuing to illegally serve Cooper alcoholic beverages, it was reasonably foreseeable that Cooper would engage in the type of violent behavior he subsequently participated in against Dwayne.

73. As a direct and proximate result of the negligence of Defendants HEJE, Hein and Jedlicki, Cooper joined with Payne in the assault and battery on Dwayne, and repeatedly kicked and hit Dwayne in the face and head.

74. Payne's harassment of Dwayne in the bar put HEJE, Hein, Jedlicki and employees and agents of HEJE on actual and constructive notice that an assault or battery by Payne was reasonably foreseeable.

75. It is reasonably probable that Payne was encouraged to act violently toward Dwayne in part to impress a minor companion who was young and foolish enough to be impressed by a braggart, bully and lout such as Payne.

76. But for the acts of Defendants HEJE, Hein and Jedlicki in allowing Cooper into the bar, serving Cooper alcohol, and expressing and implied approval of Payne's conduct, it is reasonably probable that the violent assault, and resulting injury and death of Dwayne would not have occurred.

77. As a direct and proximate result of such negligent conduct of Defendants HEJE, Hein and Jedlicki, Dwayne was assaulted, and as a consequence thereof was severely injured and died, and each claimant suffered the damages alleged in paragraphs 25 through 29 of this Complaint.

#### COUNT FIVE: BATTERY

78. By this reference, Plaintiff incorporates herein paragraphs 1-77, inclusive, of this Complaint as though they were set forth in their entirety.

79. Immediately following the assault on Dwayne by Payne and Cooper, Defendants HEJE, Hein, Jedlicki and Nath willfully and intentionally physically assaulted and committed a violent battery upon Dwayne by: (a) physically moving Dwayne from the location of Payne's assault to the bar exit, despite Dwayne's obvious injuries; (b) subjecting Dwayne to a violent choke/stranglehold administered by Nath immediately after the assault and despite Dwayne's obvious injuries; and (c) by Nath's dropping or shoving Dwayne to the floor so as to inflict additional head injuries on Dwayne.

80. As a direct and proximate result of the assault and battery by Nath, for which Defendants HEJE, Hein, Jedlicki are vicariously liable under the doctrine of *respondeat superior*, Dwayne suffered physical harm, incurred medical special damages, and thereafter died, and each claimant suffered the damages alleged in paragraphs 25 through 29 of this Complaint.

81. The acts by Hein and Jedlicki in instructing Nath to conduct himself as alleged herein, and in approving and encouraging such conduct, evidenced a personal and HEJE corporate policy of willful and wanton misconduct with disregard for the reasonably foreseeable consequences of such misconduct, such that Plaintiff should be awarded exemplary and punitive damages in such amount as will deter Defendants HEJE, Hein and Jedlicki, and management of other establishments similarly situated, from engaging in similar misconduct and practicing similar policies in the future.

82. The acts by Defendant Nath, alleged herein evidenced willful and wanton intentional acts, with complete disregard for their reasonably foreseeable consequences, such that Plaintiff should be awarded exemplary and punitive damages in such amount as will deter Defendant Nath and employees of other establishments similarly situated from engaging in similar misconduct in the future.

#### COUNT SIX: NEGLIGENT OR INTENTIONAL FAILURE TO OBTAIN VIDEOTAPE EVIDENCE

83. By this reference, Plaintiff incorporates herein paragraphs 1-82, inclusive, of this Complaint as though they were set forth in their entirety.

84. Defendants HEJE, Hein and Jedlicki owed to Dwayne, as a patron and invitee of the Outlaw Saloon on the evening of April 23, 2005, and to all other patrons of the bar, a duty of reasonable care in light of all circumstances.

85. As a result of the likelihood of violent assaults on the premises of the Outlaw Saloon, an extensive video surveillance system was installed in the Outlaw Saloon some time prior to 2005 for security reasons.

86. By their installation of a video surveillance system, Defendants HEJE, Hein and Jedlicki recognized and assumed a duty to provide increased security services in the form of video surveillance; the effect of which was to give non-violent patrons a reasonable expectation that violent assaults would be reduced and curtailed; and further, the purpose of such a system was to capture and preserve evidence of violent assaults and other crimes when they were perpetrated in order to protect the rights of patrons to access to the courts and to allow them to protect and enforce their legal right to be compensated for violence committed against them.

87. As a result of their decision to install a video surveillance system; their knowledge of past violence in the Outlaw Saloon; and their knowledge of past injuries received and crimes committed in the Saloon; HEJH, Hein and Jedlicki had actual or constructive knowledge that it was reasonably foreseeable that a working video surveillance system was necessary for their patrons' protection; and that the preservation of assaults and other crimes captured on video was necessary to safeguard their patrons' interests.

88. In the year 2005, and specifically on April 23, 2005, HEJE, Hein and Jedlicki owed Dwayne a special duty to provide security in the form of video tape surveillance, and to preserve that evidence when it was obtained.

89. On the evening of April 23, 2005, after observing the extent of Dwayne's injuries, a reasonable person in the position of Defendants HEJH, Hein and Jedlicki would have foreseen that any recorded video surveillance evidence would be material to a potential civil and criminal prosecution brought on behalf of Dwayne and others affected by the assault.

90. Defendants HEJE, Hein and Jedlicki breached their duty to Dwayne by negligently failing to maintain the Bar's video surveillance system in operable and working order.

91. In the event the Bar's video surveillance system was in operable and working order, Defendants HEJE, Hein and Jedlicki breached their duty to Dwayne by negligently or intentionally erasing, destroying, or misrepresenting the status of the video surveillance tapes recording the events on the evening of April 23, 2005, alleged herein.

92. The failure of Defendants HEJE, Hein and Jedlicki to maintain the video surveillance system, or their negligence in permitting or causing destruction of the April 23, 2005 video surveillance tapes, significantly impaired the City of Cheyenne Police Department's investigation of the assaults committed on Dwayne.

93. The failure of Defendants HEJE, Hein and Jedlicki to maintain the video surveillance system, or their negligence in permitting or causing destruction of the April 23, 2005 video surveillance tapes, was a material factor in preventing the prosecution of the parties responsible for the assaults perpetrated on Dwayne, and deprived the rights of Plaintiff on behalf of claimants to access to the courts, and deprived them of their ability to protect and

enforce their legal right to be compensated for violence committed against Dwayne, as well as their rights to obtain justice through a criminal prosecution.

94. As a direct and proximate result of the said failure of Defendants HEJE, Hein and Jedlicki to maintain the video surveillance system, or their negligence in permitting or causing destruction of, the April 23, 2005 video surveillance tapes, Plaintiff on behalf of claimants suffered damages by loss of their rights of access to the courts, their rights to seek compensation for the violence committed against Dwayne, and their rights to obtain justice, all in such amount as will be proved at trial herein.

95. As a direct and proximate result of the said failure of Defendants HEJE, Hein and Jedlicki to maintain the video surveillance system, or their negligence in permitting or causing destruction of, the April 23, 2005 video surveillance tapes, Plaintiff on behalf of claimants is entitled to entry of an order from the Court instructing the jury in the above claims to draw an adverse inference against Defendants HEJE, Hein and Jedlicki with regard to all facts alleged herein that would have been shown on such a videotape record.

WHEREFORE Plaintiff Jack D. Sells, in his capacity as Personal Representative of the Estate of Dwayne A. Sells, deceased, prays that judgment be entered as follows:

A. For award against all Defendants, jointly and severally, of judgment for compensatory damages in favor of the Estate of Dwayne A. Sells for medical expenses, funeral and burial expenses of Dwayne Sells in such amount as is proved at trial herein.

B. For award against all Defendants, jointly and severally, of judgment for damages in favor of Ashlyn Sells for the loss of Dwayne's companionship, care, comfort, advice, and society for the remainder of Dwayne's life, together with pecuniary loss including loss of Dwayne's support and earnings, all in the sum proven at trial herein.

C. For award against all Defendants, jointly and severally, of judgment for damages in favor of Elizabeth Sells for the loss of Dwayne's companionship, care, comfort, advice, and society for the remainder of Elizabeth's life, together with pecuniary loss including loss of services and earnings, all in the sum proven at trial herein.

D. For award against all Defendants, jointly and severally, of judgment for damages in favor of Jack D. Sells for the loss of Dwayne's companionship, care, comfort, advice, and society for the remainder of Jack's life, together with pecuniary loss including loss of services and earnings, all in the sum proven at trial herein.

E. For award against all Defendants, jointly and severally, of judgment for damages in favor of Shaun Sells for the loss of Dwayne's companionship, care, comfort, advice, and society for the remainder of Dwayne's life, together with pecuniary loss including loss of services and earnings, all in the sum proven at trial herein.

F. For punitive and exemplary damages against Defendant HEJE in the sum as will deter said Defendants and others similarly situated from similar misconduct in the future.

G. For punitive and exemplary damages against Defendants Susan Hein and Mitch Jedlicki in the sum as will deter said Defendants and others similarly situated from similar misconduct in the future.

H. For punitive and exemplary damages against Defendant Donald Nath in the sum as will deter said Defendant and others similarly situated from similar misconduct in the future.

I. For award of Plaintiff's costs of suit herein.

J. For such other and further relief as the Court deems the Plaintiff, and Plaintiffs' claimants, entitled, the premises considered.

DATED this 12<sup>th</sup> day of December 2005.

Respectfully submitted,

2005 WL 6047651 (Wyo.Dist.)

Page 12

JACK D. Sells, Personal Representative of the  
Estate of Dwayne A. Sells, Deceased

<<signature>>

JOHN R. VINCENT

301 East Adams

P.O. Box 433

Riverton, WY 82501

(307)857-6005

(307)857-6192 (Telefax)

Attorney for Plaintiff

<<signature>>

THOMAS G. KELLY

2120 Carey Avenue, Suite 406K

Cheyenne, WY 82003

(307)635-7766

(307)635-4266 (Telefax)

Attorney for Plaintiff

END OF DOCUMENT